



## Attorneys as a Dental Practice Resource

Dentists understand that outside experts can help ensure their practice runs smoothly and is protected from legal action. For example, most dentists use the expertise of accountants to prepare their taxes and manage other financial aspects of the business. However, dentists frequently fail to consider the value an attorney can bring to a practice. While their professional liability carrier will connect dentists with qualified and experienced defense counsel to represent them when necessary in the event of legal action, working with an attorney can help dentists avoid situations that could result in legal action.

### Attorney contributions

An attorney is particularly helpful when the dentist is setting up a practice. In this case, dentists will need to develop tools, such as employment contracts, and ensure that the practice meets state, local, and national legal and regulatory requirements for doing business. The dentist also will need to sign contracts with suppliers and other vendors (for example, a billing company) and may be purchasing an existing practice or office space. An attorney can review contracts to ensure they meet legal requirements and discuss legal and regulatory requirements to help dentists navigate the business terrain.

Attorneys make ongoing contributions to the practice as well. They can review new contracts or those up for renewal to ensure they are in the best interest of the dentist.

Attorneys also can assist dentists with practice issues. Although risk managers at the dentist's professional liability insurer may be able to answer general questions, they cannot provide advice specific to state and local laws and regulations. An attorney can provide the needed answers. Finally, dentists may need an attorney for personal matters such as estate planning or family matters (for example, divorce).

### Finding an attorney

Dentists should work with an attorney who is familiar with state and local laws and regulations. To find such an attorney, begin by asking dental colleagues for recommendations. Friends and family may also have suggestions, although these names would need to be well vetted to ensure the attorneys have the necessary expertise.

Organizations, including local or state bar associations, are another option. The American Bar Association has a search engine where the user can enter their city/state to find a list of [local associations](#). The state dental association may also provide recommendations. At [www.lawyers.com](http://www.lawyers.com), users can search for an attorney by practice area.

Most attorneys have websites where dentists can obtain general information about the practice, such as members of the firm and their experience, which can help to narrow the list of potential candidates. It also can provide insights into the attorney's practice. For example, a website with multiple spelling errors may reflect a lack of attention to detail.

Dentists may wish to check for reviews of attorneys in the [Martindale database](#) of legal professionals. For attorneys participating in the review process, the site says it assesses them "through a secure online peer review survey where a lawyer's ethical standards and legal ability in a specific area of practice is assessed by their peers."

Dentists also should check online to confirm that the attorney is a member of the state bar and for any disciplinary action. In some cases, the state bar association or a state agency may have this information. For example, the [Colorado Supreme Court Office of Attorney/Regulation Counsel](#) allows users to search for an attorney's status and disciplinary action. There is also a US Department of Justice list of disbarred and suspended attorneys at [www.justice.gov/eoir/list-of-currently-disciplined-practitioners](http://www.justice.gov/eoir/list-of-currently-disciplined-practitioners).

Before making a final decision, dentists should arrange a meeting to determine if there is a good fit. Usually there is no fee for this meeting but verify that is the case. Be prepared with a list of items you wish to cover (see Choosing an attorney) and consider asking for references from past clients. If the meeting is in the attorney's office, consider whether the staff are friendly and if the area is neat and clean. Size of the firm also factor into a dentist's decision; there are advantages and disadvantages for each. For example, a small firm may provide more personalized attention, while a large firm may have more resources to research a case.

Although one attorney is unlikely to be able to fulfill every legal need a dentist may have, it is beneficial to establish an informal ongoing relationship with an attorney who can address the most common needs, such a contract reviews and human resources issues.

### Preparing for a visit

Because most attorneys charge by the hour, it is wise to prepare before a meeting related to a specific legal matter. Dentists should write a short summary of the issue that can be left with the attorney and bring any related documentation, such as the contract that needs review and any documents received related to a lawsuit. Some attorneys may ask that documents be submitted ahead of time so they can prepare for the meeting. At this stage, send copies, not originals. It is also helpful to develop a list of questions and take notes during the meeting for future reference.

At the visit dentists should verify that the attorney has experience with the matter at hand and ask for an estimate as to how long it may take to resolve the issue, as well as estimated fees. In addition, dentists should inform their professional liability insurer if the matter involves malpractice or action against the dentist's license.

### Collaborating effectively

Dentists and attorneys need to take steps to ensure an effective collaboration. On the attorney's part, this includes detailing the strengths and weaknesses of a case, providing an itemized

invoice for services, and respecting their clients' decisions on how to manage a situation (as long as those decisions are legal and reasonable), even though they may disagree. Attorneys also should be clear about who will be doing the work: themselves or a paralegal or legal assistant.

The dentist's responsibilities for an effective collaboration include following the attorney's instructions carefully, keeping the attorney informed of any changes that may affect the matter under consideration, and responding promptly to requests for more information. The dentist also must also be willing to explain procedure details in plain language.

For both dentists and attorneys, honesty is key. Dentists may be uncomfortable speaking about possible (or actual) errors, but attorneys can only be helpful if they have the full picture.

### A broken relationship

If an attorney fails to meet expectations, the dentist should discuss their concerns and listen closely to the response. It may be a simple misunderstanding that can be easily resolved. If the dentist feels a matter is not being handled properly, they may want to seek a second opinion from another attorney. This typically is not costly, but as with dentistry, there may be different

options for managing a situation without either being "wrong."

In some cases, the dentist may decide to end the relationship and seek a new attorney. Most dentists will pay for services as each need arises, but if an ongoing agreement (for example, a retainer) is in place, a certified or registered letter should be sent to notify the attorney of its termination. Dentists will want to request their files be sent to their or their new attorney's office.

If the dentist feels an attorney engaged in malpractice, they can file a complaint with a state agency such as the bar association or a judicial grievance committee. Search on the state's court website using a phrase such as "file a grievance" find the correct to option.

### A valuable partnership

An attorney can be instrumental in the success of a dental practice. To ensure the best results, dentists should carefully vet potential candidates, evaluate the candidate in person to understand expectations, and work collaboratively as issues arise.

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## Choosing an attorney

The dentist should consider several factors during the initial meeting with an attorney they are considering hiring.

- **EXPERIENCE.** Ask about how long the attorney has been in practice and their experience in the specific area the dentist needs assistance with. For example, the dentist facing an active lawsuit has different needs than one seeking review of an employment agreement; the first may require litigation skills, while the second requires a sound knowledge of labor law. It is important to understand the types of legal problems that the attorney handles most often. It may also be helpful to know the attorney's education background and any certifications they hold.
- **FEES.** Attorney will charge either a flat fee for a particular service (for example, reviewing a contract) or an hourly rate (more common). In some cases, attorneys will have additional fees for items such as phone calls, photocopying, services provided by assistants, and transcriptions. Obtain a written fee agreement for the service; it may be helpful to ask for the agreement to include a requirement that the attorney notify the dentist if the work is taking longer than expected. Ask how often an itemized bill will be sent and when payment will be due.
- **COMMUNICATION.** Discuss expectations for communication, including calls, emails, and face-to-face visits, either in the attorney's office or by a video platform. (If a video platform is to be used, ask about security features to ensure someone does not hack into a session.) Dentists can convey their preferences (for example, email vs. phone), but know that sometimes written communication is necessary. Dentists should leave the meeting understanding both the communication methods and expected response time; for example, how soon the attorney responds to emails.

Dentists also should consider their comfort level with the attorney since they will potentially be sharing confidential information.

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## RESOURCES

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# Dental Expressions® – From the CNA Claim Files

## Wrong Tooth Allegation and Lawsuit Successfully Defended at Trial

In 2020, two Dental Expressions® articles presented claim case studies and risk management recommendations associated with dental “[never events](#).” The case studies involved swallowed or aspirated objects and treatment of the wrong tooth. In these types of cases, the fact often speaks for itself, known as the legal doctrine of *res ipsa loquitur*, resulting in claim defense challenges. The following case study describes the successful defense of a lawsuit in which the patient alleged wrongful extraction.

### CLAIM CASE STUDY

**Practitioner:** General dentist

**Claimant:** Female, aged 32 years

**Risk management topics:**  
referrals; patient assessment/diagnosis; safety protocols

#### Facts:

The patient sought dental treatment on a sporadic basis over many years, often seeking care at hospital emergency rooms, rather than treatment through a dentist. In this scenario, the patient sought care for problems that were primarily related to dental caries.

Two of the teeth requiring treatment included a lower first molar and second molar (teeth 30 and 31). The dentist planned to extract tooth 30, but was unable to complete this part of the treatment following two failed attempts to achieve adequate mandibular anesthesia. The patient was referred to an oral surgeon but subsequently cancelled the procedure.

The patient later sought care with another general dentist for extraction of tooth 30. The dentist determined that tooth 31 (and not 30) was the source of the problem and recommended root canal therapy (RCT). The patient refused the treatment, stating that she had RCT on other teeth that ultimately required extraction when the treatment failed. The patient was referred to another general dentist in the practice for extraction.

The patient advised the third general dentist that she was scheduled for an extraction, and she wanted “this tooth” removed (pointing to tooth 30). The dentist’s custom and practice was to confirm the treatment required by careful review of the referral form or letter, if applicable, and/or the patient’s dental care information records. By performing his own clinical examination, the dentist would confirm that the recommended treatment was both necessary, as well as accurately documented by the referring dentist.

Following his examination and review, the dentist confirmed that tooth 31 required RCT or extraction. This observation was accurately reflected in the referring dentist’s progress note in the patient dental care information record and was supported by radiographic and clinical findings. The dentist

recommended that the patient consider RCT for tooth 31, but, once again, the patient refused and insisted upon extraction.

The dentist performed and documented the informed consent process, including discussion of the risks and benefits of extraction and the treatment options. Following the discussion, the patient signed a consent form which identified “tooth 31, the lower right second molar” as the tooth to be extracted. The extraction proved to be challenging, requiring elevation of a small tissue flap with removal of buccal bone and tooth hemi-section.

The following day, the patient noted the extraction site and believed that the wrong tooth had been extracted. She was experiencing pain and felt a sharp point coming through the gums. The patient sought care at the hospital emergency room. The physician believed that tooth had fractured, and the sharp point was caused by a remaining piece of tooth 31. The physician recommended that the patient return to the treating dentist for evaluation. Instead, the patient sought care from an oral surgeon who removed two small pieces of alveolar bone from the tissue at the extraction site. No tooth remnants were visible clinically or on the radiograph.

One year later, the patient filed a lawsuit, alleging extraction of the wrong tooth and failure to meet the standard of care. The complaint asserted that removal of tooth 31 caused irreversible harm, both due to the lost tooth and because the loss caused problems with other teeth. At the deposition, the patient stated that she would have proceeded with RCT, but this option was not provided to her. The patient also testified that she had constant moderate to severe pain in the jaw as a result of the extraction due to nerve damage incurred during the extraction.

#### Key Allegations:

Wrong tooth extraction; failure to meet the standard of care

#### Alleged Injury/Damages:

Loss of first molar tooth; medical/dental expenses; nerve injury; pain and suffering

#### Analysis:

Proceeding to trial with a wrong tooth extraction case is unusual. Although the majority of claims associated with an allegation of wrong tooth extraction involve a treatment error, it is not always the basis of a claim. In this scenario, following discussion with the defendant dentist and review of clinical records, it was confirmed that the correct tooth was extracted. However, a wrong tooth claim may still be asserted due to one or more of the following:

- Sequential treatment of suspect teeth, when the cause of the pain or other problem is unclear.
- A conflicting opinion of another general dentist, dental specialist, or in some cases, a physician.

- Inadequate informed consent procedures and documentation.
- Other miscommunication between the dentist and patient about the findings or recommended treatment.

For these reasons and others, a wrong tooth claim may result from a patient's perception of error. Such claims can be successfully defended, but only with complete and accurate dental records.

Key points in this case include:

- The plaintiff's case relied solely on the patient's testimony. A dental expert did not opine for the plaintiff.
- The defense engaged an expert who, following review of the case records, supported that the standard of care was met.
- The dentist's custom and practice to confirm the diagnosis and recommended treatment before proceeding to treat helped to support the defense of the claim.
- The treating dentist's records included:
  - A diagnostic radiograph of the treatment area.
  - The diagnosis and treatment options.
  - Documentation that an informed consent discussion with the patient occurred and that the discussion included the benefits and risks of treatment and alternative treatment options.

- A written consent form, signed by the patient identified the tooth to be extracted by tooth number (31) and description (lower right second molar).
- Post-operative instructions and recommended follow-up care.
- Defense counsel also obtained records from other providers to support the case.

Although the defense may build a strong case, the outcome of a trial is never certain. In a professional liability matter, the jury will be comprised of individuals from all walks of life, who may be more likely to empathize with a patient's perspective than that of a dentist or other healthcare provider. In addition, understanding one's own role may be of critical importance to the outcome of a trial. For example, not every dentist would be a strong witness in their own defense.

This case clearly demonstrates the importance of accurate and comprehensive dental records in defending against allegations of negligence. When records are incomplete, or when other factors complicate and weaken the defense position, the knowledge that you did nothing wrong may not be sufficient to win the day. Therefore, consider the importance of counsel advice before proceeding to trial.

**Outcome:** Verdict for the defense.

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CNA Dental Risk Control



## New Dental Claim Report Released!

You have invested your life in your career, all of which can be threatened by a single malpractice lawsuit or state licensing board complaint. Dentist's Advantage, in collaboration with CNA, has released their newly updated claim report: Dental Professional Liability Claim Report: 2nd Edition. Included within the report are in-depth analysis and risk management recommendations designed to help dental professionals avoid claims and improve patient outcomes.

### Key findings from the 5-year study include:

- **\$134,497:** Average cost of a malpractice lawsuit against a dental professional, including legal defense costs
- **30.5%:** The increase in the average cost for a malpractice claim against a general practitioner since the 2016 claim report
- **Inadequate precautions to prevent injury:** Most common malpractice allegation against dental professionals
- **Corrective Treatment:** Procedure resulting in the highest percentage of injury claims (25.5%)
- **\$4,428:** Average legal cost to defend a dental professional from a licensing board complaint – an increase of 18.7% from the previous dataset

[Click here](#) to get your free copy of the report.

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