

Lifeline



Real-life calls and recommendations from TDIC's Advice Line

TDIC's Advice Line puts dentists in touch with trained analysts who can help keep an issue from becoming a full-blown problem or lawsuit. Thousands of dentists and staff dialed the Risk Management Advice Line in 2015, seeking input on everything from record requests and unhappy parents to noncompliant patients, problem employees or a landlord who wanted weekend access to the dental practice so he could repair another office in the building.

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Advice Line analysts fielded more than 26,000 calls between October 2014 and September 2015, including new calls, direct-line calls and returning messages. Analysts handled 75 percent of calls the first time the dentist dialed in. There were 6,667 new professional liability and 1,858 new employment calls. Using multiple resources, analysts listen carefully, assess the situation and recommend strategies to resolve issues and limit dentists' liability. Plus, they have a sense of humor about the many things that can happen in a dental practice. "A favorite call came in when an office manager reported an adult patient arriving at the office in a Superman cape. This was a regular day. She'd been a patient of record for a while and just showed up like that. I don't remember all of the details of that call, but cape still makes me laugh," said one analyst.

The majority of calls to the Advice Line are related to professional liability issues. Top concerns are crowns and bridges (9 percent), record keeping (9 percent), patient dismissal (8 percent), unhappy or angry patients (6 percent), noncompliance (4 percent) and orthodontics (4 percent).

Here are a few examples of calls to TDIC's Advice Line:

Was the Dentist Played?

A patient presented for the first time to a general dentist in December 2014. She was complaining that a tooth with an existing crown was trapping food and had a smell coming from underneath it. He could not determine the cause of any smell, so the dentist removed the crown and cleaned around the tooth. The post and core were intact. He took an impression and placed a temporary



The analyst advised the dentist to request more information from the attorney, including subsequent provider's treatment records, so he could make an informed decision about his next steps.

crown. The patient returned for the permanent crown. Unfortunately, the post and core came out when the dentist removed the temporary crown. The patient was upset, but the dentist was able to calm her down. That day, he placed another post and core and tried to retrofit the permanent crown. However, it was not a proper seat and "off by a little bit." The more he tried to make the crown fit, the more hysterical the patient became. When he was finished, the patient demanded all of her money back. The dentist agreed only if she signed a release of liability. The patient refused and left the practice.

In June, the dentist received a 90-day intent to sue letter from an attorney

alleging malpractice specific to a root perforation. The patient had the tooth extracted and now needed an implant and a bone graft. The dentist called the Advice Line, explained the letter and asked for advice. The analyst advised that the attorney letter warranted assistance from the claims department. Further, the analyst explained the 90-day intent to sue process was TDIC's best opportunity to investigate the perforated root allegation and defend the dentist. The dentist continued to refuse to consult claims and asked about the best way to handle it himself. The analyst advised the dentist to request more information from the attorney, including subsequent provider's treatment records, so he could make an informed decision about his next steps. The dentist promised to call back if he felt he needed help.

Four months later, the dentist called the Advice Line again. Apparently, the attorney was initially very responsive to his calls. However, once the dentist said he was not tendering this to his insurance, the attorney stopped communicating. The dentist assumed he was no longer interested in pursuing the case. That morning he received another letter from the attorney and it "looked like a lawsuit." The attorney was asking for \$9,999. Reading the notes from the June call, the analyst confirmed that the dentist had decided not to enlist the assistance of a claims representative. He admitted the mistake and said he really believed he could handle it himself. The analyst reiterated that receipt of the 90-day intent to sue letter was TDIC's chance to investigate the allegations. The attorney simply waited until the 90 days were up and then filed the lawsuit.

The dentist finally authorized turning the case over to the claims department and asked a final question, "So

essentially, the lawyer played me?”

“Like a violin,” said the analyst.

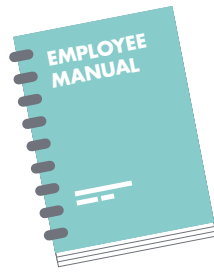
The Risk Management department has many tools and resources that can assist policyholders in trying to avoid a lawsuit or at least minimize the damage one can cause. Calls into the Advice Line typically remain within the Risk Management department. However, once a situation goes beyond Risk Management’s purview, the analyst will escalate the call to the claims department. This does not always mean a claim is opened. It means the situation warrants a claims representative’s assistance. Examples of a call escalation include when the policyholder receives a letter from an attorney or the dental board, a written demand from the patient or when the patient begins using phrases like “pain and suffering” or “pay for my lost wages.”

Analysts make every attempt to educate the caller on this process. If the policyholder does not utilize the resources available, then there is very little for TDIC to do other than wait for the lawsuit. In this case, the dentist’s choices did not allow for the type of case management where TDIC excels.

Uncommunicative Employee

A general dentist called the Advice Line about an employee with an ongoing issue pertaining to lack of communication.

Sally was a part-time dental assistant who was having trouble complying with the practice owner’s expectations and policies. For example, if an employee was ill, he wanted the employee to speak to him directly. The dentist also had this policy outlined in the employee manual. However, whenever Sally left work due



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to illness, she would tell the receptionist then leave. Most recently, she did this on a Friday at 8:15 a.m. The dentist did not know where she was until he asked the receptionist at 10 a.m.

When Sally returned the following Monday, she stated that she was feeling much better and hugged the dentist good morning. After telling her that he was glad she was feeling better, he asked her to come to his office. He told her that he was frustrated with her because she was not following office policies regarding notification when she had to leave the office. He mentioned Friday’s disappearance. She tried to defend herself and said she had been feeling sick for two weeks, but stuck it out because she did not want to miss work. She left

Friday to see a physician, as she could not take it anymore. The dentist told her that he understood that she needed to leave. He was frustrated that this was the fourth time he had to talk to her about her lack of communication and failure to follow office policy. The dentist noted that she continued to be defensive throughout the day. After her last patient, she asked to leave 10 minutes early and the dentist approved. The next morning, Sally texted the dentist that she had a backache and needed to be seen at Kaiser. A few hours later, she texted that she had a note from her physician excusing her through Friday. The dentist responded by texting that she could return on Tuesday, as he was not in the office Monday. This should provide extra time for her back to rest.

Later that week when the dentist was preparing payroll, he noticed that Sally had noted on her time card that she left early Monday because she had hurt her back at work that morning. He tried to call her, but got her voice mail. He left a message asking her to call him. The dentist called the Advice Line to ask how he should handle the issue. He verified that this was the first he had heard of her potential back injury.

The analyst commended the dentist on his attempts to communicate with Sally and for having an up-to-date employee manual. When asked if he thought the backache was the reason she left early on Monday, he said he was unsure. He told the analyst that after reading the time clock note, he left a voice message asking if her injury was work related. The analyst said it was fine to ask the employee if the back pain was a work-related injury, but advised him to be careful requesting any more information. As Sally would likely

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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.

- Recognize when, and how, to dismiss a patient without placing them at risk
- Establish trust in the doctor-patient relationship to encourage treatment compliance
- Create office protocols to instill confidence in the dentist and staff

Plus:

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

*Important information about your 5% Professional & Dental Business Liability premium discount.

Professional Liability premium discount effective their next policy renewal. To obtain the two-year, 5% Professional Liability premium discount, Alaska, Hawaii, Illinois, Minnesota, New Jersey, North Dakota and Pennsylvania dentists must successfully complete the seminar by Oct. 21, 2016. Arizona, California and Nevada dentists must successfully complete the seminar by April 22, 2016. Any elearning tests received after the deadline will not be eligible for the discount. Non-policyholders who complete a seminar or elearning option and are accepted for TDIC coverage will also be eligible for this discount.

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Spring 2016 Risk Seminar Schedule

Thursday, Feb. 25
9 a.m.—noon

151st Midwinter Meeting
Chicago, IL

Friday, April 1
9 a.m.—noon

Doubletree San Jose
San Jose, CA

Friday, April 29
9 a.m.—noon

CDA Headquarters
Sacramento, CA

Thursday, May 12
9 a.m.—noon
and 2—5 p.m.

Friday, May 13
9 a.m.—noon
and 2—5 p.m.

CDA Presents**
Hilton, Anaheim
Anaheim, CA

Saturday, May 14
9 a.m.—noon

**Attendees must register through CDA for these seminars.

Reserve your space today at
thedentists.com/seminars

Unable to attend in person? Visit **thedentists.com/eLearning** to explore convenient eLearning options.

Fees

- Dentist/staff: **\$50**
- Part-time*: **\$25**
- New TDIC Policyholder: **Free** (*within the first policy year*)

*Must have a TDIC part-time Professional Liability policy to be eligible for this discount.

C.E. Details

- **3.0** ADA CERP credits

To receive C.E. credit, registrants must be present for the entirety of the three-hour seminar. This seminar meets the Dental Board of California's requirements for 3.0 Core C.E. credits.

Special Needs

If you or someone in your group requires special assistance to fully participate in the seminar, please call TDIC at 800.733.0634 or email us at risk.management@cda.org.

ADA CERP® | Continuing Education Recognition Program

The California Dental Association is an ADA CERP Recognized Provider. ADA CERP is a service of the American Dental Association to assist dental professionals in identifying quality providers of continuing dental education. ADA CERP does not approve or endorse individual seminars or instructors, nor does it imply acceptance of credit hours by boards of dentistry. CDA designates this activity for 3.0 continuing education credits. This continuing education activity has been planned and implemented in accordance with the standards of the ADA Continuing Education Recognition Program (ADA CERP) through joint efforts between CDA and TDIC.

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report this was a work-related injury, the dentist should absolutely call his workers' compensation carrier and let the insurance professionals do their job. If the employee really did injure herself at work, then all of the workers' compensation regulations would come into place. The dentist must also document his findings in the employee's file as well as the subsequent steps he took to assist her.

One of the resources TDIC offers its policyholders is a free 15-minute consultation with an employment attorney to assist with employment-related matters outside their scope of training.

The other issue to address is Sally's continued employment problems. One of the resources TDIC offers its policyholders is a free 15-minute consultation with an employment attorney to assist with employment-related matters outside their scope of training. Analysts recognize the signs that could trigger an employment attorney referral. This situation was not quite at that level. The dentist was managing the situation very well, had good communication skills and had documentation to support his decisions.

An Ounce of Prevention: Staying Informed When Faced With Disabled, Absent Employees

By Katherine S. Carlos, Esq

Employees taking leaves of absence can be disruptive for dental offices seeking to provide exacting services to their patients. Oftentimes, dentists may prefer to layoff the absent employee and hire a temporary employee. In fact, that temporary employee may be hustling and doing a great job, possibly even unmasking an absent employee's poor performance. However, taking the step of termination is risky. This article focuses on California employment law, highlights red flags to consider when facing this common set of circumstances and provides useful strategies.



Number of Employees

Let's assume the employee is absent due to pregnancy, a disability, a workers' compensation injury and/or an on-again, off-again long-term illness. Several laws are implicated by such fact patterns including, but not limited to, Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, California's Fair



Employment and Housing Act (FEHA), California's Pregnancy Disability Leave Act, California Labor Code 132a and the California Family Rights Leave Act. Most dental offices will be covered by FEHA if they have five or more employees in the case of discrimination and one or more employees in the case of harassment. The Americans With Disabilities Act applies to employers with 15 or more employees. The Family and Medical Leave Act and the California Family Rights Act (FMLA/CFRA) apply to employers with 50 or more employees within a 75-mile radius.

California arguably has more employment regulations than other states. If you are in a state other than California and you have questions about leaves, please contact your association or the Advice Line for more information.

Timing of the Termination

Generally, terminating an employee during a leave of absence is unwise. The employee may attempt to implicate one of the laws described above and allege that the termination was motivated because of his/her disability, pregnancy, gender and/or was in retaliation of the employee's request for leave, need for leave or filing of a workers' compensation claim. The timing may simply look bad – not only to the employee but also to any jury who might hear the case if the matter proceeds to litigation, especially if there is no documented history of poor performance.

A better course of action may be to document the employee's poor performance by preparing a performance improvement plan and counseling the employee once he or she returns from the leave of absence. Of course, the employee may claim or speculate that

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the coaching is motivated by his or her protected status or protected leave, however, a good coaching form is one that is based on objective criteria and encourages the employee to improve.

Performance Improvement Plans

There is no set standard for a performance improvement plan (PIP). However, one should generally include three sections:

- A description of the employee's poor performance using action words and specific examples.
- The job expectations for the employee in those areas.
- Expected areas to improve.

For example, the PIP could say, "On June 15, 20xx, Ryan Receptionist was rude to several patients and booked patients during times when hygienists

were unavailable. Dr. _____ expects receptionists to be professional and cordial with patients. Receptionists are also expected to work as a team with hygienists. In the next 30 days, Ryan is expected to be professional and cordial with patients, organized when scheduling patients and mindful of hygienists' schedules. Failure to improve could lead to additional counseling and discipline, including and up to termination."

The PIP form may also include space for the employee to comment. The objective of the PIP is to coach the employee to improve, and it should be presented to the employee in such a fashion. The other benefit of using a PIP is that it helps document the employee's poor performance should he or she fail to improve.

Is "At Will" Employment Dead?

Employers often protest, "Why do we have to go through the PIP process for an 'at will' employee who can be terminated with or without cause?! Isn't the PIP tantamount to progressive discipline, which our employee policy expressly forbids?" Unfortunately, if the employee is a member of a "protected class," as described above, that is, one who took disability leave, pregnancy leave, filed a workers' compensation claim and/or took family leave, those laws may trump the "at will" provision. Therefore, if a dentist proceeds with the termination of a "protected" employee, the dentist will be placed in the position of having to explain why the termination had nothing to do with the employee's protected status. So, coming full circle, the PIP serves as evidence to document the poor performance and has the added benefit of possibly converting a bad employee into a performing employee.

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Newer Areas of Exposure

Another complicated feature of the above-referenced disability/discrimination laws is the relatively newer theories of liability: failure to engage in the interactive process and failure to provide a reasonable accommodation.

The point of these laws is to mainstream disabled employees back into the workforce.

The first, namely, the interactive process, requires employers to have a prompt “good-faith” discussion with a disabled employee about ways in which an employer can accommodate an employee’s work restrictions caused by his or her disability. This process usually involves the employee taking a copy of the job description to his or her treating physician to outline what the employee can or cannot do (i.e., cannot lift more than 10 pounds, must take frequent breaks, cannot sit for more than two hours without a break, etc.). Then, the employer is obligated to consider those restrictions — not the disability itself, as that is protected information — and inquire only about the restrictions, that is, how the (undisclosed) disability affects the employee’s ability to perform the essential functions of his or her job. The emphasis here is on the “good-faith” discussions between the

dentist and the employee to explore the medical restrictions and how those restrictions can be reasonably accommodated so the employee can return to work. Whoever breaks down this interactive process will be “tagged” with liability. Therefore, it is important to document the interactive process.

This leads to the next potential claim, failure to provide a reasonable accommodation. Employers are only required to provide reasonable accommodations. For example, it may be a reasonable accommodation to modify furniture, reassign job tasks to other employees, provide a part-time work schedule or even an intermittent leave of absence. It may also be a reasonable accommodation to extend an unpaid leave of absence to an employee who has exhausted pregnancy disability leave.

A reasonable accommodation is usually the result of a successful interactive process. Please note the duty to engage in the interactive process is ongoing because if the given reasonable accommodation is not effective, the employer must engage in another interactive process to find one within reason that works. The point of these laws is to mainstream disabled employees back into the workforce. As one can imagine, this area of law is complicated and consulting with an attorney is always recommended.

Katherine S. Catlos is the managing partner of the San Francisco office of Kaufman Dolowich Voluck & Gonzo LLP, where she regularly assists employers with counseling and litigation defense.

Large health care system improves policy on medical clearance

A large health care system recently improved its response to medical clearance requests, a move that provided area dentists with essential physician feedback regarding patients’ medical conditions.

This situation sheds light on dentists’ responsibility to obtain medical clearance and fully understand patients’ medical histories before proceeding with dental treatment on medically compromised patients. The issue also highlights the importance of dentist-physician relationships in communities nationwide.

“As health care moves toward increased integration, it’s vital that dentists and physicians work together to ensure an optimum outcome for their patients’ dental treatment,” said Ann Milar, a senior policy analyst with the California Dental Association.

Policyholders had been calling the Advice Line for several months reporting that physicians were not filling out the release for medical clearance form. Instead, the physicians were only providing a health history summary, prescription list and allergy information. This was not helpful

when the dentist was asking for medical clearance for a patient who was on blood thinners and required an extraction.

The number of similar calls prompted Risk Management to update the current form to see if dentists would get a different response. Working with attorneys who both defend TDIC insureds and work with physicians, TDIC updated the “Medical Clearance for Dental Treatment” form. “This situation provided an opportunity to update our form, which helps our policyholders deliver the best dental treatment possible for their patients,” said Sheila Davis, assistant vice president of claims and risk management.

Legal professionals emphasize that it is incumbent upon dentists to ensure dental treatment will not adversely affect the patient. If a physician refuses to provide medical clearance for dental treatment, TDIC recommends getting the patient involved with trying to find a solution by asking the physician directly. Analysts say medical clearance is a big-picture issue requiring broad consideration of whether dental treatment could substantially affect a patient’s physical condition, and the reverse, whether a physical condition could affect dental care.

In cases where the patient’s health is severely compromised, a conversation with the treating physician is recommended before beginning dental treatment, including prescribing medication of any kind. However, a conversation with the physician is not a substitute for a signed medical clearance form. Medical clearance in writing is necessary to provide clear documentation.

TDIC’s top tips on medical clearance

Health history: Always obtain a detailed and current health history, including all medications a patient is taking. This crucial step alerts dentists to diseases, disorders, allergies and medications that could affect dental treatment. A thorough knowledge of patient medications is essential to avoiding adverse interactions. Some patients with complicated medical conditions such as cancer may not even be sure of all the medications they are taking, but dentists must seek clarification.

Utilize resources: Dentists can save time by using TDIC’s medical release form, which is available online at thedentists.com. Dentists can customize the form as needed to include specific questions for the physician.

Include details: When requesting medical clearance from a patient’s physician, TDIC recommends that the dentist describes the dental treatment plan and includes all prescription and over-the-counter medications anticipated during treatment. Also, indicate the patient’s condition warranting special concern. Risk management experts recommend that medical

clearance forms include an area for the physician to comment on the patient’s overall health and alert the dentist to potential issues.

Acceptable authorization: A medical clearance form signed by a nurse practitioner rather than a physician is acceptable, according to TDIC Risk Management analysts. Nurse practitioners are registered nurses with advanced training in diagnosing and treating illnesses. Among other things, nurse practitioners can obtain medical histories, perform medical examinations, identify, treat and manage chronic diseases, order and interpret diagnostic tests, prescribe medications and refer to other health care providers.

Clarify when necessary: If dentists have any questions about the qualifications of the personnel signing the medical clearance form, call the physician for verification. Analysts specify that practitioners can only sign off on what is within their scope of practice. If in doubt, follow up.

Call the Risk Management Advice Line at 800.733.0634 opt 2 if you have further questions.

Question and Answer

I am a general dentist and started seeing a new patient. She is in her 20s, has had a cleaning, a full-mouth series of radiographs and I completed a treatment plan. I also identified a soft tissue lesion and recommended a biopsy. She has refused, stating she does not have the money to pay for the biopsy. What does TDIC recommend?

A: You must address this situation with quick and clear actions. Certainly, the patient's health is the primary concern. Given the seriousness of what a biopsy may reveal, make sure you educate the patient as to what you see, what it could be and why you are recommending a biopsy. Discuss the merits of early detection along with potentially ruling out serious disease. Document your conversation. If, after all of the education you have given, the patient is still refusing a biopsy, consider dismissal. Nothing sends a stronger message to your patient than dismissal. That is how important getting a biopsy in a timely manner could be to her health. If she is unwilling to address this, then you are unwilling to be responsible for her dental health. Include your concern and subsequent patient education about the soft tissue lesion in your dismissal letter. Dismissal often serves as a wake-up call and may encourage the patient to get the lesion checked by a specialist. The goal is for the patient to get the lesion biopsied. It is TDIC's experience that once a dentist is willing to dismiss for noncompliance, the patient actually concedes to what the dentist initially recommended.

I recently asked my employee to work past normal business hours; she discovered her vehicle had been vandalized when she left. I feel responsible for the damage because the incident occurred in the practice's parking lot and I had asked her to stay late. Does my TDIC Business Owner's policy provide coverage to repair my employee's vehicle?

A: TDIC commends your desire to assist your employee; however, you are not responsible for the damage to your employee's car. TDIC's Business Owner's policy does not provide coverage for automobiles owned by an insured. As an

employee is also an insured under your policy, the employee's auto would not be covered. We recommend your employee contact her automobile insurance carrier to address the damages.

Q. I am a periodontist and a patient was referred to me by her general dentist for root planing. The patient is asking me about the overall status of her existing restorations and dental health. How do I tell her that she has open margins on three crowns that were done recently by the referring dentist?

A. Comments such as "who did this to you" or "I can't believe what I am seeing" may seem innocent, but can fuel patient anger and may lead to malpractice claims.

As difficult as it may be, try to remain unbiased in your discussions about previous treatment and avoid criticizing your peers. Without pointing fingers, use lay terms and objectively describe your findings and observations. Be as factual and objective as possible and keep subjective comments and opinions out of the discussion. Also, remember that you are only receiving one side of the story. You may become aware of additional facts later that could change your original assessment.

According to the ADA's Principle of Ethics and Code of Professional Conduct, Justifiable Criticism:

Dentists shall be obliged to report to the appropriate reviewing agency as determined by the local component or constituent society instances of gross or continual faulty treatment by other dentists. Patients should be informed of their present oral health status without disparaging comment about prior services.

If you are asked for your opinion, contact the treating dentist, after gaining permission from the patient, to learn about all aspects under which the treatment was performed. Patients should be factually informed of their oral health condition, without making negative comments about another dentist's work.

It is important to support your colleagues' work to prevent a patient from perceiving that another dentist is to blame.

A woman with dark hair, wearing a black sleeveless top, is sitting in a green office chair. She is smiling broadly and looking towards the camera. She is holding a dental instrument, possibly a scaler, in her hands. The background shows a large window with a view of trees and a bright sky.

You are not a policy number.



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Liability Lifeline is published by:
The Dentists Insurance Company
1201 K Street, 17th Floor
Sacramento, California 95814

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