
The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists

RISK MANAGEMENT ARTICLE

To What Standard Will You Be Held? Determining the Standard of Care for General Dentists

As the claims administrator for the Dentist's Advantage Program, we handle a wide variety of claims including employment disputes, sexual harassment claims, and allegations of failure to secure informed consent. However, as may be expected, the majority of the claims involve allegations of negligence, or as they are commonly referred to, standard of care violations.

When a patient brings a claim (or lawsuit) against a dentist, the first step in determining whether the dentist is legally liable for the patient's alleged injury is defining the standard of care for the treatment at issue. For example, when endodontic procedure therapy ultimately fails and requires retreatment, how do we decide whether the initial treatment was done correctly, or "within the standard of care?" Similarly, when a general dentist is unable to complete treatment, such as inability to fully access a canal, what is the standard of care regarding referral to an endodontist?

The Standard of Care is generally defined by State statute and, of course, varies state to state. However, most state statutes have similar language and define the standard as: the degree of care, skill, and learning expected of a reasonably prudent dentist at that time, in the state of [applicable state], acting in the same or similar circumstances.

Unfortunately, this broad definition is not always helpful to the practicing dentist who is faced with a lawsuit or claim alleging dental negligence. Ultimately, whether the standard of care was met during a specific procedure is determined by an expert, or another dentist, who is familiar with community standards. Most often, experts are practicing dentists who specialize in the type of treatment at issue, and who are also connected with a local dental school or professional association.

One of the common questions we receive from the dentists we work with is "is my endodontic procedure treatment [or crowns or extractions] required to meet the same standard as a specialist?" Many dentists are surprised when they hear the answer is Yes. Whether the treatment was provided by a general dentist or a specialist, the standard of care is the same. This reality is the reason many general dentists find themselves liable for injuries. Similarly, allegations of "failure to refer" is often the basis for liability when the procedure involves treatment offered by specialists, such as full mouth reconstruction, endodontic procedure therapy, and extractions. It is one of the reasons, as a general dentist, you should carefully consider whether you should refer a patient to a specialist for certain treatment.

Case Study1

Doctor Jones is a general dentist in the suburbs of a major metropolitan city. He has been practicing for over 20 years and has never had a claim or been sued. He provides all aspects of general dentistry including extractions. Dr. Jones routinely refers patients to an oral surgeon for 3rd molar extractions or extractions that appear difficult; however, he is competent to perform routine extractions as well as partial bony extractions, and has been performing these procedures since he began practicing.

© *Dentist's Advantage, 2014* © *The National Society of Dental Practitioners, 2014*

Risk Management services are provided by Dentist's Advantage and the NSDP to assist the insured in fulfilling his or her responsibilities for the control of potential loss-producing situations involving their dental operations. The information contained in this document is not intended as legal advice. Laws are under constant review by courts and the states and are different in each jurisdiction. For legal advice relating to any subject addressed in this document, dentists are advised to seek the services of a local personal attorney. The information is provided "AS IS" without warranty of any kind and Dentist's Advantage and NSDP expressly disclaims all warranties and conditions with regard to any information contained, including all implied warranties of merchantability and fitness for a particular purpose. Dentist's Advantage and NSDP assume no liability of any kind for information and data contained or for any legal course of action you may take or diagnosis or treatment made in reliance thereon.

The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists

RISK MANAGEMENT ARTICLE

Ms. Feder was a long time patient at Dr. Jones's office but did not present for routine care, and often made appointments only when she was in pain. Dr. Jones had performed multiple extractions for Ms. Feder with no complications. At one of Ms. Feder's few recall exams, Dr. Jones advised Ms. Feder that she had deep decay on tooth #15 and the tooth may require endodontic procedure treatment if the decay was not removed in the near future. Ms. Feder acknowledged the diagnosis, but because the tooth was not bothering her, and she did not have dental insurance, she put off having any treatment.

Two years after the recall exam Ms. Feder returned to Dr. Jones's office complaining of pain on the upper left side. Dr. Jones performed a limited exam and found deep decay into the pulp chamber of tooth #15, and that a large portion of the tooth had broken off at the gumline. Dr. Jones advised Ms. Feder that the only way to save the tooth was to have endodontic procedure therapy and crown lengthening so a crown could be placed. For financial reasons Ms. Feder opted to have the tooth extracted.

Because Ms. Feder was in pain, and the extraction appeared mostly routine with perhaps some minor surgical intervention, Dr. Jones attempted the extraction. Unfortunately, due to the extensive amount of decay, the tooth broke several times during the procedure and Dr. Jones was unable to completely remove the tooth. Understanding that Ms. Feder was having financial problems, and likely could not afford oral surgery fees, Dr. Jones referred Ms. Feder to another general dentist colleague who Dr. Jones knew had extensive experience with difficult extractions.

Per Dr. Jones's suggestion, Ms. Feder saw the general dentist colleague, who after some difficulty, removed the remaining tooth structure. Ms. Feder returned to Dr. Jones's office a few days later complaining of pain in her jaw. It was ultimately discovered that Ms. Feder had suffered complete dislocation of the articular disc when Dr. Jones attempted the extraction, and the colleague's treatment likely exacerbated the injury. Ms. Feder had to undergo multiple surgeries and now suffers permanent damage in the left TMJ. Now, both Dr. Jones and his colleague face a lawsuit with some serious allegations of malpractice.

Some may argue that because of his experience and training, it was appropriate for Dr. Jones to attempt the extraction for Ms. Feder, and that is likely correct. However, because he attempted the extraction of a molar that was significantly broken down and was now considered a surgical extraction, rather than a simple extraction, Dr. Jones will be held to the standard of what a *prudent oral surgeon* would have done in similar circumstances. Considering the injury Ms. Feder sustained, it is likely Dr. Jones's surgical technique fell below the standard of care. Another standard of care question will be whether Dr. Jones, as general dentist, provided an appropriate referral when he experienced difficulty performing the extraction. Would a reasonably prudent general dentist refer a patient, midextraction, to another general dentist rather than an oral surgeon? Probably not.

Dr. Jones's liability is twofold: First, the fact that Ms. Feder experienced a complete articular disc dislocation during the extraction will be strong evidence that Dr. Jones's surgical technique while performing the extraction fell below the standard of care. Second, Dr. Jones's referral to another general dentist, rather than an oral surgeon, may be considered a violation as well. In Dr. Jones's case, it will be argued that had an oral surgeon completed the extraction, Ms. Feder's injury would have been much less serious. Although this position may be considered speculative, it will be difficult to argue otherwise. Accordingly, there will be two wholly separate

© *Dentist's Advantage, 2014* © *The National Society of Dental Practitioners, 2014*

Risk Management services are provided by Dentist's Advantage and the NSDP to assist the insured in fulfilling his or her responsibilities for the control of potential loss-producing situations involving their dental operations. The information contained in this document is not intended as legal advice. Laws are under constant review by courts and the states and are different in each jurisdiction. For legal advice relating to any subject addressed in this document, dentists are advised to seek the services of a local personal attorney. The information is provided "AS IS" without warranty of any kind and Dentist's Advantage and NSDP expressly disclaims all warranties and conditions with regard to any information contained, including all implied warranties of merchantability and fitness for a particular purpose. Dentist's Advantage and NSDP assume no liability of any kind for information and data contained or for any legal course of action you may take or diagnosis or treatment made in reliance thereon.

The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists

RISK MANAGEMENT ARTICLE

standards of care to be considered. Unfortunately, the likely outcome is a finding that Dr. Jones violated both standards.

As a result, Dr. Jones has learned a tough lesson: As a general dentist, he will be held to the standard of an oral surgeon any time he attempts a surgical extraction (as well as a endodontic procedure, implant or crown and bridge). This includes instances in which an extraction appears to be routine but turns into a surgical extraction once the procedure begins. Once the procedure becomes surgical in nature, the standard of care becomes the same as that applied to a surgeon. Second, any time there are complications with a procedure, always refer to a specialist.

In this case, Dr. Jones was trying to help Ms. Feder by referring her to another general dentist. Unfortunately that decision has been a costly one. Remember, even if a patient ultimately decides to ignore the specialty referral, at least the general dentist has protected him or herself from "failure to refer" allegations and potential liability.

So, to answer the question to what standard a general dentist will be held, it depends upon the treatment at issue. If the treatment is one that is generally limited to a general dentist, such as fillings, recall exams, and other preventative work, the standard is that of a general dentist in similar circumstances. However, if the treatment is one that is routinely performed by a specialist, the standard applied to the specialist will also be applied to the general dentist.

¹ The following represents an actual claim handled by our office. The names have been changed for confidentiality.

By Tracy J. Pearson, J.D., Claims Specialist

© *Dentist's Advantage, 2014* © *The National Society of Dental Practitioners, 2014*

Risk Management services are provided by Dentist's Advantage and the NSDP to assist the insured in fulfilling his or her responsibilities for the control of potential loss-producing situations involving their dental operations. The information contained in this document is not intended as legal advice. Laws are under constant review by courts and the states and are different in each jurisdiction. For legal advice relating to any subject addressed in this document, dentists are advised to seek the services of a local personal attorney. The information is provided "AS IS" without warranty of any kind and Dentist's Advantage and NSDP expressly disclaims all warranties and conditions with regard to any information contained, including all implied warranties of merchantability and fitness for a particular purpose. Dentist's Advantage and NSDP assume no liability of any kind for information and data contained or for any legal course of action you may take or diagnosis or treatment made in reliance thereon.