



# HOW TO AVOID A LAWSUIT

*Steps endodontists can take to anticipate and prevent legal action*

*By James W. Saxton, Esq., CEO and co-founder, Saxton & Stump, LLC, and Darlene K. King, Esq., of Counsel, Saxton & Stump, LLC*

*What really causes claims against endodontists? Generally, the likelihood of being sued is not tied to a particular type of procedure or adverse outcome. You may be surprised to learn that your risk of facing a lawsuit is more closely tied to your relationships with your patients, and as a result, you have more control than you may realize to prevent facing a claim.*

While certain types of issues may arise more frequently in endodontic claims — such as a drill bit falling into or lodging into a canal, a nerve injury during numbing or overfilling a root — the type of unexpected incident does not necessarily predict the likelihood of a lawsuit. More often, a patient is provoked by frustration and anger over nonclinical issues such as communication or service failures, or lack of good disclosure following an unexpected adverse outcome. Dissatisfaction provides the catalyst for the call to the plaintiff's attorney. Once the call is made, the lack of good documentation often drives the plaintiff's lawyer's decision to take (or not take) the case. So, what should you do to address the issues that cause your patients to file endodontic malpractice claims? Lay the foundation for a great relationship!

Studies in medical malpractice have shown that quality of care data and professional liability claims are statistically linked.\* The research demonstrates what we have always suspected: facilities with a higher percentage of satisfied patients tend to have a significantly lower incidence of large professional liability claims.

So, what steps can you implement this week to effectively improve quality of care? **Five-star service!** We are all familiar with this concept; we recognize excellent service immediately in the hotel or restaurant industry, when an establishment's

focus on quality and service permeates every phase of the customer's experience. This is the type of excellent service that your practice can execute to provide top-quality patient satisfaction, experience and engagement — and potentially avoid claims in the process. It is crucial to recognize that every point of contact is important, from the first hit on your website, the first telephone call to your office, the greeting the patient receives and their waiting experience, to the actual treatment experience, follow-up care and even billing. Think about the concept of pervasive and consistent excellent service. Does it exist everywhere all of the time? What about when the electronic medical records system goes down, or when someone doesn't show up for work? Measure your five-star status on a challenged day, not when everything runs smoothly. That's how you can tell if it is part of your culture.

To really understand the experience your patients encounter with your practice, measurement is key. There are practice-specific patient experience survey tools available to provide you with the information you need to ensure that your service-excellence message is uniform and consistent throughout your endodontic practice. You may think that you are doing well, but do you really know what is happening at the front desk or on the phone? Without this essential information, it is nearly impossible

to identify the areas needing improvement, formulate a plan to improve and execute the necessary steps to ensure that your patients are shown a five-star experience with every interaction.

Next, once you have implemented a plan to improve patient relationships and communication, consider whether your documentation actually reflects your efforts to fully engage your patients. As noted already, lack of good documentation often drives a lawyer's decision to take the case. If a disappointed patient makes the call to a lawyer, one of the first moves that attorney will make is to obtain a copy of the chart. Detailed records, including specific documentation identifying the procedure, the risks and alternatives you discussed with the patient, as well as your patient's acknowledgement of your discussion, could discourage that attorney from filing a case against you.

It certainly makes it more attractive for a plaintiff's attorney to take on a patient's claim if the record reflects a dissatisfied patient with an unexpected outcome. More importantly, the claim becomes easier to win if there is a poorly documented medical chart containing little evidence that the patient was fully informed that the outcome was a recognized risk of the procedure. A **lack of informed consent lawsuit** is not solely based on proving that a procedure was performed negligently. Rather, such a claim can succeed if the plaintiff convinces the jury that his or her endodontist failed to provide information regarding material risks and alternatives to make an informed decision, and then one of those material risks occurred. By contrast, thoughtful, thorough and consistent documentation is not only best endodontic practice, but it demonstrates for probing attorneys that they will have a much more difficult, if not impossible, task of convincing a jury that you failed to adequately inform your patient prior to treatment. Good documentation can tip the balance in your favor in a "he said, she said" controversy. For example, before beginning a root canal procedure, your discussion with your patient should include the material risks of the procedure, alternatives to the procedure and the risks of those alternatives. The office visit should allow adequate time for patient questions. Then, after you have had the discussion, it is *crucial* to appropriately document your patient's understanding with a procedure-specific consent form. It is not just a piece of paper.

Procedure-specific informed consent forms specifically identify the risks and alternatives discussed with your patient. It is recommended to include the risks of the alternatives

**"More often, a patient is provoked by frustration and anger over nonclinical issues such as communication or service failures, or lack of good disclosure following an unexpected adverse outcome. Dissatisfaction provides the catalyst for the call to the plaintiff's attorney."**

as well. Particular language on the form advises the patient that you and your practice consider it very important that the patient understand and consent to the treatment you will be providing. The form should explain that patients should only sign the form if they understand the procedure, the anticipated benefits, the risks, the alternatives and the risks associated with those alternatives, and if all of their questions have been answered. Finally, a true signature line, including a witness signature, actually demonstrates that the form was explained to the patient, and that the patient understood and had no unanswered questions. Again, this is not a document to simply paper your chart. This type of specific documentation supports your engagement with your patient, and also provides key evidence of your discussion, if needed, to defend your actions in a professional liability action.

**Take advantage of the control you have over your own liability risk.** Lay the foundation for a great relationship with your patients, recognizing that every single point of contact between the patient and your office is essential to engaging your patient. Survey your patients to identify areas needing improvement — even the front desk and the billing department — and create a plan to improve. Finally, take the time to document your specific efforts to inform your patients, and demonstrate that treatment decisions were made as a team. All of these measures provide you with tools to decrease your risk of facing a lawsuit — and they are great for patients too! <

---

James W. Saxton, Esq., is the CEO and co-founder of Saxton & Stump, LLC. He has sustained an active litigation practice for more than 30 years, representing hospitals and physicians before state and federal courts in professional liability and complex litigation matters, and advises physicians, hospitals and long-term care facilities on understanding and reducing their professional liability risk. He can be reached at [jws@saxtonstump.com](mailto:jws@saxtonstump.com).

Darlene K. King, Esq., is of Counsel with Saxton & Stump, LLC. With 20 years of healthcare litigation experience, Darlene concentrates her practice in the representation of hospitals, doctors and healthcare professionals in healthcare litigation, including medical malpractice defense. She can be reached at [dkk@saxtonstump.com](mailto:dkk@saxtonstump.com).

\* Source: Jones, V. Hospital and physician professional liability trends and industry topics. *J Health Risk Manag.* 2015;35(1):7-19.