DENTAL Insights

PSIC | Professional Solutions INSURANCE COMPANY

Protecting Reputations ... One Dentist at a Time®

PROFESSIONAL SOLUTIONS INSURANCE COMPANY BRINGS YOU PRACTICAL TIPS FOR AVOIDING A MALPRACTICE ALLEGATION FALL 2012

Rewritten Records Increase Risk

Altered records, patient non-compliance and standard of care issues all played a role in this case.

Dr. Saul Ramirez, DDS, a periodontist, first saw Maria Abel on October 27, 2005. She had numerous problems with her dentition, including cavities and failing restorations. Maria's most serious problem was with Tooth No. 29, and Dr. Ramirez recommended that Maria return in the near future for buildup and a crown on this tooth.

Despite Dr. Ramirez' request to return for care, Maria did not return until nearly five months later on March 7, 2006. At this appointment, she said Tooth No. 4 was bothering her. However, Dr. Ramirez thought Tooth No. 29 was still the most serious concern, and he referred Maria to an endodontist for an evaluation of this tooth. Maria failed to see the specialist.

On April 19, 2006, Maria returned to see Dr. Ramirez when the existing crown fell off Tooth No. 29. By this point, the tooth was not restorable. Dr. Ramirez believed that if Maria would have returned as requested in October 2005 the tooth could have been saved.

On April 20, Dr. Ramirez extracted Tooth No. 29. After hearing about her available options along with the possible complications and alternatives to each procedure, Maria decided to have a dental implant placed in the area of the extraction.

Patient Finally Returns for Implant

It was not until five months later, on September 19, 2006, that Maria returned for placement of the implant. Based upon his review of previous periapical X-rays and a new periapical X-ray in the area of Tooth No. 29 taken that day, Dr. Ramirez concluded there was sufficient bone to place the implant. Also, since there was no indication of close proximity to the mental nerve, Dr. Ramirez determined that Maria was an appropriate candidate for the implant. (Dr. Ramirez later said that if the radiographs would have shown an indication of mental nerve proximity, he would have referred the case to an oral surgeon for more advanced 3D imaging and placement of the implant.) With Maria's informed consent, Dr. Ramirez proceeded to place the implant.

Dr. Ramirez believed the tooth could have been saved if Maria would have returned as requested.

Dr. Ramirez used the smallest available implant with the shortest length. He used a technique that allowed him to visualize the mental nerve before he began drilling. During surgery, he was able to confirm that the implant was not placed in proximity to the nerve.

Maria later testified that she was in a lot of pain when she left the office, and her pain increased in intensity until she returned to see Dr. Ramirez on September 25, 2006. Due to Maria's complaints, Dr. Ramirez removed the implant that day, and Maria said the pain was immediately relieved.

Maria returned for two follow-up visits on September 28, 2006, and October 3, 2006, to be monitored for infection and possible bone loss. There were no notes concerning any complaints of pain or numbness during these visits.

Maria Sees Oral Surgeon

On October 13, 2006, Maria went to see an oral surgeon, Robin Williams, DDS, who noted that Maria complained of numbness to her lower lip. Dr. Williams took a Panorex X-ray and mentioned that the mental foramen was in "close proximity" to the hole that remained following the removal of the implant.

Dr. Williams saw Maria again on

Continued on page 2

NFL 9250-120307

Continued from page 1

Once Dr. Ramirez removed the implant, Maria's pain was relieved.

October 17, 2006, her second and last visit for the removal of sutures placed by Dr. Ramirez. Because of the well-recognized, three-month window of opportunity to treat mental nerve injuries through recognized pharmaceutical and surgical treatments, Dr. Williams advised Maria to return for a follow-up visit in three to four weeks. At that subsequent appointment, Dr. Williams planned to assess Maria's improvement and make a referral to a nerve specialist, if needed.

Maria never returned to Dr. Williams for follow-up treatment, nor did she ever obtain a referral to a specialist for this condition. In fact, the only dental provider she saw after October 27, 2006, was her nephew Ben Richards, DDS, a general dentist who specialized in cosmetic dentistry. Maria saw her nephew on two occasions in January 2008 for the placement of a bridge and for orthodontic treatment. Dr. Richards was not an implant specialist, nor did he have any experience with mental nerve injuries. Dr. Richards later testified that his X-ray showed the mental nerve in "close proximity" to the location of the removal of the implant.

Lawsuit Ensues

Maria filed suit against Dr. Ramirez. She claimed to experience ongoing numbness after placement of the single implant and its removal shortly thereafter.

At the time of her deposition, Maria testified that she did not have any symptoms of numbness in the interim between the placement of the implant and its removal on September 25, 2006. Several days after the removal of the implant, Maria stated she first noticed a numbness and coldness in the area from the midline of her lower lip to the

bottom of her chin to the corner of her lower right lip.

Maria testified that her symptoms of numbness had essentially stayed the same since seeing Dr. Ramirez. However, the "deepness" of the feeling on the outside of her lower right lip/chin area had decreased. She testified that her symptoms did not affect her speech but that she had to eat food on the left side of her mouth and touch the corner of the right side of her lip when she drank to make sure liquid did not come out.

Dr. Williams was brought in to testify for the plaintiff in the deposition. (She was paid $1,500 by the plaintiff's counsel to review Dr. Ramirez' X-rays.) Dr. Williams testified that she did not see any indication on the September 19, 2006, post-operative X-ray that the implant was placed on the nerve. She thought the implant appeared to be in "close proximity" to the nerve, but did not touch, directly injure or transect the nerve. However, she opined that it was more likely than not that the numbness was caused by the implant placed in the location of the mental nerve.

Dr. Williams further testified that if Maria still had numbness, it would be permanent by this point. She admitted that nerve injury is an inherent risk with the placement of an implant—even with its proper placement. In fact, Dr. Williams testified that her own consent forms expressly stated that risk.

Dr. Williams conceded that periapical X-rays can be diagnostic to show the proximity of the nerve to the implant. Nonetheless, she testified that it was the standard of care in 2006 for a dentist to take a Panorex film prior to placing an implant.

The Dentist's Defense

The defense attorney brought in a dental expert to weigh in on Dr. Ramirez' care. In contrast to Dr. Williams' testimony, this expert testified that a Panorex was not required in this case. Further, he was willing to testify that mental nerve injuries following the placement of dental implants is an inherent risk of this surgery and can occur in the absence of any negligence.

The defense team then had Dr. Ramirez testify about the care he provided. Dr. Ramirez testified that Maria experienced no numbness in the six days between the placement of the implant on September 19, 2006, and the removal of the implant on September 25, 2006.

After evaluating the testimony, the defense team generally believed Dr. Ramirez' case was solid and his care defensible. The defense attorney brought forth the concept that even if Dr. Ramirez' care did fall short, Maria would be comparatively negligent because she failed to follow the dentist's advice to return for restorative work on Tooth No. 29. This resulted in the need to extract the tooth and place the implant in the first place. Maria Abel admitted that she had not sought any treatment or evaluation for this condition since October 2006.

Further, the defense attorney contended that Maria would be comparatively negligent because she did not follow Dr. Ramirez' advice to return

for treatment after he placed the implant. This was essential because there was a three-month window of opportunity to obtain neurological treatment after experiencing problems with an implant.

The plaintiff attorney noticed Dr. Ramirez' chart looked extremely "neat," and determined it had been rewritten.

Records Cause Concern

Around this same time, the plaintiff's attorney noticed that Dr. Ramirez' chart looked extremely "neat," and he asked to see the original. Upon examination, it became clear that the chart had been rewritten.

The plaintiff's attorney immediately asked Dr. Ramirez to admit to re-writing the records and various facts about the two sets of records. Dr. Ramirez made this admission.

The original records were fairly similar to the second set of records. The key differences were that the original records contained:

- An entry on September 25, 2006, which stated a Panorex was taken (no film was ever located).
- An entry of October 3, 2006, which stated that Maria was "still" feeling numb in the lower jaw.

These differences did not create a significant *substantive* problem in the case. The defense expert could defend Dr. Ramirez' care by explaining that a Panorex was not needed, and that the dentist did the right thing by removing the implant promptly when Maria complained about the pain.

However, the fact that there were two different versions of the records cast an unfavorable light on Dr. Ramirez' credibility. Moreover, there could be some serious ramifications with the evidence. For example, the plaintiff's counsel would be sure to point out the missing Panorex to their full advantage.

Settlement Demands

Before learning of the second set of records, the plaintiff's attorney had made an initial demand of $75,000 to settle this case. But armed with this new information, he withdrew that demand, and increased it to $250,000.

The case ultimately settled in the low six figures—a value in excess of a typical case with this kind of alleged injury. The driving force behind settling for a higher amount was the issue of the two sets of records. This resulted in Dr. Ramirez and the defense expert feeling trepidation about testifying.

This case study was written by 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 Women's Business Enterprise, 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?

Don't let non-compliant patients dictate care. (See related article on back page.) There will always be non-compliant patients, and their reasons for non-compliance are unlimited. However, if you believe a follow up, consultation or test is warranted, don't allow the patient to dictate care. For patients who refuse to follow referrals, record the details of the refusal in your chart, and discharge them appropriately with a certified letter outlining your reasons for discontinuing care. Make sure to check with your state board for specific mandates.

Altered records can result in a good case becoming almost impossible to defend. Credibility is one of the most important attributes a dentist can have in a malpractice case. In this case, having two different versions of the records cast an unfavorable light on Dr. Ramirez' believability and ultimately became a key factor to settle the case.

Be frank with your claims representative and your defense counsel from the beginning. Knowledge of serious problems and issues in the case from the outset allow the defense team to better minimize the unfavorable impact. When bad facts are discovered by the opposing side, it creates a much stronger strategic advantage for them. In this case, there is no question that had the defense team been aware of the second set of records from the beginning, the case could have settled far earlier and for far less money, possibly without disclosure of the altered records.

How to Handle the Non-Compliant Patient

You've likely dealt with patients who refuse X-rays or fail to follow your referral to see a specialist. The consequences of this non-compliance include treatment delays, increased risk of harm for the patient, and more extensive, invasive, and costly care later on.

Discussing the following may be all that's needed to get to the root of the problem and turn a non-compliant patient into a compliant one:

- Why you prescribed the course of treatment.
- What you hope to accomplish or avoid through this course of treatment.
- How the prescribed treatment could benefit the patient.
- How the patient can play an active role in achieving a good outcome.

Patient May Refuse Care

At the same time, keep in mind that a patient has a right (under the patient autonomy principle of the dental code of ethics) to refuse clinical care for any reason. What you may deem to be patient non-compliance could be the patient coming to an informed decision to refuse dental care.

In these situations, it is your role to ensure the refusal actually was *informed*, just as you would with obtaining the patient's informed *consent*. In addition to the points above, your discussion with the patient should include the complications, risks, consequences of refusal and possible alternatives to the procedure. Check with your state board for possible dental practice act mandates.

Naturally, the discussion with the patient, the events leading up to it, the steps taken to resolve the problem and the patient's response to this information should all be documented. Some dentists will take this a step further by asking the patient to sign a Refusal of Treatment form, which they also add to the records.

Although patients have the right to refuse certain services, allowing the patient to dictate care should be avoided. Dentists must still adhere to the standards of care. Refusal of such services may contraindicate additional treatment or necessitate a referral.

Dismissing a Patient

In cases where patient harm may result from non-compliance, you may decide to dismiss the patient from the practice.

Obviously, dismissing a patient who still needs dental care is not to be done hastily or without cause. Be aware that the dismissal itself could become grounds for an additional allegation of abandonment if not handled carefully. So, if you take this step, be sure to:

- Communicate that you will no longer be able to treat the patient and document this in the chart.
- Explain that you will need to refer the patient to a colleague. Provide the names of several different dentists to the patient. Include a colleague or staff member in the room when you refer the patient to another dentist.
- Give the patient adequate time to find another doctor to avoid allegations of abandonment, and be willing to provide emergency dental treatment to the patient during the transition. Offer to make copies of the patient's records for the new dentist without charge.
- Send a withdrawal letter by certified mail, return receipt requested. This letter should be firm, but non-confrontational. Keep a copy of the letter, along with the certified receipt, in the patient's file.

Overcoming the Challenges

Good dentist/patient communications can help minimize the problem of patient non-compliance. If the patient still doesn't comply and a lawsuit later ensues, thorough documentation can be an invaluable tool in defending the case.

PSIC | Professional Solutions INSURANCE COMPANY

Contributing Advisors–Larry J. Squire, D.D.S. and Ed Schooley, D.D.S.

Send all inquiries, address changes and correspondence to:
Dental Insights, P.O. Box 9118, Des Moines, IA 50306
1-800-718-1007, ext. 9250 www.profsolutions.com
email – dentists@profsolutions.com