

Preventive Action

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Disclosing Unanticipated Outcomes and Dental Errors

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Dentists are often uncertain of how to proceed when faced with the dilemma of disclosing an unexpected outcome to a patient. Unfortunately, people often mistakenly equate unanticipated outcomes with dental error. However, more frequently, the unanticipated outcome is a consequence of the patient's dental condition or an inherent complication associated with the treatment. The current litigious environment may cause the dentist to be reluctant not only to discuss unanticipated outcomes, but especially dental errors. In fact, it is often this reluctance and failure to communicate that forces patients or family members to seek legal action in order to obtain answers to their questions.

In many cases, when a patient experiences an unexpected outcome or is harmed by a dental error, the healthcare team fails to acknowledge the event and refuses to discuss it. They are fearful that furnishing information about the event is tantamount to admitting liability. Absent communication and answers to their questions, the patient and family becomes increasingly suspicious and distraught until the distress eventually turns to rage. Often, it is this rage that forces the patient to retain an attorney to supply the missing answers and seek compensation.

Studies have shown that patients and family members are less likely to sue when information is provided and an apology offered in response to a negative outcome. Increased communications have been shown to enhance the patient-dentist relationship in these situations. In addition to the ethical duty to inform patients of negative outcomes and offer appropriate treatment options, Florida law (FS 456.0575) requires health care providers to disclose adverse outcomes that result in serious harm.

Important points to remember when disclosing a dental error or adverse outcome are:

- Prepare for the discussion. Consider having support persons on hand. Arrange for a private setting to conduct the discussion.
- Provide a prompt, factual description of events. Don't speculate as to the cause, if the cause has not been determined. But, do not delay initiating communication until all the facts are known. Inform the patient and family they will be advised as soon as more information becomes available and then follow-up.
- A sincere apology or statement of regret that the patient experienced a negative outcome is appropriate. Do not assign blame or assume guilt.
- Discuss the effect the event may have on the immediate and long-term status of the patient.
- Discuss the interventions that have been initiated and any future interventions that may be indicated.
- Conduct an evaluation of the event. Relay to the family that a full evaluation of the event will be made and that they will be advised of the outcome of the investigation as appropriate.

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- Provide ample time and opportunity for the patient and family's questions and concerns to be addressed.
- Reinforce applicable points made during the informed consent discussion.
- Maintain continued communications as facts become evident.
- Document the discussion, including the date and time of disclosure, who was present, a summary of what was discussed, and what questions were raised.
- Seek legal or risk management guidance when necessary.

Patients who have been engaged in a thorough informed consent discussion are less likely to become suspicious or confrontational when faced with an adverse outcome. Prior informed consent may make the disclosure process less fearful for the dentist as well, since it sets the foundation for discussion.

The three primary goals of appropriate disclosure are to avoid the conflict of an adversarial approach that pits patients and attorneys against healthcare providers in lengthy litigation, to improve patient-dentist communications, and to improve the delivery of dental care and patient safety by openly evaluating and addressing unanticipated outcomes. —

FTC Temporarily Exempts Physicians from "Red Flags" Rule

The Federal Trade Commission has agreed to temporarily exempt physicians from the "Red Flags" rule, pending the outcome of an ongoing court case. The rule requires creditors and financial institutions with "covered accounts" to implement written programs to help detect and respond to practices and activities that could indicate identity theft by Dec. 31. The FTC identified Dec. 31 as the starting date for enforcement after several previously announced delays. The American Medical Association, American Osteopathic Association and Medical Society of the District of Columbia in May filed a federal lawsuit seeking to prevent the FTC from extending the rule to physicians. Last November, the U.S. District Court for the District of Columbia ruled that the FTC may not apply the rule to attorneys, but the FTC has appealed that decision. Until the court reaches a decision in the case, the FTC has agreed not to enforce the rule for physicians. The agreement is pending the approval of the D.C. Circuit Court of Appeals.

(Source: AHA News Now, June 28, 2010) —

News Alert

Parents File Suit Against Florida Dentist for Son's Death

The parents of a 9-year-old boy who died while being sedated at a South Tampa dentist's office are suing the dentist, claiming he and his staff were negligent when they gave the boy anesthesia. In the lawsuit, the boy's mother said she notified the dentist and his staff that her son had eaten prior to the procedure, but that he was sedated anyway. An autopsy found that the child died of aspiration of gastric contents during administration of anesthesia for a tooth extraction. On the day the lawsuit was being filed, a 5-year-old boy died while being sedated at a Gainesville dentist office. "It's a rare event, but when it occurs it's a tragic event and we certainly don't want it to occur," said Milton Houpt, chairman of pediatric dentistry at the New Jersey Dental School, who studies the issue. Houpt said there are no national statistics on the number of children who die while being sedated in dental offices. The available information is anecdotal. "There has, over the years, been increasing attention to this issue in order to make sedation as safe as possible," he said. "That attention led to the development of guidelines and the review of those guidelines on an ongoing basis." (*Tampa Tribune*, 5/5/10). •

Effective Risk Management in Dentistry

PRACTICE BROCHURES

Office practice brochures are excellent tools for communicating your practice's policies to new, established, and prospective patients. A practice brochure details what you will provide patients and what you expect from them in return. It can be plain and inexpensively printed on your office stationery or typeset and printed professionally. Professionally prepared practice brochures are an excellent marketing investment.

A dental practice brochure should cover the following topics:

- Introduction to the Practice
- Professional Profile of the Dentist(s)
- Dentist's Specialty (if applicable)
- Confidentiality Practices – HIPAA Notice
- Office Policies
- Telephone Calls
- Hospital Affiliations
- Insurance Procedures
- Collection Policy
- Office Location

Archive all office brochures as they are updated. Consider printing the brochures in the language(s) warranted by your practice demographics. •

Legal FAQs For information specific to your state of practice, contact First Professionals' Risk Management department



Are there restrictions on dentist advertisements?

According to the AMA guideline E-5.02 Advertising and Publicity, "there are no restrictions on advertising by dentists except those that can be specifically justified to protect the public from deceptive practices." Pursuant to the AMA, "objective claims regarding experience, competence, and the quality of the dentists and services they provide may be made only if they are factually supportable."

What is the purpose of a 'Business Associate Agreement'?

HIPAA privacy rules require that healthcare providers enter into a

Business Associate Agreement in order to obtain assurance that business associates will safeguard the personal health information received or exchanged in connection with a healthcare provider.

What action should be taken when a dental error is suspected or occurs?

Contact the Risk Management Department at First Professionals for guidance as soon as possible. Make no admissions of liability. Federal and/or state reporting requirements under strict time constraints may apply. Always attempt to discuss the situation with personal counsel or First Professionals before meeting with any other representatives of the patient.

Should professional fees be waived or refunded when a patient is dissatisfied?

Not always. It depends on the particular situation. First give the patient the opportunity to describe the reason for their dissatisfaction. Attempt to correct the situation, if

possible. If the patient demands a refund, waiver of fees, or the issue cannot be remedied, contact First Professionals' Risk Management Department or personal counsel for specific guidance. What some may interpret as an act of accommodation, others may view as an admission of liability.

Must a dentist supply an interpreter at the request of the patient?

Yes, in compliance with the Americans with Disabilities Act. The expense incurred in providing interpreter services may be used as a write off for tax purposes.

What is meant by the term 'negligence'?

The failure to use such care as a reasonably prudent and careful person would use under similar circumstances, or the doing of some act which a person of ordinary prudence would not have done under similar circumstances. —