

Risk Management Consultants, LLC presents

THE LIFE OF AN ORTHODONTIC LAWSUIT



SPECIAL REPORT

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Orthodontic Litigation: Root Resorption Case Composite
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Two of the most frequently cited complaints in orthodontic litigation are root resorption and bone loss. Specifically, treatment negligence and negligent informed consent. In many instances, these are cited in the same civil action for damages. In the following case composite, which includes three (3) plaintiffs complaints against three (3) different orthodontists, the anatomy of the lawsuits will be discussed. They are presented as a composite for several reasons, including the similarity of the complaints, the outcomes and the avoidance of embarrassment to the individual orthodontists.

Although most orthodontists with whom I have consulted believe that the beginning of the lawsuit occurs when the sheriff or other officer serves the complaint or legal notification of the lawsuit, in reality, it begins much earlier when the interpersonal relationship is irrevocably compromised. Until that point, no matter what has transpired, the relationship could have been salvaged and the lawsuit avoided.

Note: In my book, *Managing Risk in Orthodontic Practice*, and in my lectures and articles, I have repeated the central theme in risk management, which is that maintaining the relationship is the key aspect in eliminating negative patient comments and malpractice lawsuits. I have developed a system called EBRM, Encounter-based risk management, which eliminates these two negative aspects from causing the devastation that I have observed during the past 25 years of consulting with orthodontists.

Root Resorption/Bone Loss Case Composite.

Service of the lawsuit occurs when a uniformed officer, a sheriff, appears in your reception area, generally in late afternoon, your busiest time and demands to personally hand the lawsuit to you with the not so kind words “you have been officially served notice of the lawsuit against you”. This is said loud enough for both staff and patients to hear. Embarrassing, to say the least. Unfortunately, word spreads quickly especially with social media at its current level.

The orthodontists were shocked. One had been sued before, but the other two had not. They sat in their offices while patients were waiting impatiently and tried to review in their minds what caused the lawsuits to be filed. When they composed themselves, they contacted their respective malpractice insurers and related the events to the claims representative. They were advised to fax the paperwork that was served and discuss the cases with no one except them or the lawyers assigned or personal counsel.

From that time on, until after the lawsuits were resolved, much time and thought was devoted to this most unpleasant experience. In fact, orthodontic consulting

clients have confided that the lawsuits were on their minds when they arose in the morning, they thought about them all day long and that they were the last thoughts that they recall before going to sleep. That's a lot of mental anguish over an extended period of time. We will review the time period shortly.

In all three instances, notwithstanding that root resorption and some bone loss did occur, these lawsuits and the time and toll on the orthodontist, the staff and the families of all concerned could have been prevented and how to do this is one of the reasons for this article.

For the Orthodontist, Day 1 in the life a lawsuit is when the lawsuit is served. Starting immediately there are phone calls, faxes, emails and letters with insurance carriers and defense attorneys. Prior to meeting with defense attorneys, you have to collect all of the records, which is sometimes difficult due to age of the records, loss, missing records and recovery from storage. In retrospect, some records were not very good. You may be tempted to alter the records but you don't because you remember reading that this can be detected by experts and can add to a loss and large verdict. If you have been sued before, your records are a little better than they were the first time. Good records are only one aspect to avoiding a lawsuit. As mentioned earlier, interpersonal relationships are the key.

After several meetings with your lawyers, interrogatories that have been served on the defense need to be answered. These are voluminous pages of questions about professional and personal issues, some of them objectionable, but most need to be answered. You have more meetings with your lawyers. You try to schedule them for weekends and evenings so as not to take more time out of the office but you find that difficult to do. Your file is thick and your time involved mounts up. Eventually, you are noticed for your deposition, during which opposing counsel asks you question after question. Of course, your attorney is present to represent you. This deposition requires that you cancel patients for that time period or even the whole day. Frequently at the last minute, the deposition is canceled and needs to be rescheduled, and you lose that day of production. Your defense requires much preparation. Much time is spent both in preparation and in thought. It may seem that the process moves along quickly, but it doesn't. It is not uncommon for the life of the lawsuit to be 3 to 6 years. Just imagine your life "on hold" for that period of time.

During the preparation, you and your lawyer discuss the use of an expert orthodontist to evaluate your treatment and hopefully be willing to opine that what you did satisfied the standard of care at the time the treatment occurred. (Note: I have written several articles that address the standard of care and the reader is referred to those for more information.) The defense expert agrees to prepare an expert report discussing what they have reviewed and their conclusion about your treatment. Of course, the plaintiff/patient has an expert who will opine that your treatment fell below the standard of care. There are many orthodontists who offer their services as experts for both the plaintiff and the defense. Expert fees range

from \$250/hr to \$1,000/hr or more and sometimes are given as a daily rate as for depositions or trial. These fees can be in the thousands.

With this in mind, and with an understanding that defense attorneys are paid by the hour, whereas most plaintiff's attorneys are paid a contingency fee, i.e. a fee based on the recovery of damages, generally 33-40% of the net jury verdict or settlement, it is not hard to understand why the Wall Street Journal once ran a cartoon which went something like this: one lawyer said to the opposing lawyer, "how can this be frivolous litigation, when we are both making money"!

After several years have gone by, your lawyer advises that you have a trial week set. You cancel your patients. The day before trial, your lawyer calls and tells you that something came up and trial is postponed for six (6) months. All your preparation and worry and soon to be lost production for naught, you will need to do it all over again in a few months. This scenario is repeated at least once more before your trial starts. Wow!

In one of the cases of the composite, settlement occurred on the day of trial. The settlement was for approximately \$600,000. In the other two cases, verdicts were returned for the plaintiff in the amounts of approximately \$275,000 and \$490,000. Altered records played a part in one case which otherwise may have been defensible. Many orthodontic malpractice cases end with defense verdicts. However, winning the case after all that has been described is hardly a victory. The time and mental anguish that my clients have told me that they have gone through can change your life many times for the worse. The message is clear, good risk management is good patient care and the elimination of negative patient/parent comments and the elimination of lawsuits. Yes, it takes a little extra time, but not much especially in a practice that has been optimized with the EBRM system. But, even if more time is needed, isn't it worth it to provide better patient care, increase referrals, reduce practice stress and eliminate negative comments and malpractice lawsuits.