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Liability Lifeline

Amending a patient's chart and rehiring a terminated employee can be tricky instances that require the use of best practices.

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In this issue

Attention to dental records pays off in the long run

Amendments require special care to maintain credibility

There is one thing you can do right now that will make you an even better dentist and serve in your defense in the event of a lawsuit.

That one thing?

Spend a few extra minutes with each patient's chart to make sure the dental record is complete.

"Dental records provide the history of what has taken place," said Reggie Green, claims supervisor with The Dentists Insurance Company. "You can't remember everything for every patient, and it's especially hard to remember what treatment you provided back in 2008."

Green, a claims professional for nearly 20 years, offered a reminder: "You never know when you will need that dental history."

Good dental records are the backbone of a sound dental practice.

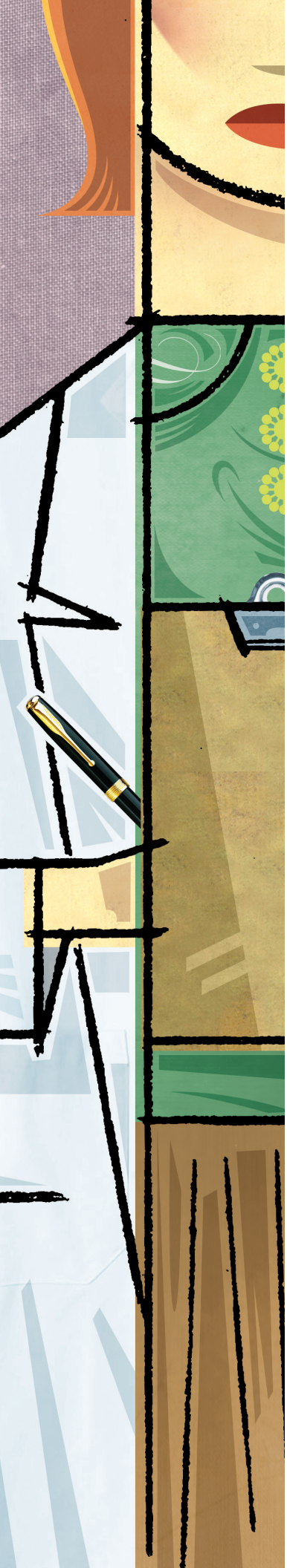
Diligent recordkeeping contributes to the best possible care for the patient and facilitates communication between the treating dentist and any other dentist or physician.

"Records help with the continuity of patient treatment," Green said. "Complete information such as a patient's medical history allows proper and effective treatment. For instance, it's important to know if the patient is taking a blood thinner prescribed by a physician." Even if you know the patient is taking a medication and it does not show up in the dental record, it will appear as if you did not know.

Or, as Green put it: "If it isn't written down, it didn't happen. That will be the opposing attorney's perspective in court."

To reiterate charting standards, the patient record should reflect a diagnosis of the patient's problem based on clinical exam findings and the medical and dental histories. Document the treatment plan including the patient's chief complaint, a complete description of the recommended treatment and how the plan addresses

Dental records continued on page 2



from page 1

the situation identified in the diagnosis. Do not forget to note the informed consent discussion and include any signed informed consent forms.

Progress notes track what happens during treatment and should include normal findings, problems encountered and changes to the original treatment plan. Also include notes about significant discussions with the patient and staff. Prescription information documented in the dental record should include the name and dose of the medication and refill information. Note anesthetics or analgesics used during treatment, specifying type, amount and any reactions.

"I have seen charts with a single entry like RCT 31," Green said. "That is an incomplete record. Include pathology such as 'Tooth is decayed to the pulp' and why you are doing treatment: 'No way to save tooth other than RCT. Discussed with patient.' It needs to be a complete entry, not just three or four words. This goes for small and simple procedures such as a restoration."

Green has seen hundreds of dental malpractice claims in his career, and he said it is clear that "somewhere down the road you may need to explain what you did and why. If the record is complete, then anyone looking at it will know the treatment was justified and appropriate."

While good recordkeeping supports a dentist's credibility, nothing can erode integrity more than illegible, incomplete or, worse, altered records. One crucial point, according to Green, is never go back in to alter or add to an entry in a patient's chart.

"My position is that you never add to an entry after the date of the entry has passed," Green said. "If an entry is dated July 7, 2012, leave that entry alone after July 7."

Some states allow doctors to cross out an incorrect entry with a thin line and make an amendment to a record, but it is critical that an entry is never obliterated. Do not use markers or correction fluid. The important factor is that the original entry must be readable, even if it is incorrect.

There can be a temptation to try to "squeeze in" or add to a previous entry, as if part of the original entry, but this will be evident if the dental record is reviewed. Alterations to patient records will be discovered. Advances in forensic science allow experts to identify changes in ink, handwriting, spacing and even pressure indentations. Detection of changes in records is not always based on technology. The front office could have given a copy of the dental record to the patient during treatment, and the earlier copy will not include changes made at a later date. The dental record will be inconsistent.

"You will always get caught," Green said.

An addendum to a chart entry may be necessary and can be appropriate, but it must be written a very specific way or it can appear like an attempt to mislead or conceal the truth.

"Usually an addendum is done one or two days later; a week at the most," Green said. Anything after that can appear like an attempted cover up. "Drop down to the next available line in chart, date the new entry, note that it is an addendum, and initial the new entry," he advised.

The temptation to add to or try to clarify a dental record can be especially strong if a complaint surfaces or a lawsuit is filed. When notified about a claim, the first instinct is usually to review the patient's records. Although most doctors will try to maintain a practical approach, it's natural that the human conditions of fear and doubt can kick in. That's when the temptation, however well meaning, to alter the records may emerge. Despite the fact that such alterations may be an honest attempt to clarify the records or more accurately depict the situation, the end result can be disastrous.

"It's a major game changer," Green said. "Altered records make a defensible case a liability." He strongly advises dentists not to panic over an incomplete record in the event of a lawsuit. "Leave the record alone. We take what you give us, and we can work it."

Claims experts refer to numerous closed cases in which dentists undermined their defense by adding to dental records after receiving a complaint or notice of a lawsuit. The case histories are often complex, as in the situation with a dentist who performed a surgical extraction of tooth No. 32 on a 38-year-old patient who reported excruciating pain in the lower right jaw.

The patient's medical history was significant and included chemotherapy and radiation therapy for neck cancer. The patient was diagnosed with oral cancer and was being treated by an oncologist. Self-described as a heavy smoker and drinker, the patient had not seen a dentist in years.

The dentist's clinical and radiographic evaluation of tooth No. 32 found decay to the pulp, and the doctor noted the entire buckle, distal and lingual cusps had fractured off and there was pulp exposure. The tooth had a vertical root fracture and class II mobility. Pulp testing determined that the tooth was nonvital. The dentist recommended extraction, and the patient wanted the tooth taken out as soon as possible due to extreme pain.

The dentist performed the extraction of the tooth and attempted primary closure of the socket with gut sutures. Post-op instructions included prescriptions for amoxicillin and Darvocet. The patient returned a week later and the extraction site was healing, but the area was still raw and sore. Additional amoxicillin was prescribed, and the dentist asked the patient to return in two weeks. During the next visit, the dentist noted the patient was still healing, and referred him to an oral and maxillofacial surgeon. On the referral, the dentist wrote, "Please evaluate and treat possible osteoradionecrosis (ORN) of the lower right mandible." The dentist did not follow up to see if the patient went to the oral surgeon.

Two months later, the patient requested a copy of the panorex for his physician. Shortly after, the dentist spoke with the patient's oncologist who said the patient's healing time was delayed due to radiation treatment to the head and neck region. The right posterior mandible area had exposed bone 15 x 15 mm. The patient then had a mandibular resection with a diagnosis of ORN. The surgery involved removal of multiple teeth and a fibular bone graft to bridge the resected area of the mandible.

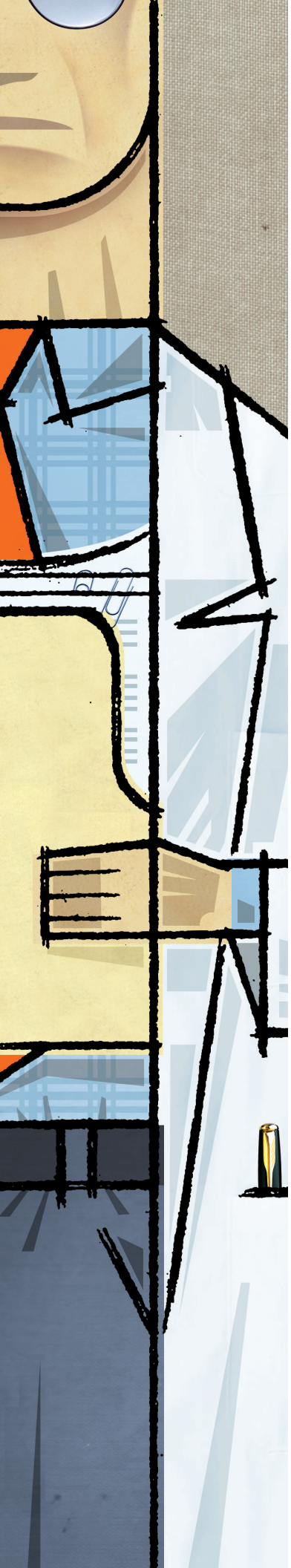
The patient initiated a lawsuit. While the plaintiff had experts to testify that the dentist did not understand the relationship between radiation therapy and ORN, defense experts were supportive of the dentist due to the emergency nature of the plaintiff's visit and the urgent need for extraction of the tooth. However, defense of the case crumbled as it became apparent the dentist had substantially altered the dental record. The defense document examiner confirmed that impressions left in the inside of the chart folder brought the credibility of the dentist into question.

In this and other cases, claims experts say dentists made their dental care look suspect by making additional entries in the dental record. Even when following the correct procedure for making amendments, making entries after receiving notice of a lawsuit gives the appearance of trying cover something up.

Plaintiff's attorneys will scrutinize records hoping to prove they were altered. When there is evidence that the records may have been altered, fraud is often added to the list of malpractice charges, making the allegations extremely difficult to defend.

"We cannot defend a dentist who has rewritten a chart," Green said. "Credibility is destroyed at that point." Additionally, if may affect renewal of your policy.

Dental records continued on page 4



from page 3

Further, if the case goes to trial, "the jury will hammer you," he emphasized. "Juries do not like professionals who change the record. You will get your hat handed to you."

Recordkeeping essentials

Remember that other dentists in the future may rely upon what you write in a dental record today. The record is also the single most important source of evidence in a liability claim. These guidelines for making dental record entries include information from the ADA:

- Date and initial each entry.
- Write neatly and only in dark ink. Never use pencil.
- Do not skip lines.
- Include attachments (i.e., referral slips) and diagnostic tools (i.e., radiographs).
- Document informed consent.
- If the patient refuses recommended treatment, note the reasons.

Other things to consider

Do not keep patient information on small slips of paper that can be lost or misplaced. If you jot down facts on a scrap piece of paper first, be sure to organize and transcribe them into the record. Keep entries objective and stick to the facts relevant to the dental care. Document while the patient is still in the office or as soon as possible after the patient leaves the office. Abbreviations are acceptable; however it is important to keep a "universal key" of abbreviations and acronyms readily accessible. Remember, any staff person can make a chart entry, but the treating dentist is ultimately responsible for what the chart says.

How to amend an entry

There are times when it is necessary to make an addendum in a patient's chart; but amendments must be handled properly, or they can appear like an attempt to mislead or conceal the truth. Amend an incorrect entry as soon as possible. Do not amend the dental record in the event of a lawsuit, even if the record is incomplete. These guidelines on making an addendum can reduce liability:

- Drop down to the next available line.
- Mark the new entry "addendum to" with the date of entry being amended.
- Date and initial each amendment.
- Never obliterate an entry.
- Do not use markers or correction fluid.
- Make sure the original entry is readable.
- Do not insert or delete words or phrases in an entry.

Offices that utilize digital recordkeeping programs may have built-in restrictions when amending a record. If you are unsure how to amend a patient record using your digital recordkeeping program, contact the vendor you purchased the program from for instructions.

For more information on dental recordkeeping see TDIC's *Risk Management Reference Guide,* a free publication available to policyholders online at thedentists.com.

Rehiring a terminated employee? Think twice

When a dental practice is understaffed, there's often a need to hire a new employee as soon as possible, and rehiring a former staff member may seem like a quick solution.

However, according to employment experts, there are very few situations in which this would actually be a good idea, especially if the former employee was terminated.

"If this question came to me, I would counsel against it," said Daniel Watkins of Watkins & Letofsky, a law firm with offices in California, Nevada and Colorado.

"As a general rule, be very careful when hiring a previously terminated employee," advised Watkins, who handles Employment Practice Liability cases for TDIC. He also suggested discussing the matter with a third party by calling a resource such as TDIC's Risk Management Advice Line. Someone who does not have an emotional investment in the situation will be more likely to have a clearer view of the scenario.

"Employers should work to eliminate problem employees from the work environment," Watkins said.

Every business wants to build a strong team, and that includes employees who are honest and take pride in their work. A strong work ethic is essential too.

"I encourage a focus on being business men and women," Watkins said. "We are here to run a business, and a downfall of small businesses is that owners can be too nice."

Once an employee has been let go, many experts warn against rehiring. The Society for Human Resource Management recently discussed the issue in *HR News*, and most human resource managers made comments similar to Watkins'.

A key idea was that time can "soften an organization's memory" of a terminated employee, and this can be a detriment. Time can emphasize the positive memories and de-emphasize the negative traits that got the person terminated in the first place, one executive said.

Watkins said the situation presents too many unknowns on the employee's "true feelings" about being terminated.

There are, of course, exceptions to the general rule. "The only time I could envision hiring an employee back would be in a layoff situation where a good employee was let go because of cutbacks or decreased business and now things are picking up," Watkins said.

Experts say another exception is when a good employee moves out of town but returns at a later date. If a former employee brings above-average skills and has the potential to be a good team member, the overall dental practice could improve in a rehire situation. In the right situation, a rehire "could present an opportunity for a fresh start and renewed energy for the office," Watkins said.

HR News reported a case where a company rehired an employee about a year after he was terminated. The employee applied for a different position and passed a new background check. The CEO of the company reported that morale improved among other employees and that the business was seen as a "fair employer who gives people a chance to succeed and recover from previous mistakes."

Think twice continued on page 6

from page 5

In looking at the pros and cons of the situation, some positive aspects of rehiring could include familiarity with the business, less training time and a familiarity with staff, which could lead to a smoother transition into the work environment. Also, the need to interview could be eliminated, and an employer does not need to spend time finding a new employee with an unknown background.

However, simply finding a quick solution to an unfilled position is risky, and there are situations in which an employee should never be rehired. Previously stealing from a dental practice is a case in point. Another serious, and likely unpardonable offense is sexual harassment.

Watkins also advised against rehiring a previously insubordinate employee. "This is a character trait that is hard to change," he said. A defiant or rebellious employee can affect other employees, and they may either buy into the insubordination or resent leniency toward that employee. "Insubordination can be like a virus," Watkins warned.

Experts say employers must seriously consider the downside of rehiring.

"The cons of rehiring include that familiarity with the business and the staff may breed complacency at a faster rate than normal," Watkins noted. Cost can be an issue too, as the employee will not want to make less pay than previously received. A former employee could also bring in a hidden bad attitude or have a chip on his or her shoulder.

"People are desperate for jobs, and they will say anything and act any way they need to get a job," Watkins said. "It may be tough to know whether the employee will really help improve operations."

Watkins also said the current pool of potential employees is good, so it is not necessary to risk rehiring. "There is energetic talent out there; and if we are looking to build a good team, a dose of new energetic talent will almost certainly help."

Additionally, a good employee manual is essential and should detail the duties and responsibilities of each position as well as a code of conduct. Professional liability carriers and/or dental associations may offer an employee manual for policyholders and members.

Watkins recommended that employers ask themselves the following essential questions before considering rehiring:

- Why did I previously terminate the employee?
- Why would I want the employee back?
- Does the employee have superior or essential skills and experience?
- What has changed in the circumstances that lead to the termination of the employee?
- Do I know for certain that the change in circumstances is real and beneficial?

Call the TDIC Risk Management Advice Line at 800.733.0634 with any questions about rehiring a previous employee.

Questions and Answers

Q: I have worked as an associate at a practice for nearly a year. When I arrived this morning, a new dentist was present who said he'd just bought the practice and today was his first day as the new owner. That is all he said. We all went about the day as patients began to arrive shortly thereafter. Since then, the atmosphere has been strange. The new owner is a general dentist and so am I. This person seems much more involved with patients that the former owner. I really like this practice, but I am not sure there is room for two general dentists here. What should I do?

A: There probably was a better way to make this announcement. At your next opportunity, ask the new practice owner for a moment. This is a good time to find out his intentions. Tell him that since the announcement, you are uncertain about your job security and where you fit in the business plan. Share that you like the practice and have a good relationship with both the staff and patients. You never know what you may uncover during this discussion. He may own other locations and only intends to be at this location sparingly.

Q: I am about to send a letter acknowledging that a patient has chosen to withdraw from my practice. This patient communicates only through email. Is it OK to send this letter via email? I also have to send a refund check. How should I do that?

A: It is a good idea to send a letter acknowledging a patient has decided to go to another dentist. In this situation, it is fine to send the letter via email. Be sure to track the email delivery and print out the receipt showing when it is received. Place that printout in the patient's chart. Additionally, since you are issuing a refund, you should also send the letter certified mail with the check inside. Consider paying for restricted delivery service, which guarantees that a specified person receives and signs for the certified mail. Request the signed receipt and place that receipt in the patient file. ■

TDIC Risk Management Advice Line:
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