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Liability Lifeline

Fall 2013

CASE STUDY REVEALS COMPLEX SIDE OF IMPLANTS

Outdated CT scan, multiple prescriptions and scant documentation lead to trouble

When a retired patient with a "moderately complicated medical history" consulted with Dr. Miller regarding a missing tooth, the general dentist ordered a CT scan and developed a treatment plan to place three implants, addressing not only missing tooth No. 30, but also a failing crown on No. 29 and another missing tooth, No. 31.

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This seemingly straightforward treatment leads to a landslide of issues for Dr. Miller as nerve damage, multiple prescriptions and bone infection complicated the situation. The 76-year old patient's medical history included lupus, which the patient noted was in remission. The medical record also included TMJ dysfunction, fibromyalgia and a heart murmur. The patient ultimately had two-thirds of her mandible removed because of osteomyelitis and demanded payment from Dr. Miller to compensate for pain, suffering and medical expenses.

While this was a difficult case, The Dentists Insurance Company claims representative noted that Dr. Miller's rapport with the patient, and his understanding of her situation, allowed for a reasonable settlement.

Here is how the case unfolded:

Two years after the initial consultation, CT scan and treatment plan, Dr. Miller extracted tooth No. 29 and placed implants in the areas of teeth Nos. 29, 30 and 31. The next day, the patient contacted the dentist's office reporting numbness in her lower lip and a burning sensation. The dentist prescribed Medrol dose pack to reduce inflammation, and noted in the patient's chart a large neurovascular bundle at the tip of the implant on tooth No. 31.

The patient arrived the following week for suture removal, and said she was still experiencing a tingling sensation on the lower right side of her lip. Dr. Miller noted that the swelling had decreased considerably. He referred the patient to an oral and maxillofacial surgeon, Dr. Douglas, who confirmed the paresthesia. However, Dr. Miller did not follow up with Dr. Douglas nor did he document the paresthesia in the patient's dental record.

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A few weeks later, the patient advised Dr. Miller that she was under the care of another general dentist for myofascial pain. Again, Dr. Miller failed to follow up with the patient to discuss this development.

Approximately two weeks later, the patient returned to Dr. Miller. He noted she appeared stable, but he did not document the tingling sensation reported by the patient. Dr. Miller also learned that she would soon be out-of-state for a three-week vacation.

Seven days later, the patient called while on vacation to report swelling on the right side of her face. She emailed photos, and Dr. Miller confirmed that the swelling was prominent. He contacted a local pharmacy, prescribed Zithromycin and prednisone and advised his patient to continue with the Medrol pack. Dr. Miller did not follow up with the patient to see how she was feeling after this phone call.

Approximately six weeks after the implants were placed, the patient informed Dr. Miller that while she was on her trip, an oral surgeon removed the implant on tooth No. 29 due to an infection. Once she returned from vacation, the patient presented with soft tissue swelling, and Dr. Miller took periapical radiographs of teeth Nos. 30 and 31. He discovered that the cover screw for the implant at No. 30 was partially exposed and trapping food, along with severely inflamed tissue.

Dr. Miller recommended removal of the remaining implants because of excessive inflammatory response. The patient agreed. Two days later, he removed them.

The patient arrived for a recall appointment the following week and Dr. Miller noted the implant site was now healing. However, the patient still reported numbness of the lip, which Dr. Miller recorded in her chart.

Nine days after he removed the implants, the patient's husband informed Dr. Miller that the patient was in the hospital and currently being treated by the hospital's oral surgeon. That oral surgeon recommended an extensive treatment protocol that included surgery to eradicate the patient's osteomyelitis, as well as continued IV antibiotics and hyperbaric oxygen treatment. Dr. Miller expressed his sympathy and concern when he heard the patient was in the hospital. He also requested that the patient see Dr. Douglas for a second opinion to ensure the course of action suggested by her current treating providers was appropriate.

Dr. Miller contacted the patient approximately three weeks later, and she was continuing with treatment as advised by the hospital oral surgeon, who also recommended mandibular nerve repositioning surgery. Later that same day, Dr. Miller received a written demand from the patient and her husband, asking for compensation for pain, suffering and coverage of the medical expenses the patient incurred subsequent to the implant placement. The patient alleged that Dr. Miller did not respond to her paresthesia in a timely manner nor should she have been a candidate for implants because of her lupus.

Consultant's Perspective

Once Dr. Miller filed a claim with The Dentists Insurance Company, an independent consultant evaluated the case. The consultant noted the lack of detail in the dental record regarding treatment, dates and follow-up documentation. While the patient signed a consent form for placement of the implants, there was no reference made to which implants.

Significantly, the consultant noted the large gap in time between the initial CT scan and treatment plan and the last treatment provided. Dr. Miller referred to a two-year-old CT scan when he placed the implants. "The problem is that the treatment was rendered almost two years after the CT was taken, and changes can and do occur over that period of time," wrote the consultant. He added that a preoperative panoramic film would have also served as a beneficial baseline.

Regarding the patient's allegation that, due to her lupus, Dr. Miller should not have placed the implants, the consultant did not confirm that her preexisting condition ruled out the treatment. Based on the 2010 panoramic image, the patient already had three implants. "It is safe to say that she had lupus when they were placed," concluded the consultant. However, TDIC risk management analysts strongly recommend physician authorization prior to beginning dental treatment when a patient has preexisting conditions that could impact the treatment outcome.

> "The patient is mildly immunocompromised and managing her treatment with steroid medication, especially without a discussion with her physician, is questionable."

A physician consultation could have also influenced the dentist's selection of medications, which the consultant questioned. The patient had a history of allergy to Biaxin (among other antibiotics), and was given Zithromycin several times. "As Biaxin and Zithromycin are both macrolide antibiotics, an allergy to Biaxin would mean Zithromycin should not have been prescribed," wrote the consultant. In addition, Dr. Miller prescribed two different steroidal medications several times. "The patient is mildly immunocompromised and managing her treatment with steroid medication, especially without a discussion with her physician, is questionable," wrote the consultant.

Regarding the nerve damage, the consultant noted that the lack of dates on scans clouded the issue, but said the periapical film showed an area near tooth No. 31 where it appeared the drill penetrated the inferior alveolar canal.

Complications related to osteomyelitis focused on tooth No. 29 where an infection developed. Once the infection involved areas of teeth Nos. 29-31, the possibility of a "more broad process was real," according to the consultant. "The crestal bone began to erode apically either from infection and/or local problems associated with the hygiene and placement."

TDIC Recommendations

The TDIC claims representative said there were several things Dr. Miller could have done to help prevent the problems associated with this case, including:

Physician Authorization: A physician's authorization would have ensured that the patient was a good candidate for the proposed treatment and medications. The patient's existing implants may have given the dentist a false sense of security to place additional implants. TDIC's recommendation regarding a preexisting condition such as lupus is to secure a physician's approval before beginning dental treatment.

Updated CT Scan: An up-to-date CT scan could have helped prevent

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"More thorough documentation of the events and more details of those events would certainly improve the ability to better analyze the record."

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complications in this case. Dr. Miller referred to a two-year-old CT scan when he placed the problematic implants. "This was a significant mistake and the situation spiraled from there," said the claims representative. Things change over this amount of time as the consulting dentist confirmed.

Prescription Consultation: As noted by the consulting oral surgeon, the prescription of medications, especially steroids, was questionable without first contacting the patient's physician.

Understanding Potential Complications: The claims representative said Dr. Miller was not prepared to address the complications arising in this case, particularly the nerve impingement and the osteomyelitis. The consultant commented on the lack of documentation surrounding the patient's paresthesia, which was confirmed by other providers, but was not referenced by Dr. Miller until two months after the symptoms began. Additionally, "no reference was made regarding treatment for osteomyelitis except the removal of the implants, and not debridement, which is the preferable treatment," according to the consultant's notes.

Follow-up with Specialists: Lack of follow up with the oral surgeon(s) and the general dentist treating the patient for myofascial pain was a weakness in this case. Active follow up and documentation could have helped Dr. Miller control the situation.

Clear Documentation: The consultant commented on the lack of detail in the dental record including surgical description, dates and documentation regarding the osteomyelitis. "More thorough documentation of the events and more details of those events would certainly improve the ability to better analyze the record."

The claims representative on this case said dentists can never over document. If something is not documented, it did not happen. Elaboration on key points will help anyone who has no information about the case comprehend what transpired.

Significantly, the TDIC claims representative emphasized that the dentist's positive relationship with the patient was an asset in this situation. It facilitated a reasonable settlement despite the medical issues the patient underwent. "The patient had nothing but praise for the dentist," said the representative. "She perceived the dentist as understanding and sought to get her the help she needed. He held himself accountable when necessary. In the long run, how you interact with patients and how you carry yourself can work in your favor."

TDIC negotiated a settlement with the patient for five figures, and concluded the case. ■

What does 'reasonable accommodation' really mean?

When talk turns to employee relations, there are "buzzwords" often heard. "Reasonable accommodation" is a good example. The phrase can be heard in regard to the Family and Medical Leave Act, the Americans with Disabilities Act, pregnancy leave, maternity leave and workers' compensation, to name only a few situations in which it is used.

Analysts at The Dentists Insurance Company report numerous calls to its Risk Management Advice Line about reasonable accommodation in relationship to disability leave for employees in a dental practice.

What does reasonable accommodation mean, and what do employers need to do to follow the laws surrounding it?

Reasonable accommodation functions as a "catch all" phrase, according to Stephen Ramazzini, a Northern California attorney specializing in employment law. "When providing examples of what qualifies as a 'reasonable accommodation,' most if not all state and federal statutes on the subject expressly list 'other' as the last example. This operates as a 'catch-all' to include potential accommodations not previously listed," said Ramazzini.

In the broadest sense, reasonable accommodation refers to the provision of conditions, equipment and environment that enable an individual to effectively perform his or her job.

Reasonable accommodation can apply to the duties of the job or where and how job tasks are performed, according to the U.S. Department of Labor. The accommodations should make it easier for the employee to successfully do the job. Examples of reasonable accommodation include modifying job duties, restructuring work sites and providing flexible schedules, accessible technology or other adaptive equipment.

Employers can be required to reasonably accommodate an employee under a number of laws, both federal and state. Federal laws include the Americans with Disabilities Act and the Family Medical Leave Act. However, many dental practices may be exempt from ADA and FMLA because of their small size.

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U. S. Department of Labor

"Employers tell me they are nervous about asking questions, but questions are your friend."

Stephen Ramazzini, attorney


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State laws often provide broader protection to employees, and can include disability laws such as the California Family Rights Act and the Fair Employment and Housing Act (FEHA). Many California dental offices are subject to FEHA. State labor departments, industrial commissions and labor codes have information about employment laws in your state.

To fully understand which laws are applicable to your dental practice, Ramazzini recommends a dedicated employee or professional consultant. "Unless the employer can afford to dedicate someone who knows when these various statutory schemes commence, and how to implement them once they are triggered, contacting an attorney or human resource professional is essential," he said. "How the employer may define 'reasonable' and 'accommodation' may be different from what is legally acceptable. Each case presents its own unique set of circumstances, and must be treated individually."

In the event of an on-the-job injury, Ramazzini advises dentists to err of the side of caution in addressing workers' compensation claims. He noted that an "injury" needs to be interpreted as broadly as possible and includes any injury or disease arising out of employment.

"The key goal is to get the injured employee back to work," he said.

Thus, reasonable accommodation comes into the picture. Ramazzini said it is essential that an injured employee feels valued, and he recommends an "interactive process" to facilitate reasonable accommodation. The interactive process includes:

- Obtaining authorization for release of medical information
- Requesting medical certification from the employee
- Communicating with the employee and discussing the essential and usual functions of the job
- Finding out about the injured employee's capacity to work and what restrictions apply
- Researching and evaluating possible accommodations
- Selecting reasonable accommodations
- Implementing and monitoring the accommodations
- Documenting every step of the process

Failure to follow these steps can lead to unintentional discrimination, Ramazzini said.

Legal experts and risk management advisers emphasize that employers must engage an interactive process to determine if they can reasonably accommodate employees who have a disability. Employers who fail to engage in a prompt, good faith, documented process will be at a substantial disadvantage in the event of litigation.

Ramazzini said few employers handle the interactive process the right way.

"Ensure there is a well-documented personnel file," he said. "In the event of a disability discrimination claim, the employer must have a better file than the employee. If you don't have a personnel file, start one immediately."

In order to avoid a disability discrimination claim, Ramazzini emphasized that employers are required to make an attempt to return an employee to work. This includes a clear understanding of employee job functions and having detailed job descriptions on file in your practice's employee manual.

"I have handled 10-12 employment cases recently," Ramazzini said, "The majority of employers did not have an employee manual. Make sure you have an employee manual and keep it up-to-date according to current law."

Consulting with the employee about his or her job functions is part of the interactive process, and if the employee does not respond to the process, be sure to document your efforts to engage the employee. Ramazzini noted situations where the employee is going on leave and says he is not coming back. Employers are advised to explore this situation by asking the employee why he is not coming back. Ask him if he is tired of the job and document the answers.

"Employers tell me they are nervous about asking questions, but questions are your friend," Ramazzini said.

As part of the reasonable accommodation process, it's useful to compare the essential job functions with the employee's work restrictions, as documented by the employee's health care provider. This conversation must occur between the employer and the employee. Legal advisers note that an employer can't communicate with the healthcare provider, unless the employee gives permission to do so, and even then, privacy and HIPAA laws are strict. As part of the interactive process, employers must keep any medical information confidential and separate from the personnel file.

For dental practices, reasonable accommodation is often difficult to navigate. Dental practices most often receive requisitions for reasonable accommodation in conjunction with occupational injuries. Benefits for occupational injuries are provided under workers' compensation regulations.

Each state has its own set of regulations governing workers' compensation benefits. While the regulations address how and when benefits are paid under the system, they do not address reasonable accommodation. Reasonable accommodation falls under federal and state employment laws. There is significant cross over between the two, and employers often fail to realize the difference. While your workers' compensation carrier will provide statutory workers' compensation benefits, they will not address the issues that fall outside of the workers' compensation regulations. Employers must deal with these issues separately. While the insurance carrier addresses workers' compensation benefits, it is the employer's responsibility to ensure he or she complies with relevant employment laws.

It is essential to treat employees who have filed a workers' compensation claim the same as other employees.

"Employers must not treat the injured employee differently," Ramazzini said. "If you take away any benefit due to a claim, it can be considered discrimination."

While laws vary state to state, statute generally prohibits employers from discriminating against, including firing or threatening to fire, employees filing workers' compensation claims. An essential point is that workers' compensation insurance does not cover discrimination claims. TDIC's Workers' Compensation policy, for example, specifies under Employer's Liability that policyholders are responsible for payments if "you discharge, coerce or otherwise discriminate against any employee in violation of the workers' compensation law."

The policy lists harassment, wrongful termination, acts of omission in supervising, investigating, demoting, reassigning or disciplining employees, coercion, detention, humiliation, defamation and invasion of privacy as acts of unlawful discrimination.

"Termination of an employee on workers' compensation leave is very risky," Ramazzini said. There are very specific conditions under which an employer may terminate an employee on workers' compensation leave, but contact your attorney before taking any action.

A workers' compensation leave of absence can vary in length. However, employers have options for extensive leaves. For instance, in California, the labor code recognizes the reality of doing business and does not compel employers to re-employ an unqualified employee. However, Ramazzini said employers must always be prepared to justify the situation to a judge down the road.

Part of the process is to determine if reasonable accommodation creates an undue hardship for the employer, and

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Key Laws

State laws about "reasonable accommodation" may vary according to where you live and may supersede federal law. Please check for information about your state's department of labor at www.dol.gov/dol/location.htm. Federal laws requiring "reasonable accommodation" of employees include:

- The Americans with Disabilities Act requires employers to provide reasonable accommodations for individuals with disabilities, and it applies to employers with 15 or more employees.

- The Family Medical Leave Act allows up to 12 weeks of unpaid leave per year for specific reasons such as a serious health condition or to care for an immediate family member who has a serious health condition. Maternity leave is also covered under FMLA. The birth of a child, or complications relating to childbirth or pregnancy, would qualify under FMLA as a serious health condition. Adoption, postpartum conditions and parental leave for childcare may also qualify.

The Family and Medical Leave Act applies to employers with 50 or more employees working within 75 miles of the employer's worksite. Employers with fewer than 50 employees can choose to provide benefits similar to those required by the FMLA, and may find it beneficial to do so, according to the U.S. Department of Labor.

During FMLA leave, employers must continue employee health insurance benefits, and when employees return from FMLA leave, employers are required to return employees to the same or equivalent positions.

In order to qualify for FMLA leave, employees must have worked for the employer for at least 12 months and completed at least 1,250 hours over the 12 months before the leave.

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many factors must be analyzed including undue cost or alteration of the nature of the business considering the overall budget. Ramazzini said employers must be aware of the difference between hardship and inconvenience. "Not doing something because it is difficult does not pass muster," he said.

Risk management analysts also note the importance of not trying to discern whether an employee's workers' compensation claim is credible or not. Do not personalize the claim. Let it work through the system.

"Workers' compensation is a constitutionally mandated system," said Ramazzini. "It represents a bargain between the employer and employee imposed by law. Qualifying employees are not awarded 'damages' from the employer after a contentious lawsuit, but instead receive statutory benefits as, one California court put it, an economic insurance measure."

While the numerous laws and requirements surrounding reasonable accommodation are complex, a few key concepts can help dentists stay on track in the event of a workers' compensation claim. "Be proactive and anticipate what you will need," Ramazzini said. "Treat all employees equally and be willing to demonstrate that you are accommodating."

Most importantly, "document everything, ask questions and stay involved," he said. ■

For more information about reasonable accommodation and disability leave, contact TDIC's Risk Management Advice Line at 800.733.0634.

Questions and Answers

Q: I am a new practice owner, and I am setting up my website. To save time, I'd like my patients to have the ability to fill out as much paperwork as possible prior to coming into the office. A company approached me offering to create my forms with fillable fields. Patients can read, fill out the forms and submit them online. Is it acceptable for a patient to fill out a release of records form using this system?

With fillable forms, there is no way to authenticate that the person making the request is actually the patient.

A: This could cause some issues for the practice owner. A request for records typically predicates an adverse patient situation. By having this form available online, you lose any opportunity to address the situation and potentially fix any miscommunication or issues that have happened.

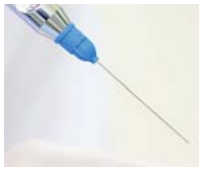
This form is usually mailed, faxed or handed to the patient. When the form returns, you should compare the signature to one you have on file to authenticate the request. If it does not match, then you or a staff person would call the patient to verify the request, and document the conversation in the patient file.

With fillable forms, there is no way to authenticate that the person making the request is actually the patient. For example, spouses often have access to each other's email. If the wife is trying to attain the husband's financial information, she could send the request via the husband's email. There is no way to authenticate if it is the husband who is sending the request. TDIC does not recommend converting a request for records form to a fillable-fields form on your site. You risk violating the patient's privacy if someone who does not have authority submits the form.

Q: My associate just saw a 14-year-old patient. She had a tongue piercing that her mother did not know about. The location of the piercing was under the tongue, dirty and susceptible to infection. My associate told the patient all of the risks involved with tongue piercings and documented it in the file. She asked the associate not to say anything. My associate told me about it once the patient left the office. There is not any infection present yet. I am calling because I feel like the parents should know about the risks associated with tongue piercings. Can I tell her?

A: You do not have a duty to disclose a piercing. Certainly, you cannot hide your knowledge, but you are not obligated to tell the parents. You would have to tell the parents if the piercing is compromising the patient's oral health.

If you decide to tell, document the reasons for your decision in the patient's chart. Also, realize that informing the parents could mean you risk the patient withholding information from you in the future.



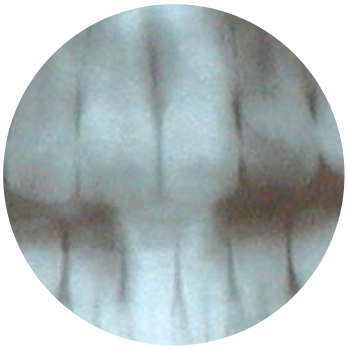
A patient fainting while you are treating him can be alarming.

Q: During a new patient's initial appointment, the patient disclosed that he faints when he sees needles. He said he is usually unconscious for about five minutes with little residual side effects except the amnesia he experiences surrounding these episodes. He tries to avoid risking this; he has not been to a dentist in a number of years. This makes me uncomfortable. Am I OK to treat this patient?

A: A patient fainting while you are treating him can be alarming. Gather as much information about this patient's condition as you can prior to treating him. Explain that you are concerned about the history he has provided and would like to contact his physician before proceeding with dental treatment.

If he allows you to speak with his physician, ask if there is anything in the patient's medical history that could be contributing to this problem. Determine if you should obtain a medical clearance before beginning treatment. Ensure that both you and your staff are prepared to address an untoward event that could result during treatment, minimizing risk to the patient.

If the patient refuses to let you speak with his physician, tell him that, based on your uncertainty as to why he is experiencing this reaction, you cannot proceed with treatment that could pose an unnecessary risk to him as a patient.



Q: I am a periodontist. A general dentist I rarely work with referred a patient to my practice. The patient arrived with bitewings and a panorex. I asked the patient to obtain the last set of full-mouth radiographs from the referring general dentist. The next day, the general dentist called the office and yelled at my staff saying a panoramic radiograph was sufficient for diagnosis. I do not agree with him. What is the best way to approach this?

A: As the treating periodontist, you determine the tools you need to assess the patient's condition and recommend an appropriate treatment plan. The treatment you will be providing is under your direction and control. You are responsible for the outcome, not the general dentist. If you believe you need a full-mouth set of radiographs to provide a clinically sound diagnosis and treatment recommendation, then you should use them. Explain this to the referring general dentist. Ideally, it would be best to have the support and understanding of the general dentist for a seamless transition of care between the two offices. However, you cannot do this at the expense of altering your treatment protocol and standards.

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