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

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Treating Employees Can Bring on Practice Risk

Whether the patient is an employee, spouse or family member, dentists must be consistent in their documentation, treatment plans, consent forms, and other practice processes. Read on to find out what can happen when a dentist provides inconsistent treatment to an employee.

28-year-old Marcy Ames had an associate's degree in business and was looking for better employment when she heard about an opportunity in the office of Louie Falcone, DDS.

Marcy's parents were good friends with Dr. Falcone, and he had mentioned he was adding an entry-level staff member who would eventually take on more responsibility. Marcy's mother asked if Marcy could interview for the position, and Dr. Falcone said yes. Marcy was ultimately offered the

treatment there, and the staff agreed. They told her Dr. Falcone would do the dental work for free—with some exceptions.

Marcy first saw Dr. Falcone for dental care in September 2005, at which time Dr. Falcone did an initial examination and filled a cavity. Dr. Falcone also noted a "small white spot" on the left side of her tongue.

Although a chart was opened for Marcy, some of the typical opening paperwork normally contained in a new patient chart was not included because she was an employee. There was no history form, documentation of a tooth-by-tooth evaluation, probing or a treatment plan. Indeed, the only note was for the filling and the "spot."

Dr. Falcone later recalled that he had told Marcy she should see another dentist to check out the abnormality if it didn't go away within the next couple of weeks. He specifically recalled asking her to see a more experienced dentist in the community to evaluate this spot. However, Marcy did not recall any such referral.



Patient Sees Orthodontist and Periodontist

Over the course of the next year, Marcy became concerned about the appearance of her teeth, especially her front teeth, which were crowded and crooked. Therefore, Dr. Falcone referred her to an orthodontist in the area, Dr. Smithfield, who recommended full orthodontic treatment, which began thereafter. Once the braces were in place, Marcy had a number of regular visits with Dr. Smithfield.

Over the next two years, Marcy had her teeth cleaned at Dr. Falcone's office and was examined periodically by him. This usually took place when she had a complaint or issue, such as a filling or simple procedure.

Dr. Falcone noted there was a "small white spot" on the left side of Marcy's tongue

position, and she became a tremendous addition to the office staff.

Since moving home after college, Marcy had not seen a dentist. So, when Marcy started at Dr. Falcone's office, she asked if she could receive dental

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Nothing in Dr. Falcone's records referred to any abnormality on the tongue or complaints by Marcy about it.

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In the spring of 2007, Marcy needed a crown and Dr. Falcone referred her to a periodontist, Dr. Silva, for a crown-lengthening procedure. In the history form at Dr. Silva's office, Marcy noted that she had been a smoker, but had quit 5 years earlier. Dr. Silva saw her three times for the crown-lengthening procedure.

Nothing in the records over this two-year period referred to any abnormality on the tongue or complaints by Marcy about it. However, Marcy's friends and colleagues did remember her sharing sporadic concerns that she had something on her tongue that worried her. Dr. Falcone's staff recalled that they had talked to Marcy about the referral to another dentist. However, Marcy kept putting off making the appointment—the staff characterized her as “scared” to find out what was really going on.

Marcy's friends characterized her as “scared” about her situation.

Marcy later denied any referral by Dr. Falcone for this spot. She claimed it was on the underside of her tongue and that she had it continuously. Marcy said that she told Drs. Falcone and Smithfield about the sore on her tongue, and they both said it was an irritation due to her braces or biting.

Marcy Succeeds at Dental Office Position

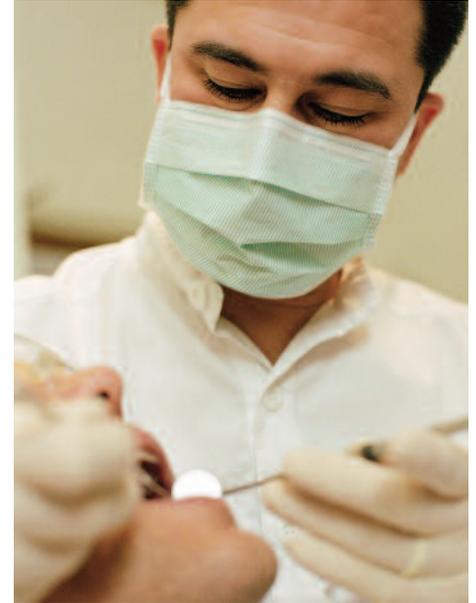
On both a personal and professional level, Marcy thrived since joining Dr. Falcone's staff two years prior. She was

promoted from receptionist to billing coordinator, and she became an integral part of the office staff. Marcy enjoyed working for Dr. Falcone, as well as interacting with his patients and staff. She finally felt settled in her career. Marcy also got married and became pregnant during that time.

In July 2007, almost two years after her first exam by Dr. Falcone, Marcy began seeing an ob/gyn for her pregnancy. At the end of her first visit to confirm her pregnancy, she offhandedly asked the ob/gyn to take a look at the underside of her tongue. At that time, Marcy said it had been there for a long time but that it had changed in the past few months. It had reddened and sometimes bled, especially when she brushed her teeth or ate spicy foods.

Marcy's husband later said this doctor's visit was the first time he heard about the spot on her tongue. The ob/gyn referred Marcy to an oral surgeon who did an immediate biopsy. Marcy was diagnosed with squamous cell carcinoma of the tongue. Her cancer was deemed to be an aggressive metastatic cancer that would be at risk for recurrence even with the recommended treatment.

Marcy's recommended course of care was affected by her pregnancy. Marcy and her husband discussed aborting the pregnancy, but dismissed it out of hand. While typically it would be recommended to remove the affected area and follow it up with radiation and chemotherapy, the pregnancy dictated otherwise. Instead, Marcy had surgery for partial removal of her tongue, followed by chemotherapy but no radiation. Marcy delivered a healthy baby girl, Katie, in January 2008.



Patient Over-Radiated During Treatment

After Katie was born, Marcy was over-radiated during further therapy. Marcy then developed other complications that necessitated numerous trips to the doctors, heavy pain medications and further exploratory surgeries to determine the cause of her complications. Ultimately, some of the complications were attributed to development of a neuroma. In spite of this, the consensus was that Marcy's treatment had been successful.

Marcy continued to work sporadically with Dr. Falcone, and Marcy and the office staff developed an exceptionally close bond. Marcy's doctors were cautiously optimistic that the treatment was successful. Marcy went in for regular follow-up examinations, and one year after Katie was born, Marcy started to develop more severe pain and symptoms in her tongue and mouth. Further biopsies revealed that her cancer had recurred and was even

more aggressive. A decision was made to remove the rest of Marcy's tongue in an effort to buy more time.

After the tongue removal, Marcy's condition got a little better before taking a downward turn. She received heavy doses of pain medication, including morphine, and had a feeding tube placed. Marcy was not given much time to live.

Marcy then filed a lawsuit against all the treating dentists and the physicians who allegedly over-radiated her. Within months of filing the lawsuit, lawyers for the defense were told that Marcy was not expected to live and her testimony must be taken immediately before she passed away.

Because Marcy had no tongue, she had to write down answers to questions on a notepad.

A week and a half before Mother's Day, in her home from the hospital bed in her living room, Marcy, then 32 years old, gave a videotaped evidence deposition. To the side of her bed were pictures of her wedding and of Katie.

Because Marcy had no tongue, she had to write down answers to questions on a notepad, which was handed to a court reporter who then read the answer for the official record. Through the approximate 3 hours of testimony, Marcy used a machine to suction secretions from her mouth and throat, and she was surrounded by numerous other machines and tubes. Breaks had to be taken for Marcy to receive additional IV morphine. Yet, Marcy expressed no ill will against her dentists.

Three days after her testimony, in the spring of 2009, Marcy died.

Dentists Provide Testimony

In Dr. Falcone's testimony, he stated that he had:



- **Referred Marcy for further evaluation** of the abnormality if it did not improve.
- **Followed up with Marcy about the referral** and was assured by her that she would go.
- **Assumed the spot had gone away** when Marcy had no later complaints.

Dr. Smithfield testified that his specialty was orthodontics, and as such, he would not have done an evaluation of the underside of her tongue in the absence of any complaints. Had Marcy told him about an issue, he would have documented it and likely referred her to a specialist.

Dr. Silva testified that he would have done a limited evaluation, so he would not necessarily have looked on the underside of the tongue. He noted that his role was a limited referral and that if the patient would have told him about the problem, he would have documented the complaint and assessed it.

The physician defendants indicated that indeed there was an issue with too much radiation, but this was promptly disclosed to Marcy and her husband and occurred after the cancer diagnosis. Therefore, too much radiation would have helped kill the cancer—not caused a recurrence.

Marcy's cancer doctors testified she had a very aggressive cancer that meant

her outcome was likely set from the time the ulceration was diagnosable. While the pregnancy altered the typical course of care, no one opined that it could have made a difference in her outcome.

Ultimately, with all of this testimony, the plaintiff's family expressed an interest in settling. The case was eventually settled in the seven figures, with the primary responsibility falling to Dr. Falcone. 🔄

(See "What Can We Learn?" on page 4.)

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



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What Can We Learn?

This case shows why providing dental care to staff employees can be problematic if not handled appropriately. Employee dental benefits should be clearly defined, mutually understood and formally documented. To offer dental care in the office as an employee benefit, the dentist should provide the same level of care a regular private patient would receive—without differentiating diagnostic and treatment services, use of materials/dental labs, or recordkeeping.

For Dr. Falcone, the initial note in his sparse records hurt his defense immensely. Two years prior to diagnosis, Dr. Falcone's first note was his only documentation about the spot. While it's possible the spot could have went away on its own or that Marcy didn't tell other providers about it, Marcy never affirmatively said it went away or refused the referral. In fact, the staff said Marcy continued to talk about it after that first visit.

Marcy's apprehension to see the referred dentist may have been a case of contributory negligence, but there was no evidence to support that argument. Dr. Falcone's office typically took detailed notes on patients, but because Marcy was an employee, his records were nowhere near as meticulous as they would have been with paying patients.

As for **Dr. Smithfield**, he could

have better documented no new complaints or had an overall exam periodically with no abnormalities noted. In addition, his testimony fell a bit flat when he claimed his role was limited to orthodontics. A jury could easily interpret this statement as an "it's not my job" defense. This could anger a jury and further sway sympathies to Marcy's side. Moreover, Dr. Smithfield saw Marcy far more than the other dentists because she was in the midst of orthodontic care.

Dr. Silva was likely the least culpable. He saw Marcy three times to care for a specific tooth, his notes were thorough, and there were no patient complaints. He testified that if there was a visible abnormality on the tongue, he would have noted it. He would not have looked on the underside of the tongue for the type of care he rendered. Moreover, because he cared for Marcy just before the time she said the sore changed, it likely would not have made a difference to her outcome even if she had a biopsy then.

However, Dr. Silva could have had a better note reflecting no complaints and that the limited examination was done due to the scope of the referral. With no documentation otherwise, a savvy plaintiff's expert would opine that a deviation in the standard of care caused this cancer to progress unheeded until it was too late. Similarly, the lack of documentation

would not be a solid basis for defense experts to claim that the standard of care was met.

The strength of the defense was in the fact that there was a clear change in the lesion a few months before Marcy showed it to her ob/gyn. A diagnosis a few months earlier would have resulted in the same treatment recommendations—unless it was before Marcy's pregnancy. Also, the spot noted by Dr. Falcone was on the left side of the tongue, not the underside of the tongue. However, the cancer physicians suggested that some abnormality, had it been there continuously for a long time, might have indicated a precancerous lesion. Nonetheless, the plaintiff could counter that a simple biopsy or excision in 2005 through the spring of 2007 would have eliminated the cancer completely.

Another factor was that Marcy's case would be very sympathetic to a jury. Trying a case with Marcy's husband and child in the courtroom would be a very tough task. Seeing Marcy's testimony in the days before her death would be even more moving. It would be a tough task for the defense to urge the jury to award no money to the husband and child.

Considering all of these factors and the fact that jury demands and verdicts in cancer/death cases can reach millions of dollars, it made sense to try to resolve the case.



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