

# Chapter 50

## Dental Litigation: Triad of Concerns

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Standard of Care  
Common Litigation Areas  
Triad of Concerns

Emergency Care  
Additional Areas of Concern  
Conclusion

Local dental societies, dental districts, and dental peer review committees have seen an increase in the number of complaints about dentists.<sup>1</sup> The National Society of Dental Practitioners<sup>2</sup> has identified 12 bases for dental malpractice claims (Box 50-1). To minimize the liability risk, dentists must communicate properly and keep good dental records. Dentists must improve the cooperation amongst members of the dental team, generalists and specialists, and improve the trust and satisfaction of patients and their families (Boxes 50-2 and 50-3).

### STANDARD OF CARE

Standard of care is defined as the reasonable care and diligence ordinarily exercised by similar members of the profession in similar cases and like conditions, given due regard for the state of the art. Initially an analysis of local community standards was implied. A dentist was held liable only for the level of competence, concern, and compassion that society would expect of the average dentist in the community in which that dentist practiced. James and co-workers<sup>3</sup> defined the legal concept of standard of care from a community standard to a national standard. Curley<sup>4</sup> also addressed the definitions of standard of care. Today the dentist must meet the national standard because

several courts have found that the conduct of a specialist should be measured against national standards of care.<sup>5</sup>

The ethical basis of standard of care is beneficence (i.e., to recommend the best therapy while minimizing potential harm and to avoid placing a patient in a situation in which there is an unreasonable risk of harm).<sup>6</sup> General practitioners are required to exercise the same degree of care and skill as a specialist acting in the same or similar circumstances, locality notwithstanding. In *Taylor v. Robbins*<sup>7</sup> the dentist failed to use accepted treatment techniques, and in *Perry*<sup>8</sup> the locality rule was nullified when sufficient foundation was recognized that the local and national standards did not differ.

### COMMON LITIGATION AREAS

The scope of dental litigation touches every phase of dentistry, some more than others (Table 50-1). Common reasons for litigation include, but are not limited to, failure to refer to a specialist; failure to diagnose and treat periodontal disease; dissatisfaction with prosthetics; endodontic failures and mishaps; extraction errors, including the extraction of the wrong tooth; implant failure; adverse consequences, such as paresthesia; temporomandibular dysfunction; poor crown margins; failure to pretreat the patient with antibiotics when medically necessary; failure to obtain the patient's medical history; writing an improper prescription; child abuse; sexual harassment; and inappropriate use of intravenous sedation (Box 50-4).

#### Box 50-1. Medical-Legal Pearl

1. Neglect to pay a fee.
2. Refuse to negotiate the return of a fee.
3. Guarantee or promise a result.
4. Exceed your level of competencies.
5. Fail to obtain informed consent.
6. Be inaccessible to a patient with complaints.
7. Be unavailable, or fail to provide coverage for patients of record.
8. Fail to refer.
9. Fail to diagnose or treat a pathological condition.
10. Fail to prescribe or prescribe incorrect medications.
11. Fail to meet a reasonable standard of care.
12. Make treatment errors (e.g., treat the wrong tooth).

From National Society of Dental Practitioners, 12; 4; 97.

#### Box 50-2. How to Avoid Lawsuits

Be professional and courteous.  
Keep good, accurate records.  
Communicate with patients and colleagues, especially those who are confused or unsure.  
Obtain adequate informed consent.  
Predict an appropriate prognosis.  
Do not be egotistical about second opinion diagnoses.  
Do not be greedy (i.e., do not overbill).

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### Box 50-3. How to Approach a Dental Malpractice Case

Do not try to settle the matter on your own.  
 Do not discuss the case with colleagues.  
 Do not be short-changed by your defense counsel.  
 Do not be your own private detective.  
 Do not rely on hold-harmless agreements.  
 Do not alter records.  
 Treat patients who have a need; do not treat patients to satisfy greed.  
 Learn from the experience.

Modified from Edwin Zinman, *What to Do When a Patient Plans to Sue*, Dent. Mgmt. 32-35 (March 1986).

In a 1994 study by Beckman,<sup>9</sup> 54% of plaintiffs who settled malpractice suits filed between 1985 and 1987 indicated that another health care provider suggested maloccurrence. In addition, 71% identified problematic doctor-patient relationships (DPRs). A poor interpersonal relationship with a patient usually is the result of communication barriers set up by the dentist's staff or by office policy. Markus<sup>10</sup> and Dorn<sup>11</sup> address methods for handling disputes between dentist and patient. Both authors suggest that conflicts must be understood, escalation checked, and resolution skills developed.

## TRIAD OF CONCERNS

### Doctor-Patient Relationship

The DPR is a fiduciary relationship in which mutual trust and confidence are essential.<sup>12</sup> Any time a professional gives advice or expresses an opinion to a patient, duties are incurred. When there is no contact and the involvement is limited to a simple observation regarding the patient, with

Procedure	Claims (%)
Endodontics	15-25
Extraction, simple	12-15
Crown/bridge work	15-20
Fixed partial denture	8-15
Routine dental care	8-17
Extraction, surgical	8-12
Removable partial dentures	3-8
Comprehensive orthodontics	3-8
Complete dentures	3-8
Periodontics	5-12
Paresthesia	8-12
Other (e.g., failure to refer, failure to diagnose, implant failures, temporomandibular joint pain, failure to give a patient with subacute bacterial endocarditis antibiotics)	3-15

**Table 50-1** Claim data from various insurance sources

### Box 50-4. Special Types of Dental Negligence

Abandonment  
 Failure to refer  
 Failure to obtain informed consent  
 Failure to warn  
 Failure to follow a manufacturer's directions

limited suggestions being offered, no direct duty to the patient is assumed.<sup>13</sup> The relationship is based on contract law, with rights and obligations affecting all concerned. The fiduciary principle relates to the fact that the dentist has knowledge and skill based on which the patient entrusts his or her care. It promotes open disclosure of all specifics and encourages the free flow of information between the individuals. The mutuality of contract principle originates when a patient requests services and the dentist agrees to render the services. Consideration, usually in the form of a professional fee, binds the contract. In most cases, gratuitous treatment and advice can establish a relationship and invoke all the duties of that relationship. No money has to change hands. Once the relationship begins, the patient is endowed with various rights that include but are not limited to freedom from bodily harm, the right to choose and consent to treatment, the right to refuse treatment, and the right to privacy and confidentiality. To reduce the liability risk, the dentist must strive to improve cooperation between members of the health care team, which includes staff and prior and subsequent caregivers. The dentist also must endeavor to improve the trust and satisfaction of their patients and their families. Once the relationship begins, a series of communication skills must be practiced: a proper history is taken, the case is presented, informed consent is obtained, referrals are made if necessary, and the patient is told what to expect.

The relationship can be terminated without incurring liability for abandonment only if the patient withdraws from treatment voluntarily, the patient no longer requires care, or the provider is unable or unwilling to provide continued care and gives reasonable notice to the patient. Failure to terminate the professional relationship in an appropriate manner can lead to legal action for abandonment. For example, if improper unilateral termination of the DPR by the practitioner occurs at a time when there is a need for continuing care, abandonment may be alleged. Before termination of care for a patient, a dentist must ensure that the patient is not in the middle of a procedure. Whatever treatment has been started must be completed and emergent care must be provided for a reasonable time. See Figs. 50-1 and 50-2 for sample letters.

Good communication with a patient usually ensures a relationship without conflict. Staff members must be taught how to communicate with a patient without suggesting that any previous treatments were questionable, poor, or improper (Box 50-5).

Date  
Patient's Name  
Address

Dear \_\_\_\_\_,

I will no longer be able to provide dental care to (you/your children). If (you/your children) require dental care within the next \_\_\_\_\_ days, I will be available, but in no event will I be available after \_\_\_\_\_, 2001.

To assist (you/your children) in continuing to receive dental care, I will make records available as soon as you authorize me to send them to another dentist.

Sincerely,

Dentist's Name

**Figure 50-1** Sample letter of withdrawal.

## Informed Consent

In the past, patients possessed full confidence in treatments provided by doctors. Smith<sup>14</sup> reviewed current literature from various sources to develop a general sense and understanding of informed consent. He found that the doctrine of informed consent had significantly influenced relationships among health care practitioners and their patients in the last 25 years. He also identified an erosion of the paternalistic approach leading to an increase in patient sovereignty and decision-making. The approach now must be the sharing of information that patients want to know.

The foundation of modern-day informed consent was established by Judge Cordozo in 1914 in the case of

Date  
Patient's Name  
Address

Dear \_\_\_\_\_,

This letter will confirm our conversation of today in which you discharged me as your dentist. In my opinion your condition requires continued dental care. If you have not already done so, I suggest that you employ another dentist without delay.

You can be assured that, at your request, I will furnish the dentist you select with information or copies of your records regarding the diagnosis and treatment that you have received from me.

Very truly yours,

Dentist's Name

**Figure 50-2** Sample letter confirming patient termination of relationship.

### Box 50-5. Principal Legal Duties of Dentists

Duty to care  
Duty to inform  
Duty to maintain confidentiality  
Duty to maintain accurate records

*Schloendorff v. Society of New York Hospitals*, when he said, "every human being of adult years and sound mind has the right to determine what shall be done with his own body." The standard for informed consent was established in *Canterbury v. Spence* in 1972. The reasonable person (patient) must have disclosed to them what a practitioner knows, or should know, about the risks for the treatment proposed, allowing a reasonable and intelligent informed decision to be made. There must be explanation to the patient, including enough information for the patient to understand the nature and extent of the treatment, the alternatives, consequences, risks, and effects. The patient must also be informed of the risks if the recommended treatments are not followed. The elements of consent evolving from various court decisions that every health care provider must be knowledgeable of, and of their application, include but are not limited to: a diagnosis in layman's language explaining the nature of the problem and proposed treatment; feasible alternative treatments; and the expected prognosis if treatment is or is not provided.

Consent, therefore, is an ongoing dialogue between the health provider and the patient in which both parties exchange information, ask questions, and come to an agreement on the course of specific dental/medical treatments. When the patient agrees on a specific course of treatment, the dialogue has reached its goal; however, the dialogue does not end there. Consent and communication about the process of obtaining consent are not limited to obtaining permission for treatment. It continues throughout the course of treatment and alterations of the course of treatment, during follow-up evaluations, and as unexpected results or procedural mishaps occur. It must occur between the person who will perform the procedures and the recipient patient, especially for any invasive procedure. Staffs do not harbor the authority to obtain consent. The provider has a responsibility to assess each clinical situation and patient need to determine the scope of disclosure.

A patient who is not properly informed is likely to launch subsequent litigation over undisclosed complications that develop. An informed consent lawsuit assumes that a doctor-patient relationship exists, there was a failure by the doctor to provide information, and that had the doctor provided the patient with the undisclosed information, the patient would not have consented to the treatment. The doctor's failure to disclose the information must be the proximate cause of the plaintiff's injury and damages claimed (Box 50-6).

The patient's signing documents does not replace the process of the dentist obtaining informed consent; it only

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### Box 50-6. Elements of an Informed Consent Lawsuit that could Constitute Negligence

1. A patient-physician relationship is proved to have existed.
2. The provider had a duty to disclose information.
3. There was a failure to provide information.
4. If the information had been supplied, the patient would not have consented to treatment.
5. Failure to disclose was the proximal cause of the plaintiff's injury and damages claimed.

serves to memorialize the process. It is appropriate for the provider to present the facts, follow the elements of the process, and conclude with the patient signing a form acknowledging the process (Box 50-7).

### Documentation

"From the facts, the issues arise. Without the facts, there are no issues." This maxim essentially states that, if nothing has been written, there are no facts, and therefore it is considered that nothing has been done. Patient records are considered legal documents, as well as business records. It is the presumption in law that all entries are accurate, are truthful, and were entered in a timely manner.

A dentist's written records can be his or her best friend or worst enemy. If subpoenaed, the records continue to testify long after the dentist has gone. The records end up in the jury room, where the jurors can review them more carefully than the testimony heard on the witness stand. They serve to record prior history, diagnosis, and therapies rendered. They provide continuity between providers (generalists and specialists, partners in group practices, and interested third parties). They also allow transfer of vital information when a patient changes dental providers.

There are many facets of a dental record.<sup>15,16</sup> Aside from containing the patient's demographics and personal identification information, the record should include a current and thorough medical questionnaire. There also must be a current dental history; notations of a complete oral, head,

### Box 50-7. Basic Elements of Consent

1. Date and time of the consent process.
2. Diagnosis in layman's language explaining the problem.
3. Nature and purpose of proposed treatment in language understandable by the patient.
4. Explanation of risks and consequences.
5. Probability of success.
6. Feasible alternative treatments.
7. Expected prognosis if treatments are not accepted.
8. Statement that patient was given the opportunity to ask questions or that the patient's questions have been answered.
9. Signature of patient or legal guardian and a witness.
10. Signature of the health provider.

and neck examination; documentation of diagnostic tests and results; a memorialization document of informed consent; and notes regarding any changes in the treatment plan. In addition, copies of letters, laboratory reports, and termination of care documents and notes regarding telephone calls, questions, complaints, pharmacy prescriptions and refills, and canceled or missed appointments are part of the dental record. Diagnostic evidence, such as radiographs, photographs, and study models, are other integral parts of a dental record (Box 50-8).

Reviewing the medical history with the patient is just as important as disclosing information during the informed consent dialogue. At this point in the examination or consultation the dentist can determine whether any of the patient's medical conditions would interfere with or impact dental care. In the event that there is a question about an entry on the medical record or a medication the patient is taking, the dentist is obligated to consult the patient's physician before commencing with treatment.<sup>17</sup> It is important to receive instructions from the patient's physician regarding the use of premedication antibiotics and/or anticoagulant therapy prior to proceeding with dental treatment.

Records should be well written, legible, and accurate. There should be no words inappropriately scratched out, no words covered with correction fluid or tape, and absolutely no improper alteration in any form. Any inappropriate alteration is frowned upon and is detrimental to the dentist's credibility. Spoliation<sup>18</sup> is the premature destruction or loss of records which can impair the patient's ability to prove negligence or other tortious conduct in a malpractice lawsuit against the provider. In such a claim, the court may instruct the jury that had the records actually existed and

### Box 50-8. Universally Accepted Record-Keeping Format: SOAP

#### Subjective data

This section of the record contains the patient's chief complaint or complaints. It should state how the patient says he or she feels, what his or her symptoms are, and what specifically has resulted in this visit to the dental office.

#### Objective findings

What does the dentist observe, see, or find in examination of a patient? This area involves the critical clinical examination and all of the diagnostic tests and results.

#### Assessment

Taking into consideration all of the comments made by the patient and all that he or she has observed, the dentist makes an assessment of the patient. The subjective and objective data guide the provider's diagnostic and treatment thought process.

#### Plans

The thought process materializes in this section, and a treatment plan is determined. When presentation of this plan is prepared for the patient, there should be an ideal treatment plan and a secondary treatment plan that would work well for the patient. Often, secondary plans are chosen because of economic issues. Patients also prefer to make choices.

been produced, they would have proved the fact favorable to the plaintiff.

The dentist has custodial rights to the record; the patient has proprietary rights. Records cannot be withheld from patients for any reason when they are requested; however, only copies should be provided. The dentist should receive a proper authorization before releasing copies of records. The dentist must never part with the original dental records or any of the original components. Most states allow a minimum fee per page for copies; however, records cannot be withheld from the patient for payment of a dental bill.

## EMERGENCY CARE

Every office must establish a policy for handling emergency calls during and after office hours. When a patient or potential patient telephones the office and speaks with the dentist or a staff member, certain information, such as the medical history, premedical requirements, and nature of the complaint, must be gathered. Emergency services, specifically for patients of record, are the responsibility of the dental practitioner, and thus the office must have a policy. Every dentist must have at least an answering service, answering machine, a mechanism of reachability, and available coverage. Every dental practitioner must be available for, and must respond to, the emergent needs of patients of record in a timely manner. Before prescribing any medication, over the counter or prescription, the dentist must be familiar with the patient and his or her medical history.

## ADDITIONAL AREAS OF CONCERN

### False Claim Acts (Fraud)

False claim acts involve a claim for compensation by a federal government agency that is fraudulent. The areas of concern are improper coding or upcoding, double billing, billing for services not yet rendered (phantom billing), improper unbundling or bundling of services, waiver of deductibles and/or co-insurance, and the alteration or destruction of records.

### Dental Areas of Consideration

#### General Dentistry

The dentist should provide the patient with treatment options and should not try to "sell" a specific treatment plan; he or she should explain the plan in layman's terms so that the patient comprehends the proposal. Consent should be obtained for every procedure to be done but is specifically important for invasive procedures. During efforts at restoration, the dentist must be observant to avoid overhanging margins, poor reconstruction, an overbite or underbite, and improper post insertions. Other litigation concerns for general dentists are the failure to diagnose periodontal disease, endodontic problems, or cancerous

and other medical conditions. Failure to refer to a specialist when necessary is also actionable.

#### Periodontics

Gingival health, retaining dentition, and cosmetics are goals of periodontal care. There are periodontal procedures that will alter the gingival appearance, hence lengthening teeth and affecting cosmetics and function. If such alterations become a necessity, the patient must be informed before treatment. The patient must participate in discussions about the treatment plan, clearly understand the periodontist's goal, and recognize that he or she must comply with good oral hygiene or the goal cannot be accomplished. At times periodontal care involves the cooperation of other dental specialists, as well as the general dentist. Paresthesia is a concern but not as much as in other phases of dentistry. Periodontists are now included in the team of specialists who place implants and they must specifically describe all aspects of implantology to the patient.

#### Oral and Maxillofacial Surgery

Common areas of lawsuits regarding surgery pertain to the extraction of the wrong tooth. Although the oral surgeon receives a prescription for a service to be rendered, the onus is on the oral surgeon to ensure that the diagnosis is correct and that the patient understands which tooth will be extracted before performing the procedure. After an extraction, unforeseen circumstances, such as dry sockets or sinus involvement, could present. Root tips can be left behind, jaws fractured, and foreign bodies aspirated. These possibilities should be discussed as potential risks before the procedure is performed. Paresthesia is a common basis for litigation. Some procedures are more difficult than others and can place stress on the jaw structures, causing trismus, temporomandibular joint dysfunction, or both. Failure to biopsy, diagnose suspicious areas with appropriate follow-up care, and inform patients accordingly have led to litigation. Patients are knowledgeable that dentists (doctors of the oral cavity) are usually first in line to diagnose cancerous lesions of the mouth.

#### Implantology

Patient selection, implant selection, and implant team member selection are of utmost importance in this area of dentistry. Expectations should be discussed and no guarantees made. Strict informed consent procedures must be adhered to so that all of the known risks are outlined for the patient, and team records must be accurate and consistent. Patients must understand that they have to comply with all instructions given by the implant team. Possible concerns include sinus perforations, mandibular canal perforations, and paresthesia. The patient should be told how much time and commitment are involved with this procedure, the potential longevity of the effect, and the prognosis.

#### Endodontics

Endodontic procedures can be successful in more than 98% of cases when the condition is properly treated, the

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restoration of the tooth is appropriate, and the tooth is periodontally sound. Yet, problems and mishaps occur in endodontic therapy. The root canal system anatomy varies from tooth to tooth and patient to patient. Many patients' root canal systems are tortuous, narrow, and constricted or calcified. With newer techniques including microscopes, enhanced vision aids, light sources, and instrumentation, the ease of endodontic therapy has increased. However, difficulties (usually related to the anatomy and chronological age of the teeth and the more heavily restored and involved teeth) are encountered in many cases. Endodontic fills that extend beyond the anatomical apex of a tooth have been criticized and been the subject of litigation; these fills must be determined as to the extent of three-dimensional sealing capabilities. The material used must be of accepted tolerances. Irrigating solutions that may escape through any of the portals of exit within the anatomical structures have also been implicated in malpractice lawsuits. Perforations of tooth structure in the chamber or root surfaces, the sinus, and the mandibular canal are not uncommon in the challenged anatomy. It is best for an endodontist to prepare a post space within the anatomy of a canal. When the restorative dentist does not follow the path of canal anatomy in preparation for the post placement, failure can follow; however, an altered path is not necessarily negligence. Other concerns in endodontic care are crown and bridge fractures occurring during access preparations, paresthesia, instrument breakage, and the swallowing of instruments if the proper rubber shield is not used.

### Fixed Prosthetics

Fixed prosthetics are more commonly referred to as *crowns* and *bridges*. Considerations in this area of dentistry include improper margin adaptation, unrealistic cosmetic expectations, occlusal problems, and retention problems. Before preparing and treating teeth by applying fixed prosthetics, the practitioner should perform a complete endodontic and periodontal examination and be comfortable with the status of each. Litigation has resulted from cases in which teeth with evidence of existing periapical pathology have been restored. Once crowns and bridges have been permanently cemented, endodontic therapy and periodontal therapy are possible but much more difficult. After the recent cementation of crowns, periodontal treatment risks the exposure of root structure. In addition, endodontic treatment performed after a final cementation can cause alteration or breakage of the crown, the bridge, or even the abutment.

### Removable Prosthetics

The most common concern among patients with removable or partially removable prosthetics (dentures) is a poor fit, which usually results from loss of bony ridge structure and poor impression techniques. In patients with removable partial dentures, poor fit can be a result of poorly designed rest areas and clasps. Improper stress on abutments can cause endodontic and periodontal pathology. Additional concerns in this area of dentistry are the mobility of abutments, failure to meet the cosmetic expectations of a

patient, temporomandibular joint involvement, and defects of various products.

### Orthodontics

Orthodontics used to be for the young, but now increased attention is paid to adult orthodontics aimed at correcting patients' cosmetic defects. Orthodontics deals with improving jaw development and ensuring appropriate occlusal contact. Some of the problems in this area are failure to meet the patient's cosmetic expectations, external apical root resorption, internal resorption, root canal system calcifications, temporomandibular joint problems, injury associated with the appliances, and untoward facial changes.

### Pedodontics

Children are sometimes difficult to treat. Some methods of physical restraint can be construed as child abuse. Problems arise due to the patient's age and behavioral problems. Additional difficulties involve improper parental consent to various treatments and the tendency for young patients to neglect oral hygiene.

### Paresthesia

Paresthesia is in a category of its own because it can result from any invasive procedure in oral surgery, endodontics, periodontics, or implantation. It can result from a poorly directed mandibular inferior alveolar nerve injection, improper surgical flapping of tissue in the mandible, involvement of the mental nerve, third molar extraction, or recklessness of care. Nerves commonly involved are the inferior alveolar nerve, lingual nerve, chorda tympani nerve, and mental nerve, as well as the peripheral sensory nerve branches. Paresthesia can involve the lower lip, a portion of the tongue, and the chin. It also can cause diminished taste and slurred speech. The dentist should be acutely aware of this possibility because paresthesia can be a temporary and transient situation or a permanent situation. The practitioner should discuss this risk with the patient before discussing the invasiveness of a procedure. Corrective treatment should be recommended when necessary. The patient should be afforded all means of communication, and all conversations and recommendations should be accurately recorded in the dental record.

### Additional issues

Failure to recognize medical problems; improper use of nitrous oxide; failure to diagnose<sup>19</sup> and refer; complications with anesthesia; failure to recognize the depressed patient's normal functions during treatment; and improperly monitoring and charting bodily functions, such as blood pressure, cardiac function, and respiration when necessary, also can lead to lawsuits.

## CONCLUSION

When all risks are considered in dentistry, most are rare and are not a basis for negligence legal actions. Good communication, obtaining appropriate informed consent for

treatment, and keeping accurate and appropriate dental records are the dentist's best preventions and defenses. Included is a list of case citations and references supporting this thesis.

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