

THE SCOPE



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EXECUTIVE MESSAGE

Dear Colleagues

This issue's thoughtful and helpful discussion of the subject of "jousting," by Managing Attorney Al Anthony Mercado, of Mercado May-Skinner, contains many useful pearls for the practicing dentist. I urge you all to read it. His discussion is comprehensive, and I have just a little to add.

First, it should be pointed out that criticism of a previous dentist or their treatment need not take the form of written or verbal statements. Often, it can simply be expressed by a shrug or a small shake of the head. The patient gets the unintended, or intended, point, and the process that often leads to a malpractice suit begins. Such criticism can be inadvertent, or it can be designed to harm the reputation and practice of another treating dentist, whom they treat as a competitor rather than a colleague.

Second, when such patients consult attorneys, they end up suing both the initial treating dentist and the one who made the disparaging remarks, proving the adage that no good deed, or bad deed, goes unpunished.

Third, when viewing the results of a previous and perhaps unsuccessful treatment, it is best simply to describe the pathology as one determines it, rather than speculating on the possible causes. There is no ethical justification for lying about or disparaging previous treatment. After all, you weren't there!

When I was in training, one of my teachers told me that, when observing the results of what had obviously been ophthalmological surgery that had gone wrong, one's first thought shouldn't be, "What hack could have done this?" Rather, it should be, "What is it about this patient's eyes that resulted in this outcome and might rear its ugly head again should I need to operate on the other eye?"

As Mr. Mercado has pointed out, avoid Monday-morning quarterbacking, and stick to a truthful description of the pathology, about which there should be little argument. This advice is best for the patient, best for the dentist, and will help to preserve your well-earned reputation in the community. It may also help to keep you out of the courtroom!

As always, feel free to contact me with questions or comments. You all have much to teach me as well!

All the best,

A handwritten signature in black ink, appearing to read "John W. Lombardo". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

John W. Lombardo, MD, FACS

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Medieval Times: Jousting in the Dental Arena

The term "jousting" may evoke images of Camelot and chivalrous knights in shining armor. Unfortunately, jousting in the dental arena is anything but a fairy tale. "Jousting" amongst dentists has been shown to be a contributing cause of patient dissatisfaction and malpractice claims. This article will explore jousting in dentistry and its negative impacts, and provide practical guidance to avoid it.

What Is Jousting?

Jousting in dentistry refers to comments made by one dentist about the treatment and/or result of another dentist that are intended to be critical or that a patient can perceive as being critical. In general, jousting can include verbal and written comments. These may include intentionally criticizing the care of other dentists, second-guessing the plan of care of another dentist, making entries in the dental chart disparaging another dentist's treatment, and writing "To whom it may concern" letters for a patient explaining why dental work needed to be redone.

Sometimes a comment is not intended to be a criticism but can be perceived as such by the patient. These comments may include "Who did this to you?" or "Why did the other dentist do or not do something?" In this scenario, demeanor and context play a role in whether the patient translates a comment about another's work into "Somebody did something wrong." Accordingly, care should be taken when commenting about another dentist's treatment so as not to imply that you are being critical.

Jousting is commonly seen in situations involving a second opinion, a referral to a specialist, or subsequent treatment. Data has shown that jousting is most noted in cases involving restoration, implants, and crowns.

The Relationship between Jousting, Patient Dissatisfaction, and Malpractice Claims

Critical comments can validate patient dissatisfaction, plant a seed that something was done wrong, and eventually lead to a malpractice claim. Cases involving jousting have been shown to be outpacing other types of malpractice cases year after year¹. Data has shown that jousting cases account for 15% of all cases and 16% of total dollars paid out². Similarly, cases involving jousting and documentation issues have been shown to be 18% more expensive to resolve than the average of all other cases³.

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In essence, the critical comments that constitute jousting can make it easier for the malpractice attorney to prove their case. The criticizing dentist will likely have their chart requested and be subpoenaed for a deposition and possibly for trial. Under oath, the critical comments will be explored in exhausting detail and used in the prosecution of the malpractice case.

Case Study: A Bridge Too Far

This case involves 54-year-old female who presented to our insured for a consultation to replace old fillings and a preexisting three-unit bridge from #2-#4. The plan was to place a new three-unit bridge porcelain fused to a high noble crown abutment. During the exam, pulp decay was noted. The teeth were prepped and a provisional bridge was made that was placed with temporary cement.

The patient was seen a few weeks later for try-in, and the bridge was sent back to the lab for adjustments.

The patient returned a month later with complaints of pain at #4. The dentist took films and confirmed root canal treatment (RCT) was needed. The dentist started the RCT but did not finish it due to inflammation of the pulp. A referral to an endodontist was given for completion of the RCT. As per the referral letter, the patient completed RCT treatment with the endodontist a few days later.

While the dentist's office made multiple attempts to contact the patient to return for final bridgework, the patient subsequently went to another dentist for a second opinion. This dentist was highly critical of the insured's preparation of teeth #2 and #4. She commented that she "couldn't believe that tooth #4 was like that, that there was no tooth anymore" and even suggested peer review to the patient to try to recover fees paid to the first dentist.

1. Data source: MedProGroup dental cases closed with >= \$50,000 total dollars paid (expense + indemnity), 2009-2019

2. Id.

3. Id.

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The patient did not want to go to peer review, so the second dentist reprepared the teeth and replaced the temporary bridge with a new one. Ultimately, the patient had crowns placed at #2 and #4 and an implant at #3.

This dentist was highly critical of the insured's preparation of teeth #2 and #4.

The patient filed a lawsuit alleging that the defendant negligently overprepared teeth, performed unnecessary RCT, provided an ill-fitting bridge, and failed to recommend an alternate treatment plan of the implant at #3.

The defense experts opined that it was wrong for the subsequent dentist to criticize the preparation of the first dentist, as she had no idea what the teeth looked like to begin with. The experts also opined that the temporary bridge placed by the first dentist was ill fitting, but it was only a provisional and not the permanent bridge. Unfortunately, the first dentist's records did not document discussions with the patient regarding alternate treatment plans, nor did they have an informed consent for the RCT.

The experts also opined that the temporary bridge placed by the first dentist was ill fitting, but it was only a provisional and not the permanent bridge.

The District Claim Committee agreed that, while it seemed that the teeth were not as overprepared as indicated by the subsequent dentist, the insured's records were problematic. The plaintiff's demand was \$75,000, and the case was ultimately settled for \$26,000.

In this case, the second opinion dentist's criticism of the tooth preparation, as well as the suggestion of peer review, validated the patient's dissatisfaction and clearly encouraged the patient to bring a malpractice claim. In addition, the facts illustrate how jousting, connected with documentation issues, can lead to the settlement of a potentially defensible case.

continued on page 7 ›



UNDERWRITING UPDATE

New Discount: Waiver of Consent to Settle

MLMIC Insurance Company is committed to offering choices to policyholders and is making a new policy discount available to dentists — Waiver of Consent to Settle, which will provide a 5% reduction in annual policy premiums beginning November 1, 2022.*

Current MLMIC dental policyholders can choose to add the discount upon renewal of their MLMIC professional liability policy. Those with a renewal date on or after November 1, 2022, will receive notice regarding the availability of the new Waiver of Consent to Settle option and the form that needs to be completed to record their choice. MLMIC must receive the completed Waiver of Consent to Settle form by the required deadline to ensure the policyholder's choice is reflected on the renewal policy.

New applicants can choose to have the 5% premium discount for waiving their right to consent to settle on the last page of their application for coverage submitted as of November 1, 2022.

"Under the existing MLMIC policy structure, the decision of settling a claim or taking it to trial lies solely in the hands of our valued policyholders, and that choice will continue. We know it is greatly empowering to policyholders to have the final say in the resolution of a claim," said Nicole Lombardo, MLMIC Underwriting Senior Manager. "But we understand that policyholders may also appreciate the savings opportunity now available with the new Waiver of Consent option. MLMIC prides itself on vigorously defending the interests of our policyholders, and that will never change," Ms. Lombardo added.

If you have any questions or would like to apply for coverage, please contact the MLMIC Dental Team at **(800) 416-1241** or at dental@mlmic.com.

**Waiver of Consent to Settle discount will be applied upon renewal for existing MLMIC Insurance Company policyholders with renewal dates on or after November 1, 2022, who choose this option and return the Waiver of Consent form. New applicants can elect to apply this discount on the application for coverage, and it will be available upon issuance of a new MLMIC Insurance Company policy.*

RISK MANAGEMENT CHECKLIST #4 — OFFICE POLICY AND PROCEDURE

HANDLING PATIENT COMPLAINTS PROPERLY

Patient satisfaction is an integral part of every clinical setting. Dissatisfaction with dental care may be a harbinger of malpractice litigation. When you receive a complaint about care, how you handle the situation may directly impact the potential for any future litigation. All dental practices should have a policy or protocol in place to address patient complaints.

	YES	NO
1. One individual has been identified and consistently used as the primary person to address patient complaints. This is often the office manager.	<input type="checkbox"/>	<input type="checkbox"/>
2. All staff know to whom complaints should be addressed, as well as what information constitutes a complaint that requires attention or intervention by that person. This, at a minimum, includes: <ul style="list-style-type: none"> • Written or verbal complaints regarding care • Billing or payment issues that involve concerns about the clinical care • Letters of complaint from third-party payors, NYS Departments of Health or Education, or other regulatory entities. Counsel is retained for assistance in formulating written responses to such agencies. 	<input type="checkbox"/>	<input type="checkbox"/>
3. Effective communication skills are essential when addressing a patient complaint: <ul style="list-style-type: none"> • Concern for the patient’s condition and well-being is expressed • Communication is never adversarial or defensive • Active listening is used, and questions are asked when appropriate • Judgmental comments about patients and their families are avoided • Negative remarks about staff, dentists, or other providers are avoided • Complaints are investigated, and follow-up is performed as indicated 	<input type="checkbox"/>	<input type="checkbox"/>
4. Conversations with patients are documented in the record. The patient is quoted when documenting their concerns.	<input type="checkbox"/>	<input type="checkbox"/>
5. Letters of response to complaints are concise and simple. A copy of the written response is kept in the patient’s record.	<input type="checkbox"/>	<input type="checkbox"/>
6. When complaints involve clinical issues or are complex, dentists or other providers are involved in addressing the situation.	<input type="checkbox"/>	<input type="checkbox"/>
7. Attorneys’ requests for records may be an indication of a patient’s unhappiness. The patient’s record is reviewed in conjunction with these requests in an effort to assess the potential for litigation.	<input type="checkbox"/>	<input type="checkbox"/>
8. Guidance is considered when presented with unusual or difficult situations. MLMIC staff is available to assist insureds with handling complaints, formulating responses, and determining potential exposure to claims of malpractice.	<input type="checkbox"/>	<input type="checkbox"/>
9. Contact with MLMIC or our attorneys is never documented in the patient’s record.	<input type="checkbox"/>	<input type="checkbox"/>

The attorneys at Mercado May-Skinner are available to assist you in the proper handling of a patient complaint. Contact Mercado May-Skinner in Syracuse at **(315) 428-1380**, Colonie at **(518) 786-2880**, Long Island at **(516) 794-7340**, or call **(877) 426-9555** toll-free.

◀ *Medieval Times: Jousting in the Dental Arena, continued from page 4*



The Ethical Considerations of Jousting

The American Dental Association's Principles of Ethics and Code of Professional Conduct provides, in pertinent part,

"Patients should be informed of their present oral health status without disparaging comment about prior services. Dentists issuing a public statement with respect to the profession shall have a reasonable basis to believe that the comments made are true."⁴

Similarly, the Principles of Ethics and the Professional Code of Conduct of the New York State Dental Association provide, in pertinent part,

"A dentist should exercise care that comments about a prior dentist are truthful, informed, and justified, and this might include consulting with the prior dentist to discuss the circumstances and conditions under which treatment was performed."

Accordingly, it is abundantly clear that comments, whether verbal or written, about another dentist's treatment must be truthful, informed, justified, and

nondisparaging. Dentists should understand that patients have access to their dental chart, and critical comments made in the chart can violate the above ethical provisions.

The question arises whether a dentist can or should comment about work done by another dentist. The general answer is yes, subject to the ethical provisions set forth above. In fact, dentists have an ethical obligation to inform patients of their findings. These findings should be communicated in an informed, factual manner that avoids finger-pointing and disparaging comments. As a final matter, though, while there is nothing in the ethical code that obligates a dentist to comment upon or critique another dentist's treatment, dentists are required to report instances of gross negligence to the appropriate governmental agency.⁵

In fact, dentists have an ethical obligation to inform patients of their findings.

4. https://www.ada.org/-/media/project/ada-organization/ada/ada-org/files/about/ada_code_of_ethics.pdf?rev=86aeaa6fb0d0467f8a380a3de35e8301&hash=89BAA88FB9305B8F134414E337CAE55A

5. Id. NYS ED. Law. 6530



Practical Guidance to Avoid Jousting

It is important that a subsequent treating dentist get the whole story. In addition to your findings and what the patient has said, get the patient's permission to communicate with the other dentist to determine the circumstances surrounding the treatment. This can include a review of previous dental records and films. You may learn that the patient was noncompliant or that the dentist was not involved in that aspect of the treatment.

Communicate your findings to the patient in a factual manner. Since you did not participate in the other treatment, discuss your findings and potential treatment plan with the patient. Exercise care that comments about other dental treatment are factual, truthful, and justifiable. Document your findings and communications in the dental chart objectively.

Document your findings and communications in the dental chart objectively.

In general, differences in opinion or preferred treatment do not necessarily indicate poor treatment. Exercise care in discussing what you would have done differently so as not to imply that something was done wrong, or a better result could have been possible.

Refrain from writing "To whom it may concern" letters that intentionally or unintentionally criticize another dentist's treatment. It should be noted that

there is no confidentiality in such letters or the comments contained therein. Therefore, these letters can be used as the foundation for malpractice claims and reports to governmental agencies. Keep in mind that any critical comments that are not truthful or justified can result in an ethical violation against the dentist author. In addition, the dentist author can be questioned at a deposition about the veracity and accuracy of such comments.

Conclusion

Patients are dependent on the dental profession to provide them with factual and substantiated information about their oral health status. Jousting helps neither patients nor the dental profession. In fact, by its definition, jousting is destructive to patient faith in the dental profession, as well as being a contributing factor to encouraging malpractice claims. Dentists should refrain from the temptation to unjustly criticize another dentist's treatment and leave jousting back in medieval times.



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FROM THE BLOG

MLMIC's dental blog provides ongoing and up-to-date news and guidance on important events and announcements that affect the practices of our dentist and oral surgeon policyholders. You can also sign up to receive MLMIC's Dental Impressions — featuring the latest MLMIC Insurance Company news and links to relevant and valuable industry articles.

AUGUST 15, 2022

How Long Does a Patient Have to Sue for Dental Malpractice in New York State?

How long a patient has to sue a dentist for dental malpractice is governed by the statute of limitations. The application of the statute of limitations can be confusing and a source of misunderstanding. From a legal perspective, it's very important for dentists to know the basics and realize its complexity so they can reach out to their dental professional liability provider when such questions arise.

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AUGUST 10, 2022

The Importance of Documenting Consent in Dentistry

It's vital that dentists understand the importance of documenting consent in dentistry. The law and best practices require that informed consent be obtained before treatment begins on a patient. The failure to do so may result in malpractice liability.

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