The stages of a malpractice suit

Dental malpractice suits can be a costly, time-consuming experience. Unfortunately, no matter how strong your clinical skills are, you need to be prepared in the event that one day you may be involved in such litigation.

By Edward J. Rowles, JD

Do you think a malpractice suit is something that happens to someone else? If so, think again. Given our litigious society, the chances are you will be a defendant at sometime during your career despite your best efforts.

Simply because you are sued does not mean you rendered substandard care. In the end, you cannot control whether a patient (with or without legal help) files a written complaint against you. You can control the quality of your dental services which, to a large extent, can reduce the chances of a lawsuit. You can also control how you respond to a claim, which is in part affected by your knowledge of the legal process.

Most dentists have little understanding beforehand of what a suit involves. The information provided in this article is not legal advice and any dentist who is sued should consult with their individual attorney. Nonetheless, it is hoped this article will assist dentists in understanding how a dental malpractice suit is litigated and resolved.

Unfortunately, the typical malpractice suit in Chicago lasts three or more years. Some suits end quickly but most are settled after significant trial preparation. Few suits make it to trial and fewer still are the subject of an appeal. Nonetheless, every case potentially involves several distinct stages. These include: the defendants initial notice of the claim; the initial gathering of all relevant documents; your initial meeting with your attorney and the preparation for formal discovery, including depositions; responding to the complaint; formal discovery; and resolution of the claim either through pre-trial motions, at trial, on appeal or at any stage of the suit through settlement.

Initial notice of the claim

Usually, a dentist's first realization of a pending lawsuit is the appearance of a sheriff or process server at your office door with the summons and complaint. However, disgruntled patients frequently make their feelings known long before they contact an attorney. If the patient seeks the services of an attorney, the attorney will first request a copy of the

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ıvolves subpoenas to prior or subse-quent dentists. A defense attorney in a case is not allowed to converse with ny of the plaintiff's other dentists and he only way they can learn relevant facts is to issue a records subpoena or a subpoena for the dentists' deposition.

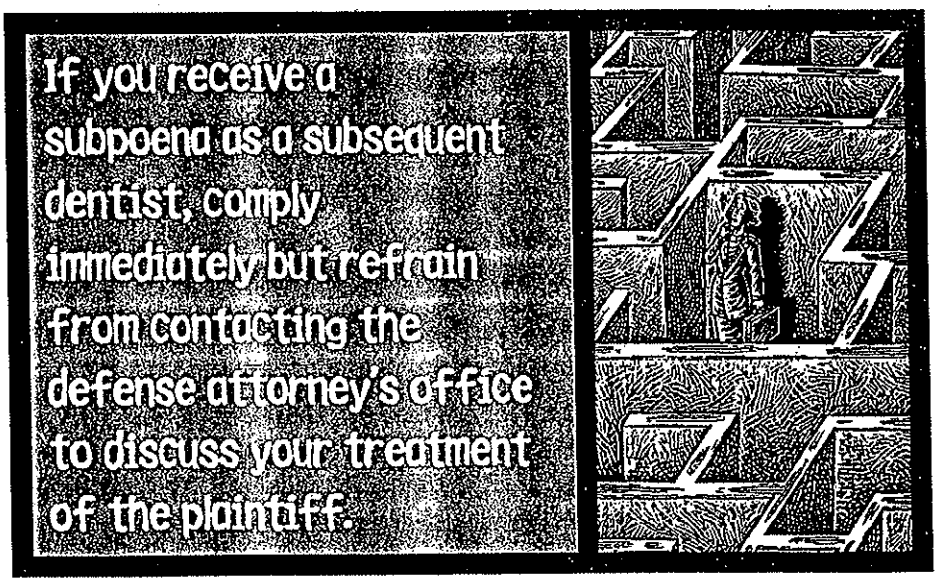
If you receive a subpoena as a sub-sequent dentist, comply immediately but refrain from contacting the lefense attorney's office to discuss our treatment of the plaintiff. Also, if you are a defendant in a case and a subsequent treater who receives a sub-poena contacts you, don't discuss the case with the other doctor. Your state-ments to individuals other than your ttorney are not privileged and can be liscovered during litigation.

The other major type of discovery is :alled oral discovery. This involves the ıse of depositions. Each party is usual-ıy required to submit to a deposition upon reasonable notice from the oppo-ıent. If you are sued you should expect to give a deposition. Also, any employees in your office who also had conversations with or treated the plaintiff may also be deposed. Other potential deponents include prior treaters, subsequent dentists, any opin-ion witnesses, including any doctors who are retained to give expert opin-ions at trial, as well as any of the plain-tiff's family members or other individu-als who may have knowledge or opin-ions regarding your treatment or the plaintiff's condition.

In Illinois each side is required to disclose the witnesses they will call at trial, including fact witnesses and opin-ion witnesses. Your attorney will determine which witnesses need to be deposed. Any statements made at a deposition are made under oath. If the party or witness testifies contrary to the prior deposition statement at trial, they will be impeached with their prior inconsistent statement. Depo-sitions are helpful to lock a party into a version of the facts so that the other party understands what statements will be made at trial.

You should expect to meet with your attorney to prepare for your deposition since it is a very important crossroad in the case. In addition to reviewing your records and any prior written statements that you have made in the case, your lawyer will go over with you the deposition process and provide you with helpful guidelines which will assist you in giving accurate testimony.

No two attorneys prepare their wit-nesses in the same manner, but there are some helpful rules for giving a deposition. The scope of this article does not allow for a detailed discussion of these rules, but they are as follows:



• Listen to the question. Make sure you understand the question, and take the time to consider the ques-tion completely before responding.

• Answer only the question; do not volunteer information that is beyond the scope of the question.

• Don't hesitate to answer that you don't know or you don't recall if that is in fact the case.

• If you have a basis to give a rea-sonable estimate in response to a ques-tion, do so, but do not guess or specu-late.

• Don't accept opposing counsel's statements that are part of the ques-tion as true if they are not true.

• Analyze documents carefully before answering questions about them.

• Do not argue with the examining attorney.

• Pay attention and do not become inattentive or distracted once you have become comfortable during the depo-sition.

• Correct any known mistakes immediately during the deposition.

• Listen to any objections that your attorney makes to questions during your testimony.

• If you make assumptions in your answers, state them so your answer is understood.

• If a yes or no answer would be misleading, be sure to give an explana-tion as part of your answer to the ques-tion.

• If you are interrupted during your answers to questions, be sure to finish your answer before responding to another question.

• Do not take medications before your deposition or tell your attorney if you do so.

• Don't hesitate to request a recess during the exam if you become tired, unwell or need a break.

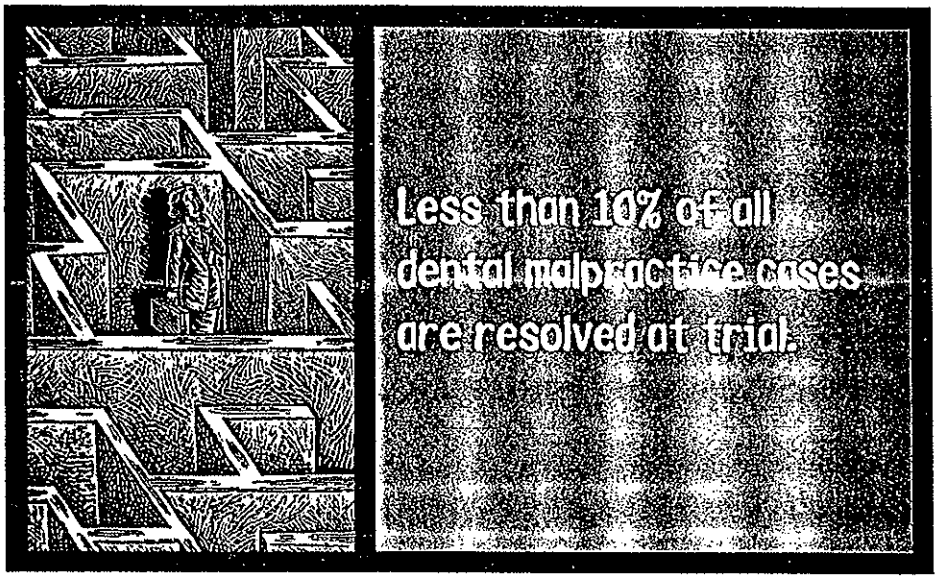
• Get plenty of rest the night before and do not skip any meals beforehand.

Most of the guidelines are designed to assist you in telling the truth during your deposition. Telling the truth requires you to listen and understand the question. Telling the truth requires

that you answer the question completely and refrain from volunteering information beyond the scope of the question or commenting on information that you do not have direct personal knowledge of. If you misunderstand a question, volunteer information beyond the question or testify to facts you actually don't know to be true based on assumptions rather than your own knowledge, then you are not providing accurate information at your deposition. Telling the truth requires a complete answer based on your own knowledge, but it does not allow for a guess, conjecture or speculation.

If you spend the time to review all relevant information and go over the guidelines for giving a deposition with your attorney beforehand, you will have no problem complying with the requirement that you submit to a deposition and complete your part in this stage of a lawsuit.

Finally, you should note that the Illinois Supreme Court has recently implemented rules governing discovery. In Illinois, depositions must be completed within three hours unless a longer period is allowed by the court or the parties stipulate to waive the three hour rule. In some cases the rule is waived, but in other cases the parties insist on strict compliance with this limitation. Remember, the three hour rule works both ways. If your attorney only allows the plaintiff to depose you for three hours, then the plaintiff's attorney will not stipulate to a longer period for your lawyer to depose your former patient. Hence, the three hour rule is usually waived for purposes of the parties' depositions.



Resolution of the claim

Ultimately all lawsuits are resolved. There are a number of ways that suits are concluded. The bulk of all dental malpractice lawsuits, more than 90%, are resolved by way of settlement. A suit can be settled at any stage during the litigation. Sometimes actions are settled before they are even filed but more commonly after some discovery has been completed. Some cases even settle after the verdict.

There are any number of reasons why the parties may agree to settle a suit. Often dental malpractice lawsuits are settled for economic reasons. Your insurance company is required to provide you with a defense and to indemnify you in the event of a loss. Your attorney's bills are paid by the carrier. If the cost of defending the suit exceeds the plaintiff's demand, your insurance company, depending upon its overall corporate policy, may be open to considering a settlement even though the case is otherwise defensible. Some argue that settling lawsuits under this scenario simply encourages subsequent suits. This argument has some merit. Nonetheless, when you are a defendant in a malpractice suit faced with uncertain exposure and the prospect of spending at least a week at a trial (which has some economic consequence to yourself as well), you are generally more apt to seriously consider settlement even though there may be a defense to the claim.

Of course, other malpractice suits settle simply because the defendant does face some exposure based upon her prior acts or omissions. Most cases do not involve clear liability or a clear defense. These suits are often settled simply because both the defendant dentist and the insurance company would rather "buy certainty" than risk the uncertainty of a verdict at trial.

Very few dental malpractice lawsuits are resolved by dismissal prior to trial or settlement. Successful motions to dismiss are usually based on the statute of limitations or statute of repose. These statutory requirements are outlined above. If the suit is filed too late it will be dismissed unless there is a dispute regarding a fact which determines the timeliness of the suit. Then the issue will be left to a jury. For example, if there is a dispute regarding when the plaintiff "knew or through the use of reasonable diligence should have known" of the existence of her injury for which damages are sought, then the jury will be required to determine this date and the case will not be dismissed based on the limitations period even though in the end the limitations defense may prevail after a trial.

In addition to a pretrial settlement or a resolution of the suit by way of a motion to dismiss, a suit can also be resolved prior to trial by way of a "nonsuit." This simply means the plaintiff has determined to voluntarily dismiss the suit. In general, the plaintiff has one year or the remaining period of limitations to refile the lawsuit. If the lawsuit is refiled, the plaintiff will again have to serve you with process

nd commence the proceeding all over again, although the discovery in the earlier case is often used in the subsequent litigation. Nonsuits occur in a relatively small percentage of dental malpractice suits.

Less than 10% of all dental malpractice cases are resolved at trial. There are a number of stages to every dental malpractice trial which are basically the same as any civil trial.

When the trial begins the attorneys participate in pretrial motions which set the ground rules for conduct of the trial. Your lawyer may have a basis to limit or exclude certain testimony from being presented before the trial even starts.

After pretrial motions are resolved, the court will proceed to what is known as voir dire, or jury selection, unless both parties waive the jury which is relatively rare. Jury selection is more of an art than a science and the stated goal at least is to obtain a fair and impartial jury that will consider the facts without undue bias or prejudice. Some attorneys retain consultants who claim to have a specialized expertise in jury selection to assist this process.

After the jury has been selected, each side will present opening statements. The parties have an opportunity in opening statements to provide the jury with the conceptual framework for the subsequent evidence. In other words, your lawyer will present your theory of the case to the jury which should be supported by the subsequent testimony of the witnesses and the documentary evidence. Many experts consider the opening statement the most important stage of the trial.

After the opening statements the bulk of the trial will consist of the testimony of witnesses. The plaintiff will first present his or her witnesses which each defendant is allowed to cross examine. After the close of the plaintiff's case then the defendants proceed to present their witnesses as well.

If you are a defendant you should expect to be called by the plaintiff's attorney as an adverse witness. Your lawyer may then question you during the plaintiff's case and again submit you for another direct exam during your own defense. Common witnesses at trial include the plaintiff, any defendants and any opinion witnesses including subsequent treaters or retained experts. Frequently it can take one to two weeks for the parties to complete the examination of witnesses at trial.

After all the witnesses have been questioned and documents have been considered for admission into evidence, the plaintiff's attorney and your attorney will give closing arguments to the jury. During closing arguments your attorney will point to the evidence which favors your defense in an effort to persuade the jury to find in your favor. Obviously, the plaintiff's attorney will do exactly the opposite. The theory at least is that each side's vigorous presentation of the favorable facts and evidence will allow the jury to review and assess all important facts and information and reach a proper outcome. No two attorneys will present a closing argument in the same manner. Also, many pundits believe juries have frequently made up their mind before this stage of the lawsuit. While that is sometimes no doubt true, it is not always true and the closing arguments must be approached as a very crucial stage of the trial.

After the closing statement, the court will read to the jury the law which applies to the case, commonly referred to as jury instructions. In general, these instructions will outline the legal elements of the malpractice claim, including duty, breach, proximate cause and recoverable damages, as well as any applicable defenses which are at issue in the suit.

After jury instructions, the jury will retire to discuss the case and hopefully reach a verdict. The verdict must be unanimous unless the parties agree otherwise. If the jury is unable to reach a verdict, then the court declares a mistrial which requires another trial absent a settlement. Thankfully, mistrials are relatively rare.

Theoretically, the final stage in a lawsuit could involve an appeal. Appeals are even more infrequent than trials. Usually if a dental malpractice case is appealed, it is appealed following dismissal of a suit prior to trial. In Illinois, an appeal of a suit can add eighteen months or more to the life span of the litigation. Most dental malpractice appeals involve issues concerning the statute of limitations, jury instructions or issues concerning pretrial discovery orders.

Conclusion

The intent of this article was to provide you with an overview of what is involved in a dental malpractice lawsuit. Again, the information in this article is not legal advice and you should consult with your lawyer if you are involved in a suit. Nonetheless, it is hoped that after reading this outline of a dental malpractice case, you have a better understanding of the litigation process. If so, you are probably more motivated than ever to avoid the process altogether. In the event you are sued, it is hoped this article will better equip you to cooperate with and assist your legal counsel during your defense in a timely manner.

The information contained in this article should not be construed as legal advice. It is a discussion of the way most malpractice suits proceed in Illinois. Dentists should seek the counsel of their own attorney if they are sued for malpractice.

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