

Curbside Consults: Liability Perspective

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The informal consultation, or “curbside” consult, is a long-standing dental practice. Extending beyond the traditional “curb” – a hallway or lounge – such consults are increasingly being conducted via cell phone and e-mail. Quick, paperless, and cost-free information exchange benefits both dentist and patient alike. While the advantages of curbside consults are many, the inherent liability should be considered and a modicum of risk management savvy initiated.

A curbside consult may be defined as the solicitation of advice regarding a specific patient’s condition, care or treatment without the consultant actually seeing the patient. Most curbside consults entail recommendations from a subspecialist. However, professional advice sought by a person other than a dentist during a social function or in the hardware aisle at Home Depot also constitutes a curbside consult.

Primary care physicians and general dentists frequently rely on curbside consults. In a study published in the *Journal of the American Medical Association*, 70 percent of primary care physicians and 68 percent of subspecialists participated in at least one informal consult in a week, usually a brief hallway chat or telephone conversation.⁽¹⁾ Consults most often entailed which diagnostic testing should be obtained or

treatment initiated for a patient. Periodontics and oral maxillofacial surgery are commonly consulted subspecialties.

Dentist-Patient Relationship

Advice or discussions that are not patient-specific are generally not considered a curbside consult. Most courts have ruled consistently that a curbside consult does not create a physician-patient relationship – the primary factor determining liability exposure.⁽²⁾ Absent a physician-patient relationship there is no “duty” on the part of the consultant and thus no basis in tort for legal action against the consultant.

However, the courts have applied certain criteria that define the legal parameters of a physician-patient relationship in the context of an informal or curbside consult, such as:

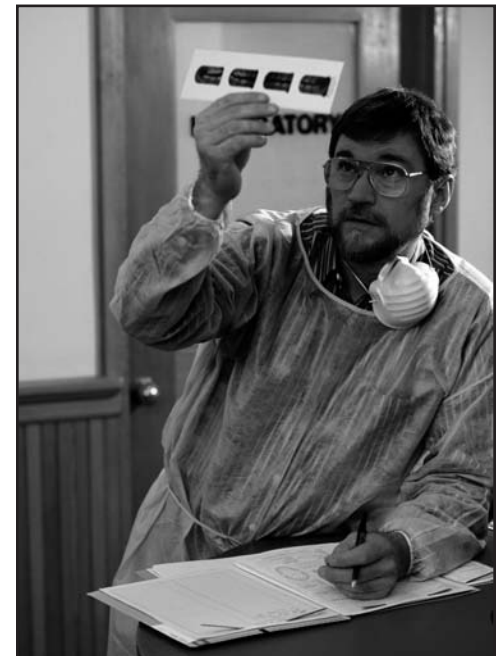
- the extent of the conversations;
- whether or not the consultant had a prior dentist-patient relationship or participated in the subject’s dental health care;
- whether the consultant did a physical examination;
- whether the consultant had access to the dental chart;
- the relative experience of the dentist seeking the consult;
- whether the consultant was paid;
- the relationship between the dentist and consultant;
- whether the patient was aware of, or requested the consult; and
- the extent to which the clinical situation was in any way emergent.

Things get a little blurry when a curbside consult is sought by someone other than another dentist or health care practitioner. Such solicitations for dental advice typically take place outside of a clinical setting. These are risky types of infor-

mation exchanges and are best avoided. Courts are more likely to find that a professional service was rendered for which the dentist will be held liable even if the person seeking the advice is not an established patient.

Ultimate Responsibility

What remains crystal clear is the fact that a dentist who seeks informal consultation remains legally responsible for the care and treatment provided to the patient. This includes following the advice sought as well as rejecting any advice offered.



The inherent risk factors of curbside consults include: reliance on incomplete, inadequate or inaccurate information; the logistical disadvantages when the consult is sought external to a clinical environment; being named as a consultant in the dental record or in deposition testimony such that a dentist-patient relationship is inferred; the obvious legal implications of giving off-the-cuff dental advice; and exposure to inappropriate care and treatment rendered by others for which you are held accountable.

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Florida dentists need to report NOIs to First Professionals Insurance Company

First Professionals Insurance Company publishes Preventive Action on a quarterly basis as a service to its policyholders. Information in this publication does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained in this newsletter are generalized and may not apply to all practice situations. First Professionals Insurance Company recommends you obtain legal advice from a qualified attorney for a specific application to your practice. The information should be used as a reference guide only.

For comments, questions, or to obtain additional copies contact the First Professionals Insurance Company Risk Management Department at 800-741-3742, ext. 3100, or rm@fpic.com.

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When you receive a Notice of Intent to Initiate Litigation (NOI), a patient's notification of their intent to sue you, **time is of the essence**. There are specific steps you need to follow so that First Professionals Insurance Company (First Professionals) can provide you with the best claims management and defense. The more you share with us as soon as you receive the NOI, the better prepared we are to meet the time deadlines imposed by state statute.

Your first action must be to call First Professionals, to let us know that you have received a NOI. The Claims Representative who takes your first report will advise you about the next steps and what to expect.

It is imperative that you forward **everything** you received to First Professionals. The Claims Representative will advise you of where to send the information (see sidebar for reference).

Please follow this checklist and send:

- The envelope in which you received the NOI and supporting documentation. The postmark on that envelope could prove to be an important piece of information.
- The NOI and any accompanying correspondence. This enables our staff to determine whether or not the NOI is defective.
- The expert's affidavit that accompanied the NOI.
- Any copies of the patient's dental record that accompanied the NOI. As a result of the September 2003 tort reform legislation, the patient's attorney is required by FL Statute 766 to include the dental records with the NOI that is sent to you.
- Any other documents or materials originally included.

You will be contacted by the Claims Director assigned to your case, who will schedule a time to meet with you to discuss the claim. The Claims Director will respond in writing to the patient's attorney. There are established timelines by which we must abide to comply with the statute, so it is imperative that you contact our Claims Department immediately.

First Professionals' policyholders outside of Florida need to contact a Claims Representative any time they receive any legal notification of a pending claim or lawsuit. In other states it may not be a NOI, but we still need to be notified in order to provide you with the best claims management and defense. The sooner you notify us, the better prepared we are to meet the time deadlines imposed by the particular states' statutes. ●

Notify a First Professionals Insurance Company Claims Rep if you receive Legal Notice of a Claim or Pending Litigation

By Florida statute, Florida policyholders will receive a Notice of Intent to Initiate Litigation (NOI), a patient's notification of their intent to sue you. If you receive a NOI (Florida policyholders) or other legal notice of a claim (policyholders outside of Florida) please contact a First Professionals' claims representative **immediately**.

Policyholders in South Florida (Martin, St. Lucie, Okeechobee, Palm Beach, Broward, Dade, Monroe or Collier counties) should contact our Plantation office.

600 N. Pine Island Rd., Suite 250
Plantation, FL 33324
Phone: (866) 760-2121
Fax: (954) 577-2721

Policyholders elsewhere in Florida or in any other state should contact First Professionals' headquarters in Jacksonville.

1000 Riverside Ave., Suite 800
Jacksonville, FL 32240
Phone: (800) 741-3742 ext. 3293
Fax: (904) 358-6728

Dental Case Study

Failure to regulate anticoagulation therapy prior to procedure results in respiratory arrest and death

Case Synopsis

A 42-year-old male presented to the insured dentist with complaints of chronic and severe oral pain of three-week duration. The patient also exhibited swelling of the jaw and neck. A comprehensive dental plan of treatment was initiated. The patient's medical history of atrial fibrillation managed by chronic anticoagulation therapy was not recorded nor was the anticoagulation therapy evaluated or adjusted for the root canal.

On the sixth visit with the dentist, the patient underwent a scheduled root canal under parenteral sedation with Versed and Demerol. Romazicon was administered near the end of procedure. Approximately 10 minutes later the patient became short of breath, lost consciousness and fell to the floor. EMS was called; however, resuscitative efforts were unsuccessful.

The cause of death was determined to be respiratory arrest caused by the combination of parenteral sedation and anticoagulant medication. The dental record was absent any documentation of a medical history, an informed consent discussion, a pre-procedure evaluation, the timing and dosage of medications administered, or an assessment during or at the conclusion of the procedure. A wrongful death action was subsequently filed against the dentist asserting negligent management resulting in respiratory arrest.

Risk Management Issues

- Failure to evaluate prior medical history
- Failure to regulate anticoagulation therapy
- Inadequate documentation
- Failure to obtain informed consent

Conclusion

Defense experts were unable to support the standard of care given the lack of adequate documentation. The patient's medical history of atrial fibrillation and anticoagulation therapy should have been noted in the dental record. Anticoagulation therapy should have been evaluated and adjusted for the root canal. The patient should have been advised of the risks and complications of sedation in light of the medical history of atrial fibrillation. Consequently, a settlement of \$775,000 resulted.

Discussion

One of the most prevalent procedures involved in malpractice claims is the initial evaluation and history. Because of this patient's medical history, specific adjustments should have been made for sedation. The patient should have been informed about the need to regulate the anticoagulation and clearance should have been obtained from the patient's attending physician. The combination of inadequate evaluation and charting documentation resulted in an avoidable complication and indefensible malpractice claim.

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Minimize the exposure

Although few dental malpractice claims are attributed to curbside consults, clever legal theories abound. While it may be flattering to be consulted, consider the potential liability exposure and follow these tips:

- Decline curbside consults involving complex dental situations, controversial care and treatment, or when examination of the patient is warranted.
- Keep the informal consult simple – discussion should be brief and recommendations specific to the information exchanged.
- Offer to see the patient in a formal consultation if the case is complex.
- Request a formal consultation if curbside consults for the same patient are repeatedly requested.
- Do not bill for curbside consults.
- When seeking the consult, do not record the name of the consulting dentist in the dental record unless the consultant is aware and in agreement. ●

(1) Washington School of Medicine. Risk Prevention and Control: Informal: Curbside Consultations. <http://aladdin.wustl.edu/riskmgmt.nsf>

(2) Family Medicine 2003; 35(7):476-81.



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Legal FAQs



What is the HIPAA Security Rule?

Security standards that were developed to protect electronic health care information. The Security Rule adopts a set of national standards for safeguards to protect the confidentiality, integrity, and availability of protected health information.

What is the HIPAA Security Rule compliance deadline?

With the exception of small health plans, all covered entities had to comply by April 20, 2005. Small health plans had until April 20, 2006.

Are all covered entities required to comply with the HIPAA Security Rule?

Yes. All covered entities that must comply with the HIPAA Privacy Rule must comply with the HIPAA Security Rule.

In what ways do the HIPAA Security Rule and Privacy Rule differ?

Although the Security Rule is closely linked with the Privacy Rule, the Security Rule entails the privacy of electronic protected health information.

Does the HIPAA Security Rule require specific technology?

No. Security Rule standards are technology-neutral and thus do not require the use of specific technology. A covered entity is free to choose technologies appropriate for its particular practice.

Does HIPAA Privacy Rule compliance establish HIPAA Security Rule compliance?

No. However, many of the requirements set forth by the Privacy Rule satisfy those required by the Security Rule in terms of a covered entity having in place appropriate administrative, physical, and technical

safeguards for the protection of protected health information. However, the Security Rule contains 18 security standards that must be implemented. Moreover, there are 42 implementation specifications that are either required or addressable. If implementing a specification is not reasonable and appropriate, the covered entity must document why, and must implement an equivalent alternative measure that is reasonable and appropriate.

Is there a reference site for information, guidelines, and instructions pertaining to HIPAA Security Rule compliance?

Yes.
<http://www.cms.hhs.gov/hipaa/hipaa2/default.asp>.