



CNA HealthPro

The Basics of Claim Assessment and Valuation

The outcome of any malpractice allegation is affected by a variety of factors, both clinical and non-clinical. The claim specialist is responsible for assessing and managing these factors to effect the most desirable claim outcome for the dentist whose professional services have become the subject of a claim.

At any given time, the claims on file in our computer databases are a collection of recently reported claims of which little information is known, claims which have been pending for some time of which more is known, and claims which are closed of which the most is known. In all three categories, some of the claims have required, or will require, monetary payment to the claimant. Others will be closed with no payment. The value of a pending claim can change (up or down) as more information becomes known.

When a claim is first reported, a monetary value is placed on the claim as a case estimate, and the information is entered into a database. The case estimate is meant to be an accurate evaluation of a claim's value, considering all the facts known at that time. As more facts become known, the estimate is adjusted up or down to reflect the claim adjuster's evaluation of potential liability. When a dental incident is reported by an insured to CNA, it is significant to note that upon receipt of the report, a minimal case estimate may be established.

Once notice of a claim has been received, a thorough investigation of the case is undertaken. If a lawsuit has been filed, this investigation will include a more formal process, encompassing the exchange of "written discovery" (questions which will be answered by both parties to the litigation, under oath). Of course, a review of all pertinent dental and medical records will be in order. Eventually, if the lawsuit continues, answers to written interrogatories will be required and depositions will be taken of all parties and witnesses, including prior and subsequent care providers.

As the investigation continues, the case will be evaluated based upon numerous factors: the purported misconduct of the practitioner, the nature and extent of the damages alleged and confirmed, the jurisdiction in which the suit has been filed, the sympathetic (or unsympathetic) nature of the claimant, as well as the demeanor and veracity of witnesses. Each of these elements will play a role in determining the reasonable case value.

Of the many factors to be considered in valuing a case, retained experts' opinions (both supportive and not supportive) play a major role. While jurisdictions may vary regarding litigation procedures, almost all require expert input before the case can be presented to a judge or jury. For example, some state statutes addressing expert witness qualifications in health care liability litigation impose more stringent requirements than others. It is generally insufficient for a layperson to sustain a claim against a health professional without expert opinion. Indeed, the valuation of the claim will include considerations of the expert's qualifications, training and background, his familiarity with the procedure or treatment at issue, his understanding of the standards of practice, his credibility, his prior experiences as an expert (i.e., is the expert a "hired gun"?) and the foundation for his opinions. In fact, the strength of a claimant's lawsuit often can be measured, in part, by the strength of his or her expert.

Similarly, the assessment of the claim will include the opinions of our own experts. How will he or she defeat the allegations of plaintiff's expert? Are the opinions of our expert sound, are they credible, will they be understandable and acceptable to a lay juror? Does our expert have difficulty in supporting some or all of the care of our insured? Indeed, are we able to obtain a credible expert?

The dental records also may play a major role in the evaluation. In some instances, textbook care may have been provided, but the records are so barren that they will not support the defense of the claim. Post-procedure complications and their treatment must not only be acted upon but also noted. Most claimants do not have a series of malpractice claims pending or a host of suboptimal results. Consequently, it is natural to assume (and their attorney will argue) that the claimants will have a much clearer recollection of the events surrounding the claim than will the practitioner, who sees multiple patients each day and has had thousands of patient encounters since the alleged malpractice occurred. It is difficult for a jury to believe a practitioner's rendition of events which are not properly noted.

As suggested above, the evaluation itself may consider elements of the claim which do not bear directly upon the clinical practice of dentistry. Is the claimant likeable and credible? What about the insured? Would the average juror wish to have the insured as his or her dentist? Will plaintiff's claim appeal to a jury, despite the fact that it is not necessarily sound from an academic standpoint? What are the damages? Are they so devastating that they will overwhelm any type of liability defense?

Not surprisingly, there are cases in which defensible dentistry may be overshadowed by non-clinical factors that would be looked upon unfavorably by a jury. These non-clinical factors often involve the unprofessional conduct of the dentist. Examples of such conduct include leaving the office to pay a parking ticket while a patient is mid-treatment, or having a female patient awakened from sedation with her blouse unbuttoned or mis-buttoned. Settlements are often pursued in such cases because the average juror would consider the dentist's conduct grossly unprofessional and would never want the defendant dentist as his or her own, thus making a defense verdict unlikely.

The various aspects of professional liability claims and their defense make claim handling a challenging task. The claims specialist's assessment of the case will be influenced by both clinical and non-clinical information, as it is compiled. Every claim, even if later closed without a payment made to the claimant, will cost the dentist some time to review the chart and report the incident. Dentists can minimize the likelihood of developing a professional relationship with a claims specialist by following sound risk management protocols.

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