

## Disclosures Can Make A Difference When Obtaining Informed Consent

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Practice Area: Health Law

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When obtaining informed consent, the degree of detailed information that Wisconsin health care professionals must communicate to their patients may have increased dramatically.

In *Johnson v. Kokemoor*, the Supreme Court of Wisconsin recently decided that a trial court properly allowed a jury to consider evidence that a surgeon:

- Failed to disclose the extent of his experience performing a complicated surgical procedure involving an aneurysm in the patient's brain;
- Failed to disclose morbidity and mortality rates that compared surgeons who were experienced with the procedure with those who were inexperienced; *and*
- Failed to inform the patient that she could obtain care from a nearby tertiary care facility staffed with more experienced physicians.

The jury concluded that the physician had not adequately informed the patient of the risks attending her surgery.

The patient introduced evidence at trial that the physician had failed to disclose his experience performing the procedure – surgery on a large posterior aneurysm. In response to her questions, the physician indicated that he had performed the surgery "several," "dozens," and "lots" of times.

While the evidence indicated that he had performed 30 aneurysm surgeries during his residency, all of these procedures involved less-complicated anterior aneurysms. He had never operated on a large posterior aneurysm such as that presented by the patient.

The patient also introduced evidence to demonstrate that the surgeon had told her the procedure was less risky than the angiogram she would have to undergo before surgery. He likened the surgery to such routine procedures as appendectomy, tonsillectomy, and gall bladder surgery.

The patient further contended that the physician had told her the procedure in question carried a two-percent risk of death or serious impairment. The evidence indicated that the physician had reviewed treatises and articles in preparation for the surgery which reported morbidity and mortality rates of 15 percent.

The patient's expert witness testified that experienced neurosurgeons reported a morbidity rate of 10.7 percent for the procedure and that inexperienced neurosurgeons reported a much higher rate, as high as 20 or 30 percent.

The patient presented professional opinions indicating that a reasonable physician in the defendant's position would have advised a patient to consider more experienced physicians and would have referred her to them.

The plaintiff also offered evidence that patients with her type of aneurysm should be referred to tertiary-care facilities. The Mayo Clinic, for example, was located approximately 90 miles away.

The Supreme Court decision does not affirmatively state that this degree of detail must always be offered by a surgeon. In this case, however, the patient had posed very specific questions as she formulated her decision to proceed with the surgery.

The decision does mean that, in obtaining informed consent for a particular procedure, health care professionals may have to explain their relative experience, accurately discuss the comparative risks of the procedure, and inform the patient of provider alternatives.

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