

Informed Consent

In a recent survey of 758 physicians with cosmetic practices, an alarming 13.5% stated they do not use informed consent with injectables.¹ A physician's failure to inform the patient of the risks and alternatives to a particular treatment gives rise to potential liability grounded in fraud² with significant financial exposure.³ Informed consent is a duty imposed upon physicians, either by statute⁴ or common law⁵, based upon a failure to adhere to the standard of care.⁶ Most importantly, the standard is not what the physician thinks is material, but what a reasonable patient would have found material before accepting the proposed treatment.⁷ Since 29 jurisdictions have abandoned geographical limitations, and now impose a nationwide standard of care⁸, it is a virtual statistical certainty that the 13.5% minority of physicians who do not obtain informed consent from their injectable patients will be deemed negligent.

Informed consent is not limited to physician's offices where injectables might be available. A salon owner performing phenol chemical peels was held to a physician's standard of care⁹, and individuals providing flu vaccinations were held to the same informed consent standard as local physicians¹⁰. Lack of informed consent is a basis for liability independent of whether an injection of anesthesia by an oral surgeon was performed negligently.¹¹ Lawsuits claiming lack of informed consent for injections have been filed involving sclerotherapy¹², injections to remove varicose veins¹³, nerve blocks collapsing one lung¹⁴, myelograms¹⁵, pericardiocentesis¹⁶ and liquid silicone as a non-FDA approved injectable substance.¹⁷

Injections constitute the practice of medicine. Consequently, every injector must obtain not only consent, but consent sufficiently informed that the patient understands the risks and benefits, all legal alternatives, *and* the FDA status of the substance being injected. Also, get it in writing, lest you risk *oral* consent being construed as *no* consent.

- by Robert Aicher, JD

¹ www.injectablesafety.org

² *Horton v. Shelby Medical Center* [1989 AL] 562 So. 2d 127

³ *Patrick v. Sedwick* [1964 AK] 391 P.2d 453

⁴ *Congrove vs. Holmes* [1983 Ohio]

⁵ *Laskowitz vs. CIBA Vision Corp.* [1995 NY] 215 AD2d 25, 632 NYS2d 845; *Traxler vs. Varady* [1993 CA] 12 Cal. App. 4th 1321

⁶ *Hillman v. Funderburk* [1986 DC] 504 A.2d 596

⁷ *Godwin v. Danbury Eye Physicians & Surgeons* [2000 CT] 254 Conn. 131

⁸ *Logan v. Greenwich Hospital Asso.* [1983 CT] 191 Conn. 282; JAMA Vol. 297 No. 23, June 20, 2007 *The Locality Rule and the Physician's Dilemma*

⁹ *Miriam Mascheck, Inc. v. Mausner* [1972 FL] 264 So. 2d 859 (chemical peels in salon)

¹⁰ *Gassman v. United States* [1984 FL] 589 F. Supp. 1534 (flu vaccination)

¹¹ *Ketchup v. Howard* [2000 GA] 247 Ga. App. 54 (negligent injection during root canal)

¹² *Cornelius v. Joseph* [2004 MI] 471 Mich. 902

¹³ *Jaskoviak v. Gruver* [2002 ND] 638 N.W.2d 1

¹⁴ *Toogood v. Rogal* [2000 PA] 764 A.2d 552

¹⁵ *Walsh v. Kubiak* [1995 PA] 443 Pa. Super. 284

¹⁶ *Medeiros v. Yashar* [1991 RI] 588 A.2d 1038 (no negligence, but patient wins on informed consent)

¹⁷ *Retkwa vs. Orentreich* [1992 NY] 154 Misc.2d 164 (FDA non-approved status admissible)