1 Current Legal Risk Management Issues
- What Risks are "Trending"?
- How Have Risk Issues Changed over the Years?
- What Can We Expect in the Future?

2 Arthur W. Curley
- Bradley, Curley, Asiano, Barrabee & Kowalski PC
  Larkspur, Carlsbad

3 Health Care Law Firm
- Malpractice Defense
- Licensure Issues
- Practice Sale/Purchase
- Incorporation
- Employment Issues

4 Ortho Trending Risks
- Methodology Disputes
  - Invisalign, Sure Smile, Non-Extraction
- TMJ/TMD Initiation, Aggravation
- Failure to Monitor Periodontal Status
- Records Security – HIPAA and HITECH
- Late Diagnosis of Root Resorption
- Treatment Significantly Longer Than Estimate

5 The Law, Protocols, Trends and Standards of Care

6 Basic Law
  Negligence >
  Causing >
  Any Injury =
  Damages $$$

7 Professional Negligence
  Below the Standard of Care
  What a Reasonable Health Care Provider Would Do Under The Same or Similar
  Circumstances, Time, Location.
  Failure = Malpractice
  Attorneys Can Not and Do Not Set the Standard of Care

8 Essential Dental Law
- Standard of Care
  - Reasonable and Prudent
- Any Injury From Substandard Care
- Liability for Negligence of Others

9 Standards of Care: Testimony
- Expert Witnesses
  - Court Approved
  - Cross Examined
• Bias, Character
  • Testimonial History
    – Literature Support

10 How Have Risks Changed Over the Years?
  • Digital Dentistry
    – Records, Communications
    – HIPAA – Confidentiality and Security
    – Digital Imaging – CBCT
    – Digital Systems – Planning and Prediction
  • Patients Expectations – Many Options
    – Speedy Results, Esthetics v Function
    – Letting Patients Dictate Treatment

11 Traditional Standards of Care:
  Informed Consent
  • Known Risk, Serious Injury
  • Alternative Treatments
  • Reasonable Person Standard
  • But What is Reasonable Person?

12 Informed Consent Basics
  • Root Resorption
  • Decalcification
  • Periodontal Challenge – Poor Compliance
  • TMJ/TMD
  • Always Dated
  • Always Signed by Patient/Parent
  • Always Counter Signed by DDS
  • Updated Forms

13 Options and Refusals
  • Many Options Approaching Treatment
  • Risk Can be Not Offering Other Care
  • Risk Can be Patient Refusing Ideal Care
  • Non-Extraction
  • Digital Options
    – CBCT – Diagnostic and Predictive
    – Invisalign®, Sure Smile®

14 Informed Refusal
  • Traditional
    – Risks of Having Treatment
  • New
    – Risks of Not Having Treatment
    – Risks of Having a Lesser Treatment
  • Alternatives
    – Offered
    – Documented
Example
- Case
  - Ortho vs. Restoration
    - Time vs. Costs
    - Options
  - Result
  - Claim?
  - Suit?
  - Verdict?
  - $80,000

Documentation
- Patient advised ________________________
- Risk, Benefits & Alternatives Reviewed
- Including _(_Worst Risk)_________________
- Patient declines/refuses
  
  
  
  _(date)_____(signature)________________

What Can We Expect In the Future
- CBCT as an Ortho and Legal Standard of Care
- Digital Data Security Mandates
- Snoring and Sleep Apnea Issues

Standard via Expert Testimony
Standard via Jury Opinion
CBCT vs. Standard Imaging

CBCT Applications
- Ortho Screening Tool
- Pathology Screening Tool
- Extraction – Bone Evaluation
- Implant – Bone Density Evaluation
- Orthognathic Planning
- In Treatment Ortho Evaluation
  - Bone Levels
  - Root Resportion

Wrong Extraction Cases
- 3 Causes
  - Referral Error
  - Patient Error
  - Surgeon and/or Team Error
- Defense Issues for All Cases
  - Not Recognizing Referral Error
  - Letting Patient Dictate Treatment
  - Surgery Team Protocol Failures

Post vs. Pre CBCT
• Used PA, Assumed Standard Location
• Removed Permanent Cuspid
• Next Dentist took C.B.C.T Because;
  – Knew Cuspid Accidentally Removed
  – Wanted to be Sure - Hindsight

22 Other Imaging Issues

23 Orthodontics
• CBCT vs. Pano, Lat Ceph, Front Ceph
• Progress and Screening
• Status of Bone Plates
• Growth Patterns
• Airway Status

24 Interpretation Issues
• Radiologist vs. Generalist
  – Diagnosis Potential
  – Bias, Turf Wars
• Licensure – DDS vs. MD
  – State Specific
  – Diagnostic Prohibitions
• Obvious vs. Specialized
  – Is Condition Treated By DDS vs. MD?
  – Taught In Dental School
  – Taught In DDS CE
  – Published In DDS Literature

25 Alternatives
• Narrow Beam CBCT
• Interpretation by Specialist
• Documented Informed Refusal

26 Liability for Digital Dentistry
• Security as to
  – Records
  – Communications
• HIPAA – HITECH Rules, Obligations and Punishments
• HIPAA – Fraud and Abuse
  – Fraud is Presumed
  – Penalties – Huge Fines, Prison

27 HIPAA
• HIPAA's Security Rule has three distinct types of security measures:
• Administrative safeguards,
• Physical safeguards and
• Technical safeguards.

28 Administrative Safeguards
• The Security Rule defines administrative safeguards as, “administrative actions, and
policies and procedures, to manage the selection, development, implementation, and maintenance of security measures to protect electronic protected health information and to manage the conduct of the covered entity's workforce in relation to the protection of that information.”

29 **Physical Safeguards**

“physical measures, policies, and procedures to protect a covered entity’s electronic information systems and related buildings and equipment, from natural and environmental hazards, and unauthorized intrusion.”

The Standards are Another Line of Defense (Adding to the Security Rule’s Administrative and Clinical Safeguards) for Protecting EPHI.

30 **Technical Safeguards**

- The Security Rule defines technical safeguards in § 164.304 as “the
- Technology and the Policy and Procedures for its use that Protect Electronic
- Protected Health Information and Control Access to it.”

31 **Confidentiality & HIPAA**

- Telephone
- Reception
- Conversations
- Placement
- Office Systems
- Fax Confirmation
- Perform Self Audit

32 **Records - HIPAA Rules**

- Patient has Right to Ask for Amendment to Records
- HCP Does Not Have to Make Amendment
- HCP Should Note Request for Amendment

33 **Practical Effect**

- Password Protect ALL Portable Devices
- Protect all Office Devices
  - Security Protocols
  - Policy for Ex-employees
- Office Policies for Internet and email

34 **Sleep Apnea**

Ortho and CBCT

35 **Sleep Apnea Definitions**

- Apnea: Not Breathing
- Sleep Apnea: Not Breathing During Sleep
- Obstructive Sleep Apnea: Airway Blockage in the Airway Passage Preventing Breathing During Sleep Not when Awake

36 **Sleep Apnea Diagnosis**

- Types:
  - Central
• Obstructive
  – Diagnosis – Medical Diagnosis
• History – Clinical Signs
• Testing – Sleep Study
• Imagine - Airway
– Dental Treatment Issues
– Liability: Not for Dental - Beyond the Scope

37 Comparative Effectiveness Review Number 32
• Portable monitors and questionnaires may be effective screening tools, but assessments
  with clinical outcomes are necessary to prove their value over polysomnography. CPAP
  is highly effective in minimizing AHI and improving sleepiness. Oral devices are also
  effective, although not as effective as CPAP. Other interventions, including those to
  improve compliance, have not been adequately tested.

38 Digital Imaging
Diagnostic Tool

39 Treatments
• Central - Medical
  – Conservative - Self Help
  – O2 Support
• Obstructive – Medical or Dental
  – Conservative - MRD
  – Surgery Depending on Airway

40 OSA Risks
• Failure to Diagnose
  – Medical vs. Dental
  – Sleep vs. Airway
• Failure to Test
  – Clinical - DDS
  – Sleep Study - MD
  – Imaging – MD/DDS/Rad
• Failure to Treat or Refer
  – Conservative Tx
  – Physical Treatment

41 Obstructive

42 MRD
  • Patient Interview, Questionnaire
  • TMJ Exam, Records
  • Millions Sold over the Internet

43 MRD and the Law
  • Diagnosis - Documentation
  • Treatment Options – Documentation
  • Treatment Selection – Patient Choice
  • TMJ Major Potential Liability Issue
• Candidacy v Informed Consent Discussion
• Treatment Response – Lack of Issues

44  TMJ Evaluation
  • ROM
  • Stops
  • Noise – Feel, Scope
  • Imaging
  • Compare?

45  TMJ and CBCT

46  Future Record Keeping
  • In Progress Photos
  • In Progress Imaging
  • Digital Transfer
  • Encryption and/or Pass Word Protection for All Aspects of the Records
  • Chart and Document the Absence of Problems – Or Diagnose, Treat or Refer

47  Summary
  • Digital Affecting All Aspects of Dentistry
  • Elevating Standards of Care
  • Informed Refusal
  • New Record Keeping Obligations
  • Complications May Not be Risks with New Consents and Imaging