



## Why Risk Management Matters to You

By Lisa D. Vaughn, RDH, BS, MSA

A phrase that has been buzzing around the dental community for years is risk management. Risk management is an all-encompassing concept and integral element of practice management that include the detection, evaluation, prevention and control of financial loss resulting from claims of negligence, thereby unifying legal responsibility with quality of dental care.<sup>1</sup> Boyce defines risk management as "a program of action designed to reduce unplanned loss to an organization resulting from legal actions."<sup>2</sup> The idea of risk management entered the health care system in the early 1970s, when the medical profession was experiencing a malpractice crisis.<sup>2</sup> Commercial insurance companies were reporting major losses causing them to cease writing professional liability insurance or withdraw from the malpractice market. Such companies were instrumental in the introduction and implementation of the principals of risk management into the health care system, as they would not provide coverage to a facility unless a risk management program were adopted and maintained.

In response to this crisis, medical professionals developed and maintained risk management programs as a part of their efforts to reduce their chances of liability actions and to allow them to obtain insurance coverage. However, by the mid 1980s, there had been a shift away from the "traditional view that medical care was a product of physicians, and should therefore be left to physicians."<sup>3</sup> Legislation and national accreditation standards distinctly placed the responsibility for the quality of care and the actions of staff employed by the facility or institution on the hospital's board of directors.<sup>3</sup> This legislation and risk management affected both the private physician and dentist. Mages states,

as stories concerning skyrocketing malpractice claims permeate the media, the federal government is considering legislation to enforce a cap on non-economic damages (which some states have already done). For medicine alone, malpractice insurance rates have increased at least 10 percent in recent years. While most think the legislation is a good thing, some argue that it could actually raise premiums by forcing carriers out of the marketplace—a trend that is not new to dentistry.<sup>4</sup>

Malpractice for dentists is not indicative of trends in the larger health care market; specifically, settlement amounts are seldom as high.<sup>4</sup> According to Mages, "With increasing

insurance costs and a bad investment market, dentistry is an after thought. Most insurance companies write policies for dentists only if they are writing for physicians. And, when the cost of business gets to be too high, they pull completely out of the market with little warning."<sup>4</sup>

### Reasons for Professional Liability

Similarly, commercial insurance companies providing liability coverage for dentists characterize the current situation regarding dental malpractice as a professional liability crisis. McDonald and Pollack cite these reasons for the crisis:<sup>5,6</sup>

1. Incidence and severity of claims
2. Large jury awards and suit settlements
3. Insurance company underwriting practices
4. Rapidly rising insurance premiums
5. Poor recordkeeping
6. Failure to obtain informed consent
7. Failure to evaluate, diagnose, refer and/or treat existing conditions such as periodontal disease and temporomandibular joint dysfunction
8. Failure to identify a patient's medically compromised condition
9. Ignorance of the legal elements that constitute malpractice
10. Consumer activism
11. Changing patterns of malpractice litigation.

Because of this crisis, oral health care professions have become concerned about their legal vulnerability to malpractice claims and realize that if they are to survive in the 21st century, they must manage professional risk in a responsible manner by staying abreast of new technology, research and techniques that will enhance services to their patients (quality assurance). Managing risk can be as simple as maintaining proper patient records (i.e., documentation); being aware of what is being communicated to patients, and understanding legal matters related to patient care as a whole. Consequently, many dentists and dental hygienists opt to

stay on the more manageable side of the malpractice crisis by practicing defensively. They do so by incorporating risk management programs in their practices and taking continuing dental education courses in related subjects to improve their recordkeeping/documentation skills.

## Litigation and Dental Hygienists

While litigation against dental hygienists appears in the literature less frequently than does litigation against dentists, dental hygienists are not exempt from lawsuits. They are increasingly subject to charges of professional malpractice both as individuals and jointly with dentists.<sup>4</sup> This is due in part to the role television has played in educating the public to the possibility "that they may recover damages from health professionals. They are informed that professionals usually carry malpractice insurance and payment will come from an insurance

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company rather than from the provider of services."<sup>4</sup> Another reason is that licensed dental hygienists have responsibility and are expected to provide reasonable and prudent care for all patients. Given the greater scope of practice dental hygienists have attained over the years, it is logical to infer that their professional standing has risen. Also, they have the education, skill and knowledge to perform treatment legally allowed in the states where they are licensed. "When a dental hygienist or any other health care professional provides a

professional service and fails to exercise reasonable care, and that failure results in injury to the patient, a malpractice claim may be filed. Although the dentist is ultimately responsible for the actions of the dental hygienist, hygienists can still be found negligent if it is proven that their responsibilities to the patient have not been fulfilled."<sup>6</sup>

According to consultant M. Crawford for Albert H. Wohlers and Company, a professional liability insurance carrier for dental hygienists, in a 1994 telephone conversation with the author, there are several instances of successful litigation against dental hygienists. For example, the company reports a case where a dental hygienist allegedly damaged a patient's periodontium during a prophylaxis, and the patient was paid \$8,000. Another patient claimed that his temporomandibular joint was dislocated during a deep scaling procedure, and he was paid \$4,400. A third patient, this one with a heart condition, presented in the office for a routine prophylaxis but, according to the dental hygienist's notations, refused to take the recommended dosage of the antibiotic prior to treatment. The dental hygienist proceeded with treatment, and, consequently, the patient developed a serious heart problem that required surgery. The patient alleged that the prophylaxis caused the heart problem that led to surgery and was awarded \$35,000.<sup>7</sup>

Brunick and Driscoll cite three cases in which a dental hygienist was sued because of his/her actions. The first occurred in California in 1976, when the courts awarded a patient

"\$46,500 in damages as a result of the dentist and dental hygienist. The dentist was charged with the failure to diagnose and treat periodontal disease, while the dental hygienist was charged with failure to detect periodontal pockets and report the findings to the dentist."<sup>8</sup> In the second case, McLean v. Hunter, the plaintiff sued alleging negligence in the failure to diagnose and treat periodontal disease before it progressed to a diagnosis of "chronic, moderate to advanced levels."<sup>8</sup> Among the main allegations were (1) failure to use a periodontal probe, and (2) failure to chart and measure periodontal pockets.<sup>8</sup> In a third case, Farley v. Goode, "expert testimony established that had the plaintiff received a thorough periodontal exam, active advanced periodontal disease should have been discovered as long as five years prior to the initiation of the lawsuit."<sup>8</sup> Therefore, it behooves dental hygienists to record pertinent data in the patient's permanent file and report all findings during the patient visits to the employing dentist.<sup>8</sup>

## Litigation and Dentists

Statistics reveal that, in recent years, malpractice judgments and settlements against dentists have escalated. Macdonald reports that in the "years 1972 to 1975 more than 50 percent of all claims were settled for under \$10,000. In 1983 over 75 percent of claims were over this figure according to the Jury Verdict Research Association. Also 25 percent of the cases were found in favor of the plaintiff. More than 75 percent of all claims are reported by female patients."<sup>9</sup>

Macdonald cites a \$1,000,000 award in Massachusetts, another for the same amount in New York, and a \$400,000 verdict in California.<sup>9</sup> ProSystems (now the Redwoods Group) cites a study of 400 cases against dentists from 1978 to 1984, where 80 percent of the malpractice cases were settled before trial by the insurance company; 20 percent demonstrated negligence in court and the remaining 60 percent could not be defended successfully because the records provided inadequate documentation—"faulty recordkeeping"—although no signs of neglect were apparent, according to legal experts.<sup>10</sup>

More recently, Shulman and Sutherland analyzed reports to the National Practitioner Data Bank (NPDB) involving dentists from 1990 to 2004, and found that "dental malpractice settlements and judgments generally have kept pace with inflation over the past decade."<sup>11</sup> They authors further state that "a total of 13.2 percent of all NPDB reports were related to dentists. Of these, 73.7 percent resulted from malpractice actions and the remaining 26.3 percent were from adverse actions. While the number of large payments increased over this period, the median payment remained relatively stable."<sup>11</sup>

Mages states that Mark Buczko, vice president of Dentist's Advantage, a division of Affinity Insurance Services, Inc., comments that "the frequency and severity of the claims have remained fairly steady over the last 10 years" and that although the company's largest dental claim was \$1.7 million, "the average dental claim is between \$12,000 and \$15,000."<sup>14</sup>

According to the Web site [www.wrongdiagnosis.com](http://www.wrongdiagnosis.com), roughly 5 percent of medical malpractice trials in the 75 largest counties in the United States in 2001 involved dentists. Roughly

38.9 percent of these were won by the plaintiffs (Bureau of Justice Statistics, U.S. Department of Justice). In 2002, 12.1 percent of U.S. medical malpractice payment reports were against dentists (2002 Annual Report, National Practitioner Data Bank, U.S. DHHS).

Evidence has shown that the properly structured and properly maintained record is an indispensable tool of patient management and an important instrument in managing professional risk. The dental record is used to document all phases of patient care and provides not only a basis for assessing the practitioner's careful diagnosis and treatment planning, but also the sequence and modalities of treatment as well.<sup>12</sup> Cases involving periodontal disease—failure to diagnose in a reasonable amount of time, failure to adequately treat, and failure to refer—are responsible for a great number of lawsuits against dentists.<sup>13</sup> Failure to keep precise, accurate, complete and legible records contributes to the inability of dentists and hygienists to successfully defend a case of malpractice.

This column will address various stages and/or aspects of risk management and recordkeeping in the dental practice. Look for the next edition on common areas of legal risk in the February 2007 issue of *Access*.

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