

MINDING YOUR BUSINESS

Informed Consent

By Richard Steinecke - This article appeared in the July 2007 issue of Grey Areas and is reprinted with permission.

“Better a friendly refusal than an unwilling consent.” Spanish Proverb

Informed consent might be one of those principles that is honoured more in its breach than in its practice. A fundamental concept for all professions, client consent is essential to the professional relationship. Without it the trust necessary for the professional relationship to work is missing.

Applies to All Professions

While perhaps originating in health care, the principle of informed consent applies to all professional relationships. Often other terms are used to describe the concept such as: informed choice, acting on client instructions, the “know-your-client” rule and receiving a project mandate. Regulators can foster consent by practitioners through educational initiatives.

Spheres of Consent

In fact, the need for consent generally arises in three distinct areas:

1. consent to provide professional services,
2. consent to collect, use and disclose personal information, and
3. consent for the billing arrangements with the client.

Often practitioners need to be reminded to obtain consent in all three spheres.

Need for Consent

Failure to obtain consent can result in professional, civil and even criminal liability (e.g., assault, theft, fraud). Some professionals ignore the need to obtain consent in the hope that they

will not be held civilly liable for damages because the client would have agreed to the professional service if the client had been informed of all of the facts. However, in a recent Ontario Court of Appeal case a physician was sued successfully for failing to obtain informed consent even though there was no negligence: *Huisman v. MacDonald*, 2007 ONCA 391. The court concluded that this particular patient might not have voluntarily assumed the risks that the physician assumed she would take.

“Nobody can hurt me without my permission.” Mahatma Gandhi

The values of our society reject, with increasing frequency, the arrogance of the proposition that the professional knows what is best for the client. Such an approach to clients is now viewed almost universally as unacceptable paternalism. Certainly such conduct is becoming an increasingly significant source of complaints for regulators. It is no longer sufficient to say “leave it with me”. As in personal relationships, professional relationships should not operate on the principle that “it is better to ask for forgiveness afterwards than to ask for permission first”.

Obtaining Consent

To be genuine, consent must be based on a discussion of the relevant considerations in making the decision. Clients have to understand the nature

of what is proposed to be done on their behalf. They need to know why it should be done. They have to be acquainted with what could go awry and the chances or odds of that happening. It is equally as important that clients must appreciate their options, including the alternative of doing nothing. Clients must have the ability to raise any individualized issues that may separate them from the “usual” client. Only then is the practitioner safe in accepting that they have authority to act.

It is not adequate to say that the matter is too complicated to explain. Even though clients come to you for your expertise in an area that they do not understand, it is still possible to give clients the “big picture” of what is involved and a sense of what the risks and benefits are.

Many practitioners assume that obtaining written instructions is sufficient to protect them. This assumption is incorrect. A written document that has not been explained and understood by the client is of no value. In many hearings clients assert that they were rushed to sign a paper they did not read and did not appreciate that they had a choice. This type of assertion is often credible because it resonates with the experiences we all have every day at the bank, the dry cleaner, renting a car or surfing the internet.

Real consent is obtained by the meeting of the minds between the client and the practitioner. A broad spectrum of strategies is necessary to achieve these goals including:

1. using handouts,
2. verbal explanations,

3. employing visual aids where feasible,
4. seeking client feedback as to what they understand,
5. asking clients if they have any questions,
6. proper use of a consent form,
7. documentation in the file of the consent obtained, and
8. frequent updates and reports while providing the service.

Of course, the ability to communicate clearly in non-technical language is a huge asset.

Obtaining consent should be viewed as a process, not an event.

Application to Regulators

In some respects, regulators are frequently ahead of practitioners in the consent realm. While practitioners rarely have the right to proceed without consent (basically only where there is an emergency or an express legal duty to disregard the client's wishes), professional regulators have the legal ability to act unilaterally in much of what they do. However, many regulators go out of their way to circulate proposals, consult with stakeholders, poll leaders of the profession, place website postings and give formal notice before establishing policies or taking regulatory action.

Even after making a decision on a matter, regulators frequently develop a communications plan as part of implementation.

Both to benefit their members and to proactively reduce complaints, regulators should strive to communicate with members about how to obtain informed consent for all professional services.



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