



DISCLOSURE: THE BEST ANTISEPTIC TO PREVENT LAWSUITS

by Theodore M. Schaer, Esq.

The rise in professional negligence lawsuits in this county can be attributed to many factors. Often times, professionals and observers of the human condition like to point to the general litigious nature of the American legal system for the answer to the question: Why are more people bringing lawsuits? Certainly, the system provides no disincentives to patients to prevent them from seeking counsel to address a problem that they believe was caused or created by their dentist. The real question is how do we prevent the problem patient from feeling that he has been wronged and seeking a lawyer to address those concerns.

Having an open and honest dialogue with the patients about the treatment you provided, even if the outcome was not ideal or even gave rise to a complication can often times prevent legal action.

As a general proposition, patients who like their dentist, do not sue when a problem arises so long as they have been informed and are made to feel that you are interested in their well being. Deception and lack of candor about an omission or commission of care creates anger and distrust among patients.

I have defended a number of dental negligence lawsuits arising from root canal therapy where suit was instituted following the separation of a file in a canal. For whatever reason, in each case, the alleged injured patient was not told about the "event" and only learned later from another dentist that in fact the canal was filled not with gutta purcha but rather the instrument of a previous procedure. While none of these cases resulted in a favorable verdict for the plaintiff, litigation could have been avoided if the treating dentist informed the patient of the event. Finding out about the occurrence from a subsequent dentist can create the impression in the patient's mind that they had been deceived and ill- treated. Plaintiff lawyers who lack an understanding of dentistry and who undertake representation without first consulting an expert also believe they have a case. The defendant dentists in each case lost valuable hours away from their practice defending a lawsuit which was without merit but which could have been avoided. In each case, the dentist who was sued was aware of the instrument separation during the procedure but chose not to disclose it to the patient. In several cases, ironically, the reason given by the dentist was fear of a lawsuit. In one instance, the dentist explained during his deposition that the separation was within the standard of care and telling the patient was not something that he felt would be important for the patient to know. While the occurrence may be within the accepted standard of care, not telling the patient of the event is wrong and the delayed disclosure by a subsequent dentist is sure to bring on other questions regarding candor and whether appropriate treatment was rendered during the dentist patient relationship.

In the context of any surgical procedure, most states today impose the legal obligation on each dentist to inform the patient of the material risks of the procedure and the alternatives prior to undergoing the surgery. Obtaining informed consent does not stop with the signing of the prepared form!!!! Certainly, a written treatment plan signed by the patient outlining the material risks is always preferable. In event of an unexpected result, tell the patient what happened. It is recommended that a dental assistant be present during the discussion with a contemporaneous chart entry reflecting that the information was conveyed. Explain to the patient how the event occurred and what treatment, if any, will be needed to correct the problem. Provide personal follow up with the patient to reassure them that you are concerned with their well being. Make appropriate referrals to other professionals whose skills might be needed. Speak to the patient after they receive follow up care to determine if they are comfortable and whether they were well treated. If the event occurred because your mistake, an offer to pay for the referral can often times be less expensive than the time missed from the office defending a suit brought against you. Be honest and forthright with the patient or their family about what happened and what needs to be done to correct the problem. Most patients can accept that a mistake occurred. What patients will not accept is deception and deceit.

In the event you receive the dreaded “lawyer letter” requesting a copy of the patients records, call your claims representative immediately to discuss the case and how you should proceed. Always follow the advice of your claims professional. Do not alter or make additions to a patients chart hoping to make the situation better. Failure to respond to a request for records further casts a cloak of wrong doing on your conduct. Moreover, alteration of records, when discovered will only compound a problem or create issues which were not there to begin with. Disclosure is the greatest antiseptic in preventing lawsuits.

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