

Informed Consent Law in Wisconsin

There was a significant court decision in Wisconsin in 2012 that resulted in changes in Wisconsin's informed consent law. This new case law, combined with a major conservative shift in the State legislature, resulted in significant changes to Wisconsin Statutes addressing informed consent. These changes justify a review of significant aspects of this State's informed consent procedures and practices.

A. Adoption of New "Standard"

First, it has long been recognized in this State that a physician can be held liable to a patient for both breaching the standard of care (malpractice) and for failing to obtain the patient's informed consent. Under common law, it is considered a separate and distinct form of negligence for a physician to fail to obtain a patient's full approval and consent for undertaking a new examination or form of treatment.

As the case law applies specifically to chiropractors, the decision in the case of Hannemann v. Boyson [analyzed in White Paper No.2403, as part of the "Case Law Series"] established the duty of informed consent. Under the decision in this case, the chiropractor had a duty of informed consent to "make such disclosures as will enable a reasonable person under the circumstances confronting the patient to exercise the patient's right to consent to, or to refuse the procedure proposed or to request an alternative treatment or method of diagnosis." This standard developed by the case law was often referred to as the "reasonable patient standard" which required the chiropractor to inform patients of all information necessary for a person to make an intelligent decision necessary for treatment under the circumstances then existing for the patient.

This "reasonable patient standard" was reaffirmed in the Supreme Court Decision in 2012 of Jandre v. Physicians Insurance Company of Wisconsin. In a lengthy decision, the Supreme Court noted that a physician must disclose information necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis. In that case, a medical doctor was held liable to his patient for

failing to obtain the patient's informed consent to an alternative, viable medical means of treatment for a condition which the medical doctor did not believe the patient had or was diagnosed with at the time of the informed consent. In response to this case law, the legislature explored a new standard of disclosure for physicians which is often referred to as the "reasonable doctor standard". Under this new "standard", a doctor is only required to disclose to patients such information which a reasonable physician would know or disclose in the same or similar circumstances involving the patient's actual diagnosed condition. This modified standard of disclosure was intended to provide added immunity to the doctors from malpractice practice claims over diagnosed conditions which the doctor did not reasonably believe the patient had at the time the informed consent was obtained from the patient.

B. Establishing the New Standard into Law

Secondly, Wisconsin subsequently adopted and has maintained a state regulatory provision which requires a chiropractor to maintain documentation on the patient's actual informed consent or similar form of consent. Specifically, Wisconsin Administrative Code CHIR 11.02, 11.03, and 11.04 mandates the importance of maintaining patient's records reflecting the patient's informed consent. CHIR 11.02(5) requires a chiropractor to create and maintain on every patient some records which "include documentation of informed consent to the patient, or the parent or guardian of any patient under the age of eighteen (18), for examination, diagnostic testing, and treatment." Given this regulatory requirement, it is often recommended that the chiropractor document: (1) actual discussions with the patient about a change in the course of diagnosis, examination, or treatment, (2) specific recommendations for care, (3) the analysis of the risk and benefits for various forms of treatment, and (4) a clear indication that the patient consented to the recommended treatment plan. Doctors should routinely renew such documentation when there is a substantial or significant change in the patient's diagnosis and the form of treatment provided by the doctor.

Most relevant to chiropractors, the Wisconsin Statutes on informed consent was revised in July of 2015. The informed consent statute for chiropractors is provided in Wisconsin Statutes §446.08, as stated below:

Informed consent. Any chiropractor who treats a patient shall inform the patient about the availability of reasonable alternate modes of treatment and about the benefits and risks of these treatments. The reasonable chiropractor standard is the standard for informing a patient under this section. The reasonable chiropractor standard requires disclosure only of information that a reasonable chiropractor would know and disclose under the circumstances. The chiropractor's duty to inform the patient under this section does not require disclosure of any of the following:

- (1) Detailed technical information that in all probability a patient would not understand.
- (2) Risks apparent or known to the patient.
- (3) Extremely remote possibilities that might falsely or detrimentally alarm the patient.
- (4) Information in emergencies where failure to provide treatment would be more harmful to the patient than treatment.
- (5) Information in cases where the patient is incapable of consenting.
- (6) Information about alternative modes of treatment for any condition the chiropractor has not included in his or her diagnosis at the time the chiropractor informs the patient.

There are two significant aspects of this new statute which the doctor should be aware of when obtaining informed consent. First, the overall standard for determining what information has to be provided to the patient has generally converted from the prior standard of the "reasonable patient's standard" to the new standard under this statute which is regarded as the "reasonable chiropractic standard." Under this new standard, the nature of the information which the doctor disclose is limited to only such information that a reasonable chiropractor, in the same or similar scope of practice, would know and disclose under the circumstances. As such, it is noted that doctors are relieved of any liability for failure to inform patients about alternative modes of treatment for conditions that the chiropractor does not believe that patient has at the time the chiropractor informs the patient. This shift in the nature of disclosed information is codified the new statute in Wis. Stat. §446.08(6). Under this section, the chiropractor does not need to provide "information about alternative modes of treatment for any condition the

chiropractor has not included in his or her diagnosis at the time the chiropractor informs the patient.”

The other significant aspect of this new statute is that it contains six (6) subject matters which the chiropractor does not need to explain or otherwise inform the patient. Of those six (6) exceptions stated in the statutes, it is often noted that Wis. Stat. §446.08(3) may excuse the doctor from informing the patient of those risks of conditions which are highly unlikely to occur; such as, strokes following an adjustment. Although this matter is debatable and no court decision has yet been rendered, these exceptions provide added areas of immunity to the chiropractor from a legal claim of the patient.

Conclusion

Given this overview of informed consent, chiropractors are often encouraged to regularly and routinely document the presence or absence of contraindications for continuing care following exams or re-examinations of the patient. Such documentation should be reviewed with the patient and any significant changes in the future course of examination, diagnosis, and resulting treatment should be thoroughly explained to the patient, and consented to by that patient. Many doctors will even have their patients initial such discussions which are stated in the patient's individual exam notes. Overall, a chiropractor should regularly exercise the use of documentation reflecting informed consent and consult with a qualified legal professional if there are specific concerns regarding the extent, nature, and overall approval of the patient's informed consent to ongoing care.

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