

Risk Management Consultants, LLC presents

THE 7 MOST COMMON REASONS WHY DOCTORS LOSE MALPRACTICE LAWSUITS!

(and some information about why they are initiated)



SPECIAL REPORT

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Why Are Lawsuits Lost?

In my book, entitled “Managing Risk in Orthodontic Practice”, I discuss in great depth why professional negligence malpractice lawsuits are initiated. Of equal importance is why are these lawsuits lost? The reasons for losses are not quite as clear. However, surveys conducted over many years, suggest several reasons and a wider range of frequency. As such, the reasons for losing a lawsuit are grouped into frequency clusters.

The highest frequency cluster (30-44%) includes the reasons as: **failure to diagnose**, which includes unrealistic expectations since as mentioned below adequate time must be spent interviewing the patient to learn what they really want treatment to achieve, **failure to respond** (including failure to treat, failure to refer, failure to follow-up) and **lack of adequate informed consent**. The next cluster in frequency of reasons for losing a malpractice lawsuit (27-38%) consists of: **poor records, missing records and altered records**. And, finally the last cluster (3-8%) is **treatment negligence**.

Once the lawsuit is initiated, the frequency of lawsuits settled or lost by the healthcare practitioner due to one of the bases mentioned above, including treatment negligence is approximately, 45- 50%. Unavoidable error, which is arguably different than treatment negligence, but for this analysis will be included in that cluster, represents a relatively infrequent basis for loss, less than 5%. With that in mind, the critical component that should be appreciated is that the practitioner is well-advised to eliminate the major initiating factors.

Lawsuits are avoidable and that is the main reason that effective risk management in professional healthcare practice, and especially in an orthodontic practice, is such a vital and high return activity. The ROI, return on investment, or ROA, return on assets, received from effective risk management implementation is significant and almost incalculable. Let's take a further look.

As a brief primer on avoiding lawsuits, when using sound and effective risk management protocols and procedures, the most frequently cited two deficiency clusters, mentioned above, are eliminated. Specifically, when the following concepts become part of your orthodontic practice, lawsuits are not initiated, and thus will not be lost:

- an optimal interpersonal relationship is formed,
- when the proper informed consent protocols are implemented,
- when there is careful patient selection,
- appropriate diagnostic evaluation,
- thorough treatment planning,
- effective informed consent presentation and documentation
- transparent and inclusive communication among all involved (especially the patient), lawsuits are not initiated, they are eliminated. In other words, the most frequently cited reasons for the lawsuit being initiated and lost by the orthodontist, are gone!

The next cluster, composed of poor records, missing records or altered records is also avoidable. Keeping records is an integral part of healthcare practice. Many practitioners use a computer-based system. As long as the entries are complete and regular and/or automatic, secure backup is employed,

little extra effort needs to be invested to incorporate the recommendation that are needed for effective risk management. Some systems permit diagnostic materials, images, worksheets, informed consent and treatment planning inputs to be stored as well. If not, these should be preserved traditionally in the event they are needed to demonstrate what was considered by the clinician pre-treatment and how the treatment plan was determined.

For those practitioners using a paper-based chart/record system, precautions need to be considered. Unexpected event such as fires, flooding, or other means that can destroy records should be considered and adequate means to preserve all records should be implemented. One suggestion is to scan and keep an extra copy of all patient records off-sight and to do so on a regular and updating basis. There are several inexpensive, double-sided scanners available for this purpose.

The excuse that you no longer have the patient's records may be received by the plaintiff's lawyer, the court and the jury with skepticism.

Altered records are more problematic. They have been the basis for punitive damages which are not covered under most malpractice insurance policies since altering a patient's record is not part of the scope of a professional practice and is an intentional act, not an act of negligence. Punitive damages can be large and relatively unrelated to the amount of the award for malpractice. Being exposed by an expert in the field of document alteration detection can be devastating to your malpractice case and may by itself sway the jury against a practitioner.

The above reasons for losing an orthodontic professional negligence lawsuit are all avoidable and can easily be eliminated as a basis for losing a malpractice lawsuit. Also, it is suggested that as part of the regular communication protocol, other treating practitioners may be receiving copies of the original notes and updates along with the correspondence as treatment progresses. In an emergency, copies may be obtained from these practitioners as well. In addition, if the record quality is inadequate, this will be discovered during review by either the producer of the record or one on the communication list and the record will be redone or corrected, eliminating that issue.

One of the main reason that practitioners feel that they can alter records and go undetected is that without the extensive and elaborate communication protocol suggested herein, the producer of those records knows that only they have access to the record and alterations could be made. Unfortunately for these practitioners, the sophisticated scientific methods available for many years enables the easy detection of alterations. Amending or correcting a chart entry is something that needs to be done from time to time. There is a protocol for doing so. However, the original entry is always preserved and the revision or new entry is added. It must be plain for anyone to see that no attempt was made to conceal the original or obliterate it. The damage to a practitioner's credibility, integrity and professionalism from allegations and proof of altering professional records is devastating and the practitioner's reputation should never be jeopardized.

The last cluster for our discussion is unrealistic expectations and treatment negligence. Although both can serve as malpractice lawsuit initiators, they play a larger role as bases for losing a malpractice case. Unrealistic expectations need special attention and are discussed at length during the initial exam and pre-treatment phase. Care in interviewing and making sure the real reason for the patient presenting is clearly understood. Under most circumstances, following the suggestions included in these sections will eliminate this type of professional negligence action especially if the patient and practitioner cannot agree on a set of realistic expectations. In that case, treatment should not be initiated.

As previously mentioned, treatment negligence in dentistry represents a low percentage of lawsuits initiated, but a larger percentage of the reasons that lawsuits are settled or lost when taken to verdict. Practitioners are well-trained and generally keep current with continuing education to preserve and improve their skill sets. Negligence does occur. One of the benefits of developing a good interpersonal patient-practitioner-staff relationship is that in the vast majority of instances, the relationship will preclude the filing of a malpractice lawsuit by the patient.

Solid risk management protocols, effective pre-treatment procedures including understanding patient psychology with suggest in-depth interviewing with regard to the real reasons that treatment is desired are suggested protocols to incorporate into the orthodontic practice.

Foreseeable complications that have a known occurrence frequency, are not negligence. It is not possible to completely eliminate these. However, good risk management practices, protocols and procedures, as suggested in this presentation, assist with the earliest possible detection of the complication and can reduce and/or mitigate the damage that results, and rightfully deserves our attention. This is considered practicing at or above the standard of care by any definition.