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MLMIC Insurance Company Enters Berkshire Hathaway Family

In July of 2016, MLMIC Insurance Company entered into a definitive agreement to be acquired by National Indemnity Company, a subsidiary of Berkshire Hathaway Inc. That transaction has been finalized, and MLMIC is pleased to announce that we are now MLMIC Insurance Company, a Berkshire Hathaway Company.

As a Berkshire Hathaway company, MLMIC will bring policyholders further peace of mind, knowing we will be able to offer an even higher level of financial security. MLMIC is now a member of a group that includes other insurers that specialize in providing medical professional liability insurance coverage to healthcare providers. This affiliation will afford

additional healthcare contacts and insights for MLMIC and allow it to expand its offerings with more customized policy limits, risk-sharing features, and services to individual practitioners, medical groups, and facilities large and small.

In the coming weeks, MLMIC policyholders can anticipate receiving further details on the enhancements to its services that this significant event will bring. To receive the latest information in real time, policyholders and their staff and representatives are urged to visit MLMIC.com to sign up for MLMIC's Blog and Twitter feeds.

Please direct any questions regarding this announcement to (888) 998-7871 or go to MLMIC.com for additional contact information. ❖

How to Resolve a Dental Claim by Refunding a Patient's Money

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Despite your best efforts, there are always patients who will demand a refund or payment for the repair or revision of dental work you initially performed. When this occurs, there are several things you must do. You need to have a clear picture of exactly what the patient is request-

ing. Never promise or commit to giving a refund or payment and never agree to give one without opening an event file with MLMIC and having an attorney prepare a legal Release of Liability form for you.

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Case Study

Poor Results and Inadequate Documentation – A Dangerous Mix

Danielle Zimbardi

*Vice President, Dental Underwriting
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A 37-year-old female had been a patient of the NYSDA-MLMIC insured general dentist since early 2009. She sued the dentist in 2014 due to damage that occurred during the extraction of tooth #17. She alleged that the dentist negligently performed the extraction, injuring the left lingual nerve, which resulted in permanent paresthesias and anesthesia of her tongue. She also claimed he failed to obtain her informed consent for this procedure.

At her examination before trial (EBT), the patient testified that the only time the dentist ever discussed extracting tooth #17 was at a routine prophylaxis visit on 2/13/13. The patient stated that the dentist advised her that there was a “problem there” and that it was better to extract the tooth before it became a “bigger problem.” The patient was surprised, as she had not experienced any pain or discomfort in that tooth. The dentist’s records for that visit are silent about any physical findings at tooth #17, nor do they reflect a discussion with the patient about the proposed treatment plan.

Based upon the dentist’s recommendation, the patient scheduled an appointment for the extraction of tooth #17. The extraction was per-

formed on the morning of 7/31/13. The patient testified at her EBT that this was the first time the dentist had x-rayed her tooth. In fact, a panorex was taken. The patient recalled signing a consent form before the procedure, but testified that the dentist did not discuss with her any of the risks of the procedure or alternative treatment options. She received nitrous oxide and local anesthetic for the extraction. The patient further testified that during the procedure, she heard the dentist state “This is the hardest one to remove.” The dentist’s documentation of the procedure states “Surgical excision with flap incision. Consent signed and postoperative instructions given.” Following the procedure, the patient drove herself home and was instructed to take Tylenol for pain.

At his EBT, the dentist testified that the indication for his extraction of tooth #17 was a noted pocket depth of 6mm that was deteriorating at the medial buccal aspect of tooth #17, adjacent to the distal buccal aspect of #18. The dentist’s only documentation of the pocket depth at #17 had been during a periodontal examination on 10/12/09, more than 3½ years prior to the date of the extraction. He did not discuss

this finding with the patient back in 2009, nor did he dispute the accuracy of the patient’s recollection that his first discussion with her about this tooth took place in early 2013. Apart from this one note, the dentist’s record contains no other documentation indicating any significant changes, problems, complaints, or further findings regarding tooth #17.

Given the sparsity of his notes, the dentist was asked at his EBT to describe the extraction procedure. He stated that this was an uneventful simple soft tissue extraction. He further denied making the comment “This is the hardest one to remove.” However, the plaintiff’s attorney confronted him with his billing records which reflected a charge for a more complex procedure involving a bony impaction. The dentist blamed his office staff for the discrepancy in the billing charge.

The dentist also testified that he did not section the tooth. When he was questioned about whether sectioning the tooth lessens the trauma of extraction, the dentist was defensive and non-responsive. He testified that the two sutures he placed were “routine.”

When questioned about whether he had an informed consent dis-

cussion with the patient, the dentist could not recollect what he had discussed with the patient regarding the risks of the procedure. However, he stated it was his “routine” to discuss the possibility of infection or bleeding. He admitted he did not discuss alternatives to this procedure.

During the evening after the extraction, the patient became concerned as areas of her mouth still felt numb many hours after the procedure. The next morning, the patient called the dentist’s office to report the persistence of numbness. She spoke only with the dentist’s assistant. The assistant told the patient that the numbness was “normal” and that it would subside in one to three weeks. The dentist documented in the patient’s record on 8/1/13 that “Patient telephoned, claimed her tongue is numb and it is difficult to hear on her left side. Called the patient back and left a message. Most likely due to inflammation post-op.”

On 8/7/13, the patient was seen for a post-extraction visit and suture removal. The dentist documented: “Patient presented for suture removal. + Pain, + dry socket, dry socket packing inserted. Rx Amoxicillin x 7 days given. Patient also claims numbness (total numbness) on left side of entire tongue and gingiva. Patient felt pain during suture removal. Gagged when tongue was pushed away from extraction socket during suture removal but claimed total numbness on the left floor of mouth when touched. Advised patient to seek a specialist and will

continue observation. Range of motion approximately 2 fingers.” The dentist testified at his EBT, against the advice of his counsel, that he purposely pushed aggressively on the numb area while removing a suture, causing the patient to gag and feel pain. This was to prove his belief that the patient was “a phony and a fake.”

Two days later, the patient remained concerned about the

“... he purposely pushed aggressively on the numb area while removing a suture, causing the patient to gag and feel pain.”

numbness. She googled her symptoms. This led her to consult with dentists at both Columbia University and NYU. She was examined at both facilities and was told that she had a nerve injury which would require further evaluation. The patient testified that she was also told that the type of extraction performed required a specialist. The patient last contacted the dentist on 8/12/13, requesting a referral due to the persistence of numbness. She was given the name of an oral surgeon who specialized in nerve injuries.

On 9/13/13, the patient was evaluated by the oral surgeon. He

diagnosed an apparent traumatic neuropathy of the lingual nerve. The surgeon recommended waiting an additional three to four weeks. If her neurosensory examination remained poor, she would be a candidate for surgical exploration of the left lingual nerve. The patient’s condition remained unchanged over the next several weeks. She was then scheduled for surgery on 11/14/13. Her left lingual nerve was found to be completely transected and was reconstructed utilizing a graft.

One year after the reconstruction, the patient experienced less numbness. However, she continued to experience the sensation of pins and needles on the left side of her tongue, pain on the left side when moving her tongue, and the inability to taste or sense hot or cold. Because of the numbness, she also periodically bit the left side of her tongue. These problems persisted for approximately two years post-reconstruction and were considered to be permanent.

The case was reviewed for MLMIC by several dental experts. They found significant issues with the dentist’s care that were difficult to defend. These included:

- The lack of documentation of the indication for the extraction.
- No written description of the procedure or the technique used.
- The inability of the dentist at his EBT to sufficiently articulate the indication for performing this procedure or the technique he used for the extraction.

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- The total transection of the lingual nerve found by the oral surgeon, which indicated that blunt force extraction had been used.
- The panorex did not support the dentist's testimony that this was a simple soft tissue extraction. In fact, the film revealed a vertically impacted tooth.
- The dentist billed the patient/insurer for a bony impaction.
- There was no documentation of any informed consent discussion.

This case was presented to the dentist's component professional liability review committee, which recommended settlement. Therefore, a settlement of \$350,000 was negotiated on behalf of the dentist.

A Legal and Risk Management Perspective

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Counsel to MLMIC Insurance Company*

As with many dental lawsuits, this one has two very serious legal deficiencies. The first is the lack of relevant documentation. In the record, there was no description of any new physical findings for the involved tooth, or images confirming the new problems allegedly identified by the dentist. Further, there was no

documentation of a treatment plan, or of a discussion of such a plan with the patient. Although the dentist took panoramic films immediately prior to the procedure, there was no documentation that the films were compared to the patient's examinations from 2009, more than four years earlier. Therefore, the defense could not point to significant changes in the condition of the tooth, any complaints by the patient, or any further findings to justify the extraction.

The dentist's informed consent documentation was almost nonexistent. He failed to discuss the risks and benefits of performing the extraction. He also failed to discuss the alternative treatment options, including not extracting the tooth, and risks of these alternatives. New York State Public Health Law 2805-d requires that all of the above be discussed with the patient. Informed consent is not a form the patient signs. It is the process of the discussion of the required elements of consent between the patient and the dentist who actually is going to perform the procedure.

The deposition of a dentist is critical in determining whether the dentist will be a good witness for himself or herself at trial. In this case, the dentist was a very poor witness. His failure to document the indications for the extraction, as well as his failure to describe the technique used for the procedure, created major problems when the plaintiff's attorney asked him those

questions. In fact, at his deposition, he was unable to defend his having billed the patient for a complex bony impaction, while simultaneously arguing that this was actually an uncomplicated tissue extraction. This could well have been alleged to be fraudulent billing.

The experts who reviewed this case all opined that the tooth clearly should have been sectioned to prevent trauma to the patient or, more appropriately, the patient should have been referred to an expert to remove the tooth. Yet the dentist would not answer any questions regarding sectioning the tooth, despite being asked to view the x-ray films, which confirmed that the tooth was deeply impacted.

Perhaps one of the dentist's most damaging responses at his deposition was his response to the patient's post-operative complaints of numbness. Despite counsel's strong advice not to do so, the dentist testified that he believed the patient was actually "faking" her symptoms. To prove this point, he intentionally caused her to have pain and gag by pushing very hard on the areas she claimed were numb.

In fact, the patient did have a completely transected left lingual nerve and, despite the nerve repair surgery, has had continued sequelae including paresthesias, decreased sensation and taste, speech difficulties, and pain. These permanent injuries have negatively affected her life. The dentist's testimony alone might have

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made a jury sufficiently angry to punish him by awarding substantially more damages than would occur by settling the lawsuit. Further, the jury could have also imposed punitive damages, which cannot, by law, be covered by insurance. Overall, the dentist appeared angry and anxious. Rather than responding directly, he repeated each question the plaintiff asked, thus appearing to be considering how to answer. This, too, would negatively affect a jury if he had testified this way at trial.

Because the dentist discounted the true nature of the patient's injuries, was such a poor witness at his deposition, and should have referred the patient to an expert because of the nature of the impaction, the risk of his going to trial was significant. Finally, because the dentist's deposition was sworn testimony, the plaintiff's lawyer would likely have used this transcript at trial to impeach the dentist's testimony if he did not admit to the facts he stated at his deposition. Juries tend to dislike defendants who do not appear to be testifying honestly. Therefore, the settlement negotiated by defense counsel was clearly indicated. ♦



1. After receiving such a request, you should only advise the patient that you will first review your dental records to determine the validity of the complaint.
2. You must also promptly contact the Dental Claims Unit of MLMIC Insurance Company (MLMIC) to place MLMIC on notice that the patient is requesting either a refund or a payment to another dentist or for other bills.
3. Give the patient a time frame within which he or she can expect a response (e.g., two weeks).
4. Once you determine that you will agree to the patient's demand, you should also request a copy of any such bills you are being asked to pay.

Depending upon the nature of the patient's demand and whether you wish to dispute it, you have several options. If the patient's demand is related to the quality of the care you provided, the patient is demanding you make a payment rather than giving a refund of the monies paid,

and you dispute the patient's claim, one option, if the patient agrees to do so, is to submit the claim to the New York State Dental Association's (NYSDA) peer review process. Alternatively, you may advise the MLMIC Dental Claims staff that you would like to attempt to resolve the complaint yourself, without involving the formal claims process or the NYSDA peer review process. In that case, the claims staff will refer you to the attorneys at Fager Amsler Keller & Schoppmann, LLP (FAKS) to assist you.

If you do choose to resolve the complaint by yourself, the initial investigation of the monetary demand is to determine who actually paid the fees for your services. If some or all of your fees were paid by an insurance company, you cannot return that money to the patient. Instead, the insurance payment must be returned to the insurer. If the patient was "self-pay" and requesting only those fees paid to you,

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then what he/she actually paid may legitimately be refunded to him/her. Sometimes, you may be asked not to make a payment, but rather to write off an outstanding balance related to the patient's care and treatment. If a payment for those services was made in part by an insurance company, you must return the payment attributable to the insurer back to the insurer before "writing off" the remainder of the patient's balance.

To determine whether the patient's monetary request is reasonable, you must thoroughly review the patient's dental records. If you decide to make either a refund or payment, you should advise the patient of your decision by letter. The letter should include the following statements:

1. I have carefully investigated your complaint and reviewed all of your dental records.
2. As a result of my review, I believe that the care I provided to you was reasonable and appropriate and well within the standard of care. However, if the patient's complaint is based upon an actual injury (e.g., nerve damage, burn, or laceration), please contact an attorney at FAKS to assist you with appropriate wording.
3. As a courtesy to you, because you are so unhappy with my dental care, I will agree to accommodate your request but only if you (and your spouse, if applicable) agree to first sign a legal Release of Liability.
4. Your letter must explain in clear and simple language that, once the patient (and spouse) has

signed the Release and receives payment, or the balance is written off, he/she has waived his/her rights to make any further claim against you involving this dental condition or event. A sample letter is available from FAKS for this purpose.

If the patient agrees to sign a Release, you must notify the claims department and the claims examiner will have an attorney from FAKS prepare the Release for you. You must provide the attorney with certain information for the release including: the patient's name, and, if applicable, the spouse's name; the amount of money to be paid to the patient or returned to the insurer, or the amount of the balance to be written off; the name(s) of all of the dentist(s) in the practice; and the name(s) of the practice(s), including any partnership or corporate entities.

You must then mail two copies of the completed Release to the patient, along with a cover letter, which FAKS will provide. The cover letter must include instructions for the patient (and spouse) to sign the Release before a notary public and return the original signed and notarized Release to you.

Only upon receipt of the signed and notarized Release should you remit payment of the refund to the patient, repay the insurer, or write off the balance of your fees. The Release must be retained for at least six years in your dental record. If you are making an actual payment and not a refund, you must be aware that there are National Practitioner Data

Bank implications, about which the FAKS attorney will advise you. In that event, the payment must be made from your personal funds, rather than business funds.

Finally, if you have not already done so, you should formally discharge the patient from your dental practice. If a patient is unhappy with your care, it is not in your best interests to continue a professional relationship with that patient. A memorandum and form letters for discharging patients can be obtained from FAKS.

If, however, after your investigation and review of records, you do not believe a refund or payment is indicated, you should send the patient a letter stating your decision and detailing the reasons for your decision. The letter should state that you completed an investigation, including a thorough review of the patient's dental records, and that the results of the investigation do not substantiate the patient's claim and, therefore, the patient's request for a refund, payment or write off must be respectfully denied. This patient also should be formally discharged from the practice by letter.

In summary, when a patient makes a demand for a refund, payment or other reimbursement, do not promise to do so before reviewing your records, talking to an attorney at FAKS, and contacting the MLMIC Dental Claims Unit, as you may later realize no payment may be indicated.

If you have any questions about refunds, payment or discharge of patients in general, or concerning a specific situation, please feel free to contact FAKS. ♦

Tip #23: Managing Patient Noncompliance

The Risk: Patient noncompliance is one of the most difficult challenges for healthcare providers. Noncompliance may include missed appointments and the failure to follow a plan of care, take medications as prescribed, or obtain recommended tests or consultations. The reasons given by patients for noncompliance vary from the denial that there is a dental problem to the cost of treatment, the fear of the procedure or diagnosis, or not understanding the need for care. Dentists and other healthcare providers need to identify the reasons for noncompliance and document their efforts to resolve the underlying issues. Documentation of noncompliance helps to protect providers in the event of an untoward outcome and allegations of negligence in treating the patient.

Recommendations:

1. Establish an office policy to notify providers promptly of all missed and canceled appointments. We recommend that this be done on a daily basis.
2. Formalize a process for follow up with patients who have missed or cancelled appointments, tests, or procedures. This process should include recognition of the nature and severity of the patient's clinical condition to determine how vigorous follow up should be.
 - a. Consider having the dentist make a telephone call to the patient as a first step when the patient's condition is serious.
 - b. If the patient's clinical condition is stable or uncomplicated, staff should call the patient to ascertain the reason for the missed or canceled appointment.
- c. All attempts to contact the patient must be documented in the dental record.
- d. If the patient does not comply, send a letter by certificate of mailing outlining the ramifications of continued noncompliance.
3. During patient visits, emphasize the importance of following the plan of care, taking medications as prescribed, and obtaining tests or consultations.
4. Seek the patient's input when establishing a plan of care. Socio-economic factors may contribute to the patient's noncompliance.
5. To reinforce patient education, provide simple written instructions regarding the plan of care. Use the teach-back method to confirm that patients understand the information and instructions provided.
6. With the patient's permission, include family members when discussing the plan of care and subsequent patient education in order to reinforce the importance of compliance.
7. When there is continued noncompliance, patient discharge from the practice may be necessary. The attorneys at Fager Amsler Keller & Schoppmann, LLP are available to discuss patient noncompliance and the discharge of a patient. ♦

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The attorneys at Fager Amsler Keller & Schoppmann, LLP are available during normal business hours to assist MLMIC insureds with a wide range of legal services, including, but not limited to, advisory opinions concerning healthcare liability issues, liability litigation activities, lecture programs, and consulting services.

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OCT 4, 2018

MLMIC to Host Warren Buffett for Conversation on the Economy and New York's Healthcare Marketplace

Berkshire Hathaway CEO Warren Buffett will be joining MLMIC Chairman of the Board James Reed, M.D. for a live streaming event at noon on Wednesday, October 17, 2018. The moderated discussion - available for free online (no registration required) - is an opportunity for policyholders and members of the public to hear how the top economic issues impact New York's ever-changing healthcare marketplace.



OCT 2, 2018

MLMIC Joins Berkshire Hathaway Family of Companies

MLMIC announces the official completion of its conversion from a mutual company to a stock company and its acquisition by National Indemnity Company, a subsidiary of Berkshire Hathaway. The cash consideration resulting from the conversion will be paid out to eligible policyholders as promptly as practicable.