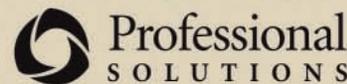




DENTAL Insights



PROFESSIONAL SOLUTIONS INSURANCE COMPANY BRINGS YOU PRACTICAL TIPS FOR AVOIDING A MALPRACTICE ALLEGATION

SUMMER 2009

Clerical and Billing Errors Spur Lawsuit

Especially in today's economy, dentists need to be careful in their documentation and billing practices and be mindful about what they say about other dentists' care.

In October 2005, 53-year-old Jim Peterson started seeing Dr. Adrian Davis, a general dentist practicing in St. Louis. At his first visit, Jim provided his dental history and Dr. Davis performed an initial examination, which revealed Jim had previous extractions, fillings, root canals, crown and bridgework. Dr. Davis performed a general cleaning, filled a tooth and advised Jim to set another appointment for the following March.

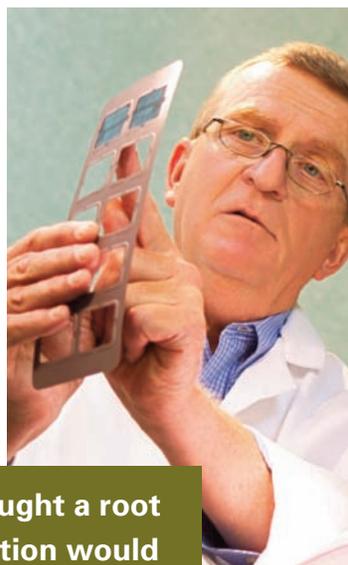
Over the Christmas holidays, Jim's elderly mother who lived near Springfield, Illinois, was diagnosed with dementia along with several serious physical ailments. She had to be placed in a nursing home, and Jim had to spend most of his free time trying to get his mother's affairs in order, and clean and sell her home. Finances were a huge concern.

Jim Sees Another Dentist

In late February, Jim seriously chipped an upper tooth while eating. He hoped to wait until his March visit with Dr. Davis to deal with the problem. However, before that time, Jim developed a very bad toothache in his lower left mouth while he was at his mother's house. Consequently, he called his mother's dentist in Springfield, Dr.

Waring, and was able to get in for an emergency appointment that same day.

Dr. Waring took a film and performed a cursory, emergency examination. He determined the upper chipped tooth, number 14, needed



Dr. Waring thought a root canal or extraction would be needed on tooth 18.

to be extracted due to the severe crack in the tooth. He also believed that the tooth causing the toothache was the last tooth in Jim's mouth on the lower left, tooth 18.

He and Jim discussed that either a root canal or an extraction would be needed on tooth 18. Jim didn't want to go through what he thought would be a lengthy and painful endodontic care process, especially now with the stress of his mom's situation. As a result, he wanted the simplest possible solution.

Dr. Waring told Jim that because tooth 18 was the last lower left tooth, he might not need a replacement tooth. Jim asked Dr. Waring if he could wait a few days to have his regular dentist remove

the tooth—both for his own convenience and to ensure insurance would cover the procedure.

Dr. Waring told him that should be fine, unless he experienced other problems. Dr. Waring prescribed some pain medication in the interim, gave Jim a copy of the films and provided him with a note to give his regular dentist. This note indicated that teeth 14 and 18 should be extracted.

Dr. Davis Disagrees on Tooth in Question

When Jim went to his scheduled appointment with Dr. Davis later that week, he gave Dr. Davis' office staff the film and Dr. Waring's note. He explained that he and Dr. Waring had discussed extracting the upper cracked tooth and the problematic lower left tooth.

Dr. Davis reviewed Dr. Waring's film and note and performed a detailed examination of Jim's mouth. Dr. Davis agreed that the cracked tooth was nonrestorable and needed to be extracted. However, he disagreed that the lower left back molar was the tooth causing the problem. Instead, Dr. Davis concluded that while the last lower left tooth was problematic, it was restorable. He believed the true source of Jim's pain

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Dr. Davis disagreed with Dr. Waring that tooth 18 was the cause of the problem.

was the tooth next to it, tooth 19, and it was not restorable. Dr. Davis wrote a lengthy note detailing his findings and recommendations, including a comment that he had discussed all risks and benefits with Jim.

Later, Dr. Davis would recall that he had discussed removal of tooth 19 and that Jim agreed to the extraction of that tooth. However, Jim would deny that much discussion occurred, and certainly not about tooth 19. Jim further would claim he never agreed to the extraction of tooth 19, only the removal of tooth 18.

What was not in dispute was the detailed informed consent form signed by Jim. This consent form, however, identified the teeth to be removed as 14 and 18—not 14 and 19. Not realizing the error on the form, Dr. Davis believed he had full verbal and written consent, and he extracted teeth 14 and 19.

Compounding this error, Dr. Davis' office submitted an insurance claim identifying teeth 14 and 18 as the teeth removed. The carrier paid the full cost of the extractions.

Jim Contends Wrong Tooth Was Removed

Upon discharge, Dr. Davis provided Jim with pain medication and told him to return in a few weeks to discuss treatment options such as implants or other replacements. When Jim got home from his visit to Dr. Davis, he was shocked to learn that he still had the last lower left tooth in his mouth and that the one next to it had been removed. Jim called Dr. Davis' office that same afternoon extremely angry, complaining that Dr. Davis had removed the wrong tooth.

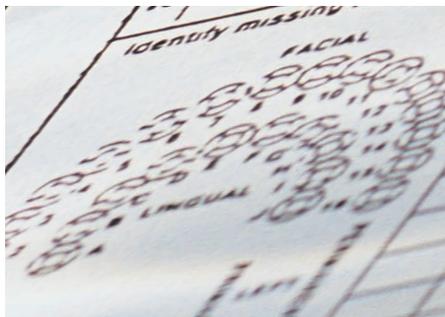
Dr. Davis explained that tooth 18

was not the problem tooth, and he reminded Jim they had discussed the tooth next to it was the real concern. Jim was extremely upset by this conversation and hung up on Dr. Davis. Then, he called Dr. Waring.



Dr. Waring was sure there had been some sort of mistake as he had recommended the removal of tooth 18, so he called Dr. Davis. Dr. Davis explained that his detailed examination, combined with his review of the film, clearly indicated that the last tooth on the lower left was not the source of Jim's pain. Dr. Waring made a note in his records, using the word "mistake" to describe what happened. In contrast, Dr. Davis' notes about the call indicated that:

- He stood by his decision to extract tooth 19
- Jim consented the extraction of this tooth
- He and Dr. Waring disagreed



about which tooth was the source of the pain

Patient Seeks Care from Third Dentist

Jim never returned to see Dr. Davis or Dr. Waring. Instead, he went to another dentist to extract tooth 18. That dentist believed tooth 18 needed a root canal, and Jim eventually went to an endodontist for this procedure.

The endodontist submitted a bill for the root canal on tooth 18. The insurance company then rejected the claim since they had already received a bill to extract the tooth. The insurance company advised Jim he may be personally responsible for any fees. Because Dr. Davis was copied on the claim rejection notice, he immediately responded that his office had made a clerical error on the claim form. He then forwarded his records to the insurance company.

In turn, Jim sent a scathing letter to the insurance company, accusing Dr. Davis of malpractice and fraud. Jim met with a lawyer to pursue suing Dr. Davis for removing the wrong tooth without his consent, and he filed a similar complaint with the local disciplinary

The insurance company rejected the claim to pay for the removal of tooth 18.

Jim decided to sue Dr. Davis for removing a tooth without his consent.

body and also accused him of insurance fraud.

Insurance Company Reviewer Supports Dr. Davis' Care

A dental advisor from Jim's dental insurance company reviewed Dr. Davis' records and film. He supported Dr. Davis' decision to extract tooth 19 and

noted it was simply a clerical error on the claim form. The dental advisor also concluded that Dr. Davis had complied with all standards of practice.

Ultimately, the case was tried in civil court, and a judgment of \$15,000 was found against Dr. Davis. The disciplinary matter was dismissed favorably after Dr. Davis was able to explain the clerical error and that only the extraction of a single tooth was billed.

This case study was derived from the files of Linda Hay, J.D. All names used in *Dental Insights* case study are fictitious to protect patient privacy.



Linda J. Hay is a member of Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C., a woman-owned law firm located in Chicago, Illinois. Ms. Hay focuses her practice on the defense of professional liability cases, including dental malpractice. In addition to trial work, Ms. Hay frequently lectures and regularly publishes on risk management issues for professionals. Ms. Hay can be contacted at lhay@illinois-law.com.

What Can We Learn?

The key problem for the defense was Dr. Davis' lack of contemporaneously written documentation to show the patient consented to removing tooth 19. Instead, the bulk of the paperwork and billing records referred to tooth 18. This supported Jim's claim that Dr. Davis meant to remove tooth 18, but made a mistake.

While Dr. Davis vehemently maintained the correct tooth was removed (and most other dentists and experts agreed), Jim denied that he consented to its removal. So, while the question of actual consent came down to Dr. Davis' word versus Jim's word, the paperwork backed up Jim's side of the argument.

The clerical errors exacerbated the situation when Jim learned he was going to have to pay money out of his own pocket for what he believed to be Dr. Davis' mistake. That is when he decided to see a lawyer.

The ultimate question for the decision makers was whether they believed Jim knew and understood which tooth was to be removed. Ultimately, the evidence backed up Jim's version of events.

It is critical to have standard procedures in place to cross check for potentially important errors. The goal is to catch these types of errors and inconsistencies before the care is provided. For example, Dr. Davis did not personally review the consent form before the procedure. Had he done so, he may have caught the

initial error. Had the written consent form identified the correct tooth number, there likely would have been no lawsuit or finding for the plaintiff. And even if a lawsuit had been filed, the case for the defense would have been far stronger.

Anytime a patient brings in information from another practitioner, it is a good practice to review that information. If there is a contradiction in the recommended care, there should be documentation and further discussion to establish a consensus. In this case, it would have bolstered Davis' defense if he would have noted in his chart that he reviewed Dr. Waring's note, discussed his disagreement with the dentist and explained his recommendations to the patient.

Careful scrutiny of billing, insurance and office paperwork is always important, but it is especially so when a patient is disgruntled. When Dr. Davis realized the patient was upset with the extraction, he should have closely reviewed and monitored the paperwork. This step might have revealed the insurance claim form error and averted the lawsuit. 🌀



Expert answers to your questions about ...

Risk in Advertising

Q: A colleague was recently brought before our state board by another dentist who claimed his advertising was deceptive. I'd like to start a campaign to announce my expansion into cosmetic dentistry, but I don't want to make the same mistake. What should I do?

A: As you can see, your advertising is something you'll want to consider as part of your practice's total risk management approach. If someone—a competitor, health care practitioner, patient or anyone else—believes your advertising is misleading, they may file a complaint against you with your state board. It's also possible they may place a consumer fraud claim against you.

As you develop advertising materials, check with your state association attorney or your own attorney to ensure you're consistent with the rules and regulations of your state board. In addition, offers of warranties, case-fee payments, terms implying superiority of care all may be in violation of state practice regulations and could lead to board action.

While there is no way to completely insulate your practice against an allegation of misleading advertising, you reduce your risk with advertising that is at least as professional as other dentists in your community. While not a comprehensive list, avoiding the following in your advertising will go a long way toward improving your practice's risk management:

- **Coupons or free offers.** For example, some dentists will offer to bleach teeth for free or at a drastically discounted rate if the person comes into the office. Then, the dentist will point out other dental concerns and try to persuade the person to receive further treatment. Not only do these deals minimize the expertise needed, they also have the potential for being misunderstood.
- **Questionable or unsubstantiated statements.** When touting the dental services you offer, be careful not to appear to over-promise. Never guarantee results. Not everyone may expect the same results as a patient who was a best-case scenario. Also, make sure to cite the source for any statistics cited.

- **Negative comments about other healthcare methods—** This may foster an environment where practitioners look for an opportunity to retaliate. Also, this tactic makes you look unprofessional.
- **Confidential information.** Never use patient information without their written consent.
- **Clinical jargon.** Using technical terms, such as endodontic procedure or amalgam restoration, increases the chances your ad will be misunderstood. Moreover, many potential patients will look past your ad if they can't relate to it.
- **Offensive images.** A clinical photo, though commonplace to you as a dentist, might strike a layperson as offensive.

When your advertising portrays your practice in a professional light, you put the principles of sound risk management into action. Plus, you'll gain the long-term respect of your community, your patients, your colleagues and your interdisciplinary relationships. 🔄

The Benefit Dentists Rely on to Avoid Claims

**Worried about a touchy situation?
Just need advice?**

Call Professional Solutions' complimentary Claims Advice Hotline at 1-800-640-6504 to talk confidentially with a professional claims representative about any potential claims concern or situation you're not sure how to handle.

You May Be a Creditor According to New Government Red Flags Rule

If so, action is required

Under its Red Flags Rule, the Federal Trade Commission (FTC) requires “creditors” to develop identity theft programs.

The intent of the Rule was to reduce the risk of identity theft through lenders such as banks, automobile dealers and mortgage brokers. However, the FTC’s definition of creditor includes those who wait for payment from insurers or who bill patients for services, so most *dental offices will be affected*.

Dental offices must conduct a risk assessment for identify theft and address any “red flags” identified in the assessment. The program also must include guidelines for staff training and monitoring by senior employees.

While the Rule technically was effective on November 1, 2008, ***the enforcement date for compliance is November 1, 2009.***

The FTC recently developed a compliance template for low-risk businesses and has placed “Fighting Fraud with the Red Flags Rule” on its website. Please see the following sections of the FTC website:

- <http://ftc.gov/opa/2007/10/redflag.shtm>—FTC’s announcement of the Red Flags Rule
- www.ftc.gov/bcp/edu/pubs/business/alerts/alt050.shtm—Information about who is affected by the Red Flags Rule
- www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml—Section on the FTC website with specific information about the Rule

In addition, the American Dental Association (ADA) has gone on record as opposing the inclusion of private dental offices in this FTC rule. The ADA has made available the resource, *Protecting Your Dental Office from Fraud and Embezzlement* on its website, www.ada.org. 

Employee vs. Independent Contractor:

WHAT YOU SHOULD KNOW BEFORE YOU HIRE

Perhaps your practice is growing or maybe you need to balance your dental practice with other professional or personal responsibilities. Whatever the reason, you’ve thought about adding staff, but hesitated because you’re just not sure which route to take: Should you hire an employee or an independent contractor?

The answer really depends on your individual work style and the particular needs you want to fill by adding workers (see sidebar on page 6 for pros and cons). Whatever you decide, it’s important for you to understand the differences and how to properly classify workers.

Facts Used to Determine Worker Status

As a dentist, you might prefer to hire independent contractors because you do not have to pay the employer’s portion of Social Security tax, unemployment taxes, workers’ compensation insurance premiums or employee benefits—often saving 30 percent or more in employee costs.

But how do you know if an individual is an employee or an independent contractor? According to IRS and U.S. Department of Labor guidelines, the relationship of the worker and the business must be examined to determine the **degree of control** and the **degree of independence**. Facts that provide this evidence typically fall into three categories: behavioral control, financial control and the type of relationship of the parties.

Continued on page 6



1. **Behavioral control** covers facts that show whether the business has a right to direct or control the worker through instructions, training, or other means. A worker is considered an employee when you have the right to direct and control the way work is done, whether you actually do so or not.
 - The permanency of the relationship.
 - How integral the services performed by the worker are to the regular business of the company.

Keep in mind, it's important to consider all the facts in each case, no single fact provides the answer. **A word of caution:** If you incorrectly classify an employee as an independent contractor for tax purposes, you can be held liable for uncollected employment taxes—and benefits—for that worker, plus a penalty for not having adequate workers' compensation coverage.

This is why it's important to consult with your tax and legal advisors before making any hiring decisions. You can also request a status determination from the IRS by filing a *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (Form SS-8)*. This process takes about six months.

If you do decide to go the independent contractor route, then develop a specific contractor agreement and make certain the contractor is adequately insured by obtaining the independent contractors' certificate of insurance.

It is also important, whether bringing on another dentist as an employee or independent contractor, that he or she has insurance in comparable amounts to what you carry and that you add this person as a certificate holder on your malpractice insurance policy. 🔄
2. **Financial control** covers facts that show whether the business has a right to direct or control the financial and business aspects of the worker's job, including:
 - Whether the worker has unreimbursed business expenses.
 - The extent of the worker's investment in the facilities and supplies used in performing duties.
 - How the business pays the worker.
 - The extent to which the worker can realize a profit or incur a loss as a result of the work being done.
3. **Type of relationship** covers facts that show how the parties perceive their relationship. This includes:
 - Written contracts describing the relationship the parties intended to create.
 - Whether the business provides the worker with employee-type benefits: insurance, a pension plan, vacation or sick pay.

Note: IRS Publication 15-A; *Employer's Supplemental Tax Guide* includes examples and directions about this issue.

CONSIDER THE PROS & CONS

To help guide you through important hiring decisions, consider the pros and cons of employees versus independent contractors:

Independent Contractor

PROS

- Reduced Overhead and Benefit Costs
- Less Managing Required
- Flexibility to Hire as Demand Dictates

CONS

- Lack of Control
- Rates That Fluctuate
- Costly Penalties for Misclassification

Employee

PROS

- Dedicated, Loyal Staff
- Productive Staff Able to Handle Multiple Roles
- Improved Work Flow and Coordination

CONS

- Added Responsibility
- Extra Overhead
- Time Spend Managing People vs. Patient Care



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