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

When Dentists Fill in, Watch Your Risks

Whenever one dentist fills in for another, it is essential that both understand their respective responsibilities and work together for seamless patient care and communication.

Dr. Kent Tate, DDS, a general practitioner, had to suddenly take a leave of absence when his wife became ill. Consequently, he had to scramble to pull together a group of practitioners to care for his patients while he was out.

He thought of Dr. Frank Adams, DDS, another general practitioner in the area who recently sold his practice to semi-retire. Dr. Tate called Dr. Adams and learned he was working as an independent contractor, and he had maintained his licensure and insurance coverage.

Consequently, Dr. Tate retained Dr. Adams to work in his practice one day a week for the next eight weeks.

Dr. Adams Makes Assumptions about Prior Care

When filling in for Dr. Tate, Dr. Adams would come in and review the day's schedule, which would include a list of treatments Dr. Tate had previously recommended. Dr. Adams would not evaluate the patients for care, but would merely perform the procedures Dr. Tate had recommended. Though Dr. Adams enjoyed being able to continue to practice dentistry, he also appreciated leaving behind the headaches of running the business and administration of a dental practice.

Dr. Adams did not typically see any patients for follow up, nor did he have a lot of interaction with the staff. Dr. Adams just assumed the administrative and paperwork matters were handled properly by the staff, just as they had been with his own practice. As a result of these assumptions, and because he was filling in for Dr. Tate on a temporary basis, he did not worry about the details.

One day, one of Dr. Tate's patients, 27-year-old Mark Terrin, came in for a simple extraction. Dr. Adams was filling in that day, and according to the notes, Dr. Tate had already discussed the matter with Mark. Consequently, Dr. Adams simply reviewed the chart and proceeded to remove the tooth without incident.

Dr. Adams just assumed the administrative and paperwork matters were properly handled by the staff.

Two days later, Mark called the office complaining about a loss of sensation in the area of the removal. When the patient came in to have it checked out, he was seen by another fill-in dentist who determined that Mark had sustained a nerve injury as a result of the extraction. Dr. Adams was not contacted about the problem and never saw the patient again.

Lawsuit Ensues

Shortly after the nerve damage was identified, Mark Terrin filed a suit against both Dr. Adams and Dr. Tate. As part of the suit, Mark claimed that neither doctor had obtained his informed consent for the procedure. He claimed that had he known about the risk of nerve injury, he would not have agreed to the extraction.

Review of this matter by a defense consultant revealed some problems with this case. The records showed that Mark had never signed an informed consent form. What's more, there was no documentation that either Dr. Adams or

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All treaters must know their responsibilities when dentists fill in for each other.

Dr. Tate had specifically discussed the risks of the procedure with him.

Dr. Tate's charts did include a brief note stating that he had discussed the extraction with Mark. However, it did not specifically address whether he had obtained Mark's informed consent.

As for Dr. Adams, he said he didn't discuss the procedure with Mark in depth. He had assumed that Dr. Tate had handled the informed consent discussion during the consultation and that the staff had taken care of the paperwork. Dr. Adams made this assumption because that was how his own office used to handle the informed consent process.

The plaintiff attorney relied heavily on the absence of records to conclude there were deviations in the standard of care.

Plaintiff Tactics in the Case

Mark Terrin worked in sales and took pride in his appearance. His nerve injury was evidenced by drooling, difficulty drinking and numbness in his lip area. Mark testified that when he entertained prospective customers, saw friends socially or went out on dates, he became extremely embarrassed by his condition. This was especially the case whenever he had to eat or drink in front of others.

Mark further testified that Dr. Tate briefly discussed what a root canal entailed and that an extraction was his only viable option. Mark vehemently denied, however, that Dr. Tate told him that nerve injury was a risk associated with the extraction procedure.

As the litigation process progressed, the plaintiff's attorney tried to get Drs.

Adams and Tate to criticize each other to drive a wedge between them. The lawyers for both dentists tried to work on a united front; however, neither Dr. Adams nor Dr. Tate could establish with certainty that they had obtained Mark's informed consent.

Moreover, the testimony of Dr. Adams and Dr. Tate, as well as that of Dr. Tate's staff, suggested that very little was said to patients—or to the substitute practitioners—about Dr. Tate's absence. Mark testified that he was told Dr. Adams would see him because Dr. Tate was unavailable and that Dr. Adams was familiar with the procedure Dr. Tate had recommended. The staff did not dispute this testimony.

Documentation, Communication Faulted

While the attorneys for Drs. Tate and Adams were able to find experts to defend their care, there was not conclusive evidence that proper informed consent was obtained. Dr. Adams' charting on the extraction itself was scant. Though the dentists might be able to explain the care provided, the experts did not have much hard evidence to back it up.

The expert for the plaintiff came across as solid and savvy. He opined that if it wasn't documented, it didn't happen. He relied heavily on the absence of records to conclude there were deviations in the standard of care.

The overall view of the testimony was that there was very little communication with this patient on critically important issues, and that Mark was convincing in that he didn't know about the procedure's risks before it was performed. The following aspects of the case were also troublesome:

- Dr. Adams' scant records.
- Dr. Adams' admission that he did not review the patient's history or chart in detail before each procedure.
- Dr. Tate's office practices of being somewhat tight-lipped about his leave of absence.
- Dr. Tate's disorderly introduction of Dr. Adams to patients.

In light of these factors, the dentists and their defense teams decided it would be advisable to attempt to resolve the case before trial. Accordingly, this case settled prior to trial in the high five figures.

This case scenario was written by Linda Hay, J.D. All names used in *Dental Insights* case studies are fictitious to protect patient privacy.

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What Can We Learn?

While this case is especially relevant to dentists who retain independent contractors or who hire part-time practitioners, many of its aspects are applicable to all dentists. Proactive risk management in the following areas may help:

Informed Consent

While it was admirable that Dr. Adams was trying to help a colleague in a time of need, he performed a procedure without knowing if the patient was informed about the procedure's nature, risks and alternatives and whether the patient had consented to this procedure. As the dentist performing that procedure, it was Dr. Adams' responsibility to ensure the patient had provided his informed consent.

Dr. Adams also was working under the mistaken assumption that Dr. Tate's office staff had appropriately processed the informed consent process paperwork. Dr. Adams should not have assumed that the methods and manners of Dr. Tate's practice were similar to those used at his old office. Moreover, Dr. Adams erroneously and problematically assumed the staff should be left to "do the paperwork."

Informed consent cannot be delegated to staff. Documentation of the informed consent procedure is not a paperwork issue, it is a substance issue. The paperwork or documentation merely serves as good evidence that there has been an informed consent process.

Practice Processes and Procedures

Using fill-in doctors is not as frequent in a dental practice as it is in a physician office. However, because dentists are more likely to fill-in only in emergencies, their processes tend to be less well-thought-out. This can result in additional risk for dental practices.

In this case, Dr. Tate was remiss for not having a better backup plan in place. His staff simply continued to follow the practices they used when Dr. Tate was there. The practice did not have a plan to orient other treaters about the practice's processes and procedures and to ensure that everything was handled to everyone's satisfaction. Dr. Tate's failure to have a plan in place in the event of an emergency was ill-fated and fostered an environment prone to problems.

The "doing what I'm told" argument rarely holds up in a court of law.

Communication

It's clear there were communication problems in this case. Mark did not have a relationship with Dr. Adams, and he had only limited information about the fact that Dr. Adams was filling in. The fleeting nature of the contact with Dr. Adams did not serve to promote any kind of a working relationship with Dr. Adams as the care provider.

Furthermore, both Dr. Adams and Dr. Tate could have drastically reduced the risk of a claim through better communication between staff and dentist, staff and patient, and dentist and patient. Dr. Adams' view of himself as an itinerant dentist coming in, rendering care, and leaving did not promote good care and communication.

Responsibility

Even as a fill-in dentist, Dr. Adams would be required to use his own judgment about the appropriateness of a particular procedure. If he felt a procedure was contraindicated or needed to be performed by a specialist, he should not have proceeded with the treatment. The "doing what I'm told" argument rarely holds up in a court of law.

Did You Know?

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Situations Where Chaperones Might Be Warranted in a Dental Practice

Though the use of chaperones is commonly associated with physician offices, some risk management experts believe this practice might help reduce a dentist's exposure to professional boundary allegations.

Granted, the risk of harassment, sexual misconduct and other boundary allegations is probably lower in a dental office than it is in a physician's office. This is likely true for the following reasons:

- Dental assistants or hygienists are typically involved in care during office hours, in effect providing "chaperones" for a practice.
- Open operatories make it difficult to allege activities went on unbeknownst to others.

Regardless of the rarity of these cases, as well as the patient's gender or age, dentists still are at risk for false allegations of sexual misconduct, especially in certain situations—such as during sedation or after-hours emergency calls. And, these cases can be devastating. If the dentist is found to be at fault, he or she can be subject to civil and criminal actions and penalties, as well as license suspension or permanent revocation.

Moreover, reports of alleged sexual misconduct by dentists against their patients may garner much attention in the media. Thus, even if ultimately found to be innocent of the charges, the dentist may suffer irreparable damage to his or her professional reputation and career.

That's why it is important that dentists protect themselves and their practices from false allegations. Effective dentist/patient communications is a good first step. If a patient has been told what the dentist will be doing during the procedure and why, there will be less chance for misunderstanding and apprehension by the patient.

Another suggestion is to develop a policy that:

- Demonstrates respect for the patient's dignity, comfort and privacy regardless of age or gender.
- Shows the dentist's professionalism and reinforces the formal nature of the examination being performed.

Finally, it may be advisable for dental offices to have a chaperone present during sedation. Ideally, the chaperone will be a qualified healthcare assistant. Due to privacy issues, any chaperone will be held to the same standards of protecting the patient's privacy and confidentiality as the dentist. Consequently, friends and family are probably poor choices for most situations.

"Red-flag" Patients

While the great majority of patients want quality dental care, a few may have a hidden agenda. Be aware of patients who show the following "red flags" of a potential predatory patient:

- Attempts to schedule appointments for the last spot of the day or see you only after hours.
- Dresses provocatively or asks personal questions such as: "Is the dentist happily married?"
- Disregards staff instructions or behaves rudely toward staff.
- Shares concerns about finances after treatment, such as: "I really can't afford these treatments."

For these patients, it may be necessary to avoid seeing them alone in the office. If the patient objects to someone from the practice being in the room, it should raise concern and perhaps a referral to another dentist.

As always, document the situation, as well as the names of the people in the room. Dentists should consult their legal counsel for specific guidance.

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