



I Left Something Behind! The Importance Of Properly Handling Issues With Retained Foreign Objects

By Tracy J. Pearson, J.D.

Most dentists think of malpractice as performing a procedure improperly, or in other words, below the standard of care. However, malpractice also includes not only substandard treatment, but also the failure to properly act. For many dentists, one of the most stressful parts of practicing dentistry is the on-going threat of a patient bringing a lawsuit alleging the dentist committed malpractice. Being cognizant of potential risks is paramount to protecting the dentist's livelihood. Just as important, is knowing how to properly handle a situation when things go wrong.

The failure to act can include failure to diagnose, failure to prescribe medication, failure to refer, and failure to inform a patient of a condition or adverse event. One adverse event that provides the basis for a handful of claims is the retention of a foreign object. The two most common foreign object claims are separation of an endodontic file and the breakage of an instrument during extractions. If you are thinking to yourself, "files and other instruments break all the time, it's not malpractice when this occurs!," you would be correct. What creates legal liability in these situations is when the dentist fails to properly handle the situation. Although the specific standard of care varies slightly from state to state, the standard regarding properly addressing retained foreign objects is nearly identical country-wide. When a foreign object is retained in the patient's body, a dentist has a duty to: (1) recognize that a foreign object has been retained; (2) inform the patient of the retained object; (3) attempt retrieval; and (4) refer to a specialist if retrieval is unsuccessful.

The following is an example of a claim that proved disastrous when the dentist failed to fulfill his duties as set forth above¹:

Dr. Evans has been practicing for nearly 20 years. He performs all aspects of general dentistry including surgical extractions. He has an excellent reputation in his community, and has never had a claim, lawsuit or Board Complaint filed against him. Several years ago Dr. Evans performed a surgical extraction of a lower wisdom tooth on a young man. The extraction was uneventful with no apparent complications. The post-op appointments went well with notes of good healing and no complaints. The patient relocated and Dr. Evans never saw the patient again. Approximately 4 years after the extraction, Dr. Evans was served with a lawsuit alleging that during the extraction, he had left behind the tip of a broken instrument in the patient's jaw and the patient was now suffering from trigeminal neuralgia as the result of the retained object. At the outset of the case, Dr. Evans was convinced that not only did he not leave behind any foreign objects during the procedure, but that even if he did, the object could not have possibly caused the serious injury of which the patient now complains. Unfortunately, Dr. Evans did not take a post-op x-ray to confirm that there was no objects left behind in the patient's jaw. There were no notes in the chart of a broken instrument, and neither he nor his assistant recalls noticing whether an instrument had broken during the procedure. The lawsuit drug on for over three years. In that time, the foreign

object was removed and was identified as the tip of an elevator, of the same type used by Dr. Evans during the extraction. A review of all of the medical and dental records revealed that there was no other explanation for the presence of the object, and that the tip of the instrument must have broken off during Dr. Evans' procedure without him knowing. Although extremely rare, the patient's neurologist and pain specialist both confirmed that the trigeminal neuralgia was caused by the foreign object. Unfortunately, the condition is severe and the patient is expected to suffer significant facial pain for the remainder of his life.

The case was ultimately settled for nearly a million dollars.

Although this case is along the lines of a worst case scenario, it is important to appreciate that the risks of leaving behind a foreign object during any procedure can prove to be catastrophic. We all know that instruments break during extractions and other procedures all of the time. The breakage can be caused by many things, but in most cases, it is not due to any negligence on the part of the dentist. As explained previously, in this situation, the duty of care requires that Dr. Evans recognize the breakage, immediately inform the patient, attempt retrieval, and refer to a specialist if retrieval is not successful. In Dr. Evans' case, because he did not recognize the breakage of the elevator he also failed to fulfill the remainder of his duties to the patient. This resulted in a case that was nearly impossible to defend.

The important take-away from this story is this: without exception, always confirm that no foreign objects remain after an extraction (the same could be said for root canal therapy). Always take a post-operative x-ray after an extraction., even if the tooth comes out in a single piece. Further, make sure that the post-op x-ray visualizes the entire surgical field. If the extraction includes a 3rd molar, take the extra step of taking a pano rather than just a PA. Yes, it is more costly and takes more time, but had Dr. Evans taken a pano after this procedure all of this could have been avoided. The patient could have been immediately referred to an oral surgeon and had the object removed before the trigeminal neuralgia developed. Dr. Evans could have avoided enduring three years of litigation, and avoided a nearly million dollar payment from his insurance policy. Most importantly, the young man could have lived his life without ongoing unrelenting pain.

In addition to post-op x-rays, you should routinely completely inspect your surgical instruments after each procedure (and before the assistant removes them for sterilization). Be sure to educate your assistants in helping you with these inspections and ensure your assistant is familiar with each of the instruments you use for each procedure. Again, had Dr. Evans (or his assistant) noticed that the tip of the elevator was broken after the procedure, it would have prompted a thorough search for the object, including, again, a post-op x-ray or possibly checking the suction traps.

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Importantly, if you do suspect that an instrument has broken during a procedure, do a thorough search for the object. If you are unable to locate the object, even if you suspect the object was removed with the suction, refer the patient to an oral surgeon to perform additional exploration. *When it comes to adverse events, documentation is vital.* Document why you suspect an instrument separated, document that you advised the patient, document the steps you went through to locate the object, document if you were able to successfully retrieve the object, and document if a referral was made. Although frustrating and seemingly unfair, when it comes to litigation, if you did not document it, it did not happen.

In summary, while a broken instrument creates potential liability for dentists, understanding your duties, and proper documentation can help protect you from a lawsuit.

When the State Comes Knocking: License Defense

By Mark Buczko, CPCU, CIC, RPLU

You receive a visit from an investigator from the State Board of Dentistry stating a patient has filed a complaint against you. He hands you a subpoena that orders you to handover copies of the patient's chart.

What do you do? Do you give him the chart? Should you reach out to the patient? Who do you call?

In this article we'll discuss the role of the State Board, their powers, how complaints can be initiated and by whom. We'll also address the steps you need to take should your State Board initiate an investigation against you or your employees.

Who is the State Board of Dentistry?

Unfortunately, the State Board is not your friend. They are not advocates for the dental profession. Their mission is to protect the public and ensure that dental professionals are in compliance with State law.

They do this by issuing, suspending and revoking licenses and certificates of dentists, dental hygienists and others. They investigate complaints against dentists, conduct official proceedings and render binding decisions.

While the composition of state board members may differ by state, this government entity may include some combination of the following representatives:

- Secretary of Health
- Director of Bureau of Consumer Protection
- Office of the Attorney General
- Commissioner of Professional & Occupational Affairs
- Dentists
- Dental Hygienists
- At-large Public Members

Why would the State Board investigate a dentist?

The investigation could be the result of a malpractice lawsuit, but a patient injury is not required. A complaint can be filed against you for virtually anything by anyone. Complaints can be filed by a patient, their family member, another dentist, your employer, a co-worker, dental plans,

your own family, or law enforcement.

Typical complaints include, but are not limited to:

- Alcohol on breath while working
- Improper advertising
- Unprofessional conduct
- Infection control
- Fraud
- Incompetence
- Abandonment
- Failure to pay child support
- Failure to meet C.E. requirements
- Negligence
- Failure to supervise
- Illegal drug use

Complaints are not to be taken lightly and must be dealt with immediately. If not dealt with properly, a Board complaint can affect your reputation in the community, result in fines, a formal reprimand, probation, supervision, additional training, license suspension or the revocation of your license.

Case Study #1

Dr. A had a practice in Louisiana that focused on providing dentures. Based upon 15 patient complaints of Dr. A's assistants performing dental work outside of their scope of practice, the Board investigated.

Once an investigation is initiated, the Board may examine your entire practice, including issues not contained in the original complaint.

In this case, the investigation uncovered that Dr. A had misrepresented his services via ads that led patients to believe a full set of denture was \$125 when in fact the price was \$125 each for the upper and lower denture. If a patient wanted a denture that looked natural, the price ranged as high as \$450. Additionally, Dr. A told his employees, "If you can't make \$3,000 per day, I'll find someone that can."

The Board concluded that Dr. A was guilty of violating 23 counts of the Dental Practice Act and

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four counts of false and deceptive advertising. Dr. A was ordered to pay \$87,000 in fines and penalties; lost his license to practice dentistry for 10 years, and is facing 10 years of probation when he returns.

How does an investigation progress?

There are generally three triggers to a Board investigation.

- Receipt of a complaint
- Internal audit or review
- A dental malpractice claim

The process often starts with a visit from a Board investigator seeking to collect information. You are obligated to cooperate with the investigator. It is within your rights to request a meeting at a more convenient time so your legal counsel can be present.

Anything you say can and will be held against you. Keep quiet. Resist the urge to clear up the 'misunderstanding' with your version of events.

The investigator may decline to provide you with a copy of the complaint that has been made against you. They may hand you a subpoena requiring you to produce a patient's chart or other documents. Provide them with copies. Never release the originals.

Depending on the state and the circumstances, the investigation may take place entirely through correspondence, or there may be a hearing.

What to do if the Board contacts you

Your first action should be to contact Dentist's Advantage, or if you have one, your broker. They will help you file a claim with the insurance carrier, who will assign a claim adjuster and provide you with a defense attorney. The attorney will help you craft a written response to the Board and accompany you to any hearings.

- If the investigator gave you a copy of the complaint, send it to your claim adjuster
- If patient records were subpoenaed, provide copies to your claim adjuster
- Do not attempt to edit your records, will look suspicious
- Do not contact the patient
- The carrier's attorney will assist you in crafting a written response
- The response should stick to the facts, nothing personal
- Send via UPS within requested time frame

What coverage is provided by your Professional Liability Insurance?

Your professional liability insurance, or dental malpractice insurance, provides \$25,000 of License Defense coverage. It will pay for a legal defense only. Fines and penalties levied by the Board are not covered.

- A defense is provided for claims that are covered under the policy
- Among the few exclusions are allegations of criminal activity
- Based on a Dentist's Advantage study, the average cost of License Defense claim was under \$5,000
- In .05% of License Defense claims, defense costs reached 5 figures, but rarely exceeded \$25,000

Case Study #2

A 46-year old female patient presented to Dr. B with the following medical history:

- Significant tooth loss
- Half pack a day smoking habit
- Moderate to advanced inflammation of periodontal tissues
- Heavy stain and tartar
- Only #5, #8 and #9 were present in her upper jaw
- #22 and #27 were present in her lower jaw

Dr. B. provided two detailed, written treatment plans; and the patient selected one. The dentist saw the patient over a lengthy treatment period, documenting each in detail.

After 15 months the patient claimed she was dissatisfied with her restorations and told Dr. B she was going elsewhere to finish treatment. Dr. B documented this phone conversation in the patient's chart. The patient filed a complaint with the State Licensing Board alleging:

- Substandard practice
- Abuse
- Poor communication
- Abandonment

An attorney was provided to assist the dentist with the development of a detailed summary of the months of care and communication. Dr. B's careful documentation helped bolster his case by showing he'd acted professionally and within his scope of practice.

All complaints were dismissed. Legal defense costs: \$2,695.

Recommendations that may help reduce your risks

- Document consistently and legibly
- Make sure Policies and Procedures manuals reflect current practice & follow them scrupulously
- Treat patients with respect
- Stay informed on evidence-based standards and incorporate them into practice
- Know the Practice Act in every state in which you practice
- Embrace transparency
- Stay educated
- Recognize fatigue and respect your physical limits
- Have a patient-centered focus
- Monitor the performance of all staff
- Keep copies of performance appraisals, recommendation/reference letters and thank you cards
- Maintain CDE certificates of completion
- Belong to professional organizations
- Subscribe to professional journals
- Learn new equipment and techniques

Don't take a Board investigation lightly. Your ability to practice dentistry could be at stake. The Board has broad powers to investigate and discipline dentists. Remember that your documentation is your best defense.



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Did you know...

...that there is a full library of Risk Management information available to NSDP members on the Dentist's Advantage website?

As a member, you have access to a full range of helpful information that you can use everyday in your practice. They include:

- **Dental Office Forms** – Our Dental Office Forms system represents one of the valuable and useful tools we provide to assist you in managing your practice in the safest way possible. Included in this library are dozens of Record Keeping Forms and Consent Forms. Some examples are:
 - Record Keeping Forms
 - Chart Review Checklist
 - Post Extraction Instructions
 - Consent Forms
 - Consultation/Biopsy Request
- **Articles** – Browse through our articles index for a specific risk management-related topic.
- **NSDP Newsletters** – Read past issues of the NSDP newsletters.
- **Risk Management Webinars** – Our webinars are open to all dentists to learn about risk exposures they might face in their daily practice. Our free web-based-seminars feature presentations made by industry leaders in the insurance and healthcare fields.
- **Risk Management Alerts** - Periodic alerts to recent changes in dental practice, dental regulation and trends in dentistry.

Need Advice? Call the Dentist's Advantage/NSDP hotline at 1.800.237.9429. Expert advice from licensed dentists and other risk professionals.

To take advantage of this value-added benefit available exclusively to NSDP members, visit www.dentists-advantage.com and click on the Risk Management section.