



## Surviving Small Claims Court

At some time in their careers, dentists may receive a summons to appear in small claims court because of a charge of malpractice or a payment dispute. A summons and possible court appearance will likely engender significant stress, but that stress can be managed by understanding the nature of small claims courts and what steps dentists can take to protect themselves during the process.

### Small claims courts

Small claims courts are designed to settle disputes quickly and inexpensively by providing more streamlined procedures and a more relaxed process compared with standard courts. As the name suggests, the amount of money the plaintiff can request is capped, usually at around \$10,000, although this varies by state. The judge typically only decides whether the defendant must pay the money. For instance, the judge would not place restrictions on the dentist's practice or order the dentist to provide free care to the defendant.

States differ on how small claims are handled, so dentists need to understand the process in the states where they practice. For example, in general, the defendant and plaintiff represent themselves, but some states permit attorneys to be involved. Usually a winning defendant cannot collect attorney fees from the plaintiff.

Judges are not experts in dentistry, so they may look to expert testimony to guide them in their decisions.

### Response to a summons

Dentists will need to sign to acknowledge receipt of the summons, which will include the name of the plaintiff, a case number, and a brief description of what the case concerns.

The first step dentists should take after signing for the summons is to contact their professional liability insurance company and complete an incident form. A claims adjuster can then advise the dentist as to whether the policy applies in the given situation. If it does, the adjuster can help the dentist decide whether to negotiate with the plaintiff or go to court. If the dentist decides to go to court, the adjuster may be able to help with preparing the defense by, for example, identifying and facilitating expert witness testimony. Dentists should also contact their attorney for consultation. Both the claims adjuster and the attorney will want a copy of the summons.

Dentists should never ignore a summons even if they feel the case is without merit. Not appearing in court could result in the judge deciding in favor of the plaintiff. Dentists may be able to file a request to postpone a hearing, but it is best to first check with the small claims court to see if the reason is of sufficient merit. If the summons was not delivered within the time frame required by the state, the dentist can include that in the explanation as to why a postponement is being sought. However, dentists should keep in mind that even if the summons was slightly late, it is usually better to appear in court, if possible, rather than ask for a postponement.

In addition, dentists should not alter any patient records after receiving the summons, even if they notice errors in documentation, because they may be asked by the judge if any changes have been made.

Finally, dentists should refrain from discussing the dispute with anyone except the claims adjuster and attorney.

### Resolving a dispute before court

Dentists may want to be open to resolving the dispute with the plaintiff

before, and even on, the hearing date, thereby avoiding the uncertainties of how the evidence will be perceived by the judge. Some courts offer a mediation service, which can be helpful in reaching an agreement, but dentists should be guided by their attorneys as to whether to pursue this route.

Any agreements should be put in writing. The plaintiff can then request the case be dismissed without prejudice (so that no judgment appears on the defendant's credit report).

### Before the court date

Before the date of the hearing, dentists should prepare with the same care they take when preparing to perform a new or complicated procedure.

Learn courtroom procedures. Review the information about small claims courts on the state's website. If possible, attend another hearing to view the process in action. Ideally, the dentist should choose a hearing presided over by the same judge who will hear the dentist's case.

Consider the plaintiff's viewpoint. Dentists should consider possible arguments the plaintiff might make in court, so they can better prepare their own case.

Choose and prepare any expert witness. When clinical care is in dispute, the defendant's case may be strengthened by the testimony of another dentist with relevant expertise. Expert witnesses should not be partners in the dentist's practice or close friends. Experts should have all the information needed to offer an opinion. Dentists should discuss with the expert what he or she plans to ask and request that the expert dress professionally for the court appearance.

Witnesses who cannot appear at the hearing can usually submit a written statement, which may need to be signed before a notary public. Some courts allow phone testimony by witnesses, but an in-court appearance is the best option.

Organize the evidence. Hearings can be as short as 15 minutes, so organization is key. Dentists should prepare an outline of what they wish to say but avoid reading a prepared statement. Bring the original and multiple copies (at least three) of any relevant materials, such as consent forms the patient signed. Only give copies to the court; keep the original.

Practice. Dentists should practice what they plan to say in court, ideally, in front of someone who can identify potentially weak areas in the presentation.

### In court

The order of cases is typically listed on the court's calendar, but dentists should know that cases can take less time than expected, which can affect the timing of their own cases. The court will call the roll to verify that the plaintiff and defendant are present.

Usually the judge has the plaintiff present first. Dentists should not interrupt during the plaintiff's presentation. The judge will then ask the defendant to present. It is important to be succinct because time is limited.

During the hearing, the judge will likely ask both parties questions. If the judge asks for copies of materials related to the case, the dentist should hand them to the court staff, not directly to the judge.



At the end of the hearing, the judge will either issue a decision or may take the case “on advisement” or “under submission,” meaning that the judge wants to consider the case longer or check aspects of the law. In that case, the decision is usually sent by mail.

Small claims judgments are normally in the public record. However, a judge may choose to issue a decision that becomes effective only if the defendant fails to pay the stated amount of money. In this case, the judge schedules a follow-up hearing to ensure payment was complete; if so, the judge dismisses the case with prejudice, which means the claim cannot be refiled. An advantage of this process is that the judgment does not appear on the defendant’s credit record.

### Preparation and calmness

Dentists can mitigate the distress of being served a summons by taking immediate action steps, including notifying their professional liability insurer, preparing for the hearing, and remaining calm in the courtroom. These actions provide the optimal opportunity for successful defense against a claim.

Note: This article is not intended to provide legal advice. For legal advice, consult with an attorney.

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## SMALL CLAIMS COURT PROCESS

The process of a small claims court varies by state, but here is a general overview.

- Plaintiff files complaint and receives court date.
- Plaintiff has defendant served (summoned) by a third party at least XX (number depends on state) business days before the scheduled court date.
- Hearing occurs. If the defendant does not attend the hearing, the plaintiff usually wins by default. If the plaintiff does not attend the hearing, the case usually is dismissed. If both the defendant and plaintiff are present, the judge hears the case.
- Decision is delivered. The judge will decide for the defendant or the plaintiff. If the decision is in favor of the plaintiff, the defendant will need to pay the amount specified. In some cases, the judge may decide that each party owes the other and that the claims offset each other.
- If either party disagrees with the action taken, they can file an appeal or for a motion to set aside the default or dismissal. Typically motions and appeals must be filed within a set time frame.

Source: Civil Law Self-Help Center. Small claims. [www.civillawselfhelpcenter.org/self-help/small-claims](http://www.civillawselfhelpcenter.org/self-help/small-claims).

## IN THE COURTROOM

Demeanor and attitude are important in a courtroom. Dentists can make an effective presentation by doing the following:

- *Dress appropriately.* Be conservative in choices of clothing and accessories.
- *Arrive early.* Parking may be a problem, and most courtroom entrances now have security stations.
- *Be respectful.* Phones should be turned off or placed on vibrate only, if there is concern about emergency calls. Do not chew gum or listen to music while waiting for the case to be called. Stand when the judge enters or leaves the courtroom and address him or her as “judge” or “your honor.”
- *Stay calm.* It can be frustrating to hear negative comments from the plaintiff that you believe to be untrue. Getting angry, however, will only harm you. Instead, take notes about what you want to say in response.
- *Speak clearly.* Address remarks to the judge, not to the plaintiff, and be unemotional. State the facts of the case and include how you would like the judge to rule and why.
- *Answer the judge’s questions thoughtfully and truthfully.* If you don’t understand a judge’s question, ask to have it explained or asked in a different way.
- *Decide how to proceed after the decision has been made.* If you disagree with the decision you can file a motion or appeal.
- *Consider lessons learned.* The experience may provide you with ideas for revising office procedures. For example, an experience in small claims court with a patient who was unhappy with a bill may prompt you to revise the procedure for reviewing estimates with patients.

Sources: Civil Law Self-Help Center. Small claims. [www.civillawselfhelpcenter.org/self-help/small-claims/going-to-small-claims-court/118-your-small-claims-hearing](http://www.civillawselfhelpcenter.org/self-help/small-claims/going-to-small-claims-court/118-your-small-claims-hearing). Civil Law Self-Help Center. Going to court. [www.civillawselfhelpcenter.org/self-help/getting-started/representing-yourself-in-court/66-going-to-court](http://www.civillawselfhelpcenter.org/self-help/getting-started/representing-yourself-in-court/66-going-to-court). State of California Department of Consumer Affairs. The small claims court: a guide to its practical use. [www.dca.ca.gov/publications/small\\_claims](http://www.dca.ca.gov/publications/small_claims).

## RESOURCES

Civil Law Self-Help Center. Going to court. [www.civillawselfhelpcenter.org/self-help/getting-started/representing-yourself-in-court/66-going-to-court](http://www.civillawselfhelpcenter.org/self-help/getting-started/representing-yourself-in-court/66-going-to-court).

Civil Law Self-Help Center. Small claims. [www.civillawselfhelpcenter.org/self-help/small-claims](http://www.civillawselfhelpcenter.org/self-help/small-claims).

State of California Department of Consumer Affairs. The small claims court: a guide to its practical use. [www.dca.ca.gov/publications/small\\_claims](http://www.dca.ca.gov/publications/small_claims).

# Dental Expressions® – From the CNA Claim Files

## Orthodontic Patient Dissatisfaction: Small Claims Court Action

**Introduction:** Orthodontic care is not often associated with high-severity professional liability claims, though patient dissatisfaction regarding treatment outcome, time and professional fees are not unusual. This claim scenario highlights a number of risk management considerations, including management of a small claims court action.

**Practitioner:** General dentist

**Claimant:** 42-year old female patient

**Risk management topics:** informed consent/specialty treatment; patient expectations; fee refund; small claims court suit

**Facts:** The patient presented for an orthodontic evaluation, having had a history of “braces” in the past. Her orthodontic concerns included an end-to-end relationship of the anterior teeth. She believed that upper front teeth might be damaged without correcting the relationship. Another concern involved her poor posterior occlusion. The patient stated that the “teeth were not touching at all.” She also was frustrated by her uncomfortable “closed bite” and complained that this caused mouth-breathing as well as bruxism. The patient was anxious to complete treatment as soon as possible to address her concerns and enhance her smile.

The patient completed a medical/dental history and following the examination, the doctor recommended orthodontic treatment using a clear aligner system with which he had several years’ experience. Impressions and the aligner treatment followed soon after the examination.

A few months later, the patient dental healthcare record indicated that results were tracking according to plan. Therefore, moving to the retention phase would be considered at the next visit. However, the next chart entry states that new impressions were recommended for refinement and to close remaining gaps. New trays were created/delivered and a third set of impressions/trays followed. Treatment was determined to be complete at just over 2 years from the start. The final clinical note indicated that everything looked great. However, the patient sent a detailed complaint letter a few months later. She explained that the results were not as expected for either the front or back teeth. Moreover, instead of the estimated six-month treatment time, the process took more than two years. The patient demanded a full refund of fees, as well as an additional \$5,000 for her time, frustration and payment for expected damages to the front crowns/natural teeth. Emails between the dentist and patient led to a partial refund offer, or coverage of the cost of subsequent orthodontic care. Absent an acceptable agreement, the patient filed a small claims lawsuit.

**Key Allegations:** Failure to deliver promised results; extended treatment time; potential future damages to crowns/teeth; future orthodontic complications

**Claimed injury/damages:** Financial damages of \$9,500: professional fees and more, as noted. (The limit of this small claims court venue: \$10,000.)

**Analysis:** What can we learn regarding the important risk management topics noted in this claim scenario.

*Informed consent/specialty treatment.* Obtaining informed consent from the patient/parent represents a key risk management action for any procedure. The process is educational for the patient, helps to establish effective communications and builds trust. In addition, documentation of the informed consent discussion comprises a critical component of an effective defense, in the event of a claim or lawsuit. In this case, the patient complaint letter explains the [alleged] details of the proposed treatment and care plan. However, the patient record reflects limited documentation of these important elements. Were the benefits, risks and alternatives discussed in sufficient detail to obtain informed consent? The dentist recommended aligner therapy. Were other treatment options appropriate/discussed? What risks or events may lead to an extended treatment time? Were they discussed? General dentists often provide treatment associated with the dental specialties and this dentist was experienced in the provision of aligner therapy. Nevertheless,

discussing and documenting the offer of specialty care as part of informed consent is recommended. These points and others would typically be part of the informed consent discussion for orthodontic care. However, they are absent from the patient record.

*Patient expectations.* Assessing/setting reasonable treatment expectations is a prerequisite to patient satisfaction, as well as an opportunity to mitigate potential risks. In hindsight, we may consider the patient’s expectations were unreasonable. We know that the patient had previous orthodontic care. Moreover, concerns expressed at the outset indicated she was knowledgeable about tooth positioning, occlusion and related concepts. Would referral to a specialist have been prudent? Or, when the anticipated results were not achieved at six months, would it have been better to recommend other treatment options and/or refer? Each dentist must consider both the patient’s best interests and their professional experience/comfort level to determine how best to proceed. Part of that assessment includes understanding and meeting the specialist standard of care for the treatment involved – the standard to which the general dentist will be held in most states.

*Fee refund.* While providing a refund of professional fees may be a reasonable risk mitigation (and patient satisfaction) strategy, the patient may not agree that this option is acceptable. Two of the most common risk management questions received from dentists are: “If I refund, am I admitting wrongdoing?” Followed by, “I did nothing wrong...why should I refund the fee?” First, as long as the dentist does not admit to wrongdoing, it may be argued the refund is solely a business/patient satisfaction decision. Second, the dentist must weigh the value of the refund against the risk of a claim or lawsuit, and the impact of a claim or lawsuit on the dentist’s well-being and business. Each situation must be assessed individually: Consultation with your insurer’s risk manager or your attorney can help to determine a preferred approach and other important protocols, including obtaining a patient-signed waiver of liability before providing a refund of fees. This case was further complicated by the patient demand for compensation beyond the professional fee payment.

*Small claims court suit.* While discussion with the claim professional revealed that the dentist tried to implement some of the recommended risk management actions, documentation of these actions was very limited. There is also no record of specific patient complaints in the dental healthcare information record during treatment. The doctor also was somewhat surprised to receive the detailed letter describing the patient’s concerns, allegations and demands. When negotiations with the patient broke down, the dentist reported the incident to the Claim department. Shortly thereafter, the dentist received notice of the filed lawsuit. Because of the facts in this case, the incident met the requirements for coverage under the professional liability policy terms and conditions. Although the dental records lacked detail, there was no evidence of a standard of care breach. Irrespective of these matters, a lawsuit is worrisome to most dentists and seeking legal counsel is recommended. Most small claims courts do not permit attorneys to accompany the plaintiff or defendant. However, the insured dentist received advice and recommendations from counsel appointed to assist with claim defense under his policy.

**Outcome:** Judgment for plaintiff: very low 4-figures, plus court costs of \$200; claim expenses: less than 4-figures.

**Summary:** Considering the patient demand, many would agree this was a “win,” although the plaintiff succeeded in receiving a judgment in her favor. The real value of this case may be in reflecting on the risk factors that led to patient dissatisfaction and the implementation of effective risk management procedures.

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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](http://www.dentists-advantage.com) and click on the Risk Management section.