

CHAPTER 1

THE LAWSUIT

A lawsuit starts when you receive a complaint letter from the patient or the attorney that states that you are being sued. But before discussing this we must examine why patients sue. I have found that there are basically two reasons: (1) the patient has allegedly been harmed in some manner as a result of your treatment or nontreatment, and (2) the patient wants money. The problem the patient may have may not even pertain to dentistry.

TRUE CASE 1: Miscarriage due to endodontics

The patient came into the dental office with pain. The patient, a healthy, pregnant woman in her 30s, was in the beginning of her second trimester with no complications. She was referred to a board-certified endodontist who practiced part-time in the dental practice. A therapeutic pulpotomy was preformed. The patient was still having pain and went to another dentist, who reopened the tooth, relieving the pain. The patient then had a miscarriage. The owner of the original dental office and the endodontist were sued for malpractice, causing the miscarriage and emotional stress. The case was settled out of court at an arbitration hearing in favor of the defendant dentists.

The complaint letter will state many things that you have allegedly done to harm the patient. As seen from the case above, the patient and her attorney, who happened to be her uncle, blamed the dentists for the miscarriage. An attorney's letter will not only state your failure to follow a procedure's protocol and the standard of care but can also include complaints about a failure to refer, a failure to diagnose, or emotional distress. Remember, anyone can sue anybody at any time for anything for any amount. It does not mean the defendant did anything wrong or that the plaintiff will automatically win.

Once the complaint letter has been received, what should you do? You should notify your malpractice carrier. However, before you notify them, be sure to recognize

Professional Responsibility in Dentistry: A Practical Guide to Law and Ethics, First Edition.
Joseph Graskemper.

© 2011 John Wiley & Sons, Ltd. Published 2011 by John Wiley & Sons, Ltd.

the difference between an incident and a claim. An “incident” is often called a “near miss”; for example, two airplanes passing each other closely. A “claim” is a hit: a collision. If the letter is from a disgruntled patient, try to decide if it is a manageable situation (see Chapter 14). If not, you should contact your insurance company. The insurance company would prefer that you always contact them so they may assist you and keep track of your troubled patient relations. Every time you contact your insurance company it is placed in your record. If you contact them too many times, it indicates to the insurance company that you have problems within the office with patient communications, patient finances, and/or treatment protocols. Depending on the number and severity of your “incidents,” the insurance company may either increase your premium or drop you because you have troubled patient relations or questionable treatment outcomes. If the letter is from an attorney’s office, you must call your insurance company.

Once you receive the complaint letter, retrieve the record from the main office filing system. As soon as possible, write down in your own words what happened on a separate piece of paper and keep it separate from the patient file. This is your work product and is not part of the patient’s treatment record. Do not change anything in the record.

TRUE CASE 2: Changing the chart

Having been an expert witness many times, I must not fail to share the following experience. During the trial of a dentist in which I was the expert witness for the defendant dentist, the patient’s attorney asked me if I would read what was on the top of page 3. The dentist’s attorney had just gone through the record with me while I was on the witness stand to show how complete the patient’s dental record was and how the dentist had followed the standard of care and all treatment protocols, thus the patient really did not have much of a case. The jury, I believe, was in full understanding that the dentist treated the patient properly. Now looking on the top of page 3, I read to the patient’s attorney what I saw. He replied, “No, above that.” There was nothing above that on my copy. He proceeded to show me and the jury his copy on which the dentist had made changes, after many copies had been made by both parties in preparation for the trial. He lost the case significantly due to altering the patient’s record.

Do not talk to anyone outside of your spouse and your staff. This will be a very emotional time that will lead to some self-doubt and second-guessing. Reassure yourself by reviewing your records to confirm you have followed all treatment protocols and the standard of care. Do not discuss the pending lawsuit with your colleagues or study club. Do not try to contact the patient or the patient’s attorney.

After you contact the insurance company, they will assign you a claims administrator and an attorney, if needed. The sooner you contact the insurance company regarding a claim, the better the chance of success. The attorney assigned to you should be familiar with dental terminology and dental malpractice lawsuits. This attorney is usually on retainer to the insurance company. If the case is beyond the limits of your policy, be sure to also have your own personal attorney. Most times this is not necessary.

TRUE CASE 3: Saving the case for trial

At an arbitration hearing, which may occur before a trial, where I was the expert witness for the dentist, a question of comparative negligence (to be covered later—the patient is partly responsible for the damages) was not asked. While walking back to the dentist's attorney's office, I asked him why he did not ask several questions that would have easily, in my opinion, settled the case in the dentist's favor. His reply was that he was going to save those questions for the trial!

Hence it is important for dentists to have a basic understanding of the legalities that apply to the practice of dentistry.

Some states have a claims committee within their state dental association [1]. These claims committees may be asked by the insurance company to review the evidence of the case and to render an opinion as to whether to settle or to defend a case. This type of review may be available only to dental association members. You may still decide to defend the case even if the committee recommends settlement. That decision depends on you, your case, and the type of malpractice insurance you have (to be discussed in Chapter 20).

The next thing to happen is the examination before trial (EBT), also described as the discovery phase. The EBT may include interrogatories and depositions. Arbitration and settlement hearings may also occur prior to an actual trial. Interrogatories are long, written questionnaires about you and the dental care you provided for the plaintiff/patient. This is then followed by depositions. These are fact-finding, direct questionings of each party to the lawsuit by the opposing attorney. These are taken under oath and with a court reporter. Both attorneys are usually present, but only one party, the dentist/defendant or the patient/plaintiff, is deposed at a time. You will be given a copy of the deposition and asked to make any corrections and sign it. Be sure to check it closely for errors because they do occur, and once it is signed you cannot change it. Those errors, if of significant importance, may be held against you if you go to trial. Both parties, depending on the jurisdiction, may then agree to an arbitration. There are binding and nonbinding arbitrations. A binding arbitration is where both parties agree that the result will be the end of the lawsuit. The

nonbinding arbitration still leaves the avenue open to further litigate the case if either party feels the result of the arbitration was not fair. Both types of arbitration are usually held with both parties and their attorneys, with a retired judge or highly experienced attorney who is familiar with malpractice acting as the arbitrator. Settlement conferences are sometimes held when the amount of damages has not been agreed upon but both parties have resolved the liability question of the case. At these various fact-finding discovery proceedings, the attorneys will try to:

1. Find out the facts that you know and explain your patient records.
2. Evaluate your credibility and whether or not you would make a good, impressionable witness.
3. Use leading questions to catch you at some discrepancy between your interrogatory and deposition (see Chapter 14).

Almost all dental malpractice cases take place within the state court system. There are basically three levels of courts within each state: trial court, appellate court, and state supreme court. Most dental malpractice cases are resolved at the trial court level, but sometimes they make it to the court of appeals. It should be noted that many dental lawsuits are settled before an actual trial starts due to the time and cost of a trial. At the trial level, there is usually a judge and jury, with some jurisdictions allowing a jury only by request.

Please keep in mind that judges and juries are humans who have biases and ideas of justice and fairness with which you may not agree. No matter how solid a case may seem, no one can predict how a trial will be resolved. In addition to the talents of each attorney and the credibility of the dentist and the patient/plaintiff, the expert witness for each side also affects the outcome of a trial. If the attorney does not ask the right questions for the expert to properly answer, the most solid of cases may be lost.

You should also be aware of the small claims court in your jurisdiction. The limits on damages are much lower but have often been used by the patient to get a refund of money or by the dentist to collect past due balances for treatment rendered. This will be discussed more under patient finances (see Chapter 21).

REFERENCE

1. www.NYSDental.org/img/document_files/risking2006webhandout.pdf, accessed December 8, 2010.