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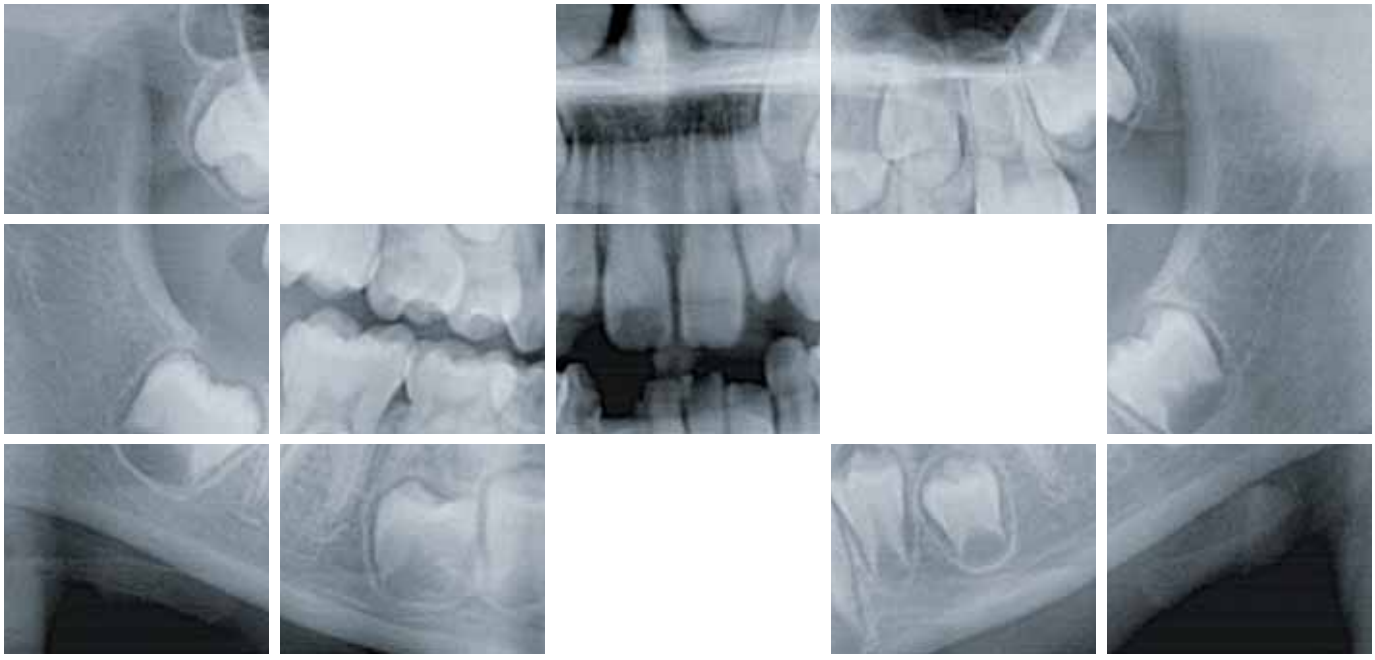
Liability Lifeline

Spring 2014



Lack of timely radiographs is downfall in pediatric case

When a pediatric dentist conducted a routine exam on a 12-year-old patient in 2011, he noted that the oral hygiene was good and took bitewing radiographs. The dentist failed, however, to document that the patient's permanent right and left mandibular canines had not yet erupted and did not take additional radiographs to further examine the transitional dentition.

This was the first misstep in a series of missteps that contributed to the loss of tooth No. 27 for the patient and landed the case in TDIC's claims department when it was discovered a year later that

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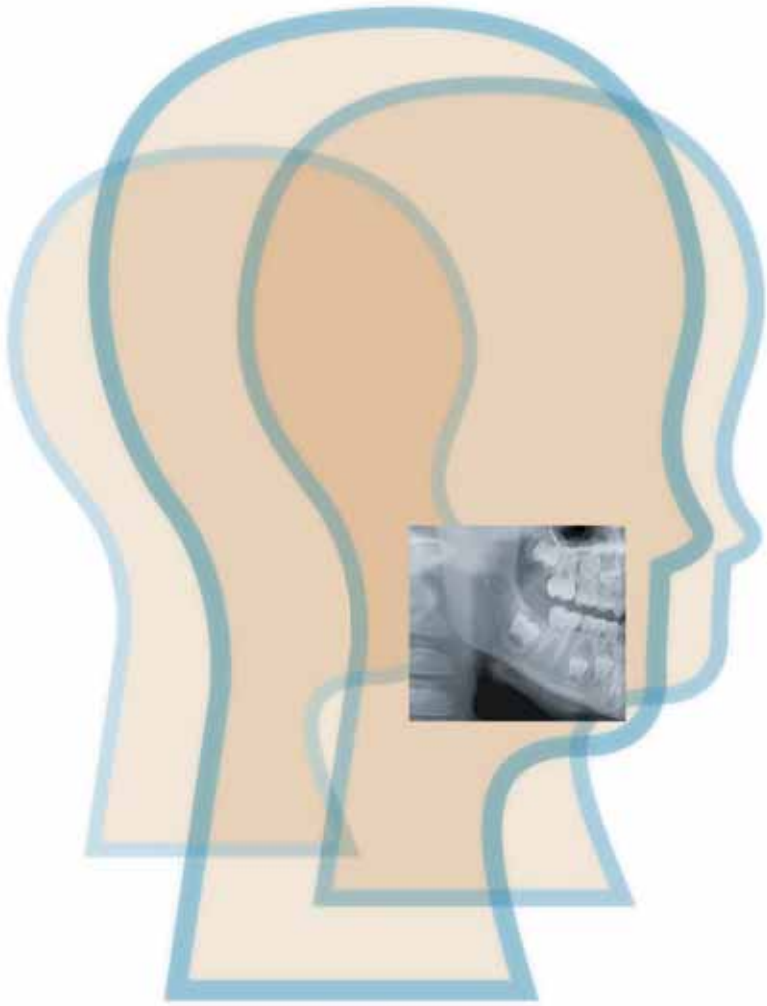

At this point, the parent became upset and questioned the dentist about not discovering the situation sooner. Shortly after leaving the office, the parent called and asked for a copy of the dental chart and said the dentist should pay for all future related treatment.

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the young patient had transmigratory mandibular canines.

The adolescent had been a patient of record with the dentist for nine years, and the last panoramic radiograph was taken when the patient was 8 years old. An associate dentist saw the then 13-year-old patient in May 2012. The associate dentist neglected to chart the failure of the mandibular canines to erupt, nor did he order radiographs during this appointment. The pediatric dentist saw the patient again in November 2012 and the primary cuspids, R and M, were still in place. The dentist informed the parent of his findings and recommended periapical radiographs to determine why the permanent cuspids were not erupting. The radiographs showed the root dissolving on tooth M, tooth No. 22 was mesio-angularly impacted across the midline and No. 27 was positioned between teeth Nos. 25 and 26. The dentist recognized that in order to address the malpositioning of Nos. 22 and 27, an orthodontic referral was warranted and referred the patient to an orthodontist.

At this point, the parent became upset and questioned the dentist about not discovering the situation sooner. Shortly after leaving the office, the parent called and asked for a copy of the dental chart and said the dentist should pay for all future related treatment.

Treatment

The family consulted two oral surgeons and three orthodontists before deciding on a treatment plan to correct the impacted lower canines, which is documented in dental journals as a rare condition. One orthodontist stated that

she had not seen lower cuspids that far forward in her entire career and referred the patient to an oral surgeon.

After a series of consultations, the family decided upon a treatment plan carried out by an oral surgeon and an orthodontist. The treatment goals included evaluation by the oral surgeon of tooth No. 27 for autotransplantation and exposure and bonding of No. 22 in an attempt to upright the tooth. However, it was ultimately decided that attempting to recover No. 27 would place an unacceptable risk to the other anterior teeth, and it was therefore extracted. The extraction necessitated a future implant for the patient. Teeth Nos. R and M were also extracted. The oral surgeon and orthodontist moved forward with placement of lower braces and bite ramps behind the upper front teeth to bring impacted tooth No. 22 back into the dental arch. Temporary anchorage devices, maxillary braces and intra-arch elastics were part of the treatment sequence to gain proper cuspid relationships. The estimated treatment time was 24 to 30 months, and the ultimate goals for this patient were to achieve a Class I occlusion, correct the deep bite and close the maxillary and mandibular spaces.

Analysis

The TDIC claims representative reviewing this case said the dentist's main weakness was the failure to take radiographs in a timely manner, which resulted in a delayed diagnosis of the impacted lower canines. An earlier diagnosis may have decreased the complexity of the treatment and possibly allowed teeth Nos. 22 and 27 to be exposed, uprighted and brought into occlusion. However, the claims

The TDIC claims representative reviewing this case said the dentist's main weakness was the failure to take radiographs in a timely manner, which resulted in a delayed diagnosis of the impacted lower canines.

representative noted that extensive orthodontic treatment would have been required regardless of any factors attributable to the dentist, a point agreed upon by the independent orthodontic consultant reviewing the case. The consultant also said more thorough radiographs should have been taken in 2011 when the canines had not erupted by the time the patient was age 12.

Lack of communication also worked against the dentist. The parent complained that the dentist did not follow up or express concern for the patient who spent significant time in orthodontic and oral surgery consultations and treatment while forgoing normal activities such as playing sports and spending time with friends. The claims representative said improved communication could have potentially facilitated an amicable resolution, reducing the settlement amount of the case. The dentist failed to offer assistance or follow up, leaving the burden on the family to handle a rare and complicated dental problem without guidance. "The breakdown happened early on in this case," said the claims representative. "Open communication and follow-up once the impacted canines were discovered would have helped, absolutely."

The final misstep in this case was the lack of chart documentation about dental examinations and findings. Dental record keeping was sporadic. The dentist lacked thorough documentation regarding the canines and the fact that they still had not erupted three years beyond the expected eruption date.

Settlement

The TDIC claims representative handling this case said the patient's parents did not ask for compensation for general damages (also known as pain and suffering) and sought only current and future treatment costs related to the impacted canines. The settlement covered the cost of the patient's oral surgery and orthodontic treatment and established a trust to cover the cost of the future dental implant to replace the extracted permanent canine.

After the breakdown in communication between the dentist

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and the patient's family, TDIC eventually established a rapport with the family and negotiated a settlement agreed upon by all parties. "There was the argument that the patient needed orthodontic treatment regardless of any action attributed to the dentist, but there was also the conversation about the lack of demand for general damages such as pain and suffering," said the claims representative.

Resources for guidelines on dental radiographs

The case study examines an unusual case of transmigratory mandibular canines and the dentist's liability in not discovering the condition early enough to attempt to save the teeth. While transmigratory teeth are rare, there are a number of documented cases and ample literature discussing the condition and the use of radiographs for discovery. A 2011 article in the *e-Journal of Dentistry* investigates a case presented at the Department of Oral Medicine and Radiology, Sri Rajiv Gandhi Dental College and Hospital in Bengaluru, India. The author stated: "The presence of an over-retained mandibular deciduous canine should always be investigated radiographically. An intraoral radiograph is usually not sufficient, and it should invariably be supplemented with an occlusal and extraoral radiograph, preferably a panoramic radiograph."

- ejournalofdentistry.com/archives.asp

The American Academy of Pediatric Dentistry's (AAPD) *Guideline on Prescribing Dental Radiographs for Infants, Children, Adolescents and Persons With Special Health Care Needs* assesses the timing of radiographic examination. The guideline was revised in 2009 and states: "The timing of the initial radiographic examination should not be based upon the patient's age, but upon each child's individual circumstances. Because each patient is unique, the need for dental radiographs can be determined only after reviewing the patient's medical and dental histories, completing a clinical examination and assessing the patient's vulnerability to environmental factors that affect oral health." The guideline discusses children with transitional dentition and includes recommendations based on caries risk.

The AAPD also issues the *Guideline on Adolescent Oral Health Care,* which specifically addresses ectopic eruption and states: "The dentist should be proactive in diagnosing and treating ectopic eruption and impacted teeth in the young adolescent. Early diagnosis, including appropriate radiographic examination is important. Referral should be made when the treatment needs are beyond the treating dentist's scope of practice." The guideline refers to AAPD's *Guideline on Prescribing Dental Radiographs*, referenced above.

The AAPD's *Guideline on Management of the Developing Dentition and Occlusion* is also available online.:

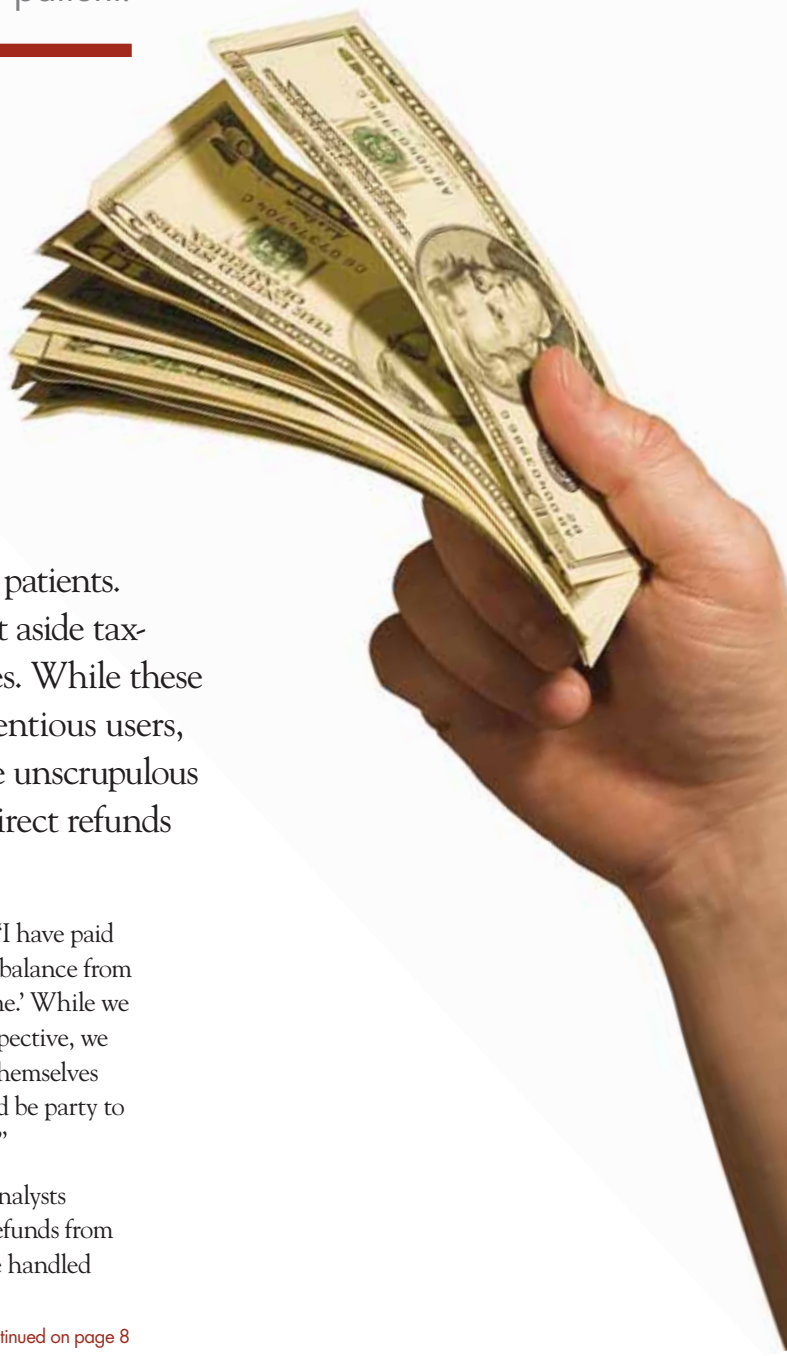
- aapd.org/policies

Literature on dental radiographic examinations includes the guidelines written by the American Dental Association and the Food and Drug Administration, which were updated in 2012. The recommendations discuss radiation exposure and promote evaluation of each patient and consideration of "high-risk" situations. Transitional dentition is discussed for both children and adolescents.

- ada.org/sections/professionalResources/pdfs/Dental_Radiographic_Examinations_2012.pdf

To avoid potential fraud, The Dentists Insurance Company advises dentists and office managers that any credit balance from HSAs and similar plans, such as medical savings and flexible spending accounts, must be returned to the account and not to the patient.

Caution with HSA refunds avoids tax evasion schemes



Refunds from health savings accounts do not go to patients. Health savings accounts offer a way for patients to set aside tax-exempt funds for certain medical and dental expenses. While these accounts provide benefits to the majority of conscientious users, HSAs and similar accounts also present a way for the unscrupulous to work the system for tax-exempt money through direct refunds from a third party such as dentists.

To avoid potential fraud, The Dentists Insurance Company advises dentists and office mangers that any credit balance from HSAs and similar plans, such as medical savings and flexible spending accounts, must be returned to the account and not to the patient.

"We recommend that the refund be sent back to the source," said Ann Milar, a dental benefits analyst for the California Dental Association. "There may be a patient who says, 'I have paid for this procedure, and the balance from the HSA should come to me.' While we recognize the patient's perspective, we don't want dentists to put themselves in a vulnerable position and be party to possible fraudulent activity."

Milar and other dental analysts emphasize, however, that refunds from HSA accounts must still be handled efficiently.

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You are not a statistic.

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or a benchmark or a market segment.
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The Dentists Insurance Company, TDIC.
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group of dentists who started this
company made three promises:
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better than any other insurance
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"Laws vary state to state, but in general dentists are required to refund any overpayment from a third party within a specified amount of time, usually 30-90 days, depending on the situation," said an analyst for TDIC. "The only difference is that, in the case of HSAs, the amount must be returned to the account."

The account source may be the employer of the patient or a trustee, such as a bank or insurance company, depending on the type of account. Flexible spending accounts are typically set up through an employer; health savings accounts are set up by a trustee such as a bank, according to information from the U.S. Department of the Treasury.

"You can receive tax-free distributions from your HSA to pay or be reimbursed for qualified medical expenses you incur after you establish the HSA. If you receive distributions for other reasons, the amount you withdraw will be subject to income tax and may be subject to an additional 20 percent tax."

IRS publication 969

Experts in the dental field say requests for direct refunds from HSAs are not yet a trend, but note there are calls about the activity.

"We have received some calls about this, and I suspect it will continue," said an analyst who monitors calls for TDIC's Risk Management Advice Line. "This is a new way of thinking for those who try to work the system."

Handling a request for a direct refund from an HSA may be a delicate matter for dentists and office staff, but TDIC suggests neutralizing the situation by informing the patient of your obligation to return the money to the account, and that use of these funds for purposes other than health care may be subject to an additional 20 percent penalty from the IRS. This arrangement prevents the patient from incurring additional tax and diplomatically addresses the situation.

If the patient has further questions, dentists can refer to the Department of the Treasury website, which includes publications clearly outlining the uses of HSAs and similar accounts.

Specifically, IRS publication 969 (irs.gov/publications/p969/index.html) states: "You can receive tax-free distributions from your HSA to pay or be reimbursed for qualified medical expenses you incur after you establish the HSA. If you receive distributions for other reasons, the amount you withdraw will be subject to income tax and may be subject to an additional 20 percent tax." The publication also addresses record keeping and states that HSA owners must "keep sufficient records to show that distributions from the account are used exclusively to pay or reimburse qualified medical expenses."

An official letter arrived: Do you open or ignore it?

One of the things many dentists fear most has come true. Your patient filed a lawsuit against you. Now what?

Being accused of professional negligence can be devastating. Dentists experiencing lawsuits have expressed feelings of frustration and fear, even a sense of betrayal from the patient. The emotional toll litigation takes on you, your practice and your family can be disruptive and painful. Stress can result from damage to your self-esteem and the uncertainty of the litigation process. This stress often manifests as defensiveness, sleep deprivation, depression, anxiety and mistrust of patients.

To better cope with a pending lawsuit and deal effectively with the pressures of litigation, TDIC suggests you:

- Talk to you family and colleagues.
- Take care of yourself through healthy diet and exercise.
- Contribute to your defense strategy and management of your case.

Discussing your feelings with family and friends can be very beneficial. Sharing your feelings ensures they are justified and even normal. Be careful about your discussions concerning any specifics of the case, as this information may be discoverable by plaintiff's counsel.

Stress affects the body in several ways. The Mayo Clinic advocates exercising as a way to manage stress. "Exercise in almost any form can act as a stress reliever. Being active can boost your feel-good endorphins and distract you from daily worries." You may think you do not have time to exercise. A lawsuit is a perfect reason to make time to get outside and get moving. Exercising helps you focus on daily tasks. It can help you remain calm and clear when faced with this type of a situation.

You have shared your feelings with family or colleagues. You have taken an extra 30 minutes a day to refocus your energy. Now, take time to learn about what is coming next and how you can assist in your defense. Hopefully, you contacted your professional liability carrier the day you received this notice of pending litigation. Establish a relationship with your claims representative. Be available to answer any questions he or she may have surrounding the case. Provide access to the patient records. Remember, your TDIC claims representative is there to assist you and provide the best defense possible. Areas he or she will investigate include:

- Did you do anything negligent?
- Was the treatment you provided clinically sound and within the standard of care?
- Is this case well documented and did you provide the necessary informed consent prior to starting the treatment?

We understand you may be surprised by these questions. It is the claims representative's job to discover every detail about the case in order to offer you, the insured, the best defense possible. The sooner you and the claims representative get all the details down, the sooner TDIC can get to the end of your ordeal.

Patients have different motivations for filing. They may feel you have wronged them in some way. They may not want to pay a bill so they claim bad dentistry. They may be getting pressure from family or friends to sue. Often, patients get angry at matters outside of your control. This could be exhausted dental benefits or unrealistic expectations of treatment results. What we do know is the lawsuit is here and will not go away. You cannot control the patient's actions, but you can control your approach to the lawsuit and subsequent actions. The key is being prepared. Assemble your team and trust that team to guide you. Take care of yourself so you remain clear headed and focused.

Life continues through this process. Do not forget you have family, friends and patients who need you, depend upon you and still believe in you.

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Questions and Answers

Q: A new patient came in for her initial exam and cleaning. During that appointment, I learned this was a workers' compensation case resulting from an injury she sustained while working. This was a fairly involved case, but one I was very comfortable treating. I had not worked on a workers' compensation case before. When I told her that, she showed me the report she had received from a qualified medical evaluator (QME). This included a treatment plan for dental treatment. It differed dramatically from the treatment plan I created. Do I have to follow the QME's plan if the patient agreed with and accepted mine?

A: QMEs are qualified physicians certified by the Division of Workers' Compensation Medical Unit to examine injured workers to evaluate disability and write medical-legal reports. The reports are used to determine an injured worker's eligibility for workers' compensation benefits.

Medical treatment provided as a workers' compensation benefit must be medically necessary to cure or relieve the effects of the injury. In order to determine the medical necessity for medical treatment, the workers' compensation claims administrator uses a process called utilization review.

If you decide to take on the case, you must submit your "request for authorization" (RFA) to the workers' compensation carrier on the appropriate RFA form along with a treating physician's progress report. The workers' compensation carrier will submit your RFA to utilization review. Your treatment plan may only be delayed, denied or altered by a reviewing physician. The reviewing doctor may contact you to get additional information. If your RFA is denied, your patient may request an independent medical review (IMR). IMR makes the final determination.

Any changes to an already-approved treatment plan must be submitted via the RFA process.

The above answer is specific to California. For further definition, please check with Workers' Compensation laws in your state.

Q: A new patient arrived for a cleaning. She told me that she had a joint replacement 10 years ago. I told her I could not proceed until I had obtained clearance from her orthopedist. She told me her infectious disease doctor did not want her to take any antibiotic premedication. I called the orthopedist and he wants her to take it. What do I do?

A: Whether to take antibiotic premedication or not is a question that surfaces every few years. Advice for risk management is consistent and remains the same — ask the specialist who treated the patient.

According to ada.org, "In 2012, the ADA and the American Association of Orthopedic Surgeons updated the antibiotic prophylaxis (premedication) guidelines for patients with orthopedic implants undergoing dental procedures. These new guidelines no longer recommend antibiotics for everyone with artificial joints."

Further, "The guidelines are reevaluated every few years to make sure that they are based on the best scientific evidence. These reviews have uncovered no evidence that taking antibiotics before dental treatment prevents infections of the heart or orthopedic implants. Therefore, for most people, the known risks of taking antibiotics may outweigh the uncertain benefits."

Guidelines on this topic seem to change and can be confusing. Perhaps the orthopedist has not read the 2012 recommendations set by ADA and the AAOS. Let the patient know there is a conflict between the two physicians. Provide the above information regarding the 2012 update. Finally, recommend that the patient facilitate a discussion between the two physicians and come up with a final resolution for you to follow.

2014 *CDA Presents* in San Francisco will feature a new Risk Management seminar:

Beyond the Science: Patient emotions in dentistry

It's estimated that 75% of U.S. adults experience some degree of dental fear. But fear, as well as anxiety and worry, may not be easily identified by the dental practitioner which can cause big legal issues down the road. Learn to correctly handle patients who exhibit these emotions so you can keep your practice, and your patients, safe.

- Earn a **5%** Professional Liability premium discount* for two years
- Receive **3.0** units of CA Core C.E.
- Obtain professional advice via a Q&A

Registration opening soon:

2014 *CDA Presents* in San Francisco Seminar Schedule
Wednesday, September 3, 4:00 - 7:00 p.m. New Time!
Thursday, September 4, 9:30 a.m - 12:30 p.m. and 2:00 - 5:00 p.m.
Friday, September 5, 9:30 a.m - 12:30 p.m.

***Important information about your 5% Professional Liability premium discount**

TDIC policyholders who complete a seminar or eLearning option will receive a two-year, 5% Professional Liability premium discount effective their next policy renewal. To obtain the two-year, 5% Professional Liability premium discount, Arizona, California and Nevada dentists must successfully complete the seminar by April 25, 2014. Alaska, Hawaii, Illinois, Minnesota, New Jersey, North Dakota and Pennsylvania dentists must successfully complete the seminar by Oct. 25, 2014. Any eLearning tests received after the deadline will NOT be eligible for the discount. Nonpolicyholders who complete a seminar or eLearning option, and are accepted for TDIC coverage will also be eligible for this discount.

Liability Lifeline

Liability Lifeline is published by:

The Dentists Insurance Company
1201 K Street, 17th Floor
Sacramento, California 95814

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