



# Legal Issues in The Dental Profession

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- Undergraduate: Gonzaga University
- Law School: University of Denver
- Employment: Johnson, Graffe, Keay, Moniz & Wick, LLP
  - Over 12 years of practice
  - Medical Malpractice
  - Dental Malpractice
  - Department of Health Claims



Johnson Graffe Keay  
Moniz & Wick LLP

*When reputation matters*

# Issues to Address



- Dental Malpractice Claims
    - Negligence
    - Informed Consent
  - Changes in Malpractice Law
  - Trends in Malpractice
  - Department of Health Claims
  - Best Practices (How to avoid meeting me again!)
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# Dental Malpractice Causes of Action

RCW 7.70.030

- Failure to follow the standard of care
  - Breach of promise
  - Failure to acquire informed consent
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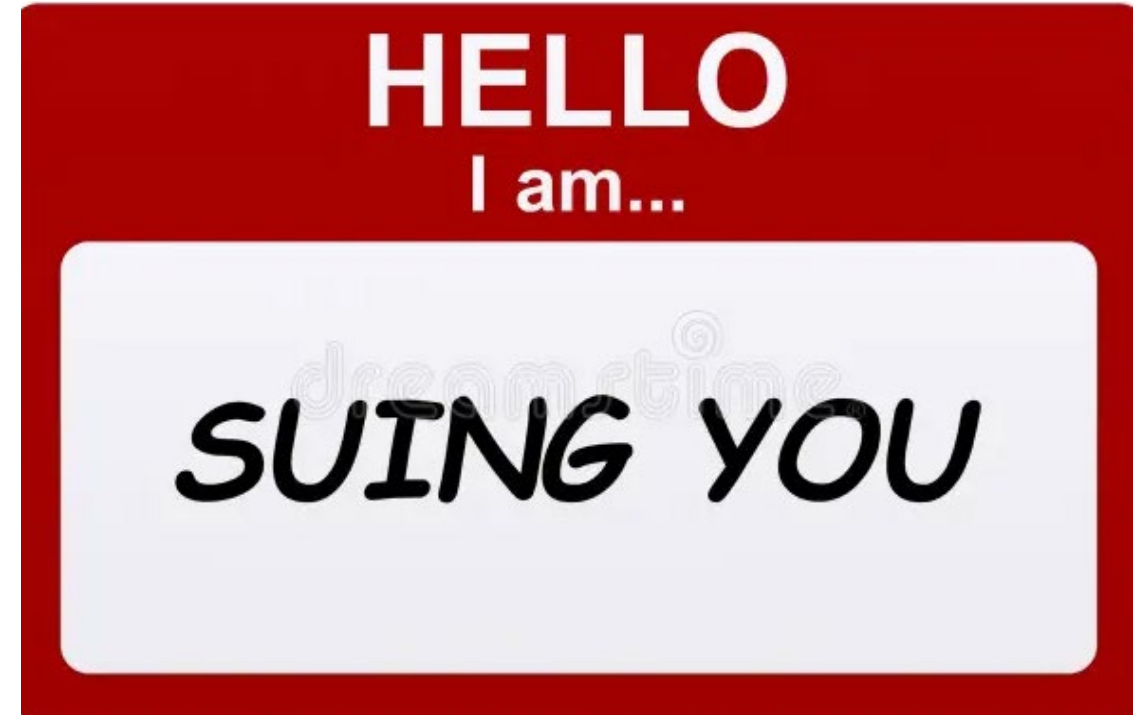
# If you get sued, what happens?

- Service of summons and complaint
    - Send to your malpractice insurer
  - Counsel is assigned (Notice of Appearance)
  - Answer is filed
  - Initial meeting with YOUR attorney
  - Written discovery
  - Request records
  - Expert retention
  - Depositions
  - Motions practice
  - Pretrial filings
  - Trial
  - Post-trial actions
- 



# Why Do Patients Sue?

- Bad outcome (Error or improper performance)
    - Failure to diagnose
    - Failure to refer
    - Cause additional damage (root fracture)
    - Cosmetic appearance
    - Retained instruments
    - Treatment failure
    - Infections
    - Implants (multiple)
    - Anesthesia issues
    - Nerve injuries (IAN)
  - Behavior – Bedside manner
  - Delay in performance
  - Communication - don't promise, watch advertising, make an apology
  - Financial incentive/confusion billing, insurance percentage, sent to collections
  - Criticisms by subsequent specialists (chose words carefully)
  - Failure to refer (when in doubt, refer it out!)
  - Poor supervision
- 



# Dental Malpractice

- Negligence - RCW 7.70.040

- The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
- Such failure was a proximate cause of the injury complained of.

- Informed Consent - RCW 7.70.050

- The dentist failed to inform the patient of a material fact
  - The patient consented without being fully informed
  - A reasonable patient would not have consented
  - The treatment caused the patient's injury
-

# What is the standard of care?

- The degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances.
  - Local and State professional organizations
  - Research and dental publications at the time of treatment
  - Expert testimony







# Expert Testimony

Dentist failed to exercise the skill of a reasonable dentist AND

The Dentist's failure caused the injury

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# Rushing to Judgment?

- Was it negligence or a complication?
    - Known risk
  - Was it an unfortunate outcome?
    - Bad outcome ≠ Negligence
  - Is there more than one way to treat a condition?
    - Utilize appropriate judgment
  - Did the negligence cause ALL of the injuries?
    - Causation!
  - Were there patient factors?
    - Bad/no follow up, or did the patient fail to follow instructions?
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# Informed Consent Claims

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# **What is Necessary for Informed Consent?**

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# Informed Consent

RCW 7.70.050 governs informed consent actions. Must prove elements:



The dentist failed to inform the patient of a material fact.



The patient consented without being fully informed.



A reasonable patient would not have consented.



The treatment caused the patient's injury.

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# What is a material fact?

If a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

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# Expert Testimony: Risks, likelihood, type of harm



The nature and character of the treatment proposed and administered

The anticipated results of the treatment proposed and administered

The recognized possible alternative forms of treatment; or

The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment



# Fast Facts: Informed Consent

- Most misunderstood claim
  - May not be negligent but still fail to obtain patient's informed consent (two separate claims).
  - She said/He said
  - Never guarantee results, triggers breach of promise. (3<sup>rd</sup> liability RCW)
  - Patients younger than 18 years old require consent from a parent or guardian.
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The dentist has no duty to inform the patient of his or her experience.

The dentist does not need to disclose ALL risks.

It is the dentist's duty, not a staff member.

Value of written consent forms.

Refusal of treatment form.



# Changes in Malpractice Law

- 2006 tort reform to address health care crisis, no change since the 1970s.
  - Most changes were short-lived
- Pandemic related changes (2021)

# How it used to be...

## Certificate of Merit

- File at the time of the complaint
- State that DDS breached SOC
- Goal: reduce frivolous claims

## Notice of Intent

- Give DDS 90 days before commencing action
- Goal: encourage settlement/resolution

# Statements of Apology

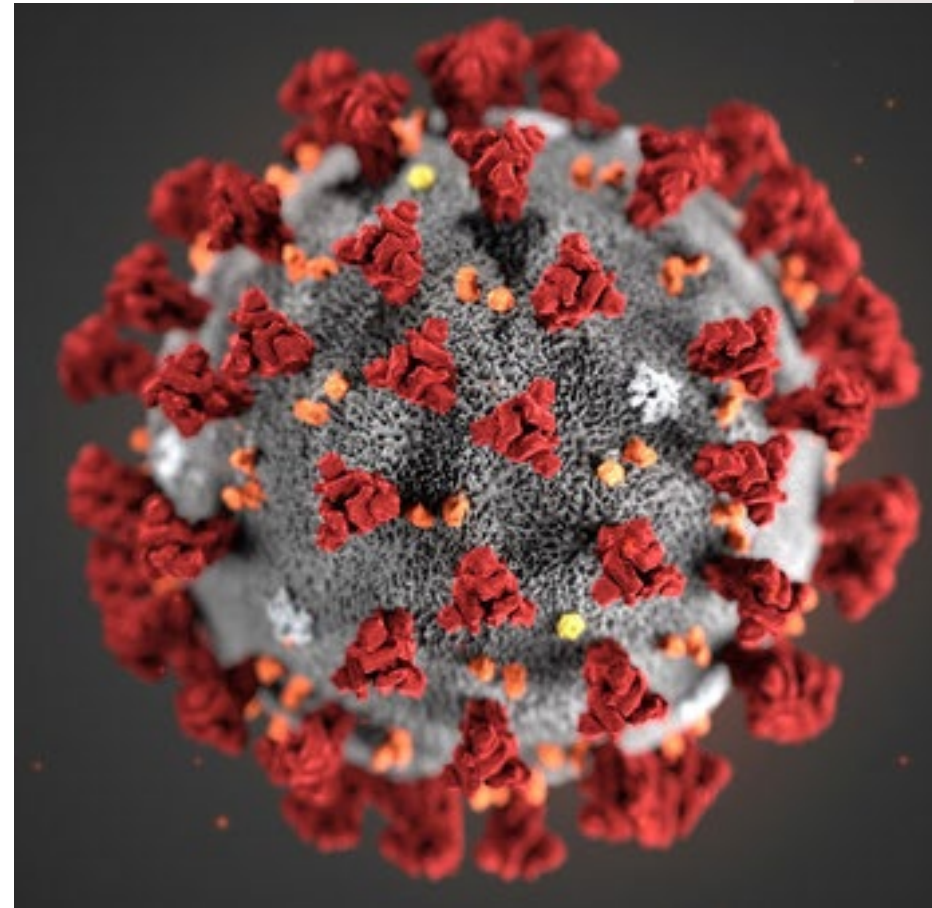
- Not admissible if conveyed within 30 days of injury or discovery
  - Statement or gesture
  - Expressing fault, apology, sympathy, or condolence
  - Relates pain, suffering, injury, or death
  - Goal: encourage open communication.
  - Studies show this defuses/deters the filing of lawsuits
- 



# Pandemic Related Changes

Applies to care between February 29, 2020, and October 30, 2022

- Was the act or omission done in good faith following guidance from the government or a governmental agency in response to the COVID-19 pandemic and applicable to such health care provider; or
- Was the act or omission due to a lack of resources including, but not limited to, available facility capacity, staff, and supplies, directly attributable to the COVID-19 pandemic.



<https://www.un.org/en/coronavirus>



## Statute of Limitations

- 3 years from the date of injury.
  - 1 year of discovery claim.
  - Tolling (1 year) if mediation requested
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A group of people in a circle with hands raised, symbolizing mediation or conflict resolution. The image is a blurred background showing several people in a circle, with their hands raised in a gesture of agreement or participation. The lighting is soft and natural, suggesting an indoor setting. The overall tone is professional and collaborative.

# Mandatory Mediation

- Court appointed
- Formal mediator

Goal: encourage a settlement or resolution



# **Jury Trial v. Voluntary Arbitration**



# What is Voluntary Arbitration?

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Parties must agree to arbitrate

Arbitrator, not the jury, decides the case

Parties must agree on arbitrator

Waive right to a jury trial

Waive right to appeal

Up to \$1 million worth of damages (<50k)

Goal: reduce court backlog



## **Benefits of Voluntary Arbitration**

- Quicker resolution (9-12 months)
  - Not court dependent
  - Shorter than trial
  - Less expensive
  - Protects assets-cap
  - Fewer lost work hours
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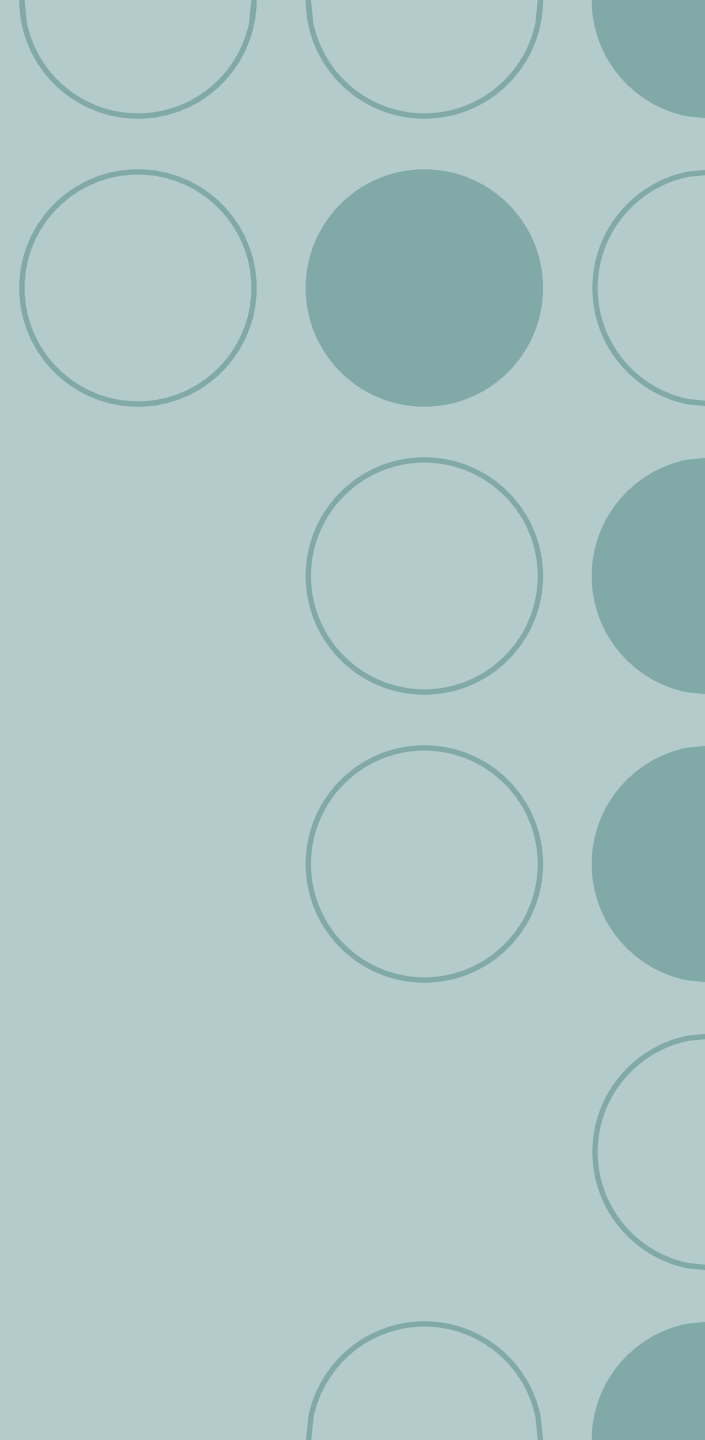
A close-up photograph of a pen writing on a document. The document features a line graph with several peaks and valleys. The pen is positioned at the top right, and the ink is being applied to the paper. The background is a light blue color with some decorative circles in the top right corner.

# Risks of Voluntary Arbitration

- Plaintiff wins closer cases
  - Not appealable
  - Less time to prepare
  - More plaintiff-oriented arbitrators
  - Must agree on an arbitrator
  - Limited discovery and investigation
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# Trends in Malpractice and Licensing Actions

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# Malpractice Actions Trends

- The number of malpractice claims is down (expense, procedural barriers)
- The severity of malpractice claims is up
- Some dismissed, many settled, and few tried (<10%)



# Malpractice claims by the numbers....

- 2017-2021: 3,507 claims reported in Washington
  - 46.1% resulted in payment (average \$493,786)
    - \$798 million on 1,617 claims
    - 13.4% were \$1 million or more
    - Longer the claim went on the higher the payment
  - Defense costs: \$229 million to defend 3,018 claims
    - \$74,325 per claim
- 2017-2021: 259 Dental group or practice
  - 45.6% resulted in payment (average: \$115,870)
  - Average defense costs: \$28,492
- 2017-2021: 263 Dental specialty
  - 46% resulted in payment (average \$122,386)
  - Average defense costs: \$30,448



# Where do patients sue?

- Superior Court (>100k)
  - Mandatory Arbitration (<100k)
  - Voluntary Arbitration (<\$1 mil.)
  - King County Small Claims (<10k no attorney)
  - Private Trial (like arbitration)
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# Licensing Actions

DOH investigation is triggered with:

- Complaint
  - Patient
  - Family member
  - Employee
  - Other provider
- Judgement
- Settlement made on behalf of the dentist
- Federal law requires insurance reports within 30 days, NPDB, or DOH. Except for pure system (billing) cases or refunds (no report, no admittance of guilt, sign release, not suit).





# Why Do Patients File Complaints?

- Bad outcome but not high value
- Poor communication
- Billing issues (eat the cost)
- Behavior – bedside manner
- Dissatisfaction with appearance, unrealistic expectations
- Criticisms by subsequent provider
- Comments from family/friends
- Frustration



# What happens after a complaint is made?

- Informative letter from the Department (report to insurer ASAP!)
    - ID the investigator assigned
    - Attorney
  - Request for information/statement (Limited time)
    - Additional requests (records, imaging, etc)
    - Current Board: 7 gen, 1 oral med, 1 oral surg, 1 DA and 3 public members
  - Action
    - Claim closure
    - Stipulation to Informal Disposition
    - Statement of Charges
    - Summary Suspension
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# Unprofessional Conduct

## RCW 18.130.180

- (4) Incompetence, negligence, malpractice that results in or creates unreasonable risk
  - (6) Distribute, (22) misuse drugs
  - (8) Failing to cooperate with investigative authority
  - (13) Misrepresentation or fraud in business practice
  - (17) Commit gross misdemeanor or felony related to profession
  - (23) Sex with patients
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# Dental Quality Assurance Committee by the numbers....

## 2022 Disciplinary Action

- All health care professionals: 893 actions
- Dentists: 68 actions
- Dental assistants/hygienists: 7 actions

# Best Practices

- ✓ Communicate
    - ✓ Set reasonable expectations
  - ✓ Documentation
    - ✓ What did you do?
    - ✓ Why did you do that?
    - ✓ What else did you consider?
    - ✓ Why did you not elect a different course?
  - ✓ Practice within your scope
    - ✓ Refer when appropriate
    - ✓ Offer second opinions
  - ✓ Own up to mistakes
  - ✓ Offer refunds
- 



# Frequently Overlooked Regulations

- Retention of dental records – 6 years (WAC 246-817-310)
  - Charges – copying records/clerical (WAC 246-08-400)
  - Reporting within 30 days – injury or mortality requiring hospitalization resulting from a dental procedure (WAC 246-817-320)
  - Patient abandonment – if you withdraw, you must advise the patient to seek another dentist and be available for 15 days for emergency care. (WAC 246-817-380)
  - Scope of practice for assistants (WAC 246-817-520 through 570)
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**QUESTIONS?**

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# **My contact information**

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