



# DENTAL Insights

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

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## An Apology That Went Awry

**A dentist's actions before, during and after an unexpected outcome often make a world of difference in a malpractice suit.**

Reggie Bird, who recently had retired as a firefighter, saw general dentist Mark Thomas, DDS, twice a year for cleanings and checkups, as well as for restorations, as needed.

In 2007, Dr. Thomas evaluated Reggie for placement of two implants in the lower left areas of teeth 18 and 19. The plan was to refer Reggie to a periodontist for the actual evaluation and placement of implants in that area. Dr. Thomas would continue to coordinate the restorative work.

Dr. Thomas initially referred Reggie to a periodontist he had worked with in the past. However, when Reggie went to see that periodontist, he ended up waiting for more than one hour, and he felt the staff was rude to him. Therefore, he walked out without even seeing that periodontist.

Instead of asking Dr. Thomas for another referral, Reggie asked some friends and family and found another periodontist, Brian Cherry, DDS. Dr. Thomas and Dr. Cherry had never worked together, but they both agreed to the recommended course of care.

### Patient Sees Dr. Cherry

Dr. Cherry first saw Reggie on December 6, 2007. His examination of

tooth number 18, a lower left molar, revealed it was the distal abutment for a three-unit bridge, with extensive decay under the crown. The site of tooth number 19 had been reduced by mesial drift on tooth numbers 17 and 18. Dr. Cherry recommended the bridge be sectioned distal to tooth number 20 and tooth number 18 be extracted. He also suggested evaluating the resorbed ridge in the area of number 19, and if necessary, using a graft to reconstruct the area.

**Reggie stormed out before Dr. Cherry could explain how easily the implants could be restored.**

Following a template prepared by Dr. Thomas, Dr. Cherry planned to place two implants into the areas of number 18 and 19, followed by a four-month integration period. Dr. Cherry explained all of this in a letter to Dr. Thomas.

On December 13, 2007, Dr. Cherry extracted tooth 18, sectioned the bridge and put in a bone graft. Dr. Cherry planned to remove sutures and place the implants in both areas in approximately five months. Dr. Cherry wrote to Dr. Thomas outlining these plans.

In June 2008, around the time the implant surgery was scheduled, Reggie

was in a serious car accident, with severe non-dental injuries. Reggie required significant rehabilitation and was in a great deal of pain as a result of the injuries. Consequently, the implant surgery was delayed and rescheduled for about one month later.

### Dr. Cherry Performs Implant Surgery

On July 18, 2008, Dr. Cherry finally performed the implant surgery. He took a film of the implants and sent Dr. Thomas a letter in which he stated that the surgery placing the two implants in the areas of 18 and 19 had "gone fine." Dr. Cherry performed a postoperative examination on July 25, 2008, and noted in his files that he "will call DDS for angulation."

Reggie returned to Dr. Cherry on October 14, 2008, for a regularly scheduled follow-up appointment. At that visit, Dr. Cherry told Reggie the two implants were close together, but he felt they could be restored and that he would speak with Dr. Thomas about the issue. Reggie then became very angry. He stormed out of the office before Dr. Cherry could explain how easily the implants could be restored. Reggie was so irate that he threatened Dr. Cherry right then with a lawsuit. Dr. Cherry's note from that visit stated, "I apologized for unsatisfactory placement and offered to cover any extra dental expenses."

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## **Dr. Cherry explained that his use of the word “unsatisfactory” did not mean a deviation in the standard of care.**

### **Dr. Cherry Drops by Unannounced on Dr. Thomas**

Because Reggie was so upset, Dr. Cherry decided to see Dr. Thomas that day to explain the situation. He wanted to discuss his recommendations for a simple resolution and how they could work together to remedy the situation of the unhappy patient.

Dr. Cherry went to visit Dr. Thomas over the lunch hour without calling in advance. This surprised Dr. Thomas—he found it odd a practitioner he didn’t know would just show up at his practice unannounced. As a result, Dr. Thomas became very suspicious of Dr. Cherry’s motives, and he conveyed these concerns to Reggie. Not surprisingly, this made Reggie even angrier. After this turn of events, Dr. Thomas decided to refer Reggie to Dr. Oak, another periodontist with whom he worked.

Upon examining Reggie, Dr. Oak technically agreed with Dr. Cherry’s opinion that the implants could be restored. However, he felt that the best resolution for Reggie was to remove the implants, perform another graft and redo them. Reggie became extremely upset upon hearing this, but he agreed to the course of care recommended by Dr. Oak. Consequently, the treatment plan was followed, and the implants were replaced successfully.

### **Lawsuit Ensues**

In spite of the ultimate resolution of the problem, Reggie remained extremely angry at Dr. Cherry for what he had to endure to get the implants successfully placed. Therefore, he decided to file a lawsuit against Dr. Cherry.

During discovery, Drs. Oak and Thomas reviewed Dr. Cherry’s records. Both felt that Dr. Cherry’s note, which said, “I apologized for unsatisfactory

placement and offered to cover any extra dental expenses” was an admission that his placement of the implants was a deviation in the standard of care.



At the deposition, Dr. Cherry explained that his use of the word “unsatisfactory” meant the implants were not optimal, that they were too close together and not that the placement constituted a deviation in the standard of care. He explained in his deposition that his offer to pay expenses were only for around \$100 to \$200. However, because Reggie was so angry, he never explained what he meant, and Reggie never took him up on his offer.

Dr. Cherry further explained that while he would have liked to have had the implants a little farther apart and at a different angle, their placement was appropriate and necessary given the bone and area involved. Dr. Cherry testified that the implants he placed were easily restorable with custom abutments.

Dr. Cherry testified that he met with Dr. Thomas because he felt strongly that the implants could be restored, but he wanted to get Dr. Thomas’ input. He also wanted to discuss how he and Dr. Thomas could work together to accommodate this angry patient.

### **Dr. Thomas Admits Lack of Expertise with Implants**

Dr. Thomas admitted in his deposition that he was not an implant expert and he did not know if the implants could be restored. Dr. Thomas wanted to check with his lab on that issue. Dr. Thomas later testified that he did not think he could restore the implants placed by Dr. Cherry with the methods he typically used. He was not familiar with custom abutments.

Dr. Cherry’s defense team retained an expert who supported Dr. Cherry. This expert focused on the fact that Dr. Oak, who was an expert in implant placement, agreed the implants were restorable, just not optimal. Restoration was the simple, easy alternative to replacement.

Reggie’s attorney brought forth a settlement demand in the amount of \$100,000, which was rejected by Dr. Cherry and his defense counsel. The case went to trial and the jury found in favor of Dr. Cherry. 🌀

This case study 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 the ultimate outcome of this case was successful, it was only after numerous years of litigation and discovery, which caused a great deal of frustration and stress for Dr. Cherry. In hindsight, the following actions may have served to avoid the lawsuit in the first place:

### Complex Cases Require More Coordination

In complex cases like this one, it is essential not to take things for granted. In this regard, roles and responsibilities should be identified for each healthcare provider involved in the patient's care. Also, informed consent can be beneficial to help the patient understand the potential risks and the alternatives involved with the treatment plan, as well as to aid in the dentist's defense if there is an allegation of wrongdoing later.

### Communication with Other Dentists and Patients

While Dr. Cherry did the right thing in writing to Dr. Thomas about the progress of the case, it would have been preferable for him to establish a more personal relationship with the general dentist. This may have enabled them to better work together to resolve the patient's issues. What's more, the fact that the problem came to light a few months after surgery did not endear the periodontist to Dr. Thomas.

Dr. Thomas jumped to the wrong conclusion in thinking that there was something dubious about Dr. Cherry showing up unannounced at his office over the lunch hour after the problem arose. The fact that Dr. Thomas told Reggie about his suspicions only

inflamed an already angry patient and this should have been avoided.

Reggie's anger was further fanned by Dr. Oak's recommendations to replace the implants. While some of these issues might not have been completely within Dr. Cherry's control, a better-planned scenario with Reggie and the treater may have helped avoid a lawsuit.

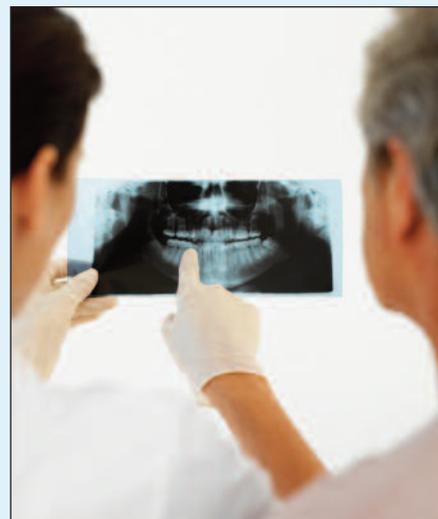
Dr. Cherry realized there was an issue with the implants three months before he informed Reggie or Dr. Thomas. Much of Reggie's anger was related to the fact that he believed (substantiated by Dr. Thomas' comments) that Dr. Cherry did not tell him right away about the angulation issue. Had Dr. Cherry set an appointment right away to discuss this issue with Reggie, it might have resulted in a less extreme reaction than the one he later encountered.

**Refunds of charges or expenses can be perceived to be an admission of guilt.**

### Apologies to Patients

An apology can be a good thing, but the nature, tone, and the specificity of the apology is crucial. Dr. Cherry made a poor choice in the way he worded the note. By putting the word "unsatisfactory" and offering to cover "any" extra dental expenses in the same sentence in his apology, Dr. Cherry gave the plaintiff's attorney the ammunition to contend that he did something wrong.

While Dr. Cherry had good



intentions, his manner, method and timing were not optimal. Dr. Cherry did not intend to imply that his work was below the standard of care. Instead, he intended to apologize for the circumstances that led to needing another appointment at a slight additional cost.

In the event of an untoward complication or a change to the treatment plan, the details should be communicated promptly with the patient. Diplomacy should be employed in conveying these changes, and the time and place of the discussion should be well thought out.

### Patient Refunds

Refunds of charges or expenses should not be mentioned lightly, as they can be perceived as an admission of guilt and are often subject to reporting to the National Practitioner Data Bank. Therefore, dentists should discuss with counsel any potential refunds they are considering. In many cases, it may be advisable to obtain the patient's agreement not to sue in exchange for providing a refund.

# 5 Considerations with Social Media

Experts advise dentists who step into the realm of social media to address its use in the practice. Here are five factors to keep in mind:



**1** Will the practice have a presence on social networking (SN) sites, such as Facebook?

- ▶ Designate who will monitor and maintain the content and respond to queries, thus representing the practice.
- ▶ Determine whether updates will be done during working hours via the practice's computer system.
- ▶ Ensure only non-patient specific information is posted, e.g., dental health information or general information about a condition.
- ▶ Contract with an IT consultant to set up security.

**2** Will there be an employee policy on the use of the practice's SN site?

- ▶ Define inappropriate use of the site, and make clear that it will be subject to disciplinary action. This may include: any unauthorized disclosure of protected health information (PHI); any photos or videos of patients, dentists or staff; any posting of unprofessional behavior or comments; or any threatening or disparaging remarks about the practice, staff or patients.

▶ Address the ramifications of non-compliance with the practice's SN policies. For example: Any unauthorized disclosure of PHI or any behavior meeting the policy's definitions of inappropriate and/or unprofessional will result in disciplinary action.

▶ Identify who will monitor the practice's page for noncompliance and for breaches in security.

**3** Will the practice prohibit the use of any electronic device that could jeopardize PHI, e.g., any devices that could text, photograph or capture video of patients?

- ▶ Identify who will be affected and in which situations. Acceptance and compliance will be better if everyone is expected to comply.
- ▶ Address the ramifications of non-compliance. For example, identify what actions would be taken for noncompliance by staff, patients, family members or vendors.
- ▶ State any exceptions to the rules, e.g., in cases where a person's life, health or safety is in jeopardy.

**4** Will the practice provide information to patients and their families about the practice's commitment to the protection of patient information?

- ▶ Determine the best way to com-

municate the practice's stance on SN with patients and their families.

- ▶ Determine which situations SN devices will be allowed, if at all. For example, will the practice allow mobile Internet access via smartphones or through the practice's computer to visit sites approved by the practice?
- ▶ Develop materials outlining the practice's position on the use of SN by the dentist, staff, patients, family members and vendors. This can include a statement to post in key areas of the practice and include along with the HIPAA privacy policy and other new patient information.

**5** Will practice training address how HIPAA regulations can be breached by SN postings by staff, patients and family members?

- ▶ Provide guidance on what staff should do if a PHI breach is suspected or confirmed on a SN site involving a patient and/or staff member.
- ▶ Communicate the penalties for unauthorized disclosure of PHI under HIPAA and HITECH in the practice's HIPAA and privacy training programs. 



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