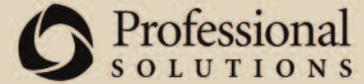




DENTAL Insights



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

SPRING 2011

Fall off a Dental Chair Complicates Case

General liability issues, such as slips and falls, can be fairly common in a dental practice. They often bring forth additional factors in a dental malpractice case.

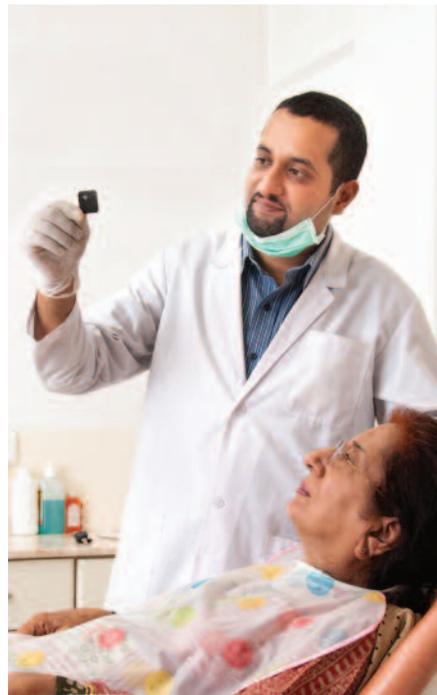
When Mildred Roosevelt first came in to see Jackson Pierce, DDS, a general dentist, she was retired and in her late 60s. Mildred was seeking an evaluation and treatment for a toothache in one of her front teeth.

She had not been to a dentist in a while and was fairly nervous about the appointment. Mildred had arthritis, so she brought along her 30-year-old niece, Lisa Ray, to drive her to the visit and help her move around the office.

Once in the exam room, Mildred showed Dr. Pierce the tooth that was causing her pain. Dr. Pierce's initial visual evaluation was he would likely need to extract that tooth. However, he wanted to do a more thorough examination to be sure.

Dr. Pierce's longtime assistant, Mary Lester, was also in the room. Mary's role was to prepare the paperwork and chart Mildred's care. When the discussion of the potential need for an extraction began, Mary pulled the practice's standard informed consent form and began to fill it out.

As he started the exam, Dr. Pierce began to lower the dental chair to the reclined position. This startled Mildred, and her purse fell off the chair. As



Mildred reached for her purse, the armrest unlocked and fell to the side. This caused Mildred to fall at an odd angle onto the floor.

Dr. Pierce and Mary rushed over, and they asked Mildred if she wanted them to call the paramedics. Mildred refused, saying she was a little distraught but she felt okay. Mildred's niece was called in and agreed that Mildred was fine. Mildred was moved to another exam room and chair. (Unbeknownst to Dr. Pierce, Lisa Ray snapped a photo of the dental chair with the arm swinging loose.)

Dr. Pierce then finished his evaluation and recommended the

extraction of two additional front teeth. Based on the films, Dr. Pierce felt a good restoration would strengthen support in that area.

He and Mildred fully discussed the plan, and Mildred nodded her head in assent to the additional extractions. Dr. Pierce left the room briefly to attend to another patient and prepare for Mildred's extractions while Mary completed the paperwork. Mildred had

As Mildred reached for her purse, she fell off the dental chair.

no questions and signed the documents.

Patient Shocked by Extractions

Mildred was sedated. After the extractions were performed, Mildred was stunned to see three teeth had been removed. She was very upset and left the practice with her niece.

Mildred's chart did note the three teeth extracted, there had been a fall, and that the patient said she didn't need further medical assistance. However, when Dr. Pierce and Mary later looked at the informed consent form, they realized it only identified one tooth for extraction. Mary forgot to identify the other two teeth on the consent form, likely due to all the commotion.

As a result of this oversight, Dr. Pierce became very angry. He told Mary

Mildred alleged she had fractured a rib during the fall.

that even though she had been with him for several years, she had made a number of mistakes over the past six months and he couldn't afford to have her make any more. Since business was slow over the winter months, he would have to let her go. He and Mary had a nasty exchange, and Dr. Pierce told her to gather her belongings, leave immediately and relinquish her keys.

The situation worsened for Dr. Pierce over the next month when Mildred's niece Lisa complained on a number of dental review websites that Dr. Pierce's

office was unsafe. Along with the derogatory comments, Lisa posted a

The informed consent form only identified one tooth for extraction.

picture of the chair with the arm swinging loose.

Lawsuit Ensues

Dr. Pierce was then served with a dental malpractice lawsuit alleging:

- Mildred never consented to the loss of

two additional teeth.

- The chair she fell from was not safe and had not been properly maintained or inspected. (The chair manufacturer was also a named defendant because the chair itself was alleged to be dangerous.)
- Mildred had fractured a rib during the fall, which was diagnosed almost three weeks later. The suit sought damages in excess of \$50,000.

Concerned, Dr. Pierce contacted his malpractice insurance company about

Continued on page 3

What Can We Learn?

There are many different risks at play in a dental office, and this case shows a sampling of what should be considered.

- **Associated claims are common.** Slips and falls are common types of claims that can be brought in many different settings. For example, if medical testimony from Mildred's doctors linked the fall to the broken rib, the general negligence case may have moved forward in the court system. Lisa Ray's postings of the picture of the chair certainly would be unfavorable to the practice in this regard. This underscores the importance of having all aspects of your dental practice protected by the appropriate coverage. In addition, it is essential to routinely re-evaluate your coverage to ensure it continues to be sufficient.
- **Informed consent is a process,** which may or may not be satisfied with a written form. It is the doctor's responsibility to make sure that the patient is properly informed, understands and consents to the treatment to be provided. However, it is also within the doctor's discretion as to how the information is communicated and how the consent is obtained. The legal concept of informed consent arises from the principle that a patient has the right to exercise control over his or her body by making an informed decision concerning whether to consent to a particular course of treatment or procedure. Generally speaking, the patient should know and completely understand the following to provide consent (though this may vary based on state statutes or case law):
 1. Nature of the treatment to be rendered.
 2. All material risks attendant to that treatment.
 3. The possibility of an occurrence of the risks mentioned above.
 4. Alternative treatment available and the risks attendant to those treatments.
 5. The consequences of allowing the condition to remain untreated.
- **Documentation is important.** Defending the malpractice claim would be difficult due to the fact that there was lacking informed consent documentation. At trial, it would likely have been Mildred's testimony versus Dr. Pierce and Mary's testimony as to whether Mildred consented to the removal of her three teeth. Mary's strained relationship with Dr. Pierce would make her a dangerous witness for the defense.
- **Outside issues can affect the case.** In this case, a product liability claim would likely be brought against the chair manufacturer to assess whether the chair was safe or not. In a claim like this, there is often finger-pointing between the chair manufacturer and the dental practice. Was the chair being used and maintained properly? Was there a manufacturing defect in the chair? Fights among co-defendants are not helpful to the defense, but they are often helpful to the plaintiff. 🌀

the suit. His malpractice insurer said it would defend him for the allegations of negligence, but those relating to the fall off the chair would most likely be considered a general liability matter. So, Dr. Pierce contacted his general liability insurance agent, who told him the company would provide a defense for allegations relating to the fall.

Mildred's professional and general liability lawsuit moved forward through the legal system. The facts and failure of adequate informed consent documentation made the professional negligence claim against Dr. Pierce difficult to defend. The professional negligence claim ultimately settled for \$25,000, which

required disclosure to the National Practitioner Databank.

The associated general and product liability claims remained pending, which involved additional time and expense for Dr. Pierce and his counsel since it was part of the same lawsuit. The general and product liability claims, if proven, could potentially result in a value significantly higher than that of the professional negligence claim, depending on the nature and extent of the resulting injuries.

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



Linda J. Hay is a member of Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C., a law firm that is certified as a

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Not Outgoing and Personable? Risk Management Reasons to Modify Your Demeanor

You provide excellent dental care and keep up to date on the latest techniques, clinical research and trends. Should you be concerned if a patient comments that you're not a "warm, fuzzy type of doctor"?

While excellent clinical care is a primary goal of any dentist, it is smart not to overlook the importance of a positive "bedside" manner. Research has shown that medical physicians who are considered "warm" and "personable" are less likely than their standoffish counterparts to be sued. The same likely holds true for dentists.

In the bestselling book, *Blink: The Power of Thinking Without Thinking*¹, author Malcolm Gladwell said that the risk of being sued for malpractice has very little to do with how many mistakes doctors make. His analysis of medical malpractice lawsuits showed some highly skilled practitioners were sued often, while others who make lots of mistakes were never sued.

"Patients file lawsuits because they've been harmed ... [and] how they were treated, on a personal level, by their doctor," said Gladwell. He pointed to findings by medical researcher Wendy Levinson who recorded hundreds of conversations between a group of physicians and their patients. Levinson found that surgeons who had never been sued spent more than three minutes longer with each patient than those who had been sued (18.3 minutes versus 15 minutes).

The practitioners who were not sued also helped patients understand what would happen during the exam. They would give the patient a sense of what will transpire in the visit and provide reassurance with comments like, "First, I'll examine you, and then we will talk the problem over." Levinson also found the physicians who were not sued were more likely to engage in active listening and laughter.

The analysis was taken a step further by psychologist Nalini Ambady who had

the tapes evaluated for intonation, pitch and rhythm to discern qualities of warmth, hostility, dominance and anxiousness. She found with those ratings alone, she could predict which surgeons got sued and which ones didn't. Surgeons with voices that were judged to be dominant tended to be in the sued group. Those who sounded less dominant and more concerned tended to be in the non-sued group.

On its surface, an allegation of malpractice seems like it would be driven by many intricate factors, and many cases do become complex by the time they go to court. But there is a very simple thing you can do to reduce your chance of a malpractice allegation: **Focus on the time you spend with your patients, making sure your demeanor and tone of voice reflects the caring and concern you feel.** 

¹ Gladwell, M. (2005). *Blink: the power of thinking without thinking*. New York: Bayback Books/Little Brown and Company.

Expert answers to your questions about ...

Charging patients who don't show up for appointments

Q: Lately, it seems like more of my patients have missed appointments without canceling. In the past, I've considered this a cost of doing business. But it's really beginning to affect my bottom line. Should I start charging patients who simply don't show up?

A: This is a tricky question. The best policy, of course, is to prevent no-shows from occurring in the first place.

Some dentists have had good results with practice communications that emphasize how missed appointments disrupt the practice, and an unfilled slot is a lost chance to help another patient. Other practices have set up telephone reminder systems to alert patients of an upcoming appointment, typically within the next 24 to 48 hours.

Even so, prevention can only go so far. Consequently, some practices have adopted the practice of charging a fee for missed appointments.

Like most aspects of practice management, there are pros and cons with this approach, and some states may not even allow it. As always, check with your legal counsel, managed care organizations and Medicaid/Medicare as appropriate before instituting a procedure of this nature in your practice.

Pros:

- It sends a message about the respect the dentist and the patient should have for each other's time.
- In a busy practice, no-shows keep other patients from receiving timely dental care.
- Missed appointments deprive the no-show patient of needed care, as well as the continuity of care, and it exposes dentists to malpractice risk if an untreated condition worsens.
- Charging may recoup some of the revenue lost for the missed appointment.
- No-shows waste the time of staffers who prepare for appointments and spend time trying to determine why the appointment was missed.

Cons:

- Patients often resent what they perceive to be unfair fees. Not only may you lose a few patients, your staff may balk at having to deal with the angry phone calls.
- Patients have been known to file claims in response to billing disagreements, and it's not unheard of for patients to complain to a state Board after receiving a bill they feel is unwarranted.

- Sending billing statements for missed appointments costs you money in supplies and postage. It also can divert your staff from more important tasks. It's possible you'll spend more money trying to collect no-show fees than you'll get back.
- Some third-party payers permit charging for missed appointments, but others don't. In that case, can your office track who can be charged and who cannot? (Note: Medicare allows patients to be billed for missed appointments, as long as non-Medicare patients are also billed.)

Before you begin charging for missed appointments, consider whether the negatives outweigh the positives. Some practices have decided it is better to establish consistent policies rather than charging patients for missed appointments. For example, some dentists will "fire" a patient who repeatedly fails to show up for appointments without canceling.

It's also important to be aware of other reasons patients may miss appointments. Some patients do so for financial reasons or because they worry that the treatment will be painful. In these situations, you may decide that charging for missed appointments is counterproductive and would only serve to damage the doctor/patient relationship. ☹

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