An Informed Consent Review:
Obtain Informed Consent before Beginning Treatment

To purchase a malpractice insurance policy with AAOIC, a potential insured is required to provide a copy of the informed consent document used consistently in the orthodontic practice. There are two reasons for this requirement:
- Obtaining informed consent prior to initiating treatment is critical for the benefit of the patient, who is entitled to be apprised of the risks and limitations of the treatment before consenting to it;
- A signed document verifying that the process was completed and the patient consented to the treatment is a defense to allegations of malpractice for failure to inform.

Almost all orthodontic malpractice lawsuits received in the AAOIC claims department contain allegations of lack of informed consent—even when the patient has signed an informed consent document. Patients allege they were not provided sufficient specific information, or deny that they understood the discussion. Under most conditions, when a signed verification document is in the records, a defense attorney is able to have such allegations dismissed. Without the document, however, a judge or jury must decide who - the patient or the doctor – is telling the truth regarding whether the consent was obtained. Patients often have very selective memories about such discussions.

Lack of informed consent is a separate allegation in a lawsuit, taking its place in a complaint beside and equal to a count for negligence or practice below the standard of care. In some jurisdictions, a finding of failure to inform for undisclosed risks may allow damages flowing from all undisclosed risks. Thus, the use of the informed consent process is one of the most important protective vehicles an orthodontist can employ to help prevent malpractice claims or mitigate their outcome.

Every state requires that the process be provided to a patient and consent be obtained. It is best if the doctor obtains the consent, rather than a staff member. The doctor is the one providing treatment and the one with the specialized education that supports the information disseminated. Informed consent is given to a specific doctor. If another doctor takes over a treatment, he/she should obtain informed consent, too.

Generally there is no rule that the informed consent process be verified in writing, although it varies. Defense of the allegation is easier if the consent has been verified on a signed document that is retained in the records and can be produced as evidence. Some doctors note in their charts, “Discussed and obtained informed consent.” Taking this extra step is good support.

Any form used must be thorough, and easy to understand. A short version combined with a financial document is inadequate. The form available from the AAO is excellent; it addresses a wide range of potential problems as well as treatment possibilities such as TADS. It is available in duplicate, which allows the patient and doctor to sign the acknowledgment, with each party retaining a complete copy. The form is available in Spanish, and also on DVD. *

As orthodontic treatment evolves, and plaintiff attorneys become more creative, informed consent forms must address current issues. The AAO has several stand-alone forms that address: Use of
Bisphosphonates; impacted canines; periodontal disease; laser use; informed refusal. If you have a patient for which any of these issues apply, use of the specific form in addition to the generalized form provides excellent protection.

No matter which form is chosen, all orthodontists must apprise all patients of the risks and limitations of treatment. The consent process must be documented by placing a copy of the acknowledgment signed and dated by the patient (or patient’s parent) in the patient’s records. When properly utilized, effective informed consent verification should provide maximum defense in the event a malpractice claim is made and the patient alleges failure to inform.

* To access informed consent forms and DVDs available from the AAO, log into aaoinfo.org. Then, go to https://www.aaoinfo.org/practice/patient-management/forms-releases. Scroll down the page to view the informed consent items.

This article is brought to you by the AAO Insurance Company (a Risk Retention Group) (AAOIC). Elizabeth Franklin, the claims manager for the AAOIC, prepared this article. The AAOIC provides professional liability insurance to AAO-member orthodontists and is endorsed by the AAO. For more information, call 800-240-2650.