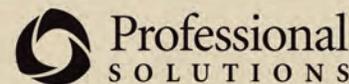




DENTAL Insights



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Several Factors Impact the Outcome of this Malpractice Case

by Linda Hay, Esq.

See how documentation, gaps in care, patient referral and the dentist's credibility all played a role in this case.

When the case began, Dr. Zaun was a general dentist practicing on his own in a suburban area. Though in practice for many years, he had not been involved in professional societies or affiliated with educational facilities. He had attained enough continuing education credits to maintain his license, though.

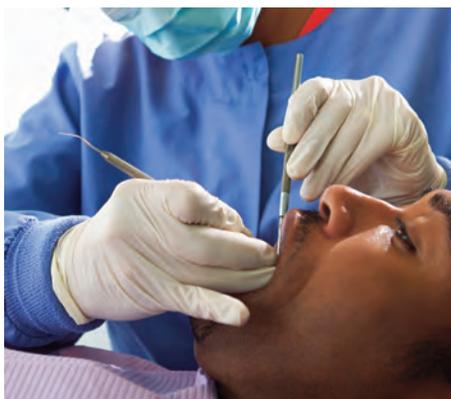
Anthony had been treating with Dr. Zaun for more than 5 years. His treatment was general in nature—coming in for routine care and having some crown and bridgework done.

Anthony had some periodontal issues, which were on a regular care plan with Dr. Zaun. Because of these periodontal issues, appointments were set for every four months, but Anthony did not keep to the recommended schedule for regular care. In fact, he even had a 14-month gap in care. Anthony was told on many occasions that he had to work harder on maintaining regular visits.

From time to time, Anthony would complain about sensitivity in his teeth. As a result, Dr. Zaun noted that he had bruxism and prescribed a night guard to be worn regularly. Dr. Zaun's periodontal care included deep cleaning,

scaling, root planing and curettage of Anthony's teeth. Anthony was never referred to a specialist.

Dr. Zaun's records show that, toward the end of his care with Dr. Zaun, there were increased complaints of sensitivity. Yet, in spite of everything Dr. Zaun observed, discussed and performed in his dental care of Anthony, the dentist's records did not include a great deal of detail.



Most importantly, there were minimal details on Anthony's initial condition, especially his periodontal condition and its severity. For example, abnormal periodontal probings were minimal at best at the initiation of care and virtually nonexistent both during care and at the end of care. Based on the records and films, it was difficult to definitively ascertain Anthony's dental condition when he first treated with Dr.

Zaun and whether those conditions got better, worse or stayed the same throughout Dr. Zaun's care.

Patient Stops Seeing Dr. Zaun

Eventually, Anthony stopped treating with Dr. Zaun and sought out a new dentist. The new general dentist recommended an extensive treatment plan, which included periodontal care and treatment with implants. The new dentist was critical of Dr. Zaun and told Anthony this extensive treatment was needed due to poor past care.

A later visit to a periodontist went much the same. Criticisms were directed at Dr. Zaun, though neither the general dentist nor the periodontist ever spoke to Dr. Zaun or reviewed his records. The cost estimate for the new treatment plan was in the \$30,000 range.

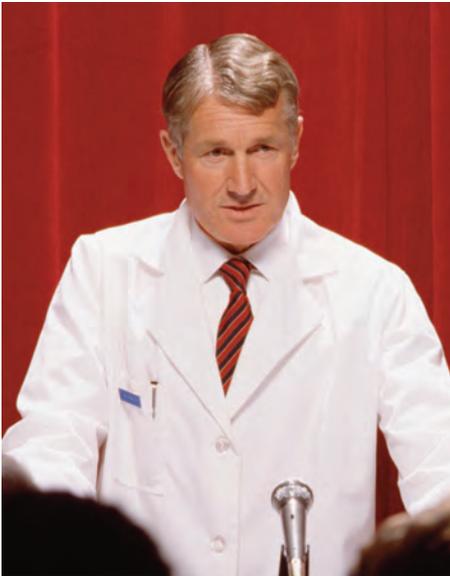
Since both dentists were critical of Dr. Zaun and because Anthony was concerned about the cost of the new treatment, he decided to see a lawyer.

Lawsuit Commences

Ultimately, a lawyer agreed to take the case. The first thing this attorney did was call upon Dr. Benning, a dentist he knew had done a lot of expert work for plaintiffs in dental malpractice cases.

On review of Anthony's dental records, Dr. Benning was critical of Dr.

The patient did not keep to the dentist's recommended schedule for regular care.



Zaun, and felt Anthony would need care above and beyond what the new treaters had recommended. For a nice fee, Dr. Benning was more than willing to testify on Anthony's behalf in a lawsuit regarding these opinions.

The plaintiff's attorney then filed a lawsuit, and Dr. Zaun's insurance carrier retained a lawyer to defend him in the case.

As the suit progressed, records and films were obtained and reviewed by the lawyers. Dr. Zaun's attorney retained a general dentist expert who would testify that Dr. Zaun's care had been appropriate. It was not Dr. Zaun's care that had caused Anthony's subsequent problems, but rather a combination of Anthony's failure to do home care along with the new treaters' overly aggressive treatment plans.

After records were reviewed, the depositions of the key players were taken. Dr. Zaun stated Anthony was told to take good care of his teeth and receive regular dental care, and Dr. Zaun said he had properly re-evaluated and treated Anthony's conditions. In contrast, Anthony denied he had been told to take

better care of his teeth or to see the dentist regularly. Dr. Zaun further stated Anthony's problems were not severe enough to warrant referral to a specialist, and he acted as a well-qualified dentist throughout his care of Anthony.

New Dentist Testifies

The new general dentist testified that Anthony's mouth was in terrible shape when he first saw him. He formulated a treatment plan, based on his clinical and radiologic evaluation as well as the history Anthony gave. According to this history, Anthony saw Dr. Zaun regularly and had always followed the dentist's instructions.

In his testimony, the new general dentist testified that Anthony presented with substandard work in his mouth—there were broken or loose restorations and restorative work could only be performed after Anthony received periodontal care.

Next, the periodontist testified. He stated that when he first saw Anthony, the periodontal disease had deteriorated the bone significantly, and Anthony should have been treating with a periodontist much earlier. Both treaters were involved with professional societies, and the periodontist was affiliated with a teaching institution.

Anthony's retained expert, Dr. Benning, testified she had specialized expertise in prosthodontics and implants, including:

- Previous affiliations with a teaching institution.
- A practice with a few metropolitan practices, as well as her own practice.
- Several courses on implants.
- Involvement with organizations and continuing education courses

that relate to bone loss in the mouth.

- Appearances on television and being quoted in newspapers.

Dr. Benning also had worked as an expert (always for plaintiff) for a number of years. She reviewed a number of cases every year, in and out of her residential state, and a good portion of her income was from expert work.

In Dr. Benning's opinion, Dr. Zaun deviated from the standard of care in a number of different ways. She testified that, from a review of radiographs, Anthony initially had 5–10% bone loss. However, after 5 years of Dr. Zaun's care, Anthony had 50–70% bone loss. Dr. Benning admitted she was not a periodontist, and a periodontist would be better suited to render this opinion.

The prosthodontic work done by Dr. Zaun was also inferior, Dr. Benning claimed. Based on the radiographs, Dr. Zaun missed areas of decay and there were open margins and overhangs on the crowns, which led to "massive decay" and the need for root canals. Also, because of the bruxism, she testified that

The patient's new general dentist and his periodontist were critical of Dr. Zaun's care.

Anthony would have TMJ problems, though no treater ever mentioned any TMJ issues.

Dr. Benning further testified all the subsequent work done to Anthony was necessary because of Dr. Zaun's substandard care. The fact Anthony may

Believing his patient care was appropriate, Dr. Zaun decided to take the case to trial.

have failed to follow Dr. Zaun's recommendations was of no relevance. She also downplayed the importance of the clinical component or examination.

As the testimony progressed, Dr. Benning stated that Anthony would need periodontal surgery and numerous implants because he would likely lose most of his teeth and would experience TMJ problems. Anthony was 60 years old, and she opined he would live to be 80 years old. Dentures or crown and bridgework were not proper options for Anthony because patients don't "tolerate" those options, and implants "help to maintain bone."

Because the lifespan of this type of reconstructive work is about ten years, Anthony would have to have most of it redone before he died. In other words, the cost of the work needed would double from \$30,000 to \$60,000.

Moreover, because Anthony had so much bone loss, due to Dr. Zaun's alleged malpractice, he would need to have hip graft surgery before he could have the implants. This surgery, Dr. Benning believed, would cost \$60,000 to \$100,000. She stated her opinion about this future work was not speculative but based on probability.

Dr. Zaun's Lawyers Weigh in

Dr. Zaun's lawyers retained a local, university-affiliated general dentist who testified at length. He contradicted Dr. Benning in all regards, including the fact that:

- Dr. Zaun treated this patient appropriately.
- Anthony's lack of home care and failure to return for care



absolutely impacted his condition.

- The clinical records showed no serious periodontal decline in the patient's condition during Dr. Zaun's care.

In spite of everything, Dr. Zaun's records did not include a great deal of detail.

This expert further testified that Dr. Benning's opinions were highly speculative, based on many assumptions unsupported by the records and testimony and were outside the bounds of her expertise. Supported by this testimony as well as the feeling that his care of Anthony was appropriate, Dr. Zaun decided to take the case to trial.

At trial, efforts to bar significant portions of Dr. Benning's testimony were unsuccessful, and all parties testified at trial. Dr. Zaun was well-prepared, but very nervous. Rather than presenting with a quiet confidence, he became angry on the stand, defending his care during cross-examination. The dentists who treated Anthony after Dr. Zaun believed their opinions and care plans were appropriate and that Dr. Zaun's care, treatments and methods were all outdated.

With her many years of trial experience, Dr. Benning appeared confident during her testimony about the money it would take to correct what Dr. Zaun did wrong. However, Dr. Benning's testimony was somewhat mitigated by Dr. Zaun's expert who refuted everything she said and who reiterated that nothing Dr. Zaun did caused any injury to Anthony.

After deliberations, the jury found Dr. Zaun had committed malpractice and Anthony was entitled to more than \$300,000 in damages—an amount reduced for Anthony's own contributory negligence. 🌀

All names used in this *Dental Insights* case study are fictional. Any relationship to actual people is purely unintentional.

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What Can We Learn?

In hindsight, Dr. Zaun could have taken steps to recognize potential issues with this patient, as well as

to protect himself. For example, he could have documented his clinical findings and evaluations of the patient's condition more specifically. If Dr. Zaun's documentation had been more detailed, it would have been apparent Anthony's condition was not as bad as the later treaters and expert made it out to be.

In addition, Dr. Zaun could have documented his recommendations to Anthony about follow up care. If this had been done, it would have been difficult for prosecutors to claim that Anthony had followed Dr. Zaun's advice. The 14-month gap in Anthony's treatment, as well as the somewhat sporadic dates of his receiving care, helped the defense in this regard. However, if Anthony had been found to be more than 50% negligent, the award would have been reduced to \$0.

Though Dr. Zaun felt he had Anthony's periodontal care under control, Dr. Zaun should have considered referral to a

periodontist—especially when Anthony failed to follow up with his care and when his home hygiene became more problematic.

Defending a general dentist when treating specialists are critical of his failure to refer can be difficult. It can be a challenge to find a specialist who will defend a general dentist on this issue.

Finally, Dr. Zaun's appearance as a witness would have been more effective if he had more recent credentials, such as activities in dental associations, updated educational activities in the area of

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periodontal care and treatment, and other related affiliations or expertise. This would have helped offset the qualifications of Dr. Zaun's critics.

As to Dr. Benning, she presented as a very savvy, albeit well-paid plaintiff's expert, which made her all the more effective compared to the nervous and agitated Dr. Zaun. Because Dr. Zaun's records were sparse, Dr. Benning was able to make assumptions about care not done or not done properly. She then built on those assumptions by giving opinions about future care costs. As a result, she was able to put forth solid, but disputed, numbers in front of the jury.



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