

# Dental Malpractice: Learning the Rules of the Road

by Anne M. Oldenburg and Linda J. Hay

## Educational Objectives

Upon completion of this course, participants should be able to achieve the following:

1. Have familiarity with legal elements necessary to support a claim for dental malpractice.
2. Recognize specific practice areas and treatment modalities that are more susceptible to litigation.
3. Document comprehensively to assist in the prevention of dental malpractice claims.
4. Recognize problem patients and institute protocols for management of these patients in a way to avoid claims.
5. Identify the circumstances where reporting to the National Practitioners Data Bank is required by Federal Law.

As a general dentist, statistics indicate that you will be involved in the litigation process during some point in your career. This article's purpose is to provide a brief overview of the litigation process, to discuss documentation as a risk management tool to prevent litigation and to address other issues that seem to arise in the field of dental malpractice. Overall, the documentation process can be used as a defensive tool once litigation ensues. Additionally, in certain instances, the litigation process can be completely avoided where there is sufficient documentation and good clinical care.

There are two types of law that govern malpractice cases. The first is the common law, which is the law generated through legal precedent. In addition, each state has specific statutory regulations that govern dental malpractice cases. The statutes specifically address filing requirements, discovery issues and damages issues.

Under the common law, a patient who is seeking to file a dental malpractice case, known as a plaintiff, must prove four basic elements to meet the filing requirement. A plaintiff must establish that a dental practitioner had a duty to them or, in essence, that a patient-doctor relationship was established. If this has been established, the plaintiff is required to show that there was some breach of that duty either by misfeasance and malfeasance. This is referred to as a "deviation from the standard of care." The standard of care is defined as that which a reasonably prudent practitioner would do in the same or similar circumstances. Once a plaintiff has established that there was a duty and subsequent breach of that duty, the plaintiff is required to show some type of causative relationship with damages. Once the plaintiff has pled these four elements, they have met the common law requirements for a dental malpractice case. If the plaintiff fails to show any one of the four elements, there would be grounds for a dismissal. For

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example, if a patient was given a medication in error, but that patient did not sustain any damages, then the patient would be unable to show the fourth element of damages as required. As a consequence, there would be grounds for a dismissal.

In addition to common law, most states have statutory law to govern the filing of dental malpractice cases. For example, the state of Illinois has a statute entitled "Healing Art Malpractice." Pursuant to the statute, a plaintiff must obtain an affidavit of a reviewing health-care professional indicating that he has reviewed the records and can state that there is evidence to show that there is a reasonable and meritorious cause for the filing of the lawsuit. This affidavit must then be filed with the complaint.

After an appropriate pleading has been filed, a malpractice case will proceed through various stages of discovery. These stages include written discovery, party testimony, fact witnesses and treater testimony, and expert witness testimony. Typically, the depositions of the parties will be followed by any fact witnesses and then subsequent and prior treating dentists. In some instances, medical providers may be deposed. After completion of all fact discovery, the expert witnesses will be identified. Their depositions will be taken, and their opinions will be examined in detail through deposition. Statistically speaking, very few dental malpractice cases actually proceed to jury trial with a verdict. Many cases are resolved through negotiated settlements, dismissal orders, or on motion practice where a plaintiff fails to meet their burden of proof.

There are three different ways that you might be involved in dental malpractice litigation. First, you might be named as a defendant where your treatment is alleged to be negligent. Second, you might be a prior or subsequent treater of a patient who has a claim for malpractice against a different dentist. Finally, you might be retained as a consultant or expert witness to review the matter and render opinions regarding the applicable standard of care.

If you are subpoenaed to give deposition testimony, be aware that your professional liability carrier might provide you with an attorney for purposes of assisting you through the deposition process. At the time of your deposition, be sure you have a current curriculum vitae in order to save time and provide information to the parties regarding your experience and credentials. Also, bring your original chart, including any records, X-rays, diagnostic studies and billing statements. Review your records so that you are familiar with the chart and can discuss the treatment. Finally, be wary of offering opinion testimony. If you have opinions critical of other treaters, be advised that you will likely be called at trial and be converted to an expert witness. If you do not have all of the facts regarding the treatment that was provided, there might be areas of your opinion that are unsupported.

There are specific types of dental malpractice claims that are seen regularly (see sidebar).

### Most Recognized Types of Malpractice

1. Lack of informed consent.
2. Failure to refer to a specialist.
3. Failure to properly treat complications of care including infection, paresthesia, etc.
4. Failure to properly perform prosthodontic work including crown and bridgework.
5. Failure to diagnose various conditions, including infection, periodontal disease, tumors, cancer.
6. Failure to properly treat periodontal disease.
7. Failure to render appropriate endodontic care.
8. Failure to appropriately place, treat, or follow up with all types of implants.
9. Failure to appropriately extract teeth or improper extraction of teeth.
10. Failure to appropriately treat with orthodontics.
11. Failure to diagnose or treat TMJ dysfunction.
12. Failure to properly supervise or oversee actions of employees, actual agents or apparent agents.
13. Slips, falls, burns, or cuts while in dental chair or office.
14. Anesthesia incidents.

Certain types of specialists tend to experience more malpractice claims. Typically, oral surgeons experience the highest incidence of malpractice claims. This is because they perform more complicated procedures and use more extensive anesthesia. After oral surgeons, orthodontists and general dentists are sued more frequently than the remaining specialists. The range of verdicts/settlements in dental malpractice cases is very wide-ranging.

The first step in practicing preventive dentistry is to focus upon documentation. The first step that a plaintiff's attorney will take in evaluating a potential malpractice claim is to review your dental record. The plaintiff's attorney will physically evaluate the record to see if the record appears to be in order and provides a complete and accurate chronology of the treatment. If there are missing notes, obliterated portions of the records, or records that appear to be altered, then a plaintiff's attorney will be suspicious that something happened that was below the standard of care. Do not use your chart to document professional disagreements with other providers or criticisms of care that was provided by any other treater. These types of professional disagreements will only give rise to potential litigation. Be wary that the issue of informed consent is ripe for litigation. If you have inadequate documentation or lack of written informed consent in surgical cases, this can be problematic. Oftentimes, plaintiff's attorneys will focus on the fact that there is no written informed consent when there is a case that involves surgical or post-treatment complications. Overall, your chart should provide a clear chronology of a course of treatment.

Be mindful that the dental record is a durable reflection of patient care decisions, treatment and outcome. During trial, portions of the dental record will be introduced into evidence and shown to the jury. The dental record then is the only witness with a truly accurate memory. The record will reflect the exact treatment that was provided at the time that the treatment was rendered.

There are three basic purposes for documentation in the dental record. The first purpose is communication. The dental record should provide all pertinent information regarding the patient, and should assist all members of the team in understanding what the treatment course is and what the expectations are. A review of the record should clearly document what is done and what is planned for future treatment. The record should additionally include information regarding pertinent referrals as well as a comprehensive history and any other medical information that might be significant to the dental treatment.

The second purpose of documentation in the dental record is to provide evidence for reimbursement. In essence, the dental record is used as a basis for obtaining reimbursement from insurance companies or federal programs. This might give rise to issues during litigation where the patient is billed for treatment, but there is not extensive documentation in the chart with regard to the specifics of that treatment.

The third purpose of documentation is that the dental record is a legal record or evidence in a malpractice case. The dental record is generally the best source of information due to the fact that the chart is made at the time the treatment was provided. At trial, the chart will be used to provide information regarding treatment provided to the patient. Oftentimes, portions of the record are enlarged or used in PowerPoint presentations to be presented to the jury. Jurors often ask to review records during their deliberations. As such, the more comprehensive the charting, the better the defense.

There are five basic elements of effective documentation for purposes of making a dental record. First, the information contained in the record should be factual. It should contain the doctor's clinical observations, treatment plan and any other pertinent facts that relate to the patient's condition or anticipated treatment.

The second element of effective documentation relates to timeliness. Progress notes should be made at or near the time of treatment. The notes should be date specific and, when pertinent, should include the time and length of treatment.

The third element of effective documentation is that all documentation should be legible. Others will need to interpret your dental record. If your charting is illegible, it will provide no information upon which opinions could potentially be based.

The fourth element of effective documentation relates to the use of abbreviations or standardized charting. There are recog-



### Five Elements of Effective Documentation

1. Information contained in the record should be factual
2. Progress notes should be made at or near time of treatment
3. All documentation should be legible
4. Use only abbreviations and standardized charting methods that are accepted in your community
5. The chart should be complete

nized types of standardized charting, such as tooth numbers and periodontal probing, or abbreviations that are generally accepted in the field of dentistry. Use only abbreviations and standardized charting methods that are accepted in your community. Do not create your own abbreviation system as it might not be able to be interpreted by others.

The fifth element of effective documentation is that the chart should be complete. An outsider should be able to take your chart and recreate a chronologic and comprehensive treatment timeline. If something is not documented, a plaintiff's expert or other individuals will assume that treatment did not occur.

There will be instances where you will need to make corrections to the record. When you make corrections, do them so that they do not appear to obliterate or change the dental record. Make corrections legibly. Draw a single line through the wrong information and document that the information was noted in error and then initial and date your changes to the record.

There are a number of special issues in dental malpractice that seem to arise repeatedly. First, when patients are sent out on referral for consultation, there should be documentation in your record that the referral was made. Information contained in the record should include the reason for the referral, as well as specific information regarding treatment proposed. There is a cause of action for negligent referral wherein a dentist can be sued for making an inappropriate referral or referral to some-

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one who thereafter commits negligence. As a consequence, you should be knowledgeable about your referring sources. You should have a relationship with your referring doctors so that you are kept in the loop of the treatment once the referral has been made.

Another issue that arises in the dental malpractice field is that of patient abandonment. Be wary of abandoning patients, especially if they are in the middle of a treatment plan. If a patient is lost to follow up or, for whatever reason, is not seen, you might be liable for subsequent sequela. If a patient fails to appear, you should follow up with letters or phone calls which are documented in the record. You need to insure that the patient has been advised of the potential complications of not presenting for continuation of the treatment plan.

In many instances, the dental malpractice case will arise after a dental practitioner has taken aggressive steps to collect unpaid fees. Be aware of your office practices regarding the collection of fees, and identify certain patients who might have potential issues if they are aggressively contacted regarding any outstanding balance. Be sure your office staff is trained regarding interactions with patients. If the treatment outcome was not as anticipated, many patients will seek legal advice. An aggressive collection protocol will only add fuel to the fire.

In a malpractice case, if a settlement or judgment is entered, that information needs to be reported to the National Practitioner's Data Bank (NPDB). The NPDB is an information clearing house that collects and releases certain information related to the professional competence and conduct of

dentists and other health care providers. The NPDB was established in 1986 because Congress was concerned about disciplining those dentists that engage in unprofessional behavior, as well as restricting their ability to move from state to state. The NPDB contains information regarding settlements and verdicts that are paid for alleged claims of negligence. Any malpractice payment and sanction taken by any state board of professional regulation must be reported to the NPDB. Under federal law, the public does not have access to the NPDB. This information is generally available to hospitals, boards of medical examiners, state licensing boards, and insurance carriers. If you are involved in litigation and are contemplating settling a lawsuit, be aware that this settlement will be reported to the NPDB. Likewise, if a case is tried and a verdict is entered against you, that information will be provided to the NPDB.

Overall, the best way to prevent being involved in a lawsuit is to follow good clinical practice patterns and deliver quality care. In addition, it is important to document the care that you provided as well as your treatment plan and any anticipated problems or complications. Documenting involved procedures, extensive reconstructive procedures, written treatment plans and informed consent will go a long way toward defending a matter should litigation arise. Also, a good chairside manner will assist you in the prevention of dental malpractice claims. If you are served with a complaint in a malpractice case, you need not panic. Notify your insurance carrier immediately and always be truthful in interviews and depositions with any lawyers that are assigned to you. ■

## Authors' Bios

**Anne M. Oldenburg** is a shareholder in the firm Alholm, Monahan, Klauke, Hay & Oldenburg, a minority owned business. Ms. Oldenburg received her B.A. degree, *cum laude*, from Ripon College and received her J.D. degree, with distinction, from The John Marshall Law School. She is admitted to the Illinois Bar and the United States District Court for the Northern, Central and Southern Districts of Illinois. She is also admitted to the Federal Trial Bar. She is on the Board of Trustees for Elmhurst Memorial Hospital and Elmhurst Memorial Home Health. She has published and lectured extensively on issues relating to health-care litigation and risk management issues.

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*Disclosure: Anne Oldenburg declares that neither she nor any member of her family have a financial arrangement or affiliation with any corporate organization offering financial support or grant monies for this continuing dental education program, nor does she have a financial interest in any commercial product(s) or service(s) she will discuss in the presentation.*

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1. The area of dental specialty that has the highest incidence of malpractice claims is:
  - A. General Dentist
  - B. Periodontist
  - C. Orthodontist
  - D. Oral Surgeon
2. What issues in the dental record will cause a potential litigant to have an increased level of suspicion?
  - A. Cryptic notes.
  - B. Altered notes.
  - C. Inaccurate chronology of treatment.
  - D. All of the above.
3. Every progress note for treatment should include:
  - A. The patient's childhood dental history.
  - B. The date of treatment.
  - C. The amount charged.
4. The National Practitioners Data Bank requires a dental practitioner to report:
  - A. Sanctions by licensing boards.
  - B. Payments by third-party for settlement.
  - C. Payments by third-party for verdict.
  - D. All of the above.
5. If a patient receives a medication in error, but sustains no medical complications, they have not sustained damages to support a claim for malpractice under the common law.
  - A. True
  - B. False
6. If a mistake is made while recording a progress note, the practitioner should:
  - A. Destroy the record.
  - B. Use white-out to obliterate the error.
  - C. Rewrite the chart.
  - D. Draw a line through the error, initial and designate as an error.
7. The best way to prevent a dental malpractice claim is:
  - A. Provide quality care.
  - B. Document that you provided quality care.
  - C. Provide a good chair-side manner.
  - D. Avoid criticizing other care providers to patient.
  - E. All of the above.
8. If subpoenaed for deposition testimony, you should have available?
  - A. Lunch
  - B. The original patient chart
  - C. Chairs
9. When referring a patient to a specialist, the dentist might be legally responsible for a negligent referral.
  - A. True
  - B. False
10. Aggressive actions for collection of fees can result in
  - A. A claim for negligence.
  - B. A good reputation in the community.
  - C. Less work for your staff.

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