

# The EDIC Practice Risk Management Program "BY DENTISTS, FOR DENTISTS"®



EDIC believes that risk management should be practiced every day in a dentist's practice to prevent medical malpractice insurance claims. In fact, since 1992, we know that good risk management practices help prevent medical malpractice lawsuits and claims.

While we cannot prevent every medical malpractice insurance claim, we are diligent in our efforts to minimize the number of professional liability claims. This is why we believe in risk management education and practices, not only for the newly graduated dentist, but also for the seasoned dentist.

As a value-added benefit for our EDIC insured's, we provide various risk management materials such as whitepapers, case studies, our bi-annual newsletter *On the Cusp*, as well as our EDIC Clinical e-Bulletin on emerging and cutting-edge risk management topics.

We encourage our dentist members to call our Risk Management team at any time if they have questions, a doubt or a pending issue. Please feel free to call our toll-free number 1-800-898-3342 for immediate concerns. Or, email us with a question or concern at [info@edic.com](mailto:info@edic.com).

**Look for EDIC's Spring and Fall Webinar Series to earn you FREE CEU's!**



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## Dentist vs. Patient Responsibility

### AN EDIC CASE STUDY

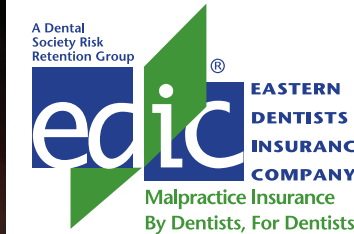
On March 20, 1997, the patient, a fifteen-year-old male, was referred by his orthodontist to an oral surgeon for treatment of a cyst associated with tooth #32. On July 7, 1997, tooth #32 was extracted and the cyst was removed. The cyst was determined to be an odontogenic keratocyst. This type of benign cyst has the highest recurrence of all jaw cysts and its growth potential is not due to osmotic pressure differences but to some unknown growth factor or enzyme. At a follow-up appointment, the patient was healing well and the oral surgeon discussed the possibility of a recurrence with the patient's mother. The oral surgeon stated that he would follow the patient and take a panoramic radiograph annually.

The patient was not seen by the oral surgeon for three years. On July 5, 2000, the patient was seen at our insured's general dentist office. The general dentist did an exam and prophylaxis. A discussion was held with the patient and his mother. They stated a cyst had been removed in 1997, but they couldn't recall what type of cyst was removed. The general dentist requested that the mother obtain the records and radiographs from the oral surgeon, and the patient's mother agreed to do so.

The patient was then seen by the oral surgeon on August 21, 2000. He was referred by his orthodontist for extraction of his remaining three third molars, teeth # 1, 16, and 17. A panoramic radiograph was taken, and on January 15, 2001, the three teeth were extracted with no complications.

Subsequently, the patient was seen by the general dentist for exams, prophylaxes, and bite wing radiographs in 2001, 2002, and 2004. The requested oral surgeon's records were never provided to the general dentist, nor did he follow up at any time with the patient's mother in an effort to obtain the records and radiographs.

On June 16, 2005, the patient presented to the general dentist with a complaint of pain and tenderness with bitter drainage in the lower right. The patient was referred back to the same oral surgeon, who then in turn referred the patient to a second oral surgeon. A CT scan was taken, and it revealed a large cyst of the right posterior mandible that presumably was a recurrence of the original odontogenic keratocyst. The cyst had destroyed mandible bone that involved three adjacent teeth, having established a fistu-



**Barry Regan** | Vice President of Claims and Risk Management



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lous tract from the cyst's lumen to the oral mucosa surface. A surgical operation was performed to remove the cyst and teeth # 29, 30, and 31, and the mandible was resected, with bone grafts harvested from the patient's hip placed along with reconstruction plates. Eventually, the area was restored with three implants and crowns.

In February of 2007, the patient filed suit against the general dentist and the first oral surgeon. The allegations against both were that neither party had any treatment plan in place to check the area of the cyst on an annual basis to detect any recurrence. Although the oral surgeon stated he would in fact follow up with annual panoramic radiographs, he did not do so. The plaintiff further alleged that the general dentist negligently transferred his responsibility to follow up with the oral surgeon to the patient and his mother. The patient alleged that both doctors' negligence allowed the tumor to grow unchecked, whereas annual check-ups would have detected the cyst at a much smaller stage, resulting in less invasive surgery. The patient alleges that the surgery lasted ten hours and resulted in the patient being hospitalized for three days. Upon discharge, the patient's jaw was wired shut for approximately eight weeks, during which time the patient was being fed through a feeding tube. Three weeks after discharge, the patient was readmitted to the hospital suffering from an infection. The patient was discharged after three days, and was on IV antibiotics for an additional month. The patient was left with a slight, but permanent, lack of symmetry between his left and right mandible, as well as a scar from the chin to the angle of the mandible. The patient alleged medical and dental bills in the amount of \$60,000. The patient's demand to settle the case against both the oral surgeon and the general dentist was \$500,000. EDIC had the case reviewed by an expert. The expert opined that the patient's dental clinicians should have been more vigilant in confirming the type of the mandibular cyst and should have ensured regular monitoring. The expert further stated that the oral surgeon had the opportunity to realize his error of not monitoring the area of the cyst's removal when he performed the surgery to remove the wisdom teeth in the other three quadrants; however, he failed to take further diagnostic films, which was below the stan-

dard of care. Lastly, the expert was critical of the general dentist for failing to follow up on his initial request of the patient's mother to obtain the oral surgeon's records. The expert opined that it is ultimately the treating dentist's obligation to obtain the needed radiographs and records, and this duty can not be delegated to the patient. By not following up for the requested records, the general dentist was not aware that the cyst which was removed had a high rate of recurrence, and never took a panoramic radiograph of the area to determine if the cyst had in fact recurred. The bite wing radiographs that the general dentist did take would not show a recurrent lesion.

EDIC only insured the general dentist. EDIC contacted the insurer for the oral surgeon, but they believed they had a defensible case, and were not interested in a joint pre-trial settlement. EDIC asked for and received permission from the general dentist to settle the case. EDIC contacted the plaintiff attorney and began to discuss the settlement of the case solely against the general dentist. EDIC was able to settle the case in the amount of \$150,000 in exchange for a full release of the general dentist. The case will now go to trial solely against the oral surgeon. The jury will not be told that the general dentist settled, nor will they know the amount of the settlement. However, any verdict rendered against the oral surgeon would then be reduced by the judge in the amount of the \$150,000 settlement.

## CASE STUDY

# Risk Management Comments

In almost every dental malpractice case, there is a degree of comparative negligence on behalf of the patient. At trial, a jury would be instructed to put a percentage on the comparative negligence of the patient. If that percentage is 51% or more, then the patient would not be awarded any judgment. In this case, an argument could be made that the patient and his mother were told by the oral surgeon that they needed to be followed annually, but they failed to comply with his recommendation. Also, the general dentist told the patient's mother to obtain the oral surgeon's records, and she failed to do so. The key question in this case, therefore, is did the patient's and his mother's comparative negligence exceed that of the two dentists?

EDIC's expert did not think so. The dentists certainly have more training, knowledge, and experience with cysts than a patient would. The oral surgeon knew exactly what type of cyst he was dealing with, and the high rate of recurrence involved. Our expert clearly believed the duty for follow up could not be delegated to the patient's mother by either the oral surgeon or the general dentist.



# FAQs

### **I had an untoward incident in my office. What should I do?**

Call the Eastern Dentists Insurance Company (EDIC) VP of Claims and Risk Management, Barry Regan, to report the incident and to seek guidance. 800-898-3342

### **I pulled the wrong tooth. Should I tell the patient?**

Yes, by all means. It will only complicate matters later if you fail to tell the patient at the time of the incident. Document your record that you informed patient and discussed corrective options.

### **I did endodontics on the wrong tooth. Can I still charge for it?**

No, the implied contract here between you and the patient was to perform endodontics on another tooth. Since you did not uphold your end of the bargain, there should be no obligation for the patient to pay for this mistake on your part.

### **Am I liable if there is an anesthesia incident in my office even though I did not administer the anesthesia?**

The question presumes that there is another dentist or there are other dentists working in your office and that one of them made a mistake in administering anesthesia. The question of your liability revolves around the legal relationship between you and that dentist. If you, if any way, supervised his or her work on a regular basis, you could be held liable under a theory of negligent supervision. Another aspect of this incident is that if that dentist was considered to be your employee, you may be held liable for his actions on the theory of what is called "vicarious liability", i.e., liability for the acts of another person who is subject to your direction and control in the work that he or she is performing.