

# THE SCOPE

**DENTAL EDITION**

**ISSUE 19**

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## EXECUTIVE MESSAGE

### Dear Policyholders,

I imagine that a dentist spending time with a lawyer in defense of malpractice allegations can feel much like that lawyer probably does in the dentist's chair for a root canal. To extend the analogy, I'll liken a practitioner's diligence in the application of risk management education to dental prophylaxis and a dental malpractice trial to that aforementioned root canal.

Those of us in MLMIC Risk Management are here to help you with your practice of risk hygiene (pardon the pun) so that the probings and drillings can be kept to a minimum (again). The facts are that even with the best of care and compliance with recommendations, "cavities" develop in your patients and lawsuits are brought against MLMIC insureds.

This edition's feature article takes you through the process and considerations of a small claim in civil court. Sure, the ultimate risk is low, the process is relatively efficient, and the outcome is typically favorable to the defendant dentist, but we understand that the frustration, anxiety, and loss of time is real.

The case study in this issue covers a suit on the other side of the spectrum: significant risk, the drawn out, sometimes years long, process in State Supreme Court, and an invested plaintiff's attorney with an expert witness to testify that the defendant dentist deviated from the standard of care. Again, the frustration, anxiety, and loss of time is real, if not multiplied.

The application of the tenets of risk management can help to avoid these painful procedures, and proper follow-up on test results is among the most effective. I hope that you find this issue's Risk Management Tip to be useful, and you can find many more tips on the newly redesigned [MLMIC.com](https://www.mlmic.com).

Thank you for reading, and warmest regards,

**Tom Gray, Esq.**

Senior Vice President, MLMIC Risk Management

[tgray@mlmic.com](mailto:tgray@mlmic.com)

“Hi Mr. Lamb (Matthew Lamb, AVP, Risk Management),

Thank you for your reply. The [article](#) and your email help me understand the range of teledentistry better. Thank you for keeping us updated and informed.”

**R.F., DDS**



# Defending the Dental Small Claim:

## A Sense of Humor Can Help

MLMIC Insurance Company continues to see small claims suits filed against our insured dentists throughout the state. Disgruntled patients seem determined to drag dentists into court to seek compensation and air their grievances about perceived negligent treatment. Ease of access to city courts, coupled with a patient's unrealistic expectations, can put a dentist on defense.

If you are being sued by a patient in small claims court, **promptly call MLMIC**. A determination will be made, based upon the allegations, whether to assign an attorney. Resist the urge to handle the case yourself merely because it is in small claims court. If nothing else, in many cases of negligence, when you are represented by legal counsel, a judge may grant professional courtesy and hear your case earlier than if you did not have an attorney. This may save you many hours away from the office, particularly when there is a crowded municipal court docket.

**If you are being sued by a patient in small claims court, promptly call MLMIC.**

## The Claim

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Some disenchanted patients use the opportunity to complain that the new dentures they inserted that morning do not feel exactly the same as the ones they have worn for the past 30 years or, oftentimes, the same as their natural teeth did. The term “demonstrative evidence” takes on new meaning when, on a rare occasion, a claimant removes their dentures to show the judge the alleged shoddy workmanship. It is an interesting legal and aesthetic experience for all involved.

Other than these disenchanted claimants occasionally waving their dentures in front of the court, what can you expect from your day or days in small claims court? A small claim proceeding is commenced like this: For a nominal fee, usually \$15 to \$20, a dissatisfied patient files a “Notice of Small Claim” with the city court or, in towns and villages, the justice court and becomes a “claimant.” The notice usually contains allegations of negligence, although even this basic information can be indecipherable at times. It is almost a given that most notices of claim lack the usual legal terms that advise a defendant about the precise nature of the complaint(s) against the dentist.

However, despite some very unusual claims, it is unlikely that a claim containing outlandish allegations

(e.g., that the defendant dentist “implanted a transistor in my tooth, causing me to receive a continual broadcast signal from a radio station on Saturn”) will prevail.

On occasion, the claim of malpractice arises as a counterclaim or response to a small claims action by the dentist or collection agency to collect unpaid dental fees. Usually, the defendant dentist can ascertain the nature of the claim based on what happened during the last few office visits or from recent correspondence from the patient. Regardless, the patient must provide the specific details of their complaint at the hearing.

**The notice usually contains allegations of negligence, although even this basic information can be indecipherable at times.**

Many claimants appear in court without counsel, or pro se. When claimants are not represented by counsel, the judge or hearing officer tends to be more patient with the claimant. Moreover, the rules of evidence and procedure do not apply in small claims court. Essentially, the claimant is given a full opportunity to tell their story. The length and tone of the claimant’s presentation depends a great deal upon the judge. It is important to understand that sometimes the judge in a small claims court is not a lawyer. This is particularly true in rural communities.

## The Trial

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Although you may have preconceived notions of what a courtroom atmosphere is like from watching television shows about lawyers, those expectations may require readjustment. For instance, the physical environment of the courtroom might not be what you expect. In some small claims courtrooms, the “courtrooms” have a judge’s bench, a jury box, and tables for the parties. These are often located inside an actual “courthouse.” However, there are also “courtrooms” that consist of a room with a folding table and chairs. The judge is seated on one side of the table, and you and the claimant may stand

shoulder to shoulder on the other side. The building in which that type of courtroom is housed may also host other community activities, such as bingo. Further, while your case is being argued, dozens of other people may be waiting their turn to be heard by the judge. This means that your friends, neighbors, and possibly other patients may be sitting in the courtroom and listening to the plaintiff speak about you. You may well be the only nonlawyer professional present. Because most small claims cases typically involve landlord/tenant disputes or faulty workmanship by a homeowner's contractor, in this arena, a dental professional liability case clearly stands out.

**This means that your friends, neighbors, and possibly other patients may be sitting in the courtroom and listening to the plaintiff speak about you.**

As in a regular trial, the claimant presents their case first, followed by any witnesses brought to court to support their claims. In most of these courts, the judge questions the claimant about the details of the case. In all courts, the defendant then may question the claimant after the claimant has completed their case presentation. This right to question a party, or a witness, is not one of the procedural rules that is "relaxed." When it is the defendant's turn to present, the same rules apply.

It is important that you are represented by counsel, even though the demand is for a "small monetary claim," since the same reporting requirements to insurers and government agencies often apply, as they do when a verdict is reached in New York State Supreme Court. Although it is important to have an attorney in such a court proceeding, some small claims judges may direct the defense attorney to keep their contribution "small," particularly when the claimant has appeared pro se. The advantage to you in having counsel is that your attorney will prepare you for testimony and organize the presentation of your case. If, however, the court is run in a more formal manner by the judge, your attorney will be allowed to question you and elicit your side of the

story in a coherent, organized manner. Either way, the claimant is also permitted to question you at the conclusion of the "defendant's proof." Consider this portion of the proceedings to be a trial of your patience.

Many questions from pro se plaintiffs will not be "questions" at all. Rather, they are often comments and opinions about your inabilities as a professional, as well as your shortcomings as a human being. Most judges will intervene and stop the claimant at this point because personal attacks are not a permissible part of the process. Nevertheless, it can be very hard to keep your composure when someone whom you have gone out of your way to help makes you appear to be incompetent and/or only after their money.

## Arbitration

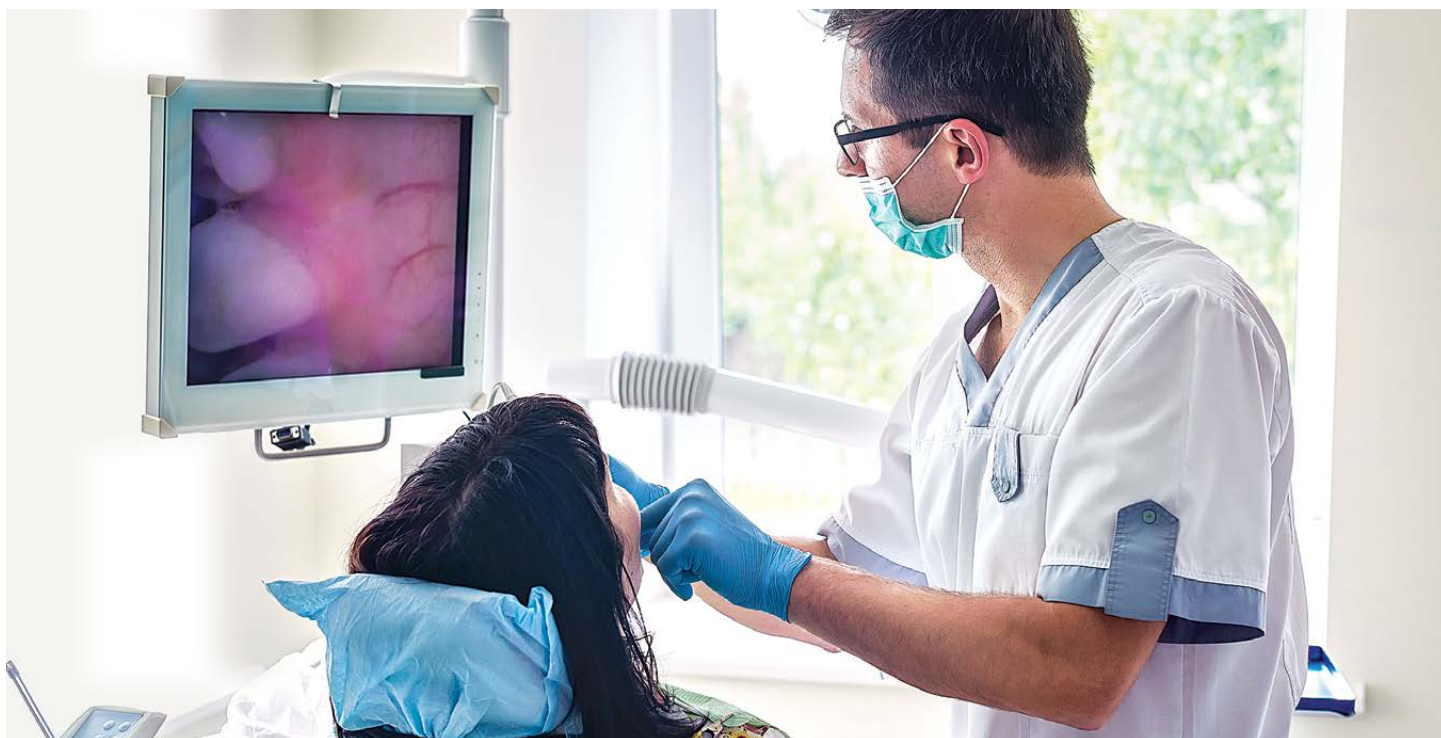
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Some courts require the parties to appear on the hearing date but do not try the case on that date. Instead, the parties are directed to try to mediate the case for reasons of judicial economy, as cases that are settled do not take up the court's time. If, however, the parties cannot reach an agreement, a later trial date will be scheduled. Fortunately, many

**Some New York counties require that all claimants in a small claims matter submit to mandatory arbitration.**

judges are sympathetic to the demands of a dentist's office schedule when this concern is presented by counsel and will agree to hear the case the same day, again as a professional courtesy. Nevertheless, the trial could require a full day out of your office. One way to minimize the time you spend in court is to request that your attorney contact the court and the claimant in advance and make it known to both that the case will not be settled. At that time, counsel can request that a hearing be scheduled. Many courts will agree to this request. Some New York counties require that all claimants in a small claims matter submit to mandatory arbitration. This entails a full hearing before a judicial hearing officer, usually an attorney or a retired judge, who issues





a “nonbinding decision.” The losing party in these situations can request a “trial de novo,” or new trial. This is basically the legal equivalent of a “do over.” The matter is then tried again before a judge as if the initial hearing never happened. While the two-procedure system is an inconvenience for the defendant, particularly one who gets a favorable decision from the arbitrator, the arbitration does prepare the defendant and counsel for the arguments the plaintiff will make at trial. Further, this also forces the claimant to win the case twice if the arbitrator has decided in favor of the claimant. Fortunately, judges are less likely than arbitrators to partially satisfy both parties by “cutting the baby in two” because they are bound to apply the controlling law in professional liability cases. At the close of proof, the judge makes their decision ... or not. Sometimes, a judge waits and issues a written decision days, weeks, or months after the hearing. There is a sound reason for not issuing a decision from the bench at the close of arguments. Losing claimants have been known to take defeat rather poorly. Thus, mailing the decision eliminates the possibility of an emotional or physical outburst in the courtroom. Unfortunately, the decision of the small claims judge may not be final. As rare as it is,

a losing claimant may appeal the decision to a higher court.

### **The Burden of Proof**

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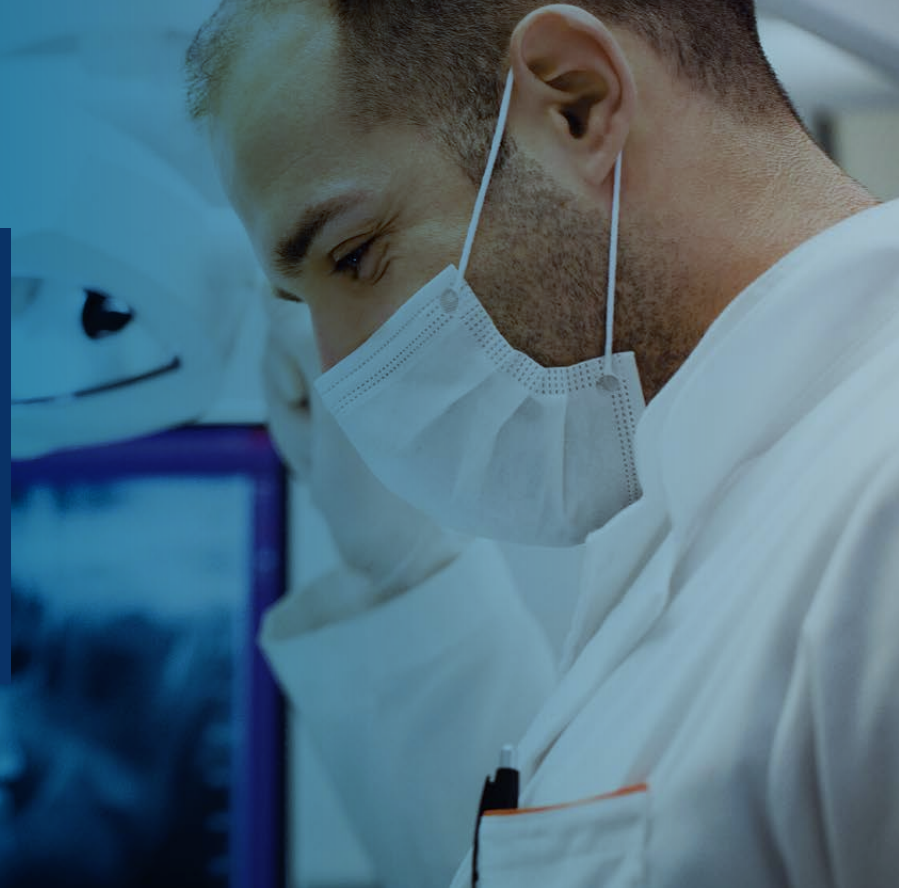
The statute that governs small claims procedures provides that the “court shall conduct hearings upon small claims in such a manner as to do substantial justice between the parties ...” That is an imprecise standard that initially appears to permit the judge to decide a case based upon what they think is fair. Fortunately, the statute also requires the judge to render their decision in accordance with “the rules of substantive law.” That is good news for the dentist defendant because the claimant must meet what is known as “the burden of proof.”

In the New York State Supreme Court, which is the initial trial court for dental professional liability cases above the monetary limits of the small claims court, the plaintiff must prove that the defendant has departed from the accepted standard of care and that the dental negligence was the cause of the plaintiff’s injury. In most cases, this requires testimony of an expert witness. Since \$3,000 is the maximum award allowable by law in village and

*continued on page 12*

**CASE STUDY:**

# Our Dental Defense Never Rests



## Initial Treatment

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A 50-year-old patient was seen by a MLMIC-insured dentist presenting with three white spots on the gingiva and tenderness near teeth 11 and 12. Prior to the events of this case, the patient had been seen over the course of nearly 10 years for various treatments, including cleanings and crowns. Notably, the patient had declined a Vizilite cancer screening just a year prior to this visit.

At this visit, the patient agreed to the Vizilite screening, which showed a slight illumination above tooth 11. The dentist informed the patient that neither the white spots nor the illumination were necessarily signs of oral cancer, but they needed to be monitored accordingly.

**She noted them as “unusual” but not a sure sign of oral cancer.**

At a follow-up visit a month later, the patient reported pressure tenderness near tooth 14. He claimed it had been present for at least 6 months. He also indicated that tooth 11 “felt weird.” On examination, the hygienist recorded the presence of the white bumps “with a wart-like appearance”

attached to the gingiva at tooth 11. She noted them as “unusual” but not necessarily indicative of oral cancer. The hygienist discussed these findings with the dentist, who felt that the radiolucency seen from the film taken a month earlier likely represented scar tissue from a prior extraction.

## Family History Revealed

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The patient called several days later to report that his father had died from head and neck cancer and that his first cousin was an oral cancer survivor. This new information, coupled with the findings of white bumps and the positive radiolucency, were concerning enough for the dentist to refer the patient to an oral surgeon. The patient presented to the oral surgeon two months later and a subsequent biopsy indicated no evidence of dysplasia or malignancy. These results were faxed to the dentists three weeks after the biopsy.

One month later, the patient returned to the dentist with complaints of a bump that was apical to tooth 11 and sore to pressure and paresthesia of the left upper face and lower left jaw. The insured requested consultation for the swelling over tooth 11. However, he misidentified the review of upper right vs. upper left jaw.



The patient delayed 6 weeks before making an appointment for an oral surgeon consultation. He was given an appointment for one week later, but the patient cancelled that appointment and rescheduled it for one month later. Upon examination, the oral surgeon noted tooth 11 was positive to cold and tooth 12 was positive for cold and percussion. Periapical x-rays of teeth 11 and 12 were taken and revealed a fistula. The tooth was accessed, but no fracture was found. The oral surgeon confirmed the existence of the fistula at the root, which was infected. Root canal therapy was completed several weeks later.

### Clinical Diagnosis

The patient returned to the dentist three months later complaining of unresolved swelling at teeth 11 and 12. An infection was suspected, and antibiotics were prescribed. The patient was referred to the original oral surgeon and was seen within days of his visit to the dentist.

The oral surgeon noted a large, indurated swelling in the left maxillary vestibule near teeth 11 and 12, as well as a 3 mm raised lesion of attached gingiva near tooth 11. He was so alarmed by these findings that he completed a biopsy that same day. The results of the biopsy indicated the presence of an ameloblastoma.

**He was so alarmed by these findings that he completed a biopsy that same day.**

A subsequent treating ENT documented that the size of the mass was “impressive.” In fact, the mass extended from teeth 9 through 16. Nasal endoscopy confirmed no mass in the nasal sill. This oral surgeon recommended that the patient undergo a transfacial approach due to concerns of sinus involvement.

A subsequent CT scan showed the mass measured 1.6 cm x 1.9 cm x 1.6 cm. The plan was to excise the mass with reconstruction. The patient underwent left hemi maxillectomy with orbital preservation. Teeth 10-14 were removed. Pathology confirmed the mass was an ameloblastoma with a tumor size of 3.5 cm. No malignancy was identified. Subsequently, the

patient had implants and required two additional procedures to excise excess tissue growth.

### Lawsuit and Trial

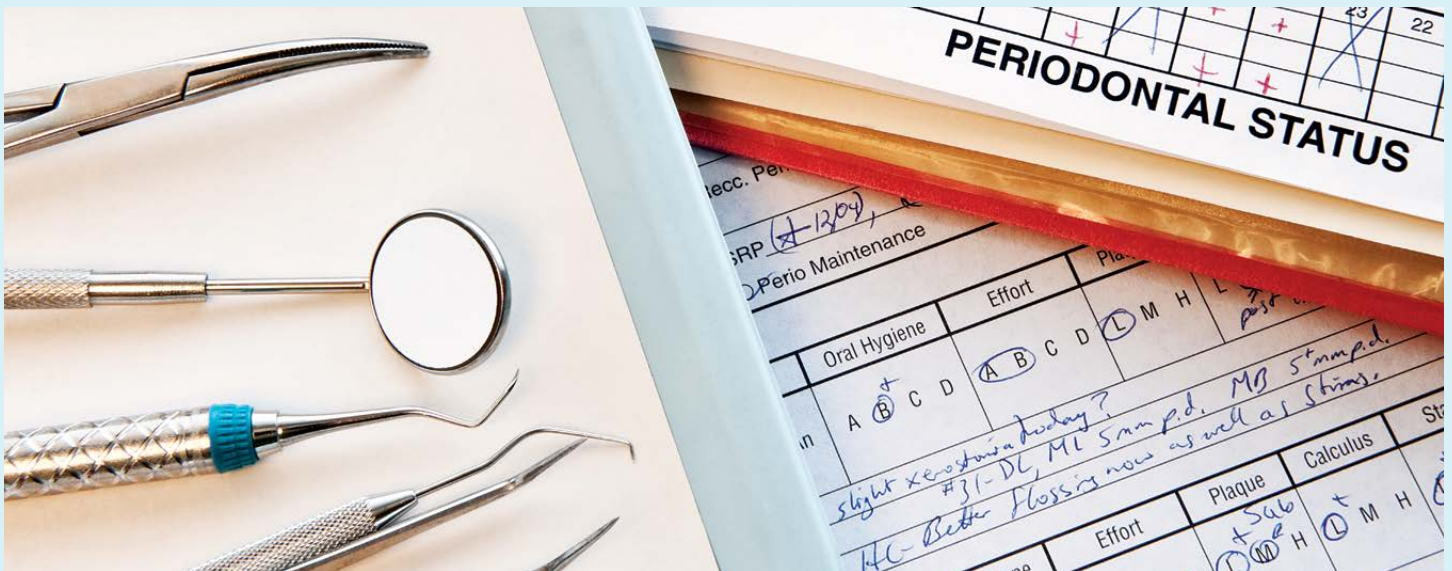
A lawsuit was filed, and at his deposition, the patient claimed he was no longer able to hike, run, or play tennis because the bone harvesting from his fibula resulted in leg weakness. The plaintiff’s pretrial demand to settle this case was \$10,000,000.

Nine years after being placed into suit, at trial, the plaintiff contended that the dentist failed to diagnose and contributed to the delay in diagnosis of what was later, after additional procedures to excise excess tissue growth, found to be an ameloblastoma near tooth 14. The plaintiff argued that the dentist was negligent in failing to order a root canal upon discovering the radiolucency near teeth 11 and 12 and that root canal therapy would have ruled out a dead tooth.

**MLMIC coordinated a strong defense and secured the necessary experts to support the insured’s care at trial.**

Further, the plaintiff alleged that this would have identified a lateral periodontal abscess, cyst, or periapical cyst as the cause of the radiolucency, thus moving a maxillary mass to the top of the differential diagnosis. He argued that the radiolucency required the dentist to order a CT scan of the area and that the dentist’s failure to perform a bone biopsy was a deviation from the standard of care by not recognizing and taking appropriate action because the oral surgeon had failed to biopsy the radiolucency as part of his consultation. Allegations also included that the dentist erred by not making another referral promptly and that an earlier diagnosis would have reduced the amount of tissue and bone removed. The patient testified that he continued to have numbness in the left portion of his lip, cheek, and nostril.

The dentist’s testimony included acknowledgement that the radiolucency could have been a sign of oral



cancer, but he did not believe it was in this case. MLMIC coordinated a strong defense and secured the necessary experts to support the insured's care at trial. The defense took the position that the patient's initial complaints did not raise suspicion of oral cancer and that the insured acted appropriately by referring the patient to the oral surgeon after the revelation of the patient's family history coupled with the results of the Vizilite screening. Once the referral was made, the decision of where and when to do the biopsy was up to the consultant.

**He further strengthened the defense by testifying that early recognition would not have changed the treatment or outcome.**

The general dentist expert testified that the response to the findings and referral to an oral surgeon were appropriate. The expert also noted that the outcome would have been the same even if the tumor had been discovered when it only involved the area of teeth 11 and 12. The patient would still have required a resection of the entire upper left maxillary area.

An oral surgeon expert testified that the initial three bumps were related to the ameloblastoma. He agreed that the insured dentist was entitled to rely on the judgment of the oral surgeon. He further strengthened the defense by testifying that early recognition would not have changed the treatment

or outcome. A CT scan or root canal were not required to rule out the causes of the radiolucency. He felt that referral was the appropriate course of treatment from a dentist's perspective.

At the end of the 6-day trial, the plaintiff's counsel asked the jury to award \$5,000,000 in damages. However, the jury deliberated for only 90 minutes and returned with a unanimous verdict for the defense. The dentist recognized and was greatly appreciative of the diligence of and preparations by MLMIC and the defense counsel throughout the defense of this case, which led to a successful outcome. The costs for defending this case reached a total of \$130,000.

### **A Risk Management and Legal Analysis**

Although this case was successfully defended at trial, the dentist's treatment was not without flaws. First, this case is an obvious example of the necessity to obtain and routinely update an accurate family history for each patient.

**The age-old adage applies: If it wasn't charted, it wasn't done.**

In his testimony, the dentist in this case claimed he performed an oral cancer exam, though his notes did not explicitly state so. The age-old adage applies: If it wasn't charted, it wasn't done.

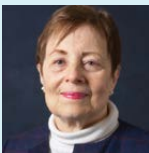
Even though the dentist made an incorrect reference to the side of the patient’s mouth, he stated in his testimony that specifying the correct tooth number would override the wrong side he had documented. However, this error is obviously a very strong indication of sloppy documentation, which is indefensible.

The dentist’s documentation also failed to include reference to tooth 12, but the dentist testified he “made a mental note of it.” This approach to documentation is clearly unprofessional and inappropriate.

The dentist should have impressed upon the patient to seek additional care immediately. And after multiple instances of delayed appointments for his referrals, the dentist could have made more timely appointments for the patient to be seen by these specialists.

Finally, the dentist should have been more aggressively involved in seeking results from referrals, which would have revealed a prolonged period of time before the patient was actually evaluated and results were received.

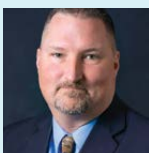
While the plaintiff’s settlement demand was excessive, MLMIC protects its policyholders in defensible cases regardless of the demand. Obtaining this swift defense verdict reflects the value of experts’ opinions and the combined skills and expertise of MLMIC and its defense counsel.



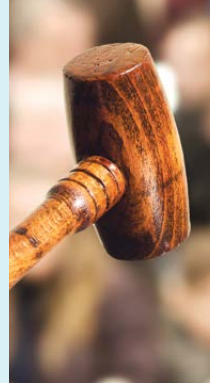
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Have a Legal Question?

Ask an Attorney!

As a MLMIC Insurance Company policyholder, you enjoy a rare benefit in the medical professional liability insurance industry: **24/7 legal services available at no cost.**

MLMIC’s New York-based attorneys possess a deep understanding of the State healthcare legal landscape. Whether it’s a complex legal question or a time-sensitive matter, MLMIC’s legal team is available around the clock to help you navigate challenging situations, minimize liability risks, and reduce stress in your office — with confidence.



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MLMIC Legal Department Attorneys can be reached 24/7 for emergency support services at **(877) 426-9555** or by email at [hotline@tmglawny.com](mailto:hotline@tmglawny.com).





**MLMIC's Open Bar** is a monthly FAQ covering trending issues in healthcare that are derived from questions received by the seasoned, New York-based healthcare attorneys of **MLMIC's Legal Hotline.**

**January 17, 2025**

## **Preparing for Retirement – A Guide for Dentists**

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Retirement may be looked at both with anticipation and, at times, sadness. Many professionals have practiced in their specialty for a long time and may be looking forward to making changes geographically and/or spending more time with family. Other times, retirement may be thrust upon you by illness or economic reasons.

Regardless of why you intend to retire, there are some important questions to consider.

1. Are you going to be selling your practice to another professional, or are you just closing your doors?

[CLICK HERE TO CONTINUE READING >](#)

**December 20, 2024**

## **How to Properly Discharge a Difficult Patient from Your Dental Practice**

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Two of the most common questions MLMIC receives from dentists and dental practices are: (1) Should we discharge a difficult or noncompliant patient, and (2) how should we appropriately discharge the patient?

The most common reason for discharging a patient is that the patient is a difficult patient. In legal parlance, this is commonly referred to as a serious breakdown or disruption in the dentist-patient relationship. It may arise from disruptive behavior on the telephone or in the office; rude, seductive, or abusive behavior directed at providers or staff; or conduct in the waiting room that is upsetting to other patients ...

[CLICK HERE TO CONTINUE READING >](#)

## RISK MANAGEMENT TIP

Office and Policy Procedure

# Tracking Test Results

### The Risk

The receipt and review of test results are important aspects of patient care and safety in dental practices. Tests may not be completed, or results may be lost, overlooked, or not received, leading to a potential delay in diagnosis and subsequent liability exposure. Follow-up procedures should be an integral part of your practice and can help ensure that patients obtain the necessary testing as ordered and that results are received, reviewed, and properly addressed.

### Recommendations

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1. Inform patients about the indications for the test(s), and document this conversation in the record.
2. Implement a follow-up system in your practice to ensure that patients have undergone the recommended test(s) and that the results are returned to the office.
3. The follow-up system should allow you to track the following information:
  - the patient's name
  - the name of the test(s)
  - the date the test(s) was ordered
  - the date the results were received
4. The record should indicate the date of the provider review.
5. It is the dentist's responsibility to notify patients of significant test results. This should be documented in the patient's record.
6. Your process should include follow-up when patients have not undergone the recommended test(s). This may include telephone and/or electronic communication. All attempts to reach the patient should be documented in the record.
7. A follow-up mechanism that utilizes the same process should also be in place to track consultations.

## Defending the Dental Small Claim (continued)

town courts for a successful claimant (\$5,000 in city courts and \$10,000 in New York City), claimants very rarely hire an expert. In most cases, by law, the claimant must have an expert testify to win the case. Practically speaking, unless the claimant has a friend or relative who is both a dentist and willing to testify for free or a nominal fee, it would cost the claimant more to properly prove the case than the claimant could recover from the court.

**In most cases, by law, the claimant must have an expert testify to win the case.**

So, why do people even bother to sue a dentist in a small claims court? Sometimes, they are legitimately aggrieved and simply do not know how the system works, e.g., that they require an expert to testify for them. Alternatively, they may be convinced that, despite this, they can somehow succeed. While moral outrage may work in the scripted world of TV judges, it does not usually work in the real world. However, there are occasions when a claimant does succeed in small claims court, despite the lack of expert testimony to support the case. For instance, the judge may rule for the claimant based upon the notion of substantial justice, even though they failed

to meet the burden of proof, and award damages to the claimant. In such cases, an appeal to a higher court may overturn that decision.

## Appeals

At the appellate level, the issues that the dentist's counsel can contest on appeal are only matters of law and not matters of fact. In other words, no new testimony is taken, nor is new evidence admitted. The lawyer, or the party who takes the appeal, must argue that the small claims court made an error of law in deciding the case in favor of the claimant. Thus, if the judge decided in favor of the claimant, despite the lack of any expert testimony to support the allegations of a deviation from the standard of care, it would be considered an error of law. If expert testimony was required but not provided by the claimant at the small claims level, the decision for the claimant is likely to be overturned. In summary, while there may be entertaining and even humorous aspects to the case presented against you in a small claims court as noted above, a verdict against you may also have serious repercussions on your time, reputation, or even your professional liability history and credentials. Therefore, to protect your legal rights, it is important that you promptly notify MLMIC of any service of a small claim proceeding.



## AM Best Update

MLMIC Insurance Company is pleased to announce that **AM Best**, the preeminent credit rating agency for insurance companies, has again “affirmed MLMIC’s Financial Strength Rating of A+ (Superior) and its Long-Term Issuer Credit Rating of “aa-” (Superior).”

Per AM Best, “these ratings reflect MLMIC’s balance sheet strength, which AM Best assesses as strongest, as well as its adequate operating performance, limited business profile, and appropriate enterprise risk management.”

For more information: [AM Best Press Release](#) | [MLMIC Acknowledgement](#)







# SALUTE VETS WITH A SMILE

# New York

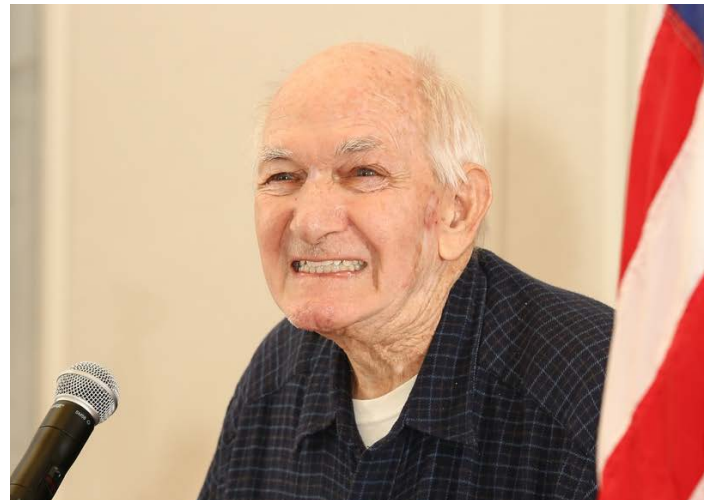
## WILL YOU PLEDGE TO PROVIDE DENTAL CARE FOR ONE VETERAN IN 2025?

Through major acts of courage and simple acts of kindness, Veterans have protected Americans' rights and defended our freedoms. Yet millions of U.S. Veterans are not receiving essential oral healthcare.

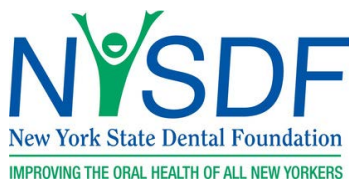
The New York State Dental Foundation is organizing a crew of dentists across New York State who will pledge to provide free dental treatment to one or more United States Veterans in 2025.

### PLEDGE YOUR SUPPORT TODAY

- Fill out the pledge form using the QR code below. You can choose to have your name added to our list recognizing Dental Heroes on the web and social media, or you may remain anonymous.
- We will contact you when there is a Veteran in need in your area. You can review the specific case details and decide whether or not to accept the case.



"85%, or about 7.8 million Veterans enrolled in the Veterans Affairs (VA) healthcare system are ineligible for VA dental benefits ... In order to qualify for dental services, Veterans must either have a dental issue that is service-connected or qualify based on narrow criteria."





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