

Guidelines for Protecting a Dental Practice From Liability Claims Related to COVID-19

By William Hassett, Esq.

At the outset of the COVID-19 pandemic, New York State declared a public health emergency that allowed Governor Andrew Cuomo to take swift action to mitigate the spread of the highly contagious corona virus.

This was followed by subsequent executive orders that focused on reducing social interactions and included the closure of all dental practices throughout the state. Subsequent directives clarified that dental offices could remain open for the purposes of emergency treatment from March 20, 2020, until offices were permitted to fully reopen on June 1, 2020. As a result of the temporary closure of many dental practices, numerous ongoing treatment plans were disrupted and routine examinations were canceled, resulting in the postponement of dental treatment that did not rise to the level of an emergency.

As a result of the re-entry into practice on June 1, 2020, a concern has arisen about claims related to COVID-19 exposure made by patients who may contract the virus. While this concern is certainly legitimate, an overlooked, likely greater concern is the potential for claims related to delays in diagnosis and treatment that could stem from the closure of dental practices during the peak of the pandemic in New York State.

There Is No Qualified Immunity from Liability Claims

Pursuant to Executive Order 202.10, qualified immunity for civil and criminal liability was given to medical professionals who provided services in support of the state's response to the COVID-19 outbreak. These protections were subsequently passed into law by the Emergency Disaster or Treatment Protection Act (EDTPA). The EDTPA codified that the act also extended immunity to apply to the "care of any other individual who presents at a healthcare facility or to a healthcare professional during the period of the emergency declaration."

However, a subsequent amendment of the act rolled back this broad immunity and limited its application to the care and treatment of COVID-19 patients. Regardless of the scope of the immunity provided, dental professionals were omitted from the act's definition of healthcare professionals and therefore not provided the protection of immunity from claims arising during the crisis.

The lack of immunity under the EDTPA notwithstanding, the frequency of claims arising from the contraction of the corona virus in the dental office will likely be minimal.

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From the President

My Goals for 2021 Are Possible with Your Help

By Dr. Arelys Santana



the drastic changes in our life.

We can now see how fortunate we are. I am a mother of three great children, Katherine, Keisha and Kevin. I am very proud of them being in the educational, dental, and business fields.

I am very excited and passionate

As all of us know, it has one year since we were hit by the devastating pandemic of COVID-19. Some of us lost family, patients, friends, colleagues, or felt

about our new goals in this challenging year. It is ideal to continue to recruit new members and increase continued digital education credits, as well as updating our facility.

Thank God for guiding my life. I am already so happy and thankful to all of you for your support for the amazing event, the induction of ADA President-Elect Dr. Caesar Sebates on January 10, 2021.

I will be working closely with our executive director, Dr. Chad Ghani, and our officers and Board members. I believe that all of us, together, can fulfill our duties and reach our anticipated

membership goals. We value membership because we believe there is strength in numbers, and that is the key to making sure that our voices are heard.

We have been reaching out to other communities and people to distribute masks, goggles, scrubs and head dressing.

This has been a difficult year, but we will all be better if we work together, as I learned from Past President Dr. Prabhakar Koppikar. I will continue the goals and ambitious plans set by our previous presidents.

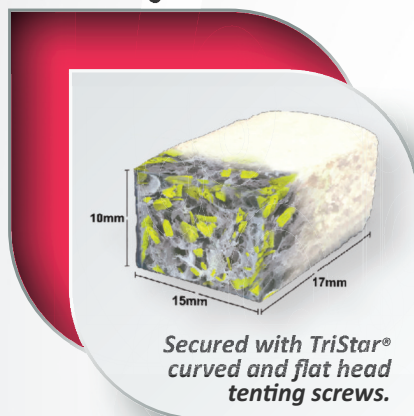
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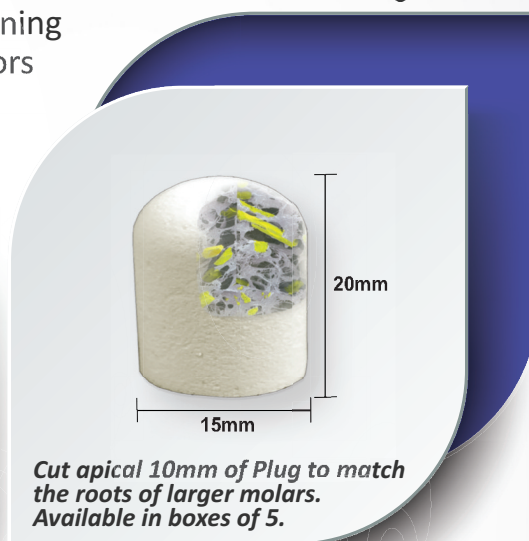
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The ADA, COVID-19 and My Practice

By Prabha Krishnan, member, ADA Council on Communications

With the total disruption of COVID-19 on all practices and lives nearly a year ago, we faced so much uncertainty.

The ADA helped me through the crisis by providing me with trusted, up-to-date information on [ADA.org/virus](https://ada.org/virus), which is a hub for all of its COVID-19 related resources. It includes the latest PPE info, SBA loan information, patient and staff safety and communications information—and it's still being updated daily, and free to members.

More recently, the ADA has focused on the vaccine and to continue to be the go-to source for member dentists on COVID-19. It is providing the latest information and developing new resources on vaccination to increase vaccine confidence and support the health and safety of dentists, team members, patients, and the public. In support of this strategy, the ADA created a new one-stop-shop "Vaccine" section in the COVID-19 Center housing clinical, scientific, legal and patient resources. It also developed a three-part action plan:

- Dentists getting the vaccine: in which the ADA successfully advocated for dentists to receive priority access to the vaccine. Other resources include COVID-19 employer and employee frequently asked questions to help you navigate vaccine issues with your team.
- Dentists giving the vaccine: including an advocacy toolkit to assist states in advocating for legislation authorizing dentists to vaccinate.
- Dentists recommending vaccination to patients: including resources in development to address vaccine hesitancy among patients.

In addition, the ADA has seen the emotional, physical and financial toll the pandemic has had on so many of us, and it's working to provide resources to help with these issues.

The ADA has developed these additional resources on [ADA.org/virus](https://ada.org/virus):

- Mental health resources including ways to deal with stress, build resilience and stay healthy.

- Physical health resources including ways to deal with PPE and ergo issues.

- Financial health resources, including how to protect your financial health during COVID-19, and other resources.

“

The ADA helped me through the crisis by providing me with trusted, up-to-date information

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I am proud of our QCDS, too! We have received prompt information on receiving the Covid19 vaccine and NYCDOH requirements for dental offices.

It is the persistence of the ADA, under the leadership of our own Dr. Chad Gehani, that dentistry is considered as an "Essential Service." We must be united to get through these tough times.

No matter what comes next, I know the ADA and the tri-partite will be there for me, with whatever support I need.

And I know they will be there for you too. Please renew your membership today. We are stronger together.

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A dental professional's substantial compliance with guidelines from the Centers for Disease Control and New York State Department of Health, in conjunction with proximate causation issues, will make such claims difficult to prove and unappealing to personal injury attorneys.

Apart from corona virus contraction cases, a lack of immunity protection for dental professionals could result in an increase of dental professional liability claims arising from breakdowns in communication, delays in treatment and diagnostic failure related to the two-and-a-half-month period of office closures caused by the pandemic. As practices resume the performance of non-emergent services, dental professionals must take steps to ensure continuity of care and prevent patients with existing dental issues from falling through the cracks.

Importance of Active Patient Chart Review

Prevention of breakdowns in treatment starts with a review of active patient records. Prior to the pandemic, studies have shown dental professionals saw on average 70 patients per week. It is impossible for a dental professional to remember the status of every active patient prior to their practices being shuttered. A brief review of dental records for active patients, those seen within one to two months before the March 20 closure, will help identify patients who may have had treatment plans disrupted or who may have ongoing dental issues that require follow-up treatment or evaluation. A claim based on a failed dental appliance, infection or other dental issue is far more likely to be viable than one based upon contracting the corona virus.

Patients who were in the course of ongoing treatment prior to the pandemic should be contacted and notified that the practice is operating with appropriate safety measures and that they require continued dental treatment. These efforts, as well as the substance of conversations with patients, should be documented in the dental record. If a practice is unable to contact a patient, a notification should be sent in writing (via regular mail and certificate of mailing) that outlines the patient's status at the last encounter, the outstanding treatment and the risks associated with failing to resume dental care.

Emergent Dental Treatment During the Temporary Closure

Executive Order 202.6 required the closure of all nonessential businesses. A subsequent clarification by New York State mandated that effective March 23, 2020, dental practices could remain open only for the purposes of emergency treatment. This mandated closure remained in effect until Governor Andrew Cuomo announced dental offices could reopen statewide on June 1, 2020. The American Dental Association has defined an emergency to include potentially life-threatening conditions requiring immediate treatment to stop ongoing bleeding or to alleviate severe pain or infection. Dental providers were also instructed to use their professional judgment in determining a patient's need for emergent care dur-

ing the period of required office closure.

During the time that dental practices were ordered closed, some practitioners ceased operations completely, suspended their liability insurance coverage and directed patients with emergencies to contact dentists who remained operational for emergent encounters only. In these instances, dental practitioners should follow up with the patient, as well as the dental provider to whom they were referred, to confirm the condition was addressed and to determine if any follow-up care is required. These conversations should be documented in the dental record. Dental professionals should also make sure the initial conversation with the patient concerning the emergent referral to an open dental practice is documented in the dental record. If not, the follow-up with the patient will provide an opportunity to document the history leading to the referral that transpired during the closure.

Dental professionals should also address any requests for treatment they may have received during closure that did not meet the standard of "emergent" and were deferred until after the office was opened for all circumstances of dental care. Where treatment was deferred as nonemergent, the dental record should contain documentation to support the practitioner's judgment, including the aspects of the patient's symptomology to support their reasoning. Of course, now reopened, dental professionals should make efforts to coordinate an evaluation with the patient.

Routine Examinations Not Performed

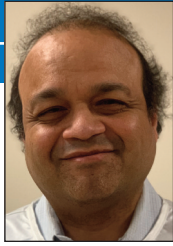
As a result of the 72-day period of dental practice closure, how many appointments for routine examinations and/or cleanings were canceled that have not been rescheduled or followed up by the practice? Diagnostic errors account for the second highest number of liability claims against dentists, of which oral cancer claims account for the majority of indemnity payments made.

Oral cancer screenings missed as a result of the lack of routine examinations, and the delays in following up with patients whose appointments were canceled, could potentially give rise to liability claims. Most practices have sent out notifications via mail or email informing patients that their practices are open. However, it is recommended that additional steps are taken to specifically notify patients to reschedule routine examinations that had been canceled. This can include a telephone call with appropriate chart documentation or, if necessary, a letter sent with certificate of mailing to confirm the efforts to contact the patient.

Referrals to Specialists

Dental professionals should also be mindful of situations where patients were referred for endodontic, periodontal, or even surgical treatment or evaluation prior to the closure of dental practices. Communication breakdowns between providers are always one of the leading causes of professional liability claims, and dental practitioners should take steps to

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QCDS, NYSDA Will Get Us Through COVID

By Dr. Viren Jhaveri, NYSDA trustee

By now, I imagine most of us have been inoculated with at least the first dose of the vaccine. What a tumultuous year we have had!

We all learned from the past year that nothing can be taken for granted. Today, in New York State, largely due to NYSDA's efforts, the dental profession, including staff, have been classified under group 1a for vaccination. Such is not the case in many other states in the country.

I vividly remember when the pandemic first hit and all in-person meetings, including council meetings, NYSDA's lobby day and the annual session of the House of Delegates, were conducted virtually. NYSDA swiftly formed a Strategic Planning Committee and a Crisis Management Committee and diligently adhered to their recommendations. NYSDA's Board adopted an interim vaccine administering policy and put the power back in the hands of the dentist to choose.

NYSDA's PPE gathering efforts paid dividends for all dentists during the time it was most needed. There were times when there were complainants, and I understand that for many of our members it was not only not being allowed to work, but the fear of the unknown.

Citing the need for better communications and different member communications preferences, the NYSDA board voted to hire the Baker PR firm for a nominal fee and on a short-term basis. At times, it seemed like NYSDA's COVID-19 webpage was in a constant state of flux and updates, much like our world. I am thankful to the leadership of NYSDA and I am looking forward to putting this pandemic behind us and carrying on with the lessons learned. Despite the challenges posed by COVID-19, NYSDA addressed multiple other issues in 2020.

I am pleased to report that the state approved a \$125,000 allocation to NYSDA for its Dental Demonstration Project. Additionally, Dental Anesthesia, as of May 20, 2020, is now a recognized dental specialty in New York State, and the state passed a new law changing the professional license title to "Registered Dental Assistant" from "Certified Dental Assistant."

I am happy to report that the NYSDA Journal will soon be entirely digital. In addition to its legal protection plan, NYSDA introduced an affordable Cyber Liability Program for its members. This program is due in large part to the efforts of the Information and Technology Task Force. The NYSDA board voted to endorse TDSC.com, a subsidiary of Henry

Schein, Inc., to allow NYSDA members to get group pricing when purchasing dental supplies. And, perhaps most importantly, the Board voted no dues increase for 2021.

I want to take a minute to thank each and every one of you for doing your part to help us get this far. Participation can be as simple as writing a check and being a member. Each and every role counts. Working with NYSDA's leadership throughout the pandemic and seeing the impact we had only reinforces my commitment to our organization and my given role. I hope it encourages many more members to participate actively and I look forward to seeing you all soon.

As always, if you have any questions, please do not hesitate to contact me. May the new year bring a renewed sense of hope, optimism and happiness for all of us.

... I am looking forward to putting this pandemic behind us and carrying on with the lessons learned.

TAX TIPS FOR DENTISTS

Congress recently passed "The Secure Act." This act raised the mandatory retirement distribution age from 70.5 to 72. It also removed the restrictions on traditional IRAs if you are still working past age 70.5. Now you can still do the traditional IRA beyond that age. There are new life expectancy charts for required minimum distributions. No RMD for 2020.

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confirm that any referred treatment or evaluation was completed. If so, this should be appropriately documented in the chart and should include a report from the specialist relative to their findings and any need for follow-up care.

Any discussions with the patient or the specialist concerning the evaluation should also be documented in the chart. Finally, if the evaluation or treatment has not taken place, the patient should be notified immediately to address this.

Changes in Circumstances for Patients

As a result of the COVID-19 pandemic, patients may have changes in insurance coverage, loss of income/employment or even increased fears that visits to dental offices could result in contracting the corona virus. These changes could result in patients transferring care to another dental professional, electing not to proceed with treatment or simply being noncompliant with a dental professional's recommendations.

If a patient has switched providers, it is important to memorialize in writing that they have elected to place themselves under the care of another dentist and offer to provide a copy of their dental record in compliance with state and federal privacy regulations. Similarly, missed appointments or episodes of noncompliance must be documented in the dental record.

Finally, in the unfortunate situation where a dental professional finds it necessary to discharge a patient from their practice, it is important to take appropriate steps to prevent claims of abandonment and to mitigate the potential for a claim arising from treatment that may be incomplete. The withdrawal from patient care notification should be undertaken in writing. When appropriate, reference should be made to noncompliance on the part of the patient, the need for continued dental treatment and the risks associated with the patient's failure to seek dental attention. Of course, dental professionals should always consult their liability insurer or counsel to provide guidance and assistance concerning the withdrawal from care process.

Patient Abandonment

Lastly, it bears mentioning that these potential areas of liability exposure could equally serve as a basis for a professional misconduct claim based upon patient abandonment. New York State regulations define unprofessional conduct to include "abandoning or neglecting a patient or client under and in need of immediate professional care, without making

reasonable arrangements for the continuation of such care, or abandoning professional employment by a group practice ... without reasonable notice and under circumstances which seriously impair the delivery of professional care to patients or clients." This provides further emphasis to dental professionals on the importance of dentist-patient communication and documentation to ensure that continuity of care has remained effective following the temporary closure or restriction of their practice.

The corona virus and efforts to contain its spread have created disruption and changes in practice unlike any other in the era of modern dentistry. As a result, dental professionals who have reopened their practice in New York State must be aware of potential breakdowns in patient care caused by the disruption of the patient-dentist relationship stemming from the extensive period of state-mandated office closure. By undertaking a review of active patient dental records, coupled with communication and documentation, dental professionals can identify issues in treatment and minimize the risks of professional liability claims arising from delays in treatment or failures in diagnosis.

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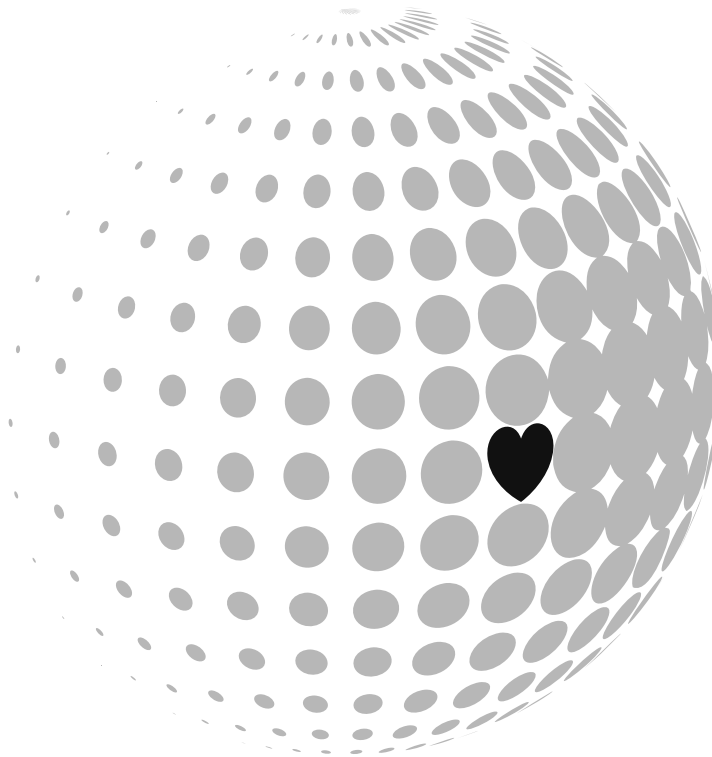
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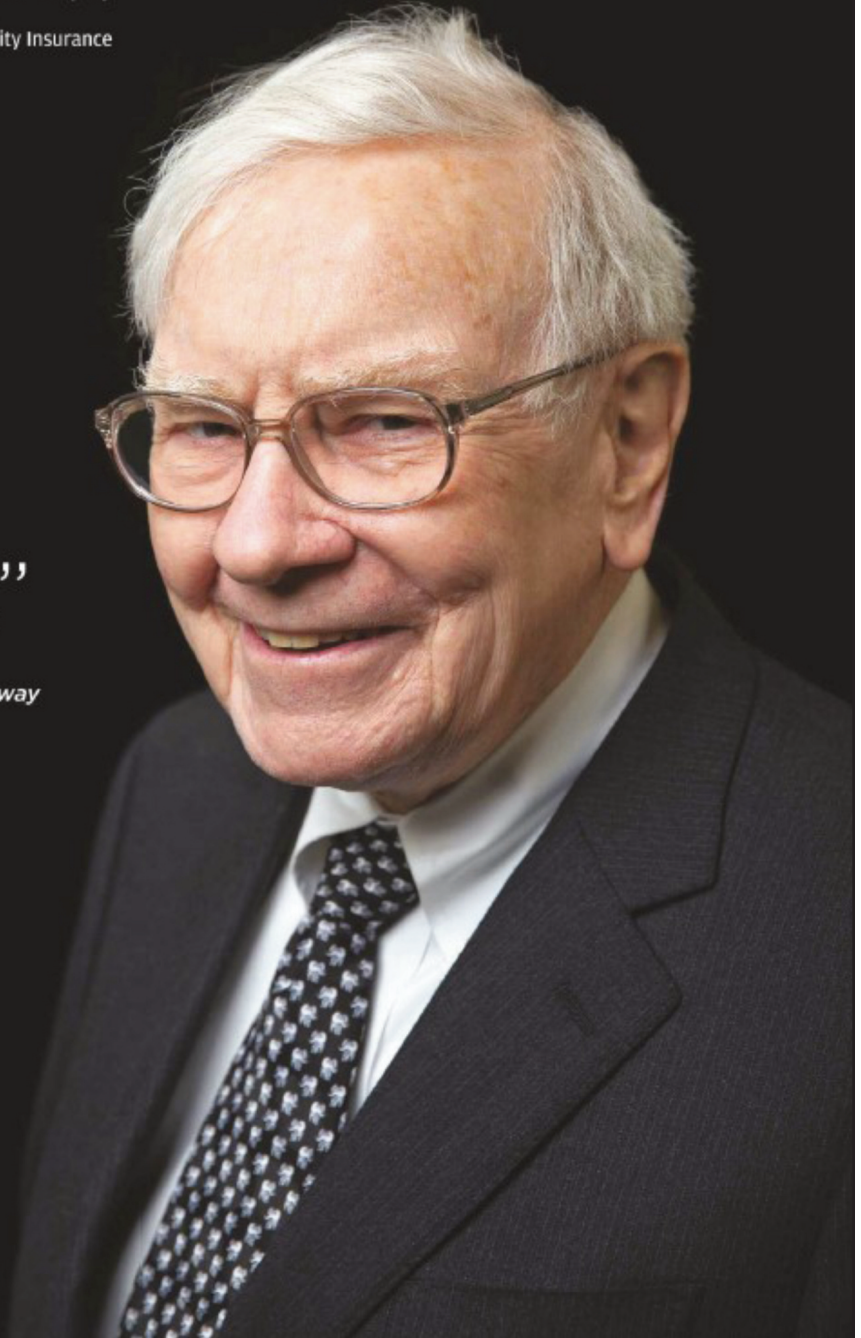
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