Dental Malpractice 101

By: Paul-Michael La Fayette Mazanec, Raskin & Ryder
Paul-Michael La Fayette, Esq.

Paul is a partner with Mazanec, Raskin & Ryder. He concentrates his practice in the areas of professional liability defense, including the defense of dentists, physicians, real estate agents and attorneys. In 2012, he was recognized by his peers as an Ohio Super Lawyer which is limited to the top 5% of practicing attorneys. He represents several professionals in administrative licensure proceedings before their professional Boards. He defends clients in lawsuits involving professional malpractice, premises liability, contracts, employment, construction, civil rights, zoning, wrongful death and products liability.

Paul’s prior experience includes the honor of having served as a staff attorney for the Ohio Supreme Court and as an Assistant Attorney General in the Court of Claims Defense Section. He served as the Director of Legal and Legislative Services with the Ohio Dental Association where he provided legal advice to the Association’s membership and lobbied in the Ohio General Assembly on health care issues and administrative law reform.

Paul is licensed before all state and federal courts in Ohio, in the State of Florida, as well as in the United States Supreme Court.

Paul regularly presents in numerous Professional Seminars and Continuing Education Programs on the topics of medical malpractice, general liability risk management, governmental liability and legal ethics. As a featured speaker at The Ohio State University College of Dentistry, Paul regularly lectures on issues of dental risk management and malpractice. In 2010, he supported legislation to reform the Ohio Dental Practice Act. He provided specific amendments to the legislation and testified in support of these changes in front of the Ohio Senate. The legislation passed and became effective in September of 2010.
Paul also serves his community as a former President of the Epilepsy Foundation of Central Ohio, and, presently, as a Cub Scout leader, church volunteer and youth athletics coach.

In college, Paul was a scholarship athlete as well as an academic scholar. After college, Paul played semi-professional baseball before attending law school. Paul graduated from the Capital University School of Law. He understands challenges and the discipline necessary to meet them. Paul’s wide variety of experiences has enabled him to have a unique understanding of people and how to best meet the challenges faced in litigation and to manage future risks.

Paul-Michael La Fayette
Mazanec, Raskin & Ryder Co., LPA
175 South 3rd Street, Suite 1000
Columbus, Ohio 43215
Office | 614-324-1042
Direct | 614-228-5931
Cell | 614-499-6731
Email | plafayette@mrrlaw.com
Web | www.mrrlaw.com
The Dental Negligence Claim

- Prima Facie Case
  - Duty
  - Breach
  - Causation
  - Damage
The Dental Negligence Claim

- Plaintiff must prove that the dentist failed to meet the professional standard of care.
- Plaintiff must demonstrate the he/she suffered actual injury.
- Plaintiff must prove that the injury was caused by the dentist’s failure to meet the professional standard of care.
The Dental Negligence Claim

- **Standard of Care**
  - What a reasonably prudent dentist would do under like or similar circumstances. It is based upon the information that the dentist had at the time the dentist provided care and treatment.
  
  - Expert testimony is required to support a deviation from the standard of care. Generally requires an expert in the same field however in majority of jurisdictions a general dentist can perform all dental procedures.
The Dental Negligence Claim

- Proximate Cause
  - Defined as “direct cause.” It is an act or failure to act which is the natural and continuous sequence that directly produces the injury and without which would not have occurred.
  - Majority of states provide that negligence of a subsequent treating dentist to resolve prior negligence remains attributable to the first negligent actor. Unless a true break in the causal chain can be established.
The Dental Negligence Claim

- Damages
  - Special Damages
    - Medical/Dental Bills
    - Lost Income
    - Funeral Expenses
  - General Damages
    - Physical Pain and Suffering
    - Emotional Pain and Suffering
<table>
<thead>
<tr>
<th>Standard of Care</th>
<th>Causation</th>
<th>Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Reasonable</td>
<td>- Direct</td>
<td>- Medical Bills</td>
</tr>
<tr>
<td>- 20/20 vs Prospectively</td>
<td>- Intervening/Superceding</td>
<td>- Lost Income</td>
</tr>
<tr>
<td>- Different Methods</td>
<td></td>
<td>- Pain and Suffering</td>
</tr>
</tbody>
</table>
The Dental Negligence Claim

- **Procedural Hurdles**
  - Affidavit of Merit – 30 states require some form of validation of claims upon the filing of the Complaint whether by attestation of plaintiff’s counsel or an expert.
  - Jurisdictions vary on whether the failure to comply with the affidavit of merit requirement is a failure other than on the merits.
The Dental Negligence Claim

- Negligence v. Lack of Informed Consent
  - Distinct theories. Informed consent claim arises out of common law battery claims.

- Lack Informed Consent
  - Failure to disclose to patient material risks;
  - Unrevealed risks materialize and are proximate cause of injury; and
  - A reasonable person would have declined the treatment if the risks were disclosed.
Dental Specialties and Experts

- Dental Specialties Recognized by ADA
  - Dental Public Health
  - Endodontics
  - Oral and maxillofacial surgery
  - Oral and maxillofacial pathology
  - Oral and maxillofacial radiology
  - Orthodontics
  - Pediatric Dentistry
  - Periodontics
  - Prosthodontics
Dental Specialties and Experts

- General Dentist - can treat any condition and perform any dental procedure but cannot claim to be a specialist in any one procedure. That is, he/she cannot claim to specialize in root canals as this is reserved for specialists;

- Endodontics - Endodontics is the branch of dentistry which is concerned with the morphology, physiology and pathology of the human dental pulp.

- Oral and Maxillofacial Pathology: Oral pathology is the specialty of dentistry and discipline of pathology that deals with the nature, identification, and management of diseases affecting the oral and maxillofacial regions.
Dental Specialties and Experts

- Oral and Maxillofacial Radiology: Oral and maxillofacial radiological interpretation of images and data used for the diagnosis and management of diseases, disorders and conditions of the oral and maxillofacial region.

- Orthodontics and Dentofacial Orthopedics: the dental specialty that includes the diagnosis, prevention, interception, and correction of malocclusion, as well as neuromuscular and skeletal abnormalities of the developing or mature orofacial structures.
Dental Specialties and Experts

- **Pediatric Dentistry:** An age-defined specialty that provides both primary and comprehensive preventive and therapeutic oral health care for infants and children through adolescence.

- **Periodontics:** The specialty of dentistry which encompasses the prevention, diagnosis and treatment of diseases of the supporting and surrounding tissues of the teeth.

- **Prosthodontics:** The dental specialty pertaining to the diagnosis, treatment planning, rehabilitation and maintenance of the oral function, comfort, appearance and health of patients with clinical conditions associated with missing or deficient teeth and/or oral and maxillofacial tissues using biocompatible substitutes.
Dental Specialties and Experts

- Dental Public Health: Dental public health is the science and art of preventing and controlling dental diseases and promoting dental health through organized community efforts. It is that form of dental practice which serves the community as a patient rather than the individual.

- Oral and Maxillofacial Surgery: Oral and maxillofacial surgery is the specialty of dentistry which includes the diagnosis, surgical and adjunctive treatment of diseases, injuries and defects involving both the functional and esthetic aspects of the hard and soft tissues of the oral and maxillofacial region.
Dentistry 101

- Dental Terms and Abbreviations – when you are reviewing a dental chart, the following are the most common abbreviations:
Dentistry 101

- **BWX** – Bite wing x-ray. It shows upper and lower teeth and is the most commonly used x-ray. It is used to identify decay, malocclusion, bone loss and exiting restorations.
Dentistry 101

- **PA** – Periapical x-ray. It typically isolates a single tooth showing from the crown to the tip of the root. It is principally used by an endodontist to help determine if a root canal is necessary.
**Dentistry 101**

- **PAN or PANX** – A panoramic x-ray. Shows the entire mouth. It is typically used to identify bone loss (i.e. periodontal disease), fractures, orthodontic issues, occlusion, TMJ and impacted wisdom teeth. It is typically not diagnostically useful for identifying decay or potential root canal therapy.
Dentistry 101

- **RCT** – Root Canal Therapy. It is the endodontic procedure for performing root canals.
Dentistry 101

- Cone Beam Computed Tomography (iCat) - Used to provide 3-dimensional views of tooth and bone structures. Primarily used by oral surgeons for various procedures. Becoming standard of care for dental implant procedures.
Dentistry 101

- **Prophy** – Oral Prophylaxis. Means a cleaning usually performed by a hygienist.

- **OH** – Oral hygiene appointment.

- **GP** – Gutta Percha. It is a rubbery biologically neutral putty like substance that is placed into the canals of a newly root canaled tooth.

- **WL** – Working Length (see RCT picture above). Used to determine length of file to be used during root canal procedure.
Dentistry 101

- **CR** – Crown. Sometimes referred to as a cap.
- **Lingual** – refers to the tongue side of a tooth.
- **Buccal** – refers to the cheek side of a tooth.
- **Occlusal** – refers to the top or biting surface of a tooth.
- **Cervical** – refers to the portion of the tooth adjacent to the gum line.
Dentistry 101

- Tooth Structure

[Diagram of tooth structure with labels: Enamel, Dentin, Gingiva (gum), Pulp cavity, Pulp, Cementum, Root Canal, Alveolar bone, Periodontal ligament, Apical foramen, Nerve, Vascular supply.]
Dentistry 101

- Maxillary – Upper jaw.
- Mandibular - Lower Jaw.
- Mandibular - Lower Jaw.
- TMJ – Temporal Mandibular Joint Dysfunction
Dentistry 101

- Teeth Numbering - Adult

![Diagram of Permanent Teeth with Numbers]
Dentistry 101

- Tooth Numbering – Child
Dentistry 101

- Periodontal Chart
Dentistry 101

Dental Nerves

The Trigeminal Nerves – V –

- Superior orbital fissure
- Ophthalmic division (V₁)
- Trigeminal ganglion
- Pons
- Maxillary division (V₂)
- Mandibular division (V₃)
- Foramen rotundum
- Foramen ovale
- Anterior trunk to chewing muscles
- Mandibular foramen
- Inferior alveolar nerve
- Mental foramen

(a) Distribution of the trigeminal nerve

(c) Motor branches of the mandibular division (V₃)
Dentistry 101

- **Trigeminal Nerve**
  - The trigeminal nerve is the largest and most complex of the 12 cranial nerves. It supplies sensations to the face, mucous membranes, and other structures of the head.

- **Inferior Alveolar Nerve**
  - The inferior alveolar nerve is also located within the mandible in an area called the mandibular canal. Provides sensation to the teeth, lower lip and chin. Anesthesia used to numb this nerve prior to dental procedures.
Dentistry 101

- Lingual Nerve
  - Provides sensation to the tongue to include taste.
  - Lingual nerve injury will cause loss of sensation and ability to taste.
  - The nerve crosses the mandibular ridge in the area of lower wisdom teeth and aberrant location of the nerve can result in damage during wisdom tooth extraction.
Electronic Records

- Records in a malpractice action are like sex; when they are good, they are great, when they are bad, they’re better than nothing.
- Records are the corroborating witness in the courtroom.
- Poor documentation reflects poorly on the dentist; create issues of fact; negative inferences.
Electronic Records
“All this talk about EMRs and EHRs is just a fad - like the Internet thing.”
Electronic Records
Electronic Records

Benefits

- Electronic records provide clear documentation of diagnosis, treatment planning and procedures.
- Readily provide the dentist with available information relative to prior treatment and access to radiographic records in the operatory.
- Generally assist in the defense by providing clear documentation and avoids handwriting concerns and transcription.
Writing Samples

< 10 or 40 ?

[Handwritten text: if am Vasoconger level is 40, give 1 mm IV: 1 dose]

ISMP Medication Safety Alert!

NurseAdvise-ERR

November 2004 NurseAdvise e-Newsletter
http://www.ismp.org/nursingarticles/
Electronic Records

Writing Samples

80 or 8.0 mg?

Gentamicin 8.0 mg IV now
Electronic Records

Problems

- Often provide repetitive information that makes the record appear to a jury as mechanical that creates a barrier between the dentist and the diagnosis and treatment.
- Depending on the software, electronic records can be limiting in the options as to description of diagnosis and treatment.
- Dentist may not provide the level of detail that ordinarily would be written in chart.
Electronic Records

- **Discovery**
  - Most if not all software is proprietary which makes it difficult to duplicate, in electronic form, the records.
  - Records can be printed but often have a multitude of options as to how the records can be printed. As a result, the records can be confusing as a single appointment can result in voluminous pages of materials as each screen can be printed differently.
Tips on Defending Claims

- Get ahead of the facts.
  - Identify your client’s strengths and weaknesses;
    - Plaintiff – credible? Sympathetic?
  - Ensure that you have the complete chart;
    - Get all electronic records, consents and radiographs;
    - Where applicable, prepare timeline;
    - Identify gaps in the records. Consult with client on gaps in records, i.e., rationale for procedure etc.
Tips on Defending Claims

- Educate yourself on the procedures:
  - Identify known risks of procedures;
  - Identify differential diagnoses;
  - Identify alternative techniques.

- Choose the right expert:
  - Right specialty;
  - Research prior testimony;
  - Meet with the expert – presentation is more important than CV.
Trends in Dental Malpractice Litigation

- Dental Implants – Good Example
Trends in Dental Malpractice Litigation

- Failing Dental Implant
Trends in Dental Malpractice Litigation

- Failing Implants – Bone Loss
Trends in Dental Malpractice Litigation

- **Dental Implant Claims**
  - Failure to consider compromised patient;
  - Failure to utilize surgical stent;
  - Failure to perform alveoloplasty (leveling maxillary or mandibular ridge);
  - Perforation of sinus or nerve canals;
  - Failure to treat infection;
  - Improper angulation.
  - Use iCat becoming more common and likely to become required by standard of care.
Trends in Dental Malpractice Litigation

- Endodontic Treatment
Trends in Dental Malpractice Litigation

- Endodontic Procedure
Trends in Dental Malpractice Litigation

- Broken (Separated) Endodontic File
Trends in Dental Malpractice Litigation

- **Broken (separated) Endodontic Files**
  - Not necessarily a deviation from standard of care.
  - Requires notifying patient that the file broke.
  - Provide options:
    - Wait and see. Do not finish treatment. Place temporary filling and wait;
    - Attempt to retrieve – refer to specialist;
Trends in Dental Malpractice Litigation

- Extractions – Fractures

Fractured Lower Jaw (fracture running through the socket of the Lower Right Wisdom Tooth)

Fracture running through socket of Wisdom Tooth
Trends in Dental Malpractice Litigation

- Fractures are not necessarily negligence.

- Deviations include:
  - Failure to identify complications – referral to specialist.
  - Failure to advise patient of fracture.
  - Failure to utilize proper technique.
Trends in Dental Malpractice Litigation

- Extractions – Nerve Injury
Final Thoughts

In order to successfully pursue or defend a dental malpractice case you need to:

- Know the language
- Know the procedures
- Know the records
- Know the facts
Paul-Michael La Fayette
Mazanec, Raskin & Ryder Co., LPA
175 South 3rd Street, Suite 1000
Columbus, Ohio 43215
Office | 614-324-1042
Direct | 614-228-5931
Cell | 614-499-6731
Email | plafayette@mrrlaw.com
Web | www.mrrlaw.com
Bio | https://www.mrrlaw.com/paul-michael-la-fayette/