



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 2014

Multiple Dentists Encounter Drug-Seeking Patient

Single and in his early 30s, Joe Mahorn worked primarily as a bartender at high-end hotel restaurants. At the time, he wasn't seeing a dentist regularly. Instead, he went to various treaters for the occasional filling or cleaning.

Joe began to treat with Sam Arias, DDS, in December 2006 for dental pain. His history indicated that he was taking hydrocodone and Tylenol for pain for prior injuries. He came to see Dr. Arias for a chipped tooth in the front, as well as "sensitivity in his front teeth." After taking films and performing a full exam, Dr. Arias noted Joe had impacted wisdom teeth and some generalized periodontitis.

Joe had last seen a dentist about two years prior and had some cavities. Dr. Arias recommended a cleaning and treatment on teeth #8 and #9, and he prescribed Vicodin for the pain.

When faced with red flags for abuse potential, practitioners should address the issue with the patient and document these discussions thoroughly.

When Joe returned in January 2007, Dr. Arias filled the two cavities. Joe then came back to have two more cavities filled that March. In April, Joe received a

prescription for an antibiotic and two prescriptions for Vicodin (one of which was a phone prescription). Dr. Arias' records did not indicate the reasons for the prescriptions or the phone call.

On April 13, 2007, Dr. Arias' office referred Joe to an oral surgeon to evaluate removing his impacted wisdom teeth. The referral slip noted that Joe had pain on the lower left side.

Patient Sees Oral Surgeon

Joe went to an appointment with the recommended oral surgeon, Dr. Sparrow, on April 14. Joe told Dr. Sparrow that he was in terrible pain, and after evaluating the patient, Dr. Sparrow recommended the removal of Joe's wisdom teeth.

After consulting with the patient, Dr. Sparrow performed the procedure without incident. Joe requested pain medication in case he needed it, and Dr. Sparrow prescribed narcotic pain medication. Thereafter, Joe returned for a total of nine follow-up visits over four weeks to Dr. Sparrow's office. He was treated for dry sockets, delayed healing in the lower extraction sites, and problems with trismus.

During the nine follow-up visits, the patient complained of pain and difficulty opening his mouth. At five of



these visits, Dr. Sparrow prescribed narcotic pain medication. After the ninth visit, the sites appeared to be healing. Joe was advised to report back for further care as needed.

Shortly after that last visit, Joe called Dr. Sparrow's office and said he was running out of analgesics. Joe reported that it hurt when he performed stretching exercises for the trismus. Dr. Sparrow progress notes stated: "Discussed limiting regimen of Norco. Patient leaving to go out of town. Discussed refilling one last prescription. Patient may have abuse potential." A refill of Norco was prescribed. The note concluded: "No more narcotic meds."

Joe Requests Referral to Another Oral Surgeon

Joe never returned to Dr. Sparrow, but instead went back to Dr. Arias for a referral to a new oral surgeon,

Continued on page 2

Joe claimed he had no abuse problem and that no one ever told him that he did.

Continued from page 1

supposedly because he was not getting better. On May 14, Joe saw Dr. Bogdan who believed that Joe had an infection and possibly osteomyelitis.

Joe also complained of related headaches, and Dr. Bogdan prescribed the pain medication Percocet and did a debridement in the lower extraction sites. Thereafter, Joe improved.

In late May, Dr. Bogdan's records contained a note indicating that Joe wanted another medication besides Percocet because it made him sleepy. Joe requested the drug Norco, and Dr. Bogdan approved the switch, even though Joe was already taking Vicodin for pain due to teeth grinding.

Joe returned to Dr. Bogdan's office in August 2007, and then in February 2008, at which point he complained of inflammation and pain. Dr. Bogdan's records were not well documented as to the pain medications prescribed, but Joe received another prescription for Norco.

Because of the pending appointment, Dr. Arias refilled the prescriptions by phone.

More Pain Meds Prescribed

Joe also was seeing Dr. Arias during this time and had an appointment scheduled for June 25. However, before this appointment, Joe called to request a pain medication refill. Because of the pending appointment, Dr. Arias refilled the prescriptions by phone.

Prescriptions were given for Vicodin and Norco narcotic pain medications on June 20 and 22. As for the June 25 appointment, Joe was a no-show for it.

On July 11, Dr. Arias' hygienist took another call from Joe saying he was in a lot of discomfort and needed his pain medication refilled. He said he would have his oral surgeon, Dr. Bogdan, fill it, but he was out of town.

The hygienist explained to Joe that Dr. Arias was not in the office either, but she would refer him to the ER or another dentist. Joe became agitated in response, saying, "So you expect me to pay emergency room fees when your office originally gave me the referral for the surgery that caused all these problems?" Joe made an appointment for July 18, but again failed to go the appointment.

Six months later, on January 14, 2008, Joe appeared for an appointment at Dr. Arias' office. At this appointment, Dr. Arias prescribed the pain medication Norco. One last visit took place in February 2008 when Joe complained of tenderness in tooth #2 and Dr. Arias considered an endodontic referral. Dr. Arias' records were not well detailed as to any pain medications prescribed either in person or over the phone.

Concerns Raised; Lawsuit Ensues

Of special note was that Joe's dental insurance carrier had sent letters in July 2007 to Dr. Arias, Dr. Sparrow and Dr. Bogdan advising them that each of their records indicated a pattern of medication use that could be excessive for Joe. The insurance carrier letters included a detailed listing of narcotics prescribed for Joe by numerous unidentified providers. The letters also included a sample treatment agreement the treaters could have Joe sign to help



monitor prescription use. One of the letters listed hydrocodone prescribed between April 20, 2007, and May 14, 2007, by six providers other than Drs. Arias, Sparrow and Bogdan.

Thereafter, Joe filed a lawsuit against Dr. Arias and Dr. Sparrow for lack of informed consent for extractions, negligence in the follow-up care, and negligent referral.

At his deposition, Joe stated that he had treated with a number of doctors for various maladies (e.g., hurting his back while playing football and injuring his elbow after a fall on ice) and was prescribed narcotic pain medications for the injuries. Some of this treatment occurred when he would go out of state for family visits.

During his deposition testimony, Joe claimed that he didn't know or understand the risks of wisdom tooth removal included infection, dry socket, numbness and trismus. Joe also contended he had lingering headaches and sensory changes, and that he had mentioned lower lip and chin sensation changes to Dr. Sparrow but the dentist dismissed his complaints.

Joe admitted to an incident of drunk driving in 2001, as well as an arrest for possession of illegal drugs in 2005, which was dismissed. However, he claimed he had no abuse problem and that no one ever told him that he did.

Experts Weigh in

Joe's lawyer identified an expert to support his claim that Dr. Arias failed to refer Joe to a well-qualified oral surgeon. This expert also supported Joe's claim that Dr. Sparrow failed to obtain Joe's informed consent in light of possible complications and that he failed to properly treat and diagnose an infectious process.

The defense team for the dentists identified experts who strongly disputed the substantive claims against them. Part of the defense experts' testimony was that Joe had drug-seeking behavior that affected the credibility of his subjective complaints and delayed any normal healing process.

The case proceeded to trial where Joe's lawyers sought to bar:

- Any past pain medication issues unrelated to the dental care at issue as irrelevant
- Joe's prior drug arrest as not a conviction, irrelevant and prejudicial
- The admission of any drug abuse related to dental care as irrelevant and highly prejudicial

Often at trial, the court looks at the relevance of any contested issues, as well as whether the evidence sought to be admitted or barred is so prejudicial that it outweighs any probative value. Evidence related to drug abuse is generally considered to be prejudicial.

The defense fought to be able to address these matters in the trial. However, not surprisingly, they lost the ability to bring up the unrelated narcotic use for physical injuries, as well as to mention the drug arrest.

On the issue of dentally related

narcotic use, the defense argued that Joe's behavior was probative in that it explained a delay in typical healing times. What's more, the doctor's ability to properly treat and follow up on care was impaired because Joe's complaints of constant pain were unreliable due to his drug-seeking behavior.

Court Excludes Evidence

The court disagreed and found the issue of abuse was highly prejudicial. The court also found the drug abuse was not so intertwined with the care as to overcome the inflammatory nature of the drug abuse or drug-seeking behavior. The court struck the defense experts' opinions that Joe's drug-seeking behavior affected his complaints of pain and were a reason for his delayed healing.



The court also refused to allow any of the letters and attachments from Joe's insurance carrier to be admitted given their inflammatory nature. However, this was not surprising, given that insurance mentions are rarely allowed at trial.

The court specifically ruled that the defense could not use the words addict, addiction, abuse, abuser or similar terminology. The court did allow Dr. Sparrow to read to the jury his written progress notes: "Discussed limiting regimen of Norco. Patient leaving to go out of town. Discussed refilling one last prescription. Patient may have abuse potential."

No other references to drug abuse were allowed. The case was sent to the jury, with the focus of the substantive dental care provided. The jury was out for approximately two hours and returned a verdict in favor of the defendant dentists.

What Can We Learn?

This case was a strongly defensible case on the substantive dental care provided. Because of that strength, the drug abuse issue was not critical to the defense of the case. However, when viewed together, all the records clearly showed a pattern and practice by the plaintiff to obtain narcotic medications from numerous providers including the defendant dentists. While not the case here, practitioners may find themselves on the wrong end of a lawsuit if a patient causes himself/herself harm as a result of a drug overdose.

While matters like drug abuse are very difficult to admit into evidence at trial, the prudent practitioner, if faced with numerous red flags for abuse potential, should seek to address these issues with the patient and to document those actions and discussions in detail. Also, it is critically important to detail the impact of the abuse and its impact on the treatment plan. The practitioner's best hope to keep this kind of evidence in the case is to show how it directly impacts the patient's treatment.

Moreover, Joe's manipulation of the treaters is more clearly seen when taking into account his pattern of behavior with all the treaters. Better communication about the patient and the care among all the practitioners might have helped show the true picture and the pattern of abuse. Finally and critically, the hygienist's conversation with an agitated patient who expressly claimed poor care should have been a key indicator that this patient was one not worth further time and effort. While it might not have

Continued on page 4

Continued from page 3

ultimately helped Dr. Arias, this was not the kind of patient a dentist should want to continue to treat. Dr. Arias was lucky that there were no further claims of malpractice given how this relationship had completely deteriorated.

Finally, better and consistent documentation about the prescriptions requested, prescribed by phone or in office, and the specific dosage and amounts (with or without refills) may have helped the practitioners see the patterns with better clarity during treatment.

Good practitioners can strive to maintain better working knowledge among their team of providers to assure full knowledge of problematic patients. Good communication within the team, combined with early recognition and intervention on potentially difficult issues, such as drug abuse or drug-seeking behavior can help the dentist prevent and mitigate problems such as those faced in this case.

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 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.

Recognize/Document/Communicate & Coordinate

Recognize

Reference your state's prescription drug monitoring program and/or the administrative code. They may provide guidelines for signs of abuse/diversion such as:

- Drugs from multiple prescribers
- Frequent requests for early refills
- Lost prescriptions
- Protracted use
- Drug-seeking behavior includes:
 - Requests of maintenance narcotic analgesics for a chronic condition
 - Calls after hours or when dentist is not available
 - Refusals to go to the ER
 - Claims that over-the-counter medications don't alleviate pain
 - Refusals to have a diagnostic workup or to be seen by dentist or dental provider
 - Reports of subjective oral or tooth complaints

Document

Legibly document the reason the drug was prescribed and the details of the prescription (strength, dosage, number of pills, etc.). Establish an office policy for refilling prescriptions to:

- Review the patient's chart prior to authorization
- Avoid over-the-phone prescribing
- Require the dentist/dental provider's authorization prior to prescribing
- Allow covering dentists/dental providers to prescribe only minimal amounts until the attending dentist/dental provider is reached
- Ask routine questions to determine whether the patient should be seen before the refill is authorized
- Refuse to provide refills for prescriptions provided by other providers or for conditions not being treated

Communicate and Coordinate

Give patients more than one choice for referrals and offer to make appointments for them. If the referral cannot be scheduled for the recommended time, the dentist/dental provider should follow up with the patient and maintain a system to:

- Identify patients who are referred for consultation with another specialist
- Monitor receipt of reports from the consultant and/or specialist, so care can be coordinated
- Define the role of each consultant and/or specialist to ensure follow up



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

Dental Insights is published quarterly for policyholders of Professional Solutions Insurance Company. Articles may not be reprinted, in part or in whole, without the prior, express consent of Professional Solutions.

Information provided in *Dental Insights* is offered solely for general information and educational purposes. It is not offered as, nor does it represent, legal advice. Neither does *Dental Insights* constitute a guideline, practice parameter or standard of care. You should not act or rely upon this information without seeking the advice of an attorney.