DENTAL Insights

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PROFESSIONAL SOLUTIONS INSURANCE COMPANY BRINGS YOU PRACTICAL TIPS FOR AVOIDING A MALPRACTICE ALLEGATION Spring 2014

Dentist Deals With Defective Instrument

Dentists should be aware of the risk management issues associated with the instruments they use, especially when they malfunction.

Jenny White was 20 years old and in college. She was a bright, active and attractive young woman who worked part time on breaks and over summers as a hostess at the family's country club. On her holiday break, Jenny had an appointment with her dentist, Dr. Marker. Dr. Marker was one of three dentists in a group practice. Jenny had a lower back tooth that had significant decay and some old fillings. That tooth was causing her pain. Dr. Marker examined the tooth and determined that it would be best to restore the tooth with a crown.

Jenny agreed and Dr. Marker proceeded to prepare the tooth using an electric handpiece. Toward the end of the procedure to prepare the tooth, Dr. Marker noticed an unusual noise coming from the handpiece. He stopped, examined the area, and asked Jenny if she was okay. Jenny indicated she was fine, and Dr. Marker finished the preparation. He did notice some redness in the corner of the left lip area. He completed the work for the day, and prescribed Bacitracin.

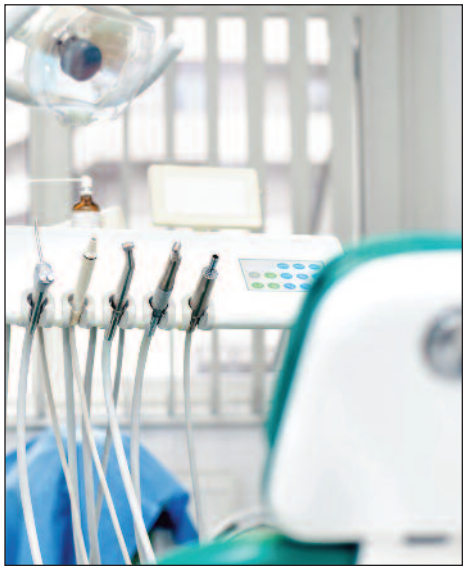
Dr. Marker's notes did not reflect any problem with the handpiece. Nor did the notes include any explanation about why he stopped before completion, what he discussed with Jenny about the procedure, details as to why he prescribed Bacitracin or the specifics of his follow-up instructions to the patient.

Patient Exhibits Sore Post Procedure

Three days following the procedure, Jenny's parents called the office to schedule an emergency appointment because there was a very bad sore on the corner of Jenny's lower lip, about the size of a quarter, which was swollen and blistered in appearance. Jenny was seen by Dr. Marker's partner on that date, Dr. May, who took a photo of the area. Dr. May referred Jenny to a plastic surgeon for consultation.

The next day, Jenny went to see the plastic surgeon, who prescribed continued care with the Bacitracin. Later that same day, she returned to Dr. Marker with her parents and in his progress note, Dr. Marker indicated that the patient was seen in follow up for a burn caused by a malfunction/ overheating of the handpiece.

Eleven days after that visit—two weeks following the procedure—Dr. Marker returned the handpiece to the manufacturer with a short letter indicating that it was defective and had



overheated. The patient continued to follow up with both the plastic surgeon and Dr. Marker over the next few months. The burn area resolved well, leaving only a slightly discolored area smaller than a quarter at the corner of the lip area.

Lawsuit Ensues

Jenny White then sued Dr. Marker, the practice and the manufacturer. The case was evaluated by a consultant on behalf of Dr. Marker and the practice. This consultant found it troubling that the initial note did not mention any problem during the procedure or any advice given to the patient about what had occurred.

While the burn did not appear severe at the outset, Dr. Marker clearly admitted in his later notes and

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Dr. Marker's notes did not reflect any problem with the handpiece or discussions with the patient related to the procedure.

correspondence that there was a burn incident that occurred during the initial procedure. The lack of documentation in that note would lead to difficult cross examination questions for Dr. Marker. Additionally, there would be questions asked of Dr. Marker about how much work he did after noticing the unusual noise and whether continuation of the procedure after that point caused or exacerbated the injury.

Moreover, nothing in later notes or correspondence described exactly what occurred, including its timing or sequence. Again, Dr. Marker had to explain through solid testimony exactly what had occurred and why it was not recorded. Finally, Dr. Marker sent the handpiece to the manufacturer, so it was out of his and the practice's control. He concluded it was defective, but he did no testing. Therefore, no one knew when the suit was filed whether or not the product had been tested and found defective.

Dr. Marker returned the handpiece to the manufacturer with a short letter indicating that it was defective and had overheated.

Despite these shortcomings, the expert consultant testified that, based on the timing of events, the course of follow-up care taken was appropriate. An examination of the patient after the suit was filed showed a fairly good result for this young woman.

Handpiece Maintenance Becomes an Issue

As to concerns related to the practice, how the handpiece was maintained became an issue. Initial research by the consultant indicated that there were specific manufacturer guidelines for the care of the handpiece. Yet, the practice had scant documentation as to how the handpiece was maintained and whether the manufacturer's guidelines had been followed. This meant this information would need to come from testimony of the practice staff and dentists, and these were details that no one could recall with specificity. No one staff person was designated to oversee care and use of the handpiece—it was a shared staff responsibility.

Defense counsel for Dr. Marker and the practice anticipated that the manufacturer would point the finger at Dr. Marker and the practice for not properly maintaining the equipment. The defense would respond that there was a manufacturing defect in the handpiece. This fight would serve to make the job of the plaintiff's counsel simpler as the defendants blamed each other.

Case Resolves

Given all of these factors, Dr. Marker, in consultation with his counsel, decided to try to settle the case. This decision was reached early, before deposition testimony was taken. The concern was that the jury would find someone at fault—whether it be the dentist/practice or the manufacturer.

The initial demand to settle was $150,000 total. Ultimately, the case resolved for $50,000, with all defendants contributing to this total amount.

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

What Can We Learn?

Several shortcomings, along with a permanent injury to the face of a young woman, led to the early resolution of this case. The following are some steps that may have helped Dr. Marker's defense.

Documentation during the procedure. It would have been a far stronger defense if Dr. Marker's notes from the initial procedure had been more detailed about what he saw, heard, responded and advised. Had that note been more detailed, Dr. Marker would have had the very strong defense that he knew enough to recognize that the handpiece was not working properly. Here is an example of a more descriptive note for this situation:

"At a point approximately three-fourths through completion of the procedure, I noticed an unusual noise emanating from the handpiece. I immediately stopped the procedure, checked to see if the patient was doing fine, and visually inspected the handpiece and its connections. I confirmed that the handpiece had been properly prepared and tested prior to the procedure per our usual protocol, with the assistants. I then turned on the handpiece, and hearing no further noise, completed the procedure, taking care for any other abnormalities. None were noted. Upon completion of the procedure, I noticed a slight redness in the area of the lower lip (diagram). The patient advised that there was no discomfort, however, to be on the safe side, I prescribed bacitracin and told the patient to return with any questions or problems. I advised her that I had heard an odd noise, looked over the handpiece and all seemed to be in working order, so we completed the procedure. I then advised my assistants to have the handpiece taken out of circulation for a more detailed inspection and/or return to confirm whether any further issues existed that I could not detect."

Records of equipment care and maintenance. If the practice would have kept documentation on the care and maintenance of the handpiece, the defense's case would have been stronger. It also would have been beneficial for the practice to have on-hand the manufacturer's recommendations for routine servicing, based on a practice's actual use of the handpieces. If the practice had designated a staff person to maintain the equipment and document what was done, the practice might have been better able to prove that the recommendations were followed. Without any documented process of inspection and maintenance, it would have been hard to prove that the piece was properly cared for and maintained.

Designated staff processes. The dentist and the practice staff should have had a process in place to examine the handpieces before each use to assess for signs of wear or improper maintenance. What's more, training of personnel in the specific device maintenance requirements for proper cleaning and maintenance of the handpiece would have helped the defense. This should have included a system to track maintenance and routine service for each handpiece used. Also, instead of returning the handpiece to the manufacturer, it may have helped the dentist's defense to keep it in his own office, under lock and key, immediately after having problems during its use.

Why It's Important to Keep Your Policy Current

Just like you should review your office policy and procedure manual annually to ensure you and your staff are staying current and compliant, it is good practice to review your malpractice insurance policy each year.

Your practice might have changed over the year. For example, you may have incorporated or added staff, locations or services for your patients. Insurance coverage and policies can also change.

Consequently, it's essential to make sure your coverages and limits are keeping up with your changing practice. An easy way to do this is to establish a specific time to review your professional liability insurance policy with your agent. Your agent has a wealth of information to help you avoid coverage gaps.

Some dentists like to do this review toward the beginning of the year, while others prefer to evaluate their insurance needs and limits just before their policy renewal date. Whichever you choose, the key is to just do the review.

The best result of a short review is the peace of mind it brings you and your practice.

Expert answers to your questions about ...

Q&A

How Should You Handle a Negative Social Media Comment?

Q: A disgruntled former patient recently posted an angry rant about me on Facebook. The post was filled with false information and inflammatory allegations. Should I ignore it or attempt to respond to it?

A: The days of "any publicity is good publicity" are long gone. Social media complaints are available for the world to see, and they can definitely have a negative effect on a dentist's reputation. Moreover, negative online publicity from credible sources can result in a profound decrease in business.

Bringing in lawyers or insulting the commenter can incite negative publicity. These types of responses are likely to only make the person angrier, and more likely to look for a reason to file a board complaint or a malpractice allegation against you. In addition, the resulting anger can escalate into the type of drama you would like to avoid circulating throughout the Internet.

Instead, a proactive campaign to handle the negative online press may undo some of the damage. Whether the negative comments are from a disgruntled former patient, employee or someone else, here are a few tips to help minimize the damaging effects:

- **Ask the person to take down the information.** Respond either directly or through specially trained staff to let the person know you're aware of the concerns and empathize with the situation.
- **Sometimes, it is not what you say but how you say it.** Dentists should choose their words carefully, expressing regret for the occurrence of the event rather than any individual actions. An apology can be mistaken for an admission of liability if not well thought out. It is best to express sympathy for their problems without admitting negligence or responsibility.
- **If the information remains online, post a brief explanation** to clarify misunderstandings and correct factual statements—but only if it's possible to do so without violating patient confidentiality.
- **Make sure your online response is calm and takes the high road.** If the person is angry, do not engage in an argument. Your goal should be to bring the situation to an amicable resolution. However, you also want others who review the post to realize that the patient may not have provided a fair review.
- **Encourage patients to share their positive experiences** about your practice on your business website. These positive comments can help offset the negative ones.

It is a good idea to search your name and practice on a regular basis on social media platforms to see if anything, positive or negative, has been posted. Also, require your own sites to identify commentators, so there is a line of credibility. (Facebook and many other professional sites already have built-in mechanisms for this.) Add a statement that anonymous comments will be removed, as appropriate.

The anonymity of the Internet can bring out unwanted comments posted deliberately by people who have an ax to grind or simply want to wreak havoc. Save your energy for happy patients and prospects who are interested in receiving high-quality dental care.

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Dental Insights is published quarterly for policyholders of Professional Solutions Insurance Company.