

# focus

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# Geriatric Dental Patients with Diminished Decision-Making Capacity

## *Issues Surrounding Informed Consent*

*Scenario: You have a long-standing relationship with an elderly patient, Maxine, who comes in for her regularly scheduled teeth cleaning. Recently, Maxine's son has been accompanying her to dental appointments. You notice Maxine is acting confused and does not seem to recognize you, and you are concerned that Maxine's cognitive impairment has reached a problematic level. Can Maxine provide appropriate consent to treatment? How should you make this important determination? Can Maxine's son provide consent on her behalf?*

For dental professionals, it is not uncommon to confront and treat geriatric patients who have some level of apparent cognitive impairment.<sup>1</sup> Dentists must assess whether any such patient with diminished decision-making capacity due to cognitive impairment still possesses the capacity to provide "informed consent."<sup>2</sup> To further complicate this assessment, the capacity of a patient to provide informed consent can change from one interaction to the next. Regardless, when a dentist suspects that a patient does not have the capacity to provide informed consent, the dentist should stop providing treatment until appropriate consent has been obtained.

This article discusses some of the legal questions that a dentist faces when making an evaluation about the ability of his or her patients to provide informed consent and other issues related to the treatment of patients with diminished capacity under Missouri law.

### INFORMED CONSENT

Dentists must obtain informed consent before treating a patient. In order for a dentist to obtain informed consent from a patient in Missouri:

- the patient must have the capacity to reason and make judgments;
- the decision must be made voluntarily and without coercion; and,
- the patient must have a clear under-



standing of the risks and benefits of the proposed treatment, along with a full understanding of the nature of the disease and the prognosis.<sup>3</sup>

Dentists have an obligation to communicate to the patient and ensure the patient understands (1) the diagnosis of his or her condition, (2) the dentist's recommended treatment and alternative treatments, (3) the potential risks associated with all treatment plans, and (4) the potential risks of not receiving treatment.<sup>4</sup> Dentists must go through the process of obtaining informed consent each time services are provided to a patient,

and it is advisable to document the patient's consent in his or her medical record.

Based on the requirements of informed consent, if the patient lacks the capacity to reason and make judgments, he or she cannot provide informed consent to treatment. Dentists should evaluate whether a patient has the ability to provide appropriate informed consent and should be cognizant that patients with cognitive impairment may slip into and out of incapacitation. If it appears that a patient may not have the capacity to provide informed consent, the dentist should stop providing dental services to the patient until appropriate consent is obtained.

## ADVANCE DIRECTIVES

In some cases, the patient may have an advance directive—often a power of attorney for health care decisions—in place for this very purpose. A power of attorney for health care decisions allows an individual with decision-making capacity to appoint another person to make health care decisions in the event the individual is incapacitated.<sup>5</sup> Although a power of attorney for health care decisions delegates a patient's decision-making authority to another person, dentists should try to keep the patient involved in the decision-making process to the greatest extent possible.<sup>6</sup>

A dentist confronted with an incapacitated elderly patient should first check the patient's medical record to determine if it includes an effective advance directive. If no directive is on file, the patient's next-of-kin should be consulted to determine whether a power of attorney for health care decisions exists. Dentists treating elderly populations should consider asking patients for this information during their initial visits to the dental practice to avoid scrambling to obtain documents or to contact next-of-kin during later visits after issues arise. If a dentist obtains a copy of a patient's power of attorney for health care decisions, the copy must be made part of the patient's medical record.<sup>7</sup> Dentists should be aware that a power of attorney for health care decisions can be revoked by the patient, and if a dentist becomes aware that a power of attorney has been revoked, the revocation must be included in the patient's medical record.<sup>8</sup> If the patient ultimately does not have an advance directive, the dentist may then need to refer the patient to his or her primary care provider for further evaluation.

It is important to understand that a power of attorney for health care decisions is different from a power of attorney for financial decisions. It is possible that the person that has the power to consent to medical treatment may not be able to consent to payment for such treatment.<sup>9</sup>

Dentists should request this information from patients and include copies of any power of attorney for financial decisions in the patient's file as well.

## REFUSING TREATMENT


Dentists should remember that while a competent patient may give informed consent to receive treatment, he or she may also choose to make an informed decision to refuse treatment.<sup>10</sup> A patient may decide not to follow a recommended treatment plan for a variety of reasons, including out-of-pocket costs, anxiety about a procedure, or a belief that a condition will improve on its own. In these situations, the dentist must ultimately respect the patient's decision while minimizing his or her own risk associated with non-treatment. There are several actions a dentist can take to help minimize his or her potential liability arising from the patient's refusal, including fully explaining the patient's treatment options and potential consequences of not accepting treatment for the condition, in a way the patient understands, and fully documenting the same.<sup>11</sup> Dentists also should consider requesting that the patient sign a "Refusal of Treatment" form.<sup>12</sup> Thorough records are crucial in the event that a patient who refused treatment later experiences complications and alleges provider wrongdoing.

## ELDER ABUSE

Beyond questions of informed consent, capacity, and decision-making authority, dentists serving geriatric patients may find themselves questioning the treatment of a particular patient by a family member or guardian. Missouri state law criminalizes the abuse of elderly individuals.<sup>13</sup> Dentists are mandatory reporters in Missouri, so it is their obligation to recognize and report any suspected elder abuse.<sup>14</sup> Failure to report is a Class A misdemeanor and can result in fines of up to \$1,000.<sup>15</sup> All dentists should familiarize themselves with the signs of elder abuse and know when and how to report suspected abuse.<sup>16</sup>

Elder abuse takes various forms. It could be a guardian's refusal to consent to critical dental treatment for the individual in his care, which puts that individual's health at significant risk. Or, perhaps a guardian has failed to seek necessary medical care for an aging patient to the point that it has seriously endangered the patient's health. Dentists should regularly assess the general health

and well-being of the elderly patients in their care and take note of interactions between patients and their family members, caretakers and guardians. If a dentist has reasonable cause to suspect that a patient has been subjected to abuse or neglect, or observes a patient being subjected to conditions or circumstances that would reasonably result in abuse or neglect, he or she must immediately report the suspected abuse to the Missouri Department of Health and Senior Services.<sup>17</sup> Dentists can make reports through the Department's Abuse and Neglect Hotline at 800-392-0210 or by submitting a Mandated Reporter Form, available at [health.mo.gov/safety/abuse](http://health.mo.gov/safety/abuse).

Evaluating legal issues implicated by providing dental services to geriatric patients with apparent diminished capacity can be challenging. Dentists should contact their health-care attorney with any questions regarding obtaining informed consent or the associated issues discussed in this article. 

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This article was written by Brooke Robertson and Michelle Caton, associates at Husch Blackwell, LLP. Husch Blackwell acts as outside general counsel to the MDA. The information contained in this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and readers are urged to consult their own attorney concerning their own situation and any specific legal questions.

## REFERENCES

1. Tam T. Van, Laura K. Chiodo & Eleonore D. Paunovich, Informed Consent and the Cognitively Impaired Geriatric Dental Patient, 126 Tex. Dental J. 582, 583 (Dec. 2009).
2. *Id.*
3. 5D Mo. Prac., Probate Law & Practice § 2301(3d ed.) (citing *Cruzan v. Harmon*, 760 S.W. 2d 408, 417 (Mo. banc 1988), cert. granted 492 U.S. 917, 109 S.Ct. 3240, 106 L.Ed.2d 587 (1989)).
4. 5D Mo. Prac., Probate Law & Practice § 2302 (3d ed.) (citing the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, (1983), p. 51).
5. See Mo. Ann. Stat. §§ 404.705, 404.710, 404.820; Office of Missouri Attorney General Chris Koster, *LifeChoices 13-14* (Mar. 2009).
6. Tam T. Van, Laura K. Chiodo & Eleonore D. Paunovich, Informed Consent and the Cognitively Impaired Geriatric Dental Patient, 126 Tex. Dental J. 582, 587 (Dec. 2009).
7. Mo. Ann. Stat. § 404.840.
8. Mo. Ann. Stat. § 404.850.
9. See Mo. Ann. Stat. §§ 404.800 to 404.865.
10. John A. Borron, Jr., 5D Mo. Prac., Probate Law & Practice § 2306 (3d ed. 1999); Alec Buchanan, Mental capacity, legal competence and consent to treatment, J. R. Soc. Med. 415, 415-16 (Sept. 2009).
11. See Nathan Hershey & Christopher Holt, *HOSPITAL LAW MANUAL* § 8-4 (1995).
12. See *id.*
13. See Mo. Ann. Stat. §§ 565.180, 565.182, 565.184.
14. Mo. Ann. Stat. § 630.165(1).
15. Mo. Ann. Stat. § 630.165(2).
16. Mo. Ann. Stat. § 565.188.
17. See Mo. Ann. Stat. § 630.165(1); Mo. Dept. of Health & Senior Svcs., *Abuse, Neglect and Financial Exploitation of Missouri's Elderly and Adults with Disabilities* (2011).