

Some Things Never Change: Updated Dental Claims Guidelines

Introduction

Perioperative dental injuries are the most common anesthesia-related adverse events and malpractice claims against anesthesia providers.¹ Dental claims comprised nearly one-third of all claims reported to PPM in the past ten years, as illustrated in the chart below.

Despite the significant number of dental claims reported by PPM policyholders, dental claims only account for a small percentage of PPM's losses. Dental injury is typically not caused by negligence. In a large percentage of the dental injuries investigated, PPM discovers that the patient had significant pre-existing dental disease or conditions that caused or contributed to the injury. The majority of dental claims turned over to PPM are resolved without litigation or payment. PPM's considerable experience in investigating dental injuries indicates that

Claims / Litigation
2009 – 2018



most dental claims are defensible. However, there are several important steps PPM policyholders should take to prevent or minimize dental injuries and the occurrence of dental claims.

Identifying Patient Risk Factors

While dental injury is a risk for all patients during anesthesia and all perioperative stages, the risk is significantly greater if the patient has existing periodontal disease, poor dentition, dental restorations or other medical conditions that predispose them to dental disease.² Other patient high risk factors associated with dental injury include:

- History of previous difficult tracheal intubation
- Limited neck motion
- Previous head and neck surgery
- Craniofacial abnormalities³

Avoiding Iatrogenic Causes of Dental Injury

Various anesthetic devices, especially rigid devices, can cause dental injury. The following devices are frequently associated with dental injury and should be used with caution:

- **Laryngoscope:** Upper incisors can be damaged if force is applied to the teeth by the laryngoscope blade using the upper teeth as a fulcrum
- **Oropharyngeal airways:** Can cause injury during extubation as the patient might involuntarily bite down on the airway and it can act as a fulcrum causing injury
- **Jaw clamping:** Use of a jaw clamp during light anesthesia, particularly when used with an oropharyngeal airway, can put pressure on the teeth
- **Bite blocks:** Wrong placement of bite block can cause damage to the anterior teeth
- **Suction devices:** Dental injuries can be caused when anterior teeth are subjected to extreme lateral force
- **Dental props and mouth gags:** Can damage teeth during insertion or removal or when they are moved from one side of the mouth to the other⁴

Preanesthesia Evaluation and Documentation

PPM policyholders are strongly encouraged to conduct a thorough preoperative oral evaluation of all patients undergoing general anesthesia. The evaluation should include the patient's dental history, oral and dental examination, and a specific discussion with the patient about any existing dental conditions that might increase the risk for dental injury. The dental examination should also include a focused assessment of the patient's upper incisors, which are the most commonly involved teeth in dental injuries. Patients with existing dental problems should be advised that they are at increased risk for dental injury. Patients with existing bridges, caps, crowns or veneers are particularly susceptible to injuries, which

frequently require expensive repairs. Removable dental work such as dentures or bridges should be removed preoperatively. Patients with very loose teeth that might be at increased risk for aspiration should be informed and advised that they might want to see their dentist before the procedure. Pre-existing dental conditions not only increase the patient's susceptibility to injury, but the significantly higher cost associated with repairing such injuries greatly increases the likelihood the patient will pursue a claim. Preoperative notes should specifically document any existing dental damage or condition and the discussion with the patient that they are at increased risk for dental injury.⁵

Informed Consent

Informed consent is a key factor in managing dental claims. In order to minimize losses caused by dental injuries, PPM recommends that the risk of dental injury with all patients undergoing general anesthesia is included on anesthesia consent forms. Documentation of the risk of dental injury in both the preoperative notes and on the informed consent helps to establish reasonable patient expectations and diminishes the perception of medical negligence. The following is a sample section of an anesthesia-specific informed consent listing the risk of dental injury:

Risks (include but not limited to:	Mouth or throat pain, hoarseness, injury to mouth, airway, esophagus or teeth, awareness under anesthesia, injury to blood vessels, respiratory arrest, vomiting, aspiration, pneumonia, corneal abrasion.
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After a Dental Injury Occurs

In the event dental injury occurs, all teeth fragments or dental prostheses need to be recovered and documented. In the event there are missing fragments or dental prostheses, a chest radiograph should be performed to exclude aspiration. If aspiration is suspected, an ENT or thoracic surgeon should be consulted urgently.⁶ However, not all dental prostheses are radiopaque and direct visualization may be required. While most dental fragments will pass through the gastrointestinal tract without causing harm, large prostheses may cause obstruction and perforation. Those cases may require surgical or endoscopic removal.⁷

When the patient is sufficiently awake, the patient should be notified of the dental injury. Unless the PPM policyholder has previously discussed the manner in which dental claims are handled, please contact PPM for risk management guidance and to discuss options for handling these claims. If it is not possible or practical to contact PPM first, the following is a sample dialogue to prepare PPM policyholders for patient conversations in the event of a dental injury:

PPM Policyholder: "One of my patients sustained a dental injury. I need to go talk to the patient. What do I say?"

PPM: "First, let me ask you a few questions. Did you note or document any dental conditions the patient had prior to surgery? Did you discuss the risk of dental injury with the patient during your preanesthesia evaluation? Is dental injury listed as a risk on the anesthesia consent form?"

PPM Policyholder: "Nothing about the patient's dentition was noted on the medical record and I did not specifically discuss the risk of dental injury with the patient, but it is included as a risk on the anesthesia consent form the patient signed."

PPM: "Based on what you have reported, we recommend explaining how the dental injury occurred (if known) and the efforts taken to minimize any complications. Inform the patient that dental injury is a common, known risk and complication of general anesthesia and remind them that the risk was discussed with them prior to surgery or contained in the anesthesia consent form they signed. It is appropriate to tell the patient you are sorry the complication occurred and they should follow up with their dentist."

PPM Policyholder: "What if the patient wants me to pay for the dental consultation and repair?"

PPM: "Inform the patient again that dental injury is a known risk and complication of general anesthesia. If they insist on someone paying for the repair, tell them you will turn their claim over to your medical malpractice insurance company, Preferred Physicians Medical, and they will investigate the claim. However, there is no guarantee that any payment will be made. Let the patient know that they will be receiving a letter from Preferred Physicians Medical to start the process and they should contact Preferred Physicians Medical directly regarding their dental claim."

PPM Policyholder: "Will my malpractice premiums go up because I reported a dental claim and turned it over to PPM to handle?"

PPM: "No, PPM's in-house claims attorneys and specialists are experts in handling dental claims. Our investigations typically do not identify any negligent care by our policyholders and most dental claims do not result in litigation. There is no additional charge for PPM's services and your premiums will not be affected due to reporting dental incidents or claims. PPM's in-house claims attorneys and specialists are here to help you and we can be reached at 800-562-5589 24 hours a day, 7 days a week, 365 days a year."

Perioperative dental injuries are the most common anesthesia-related adverse events and malpractice claims against anesthesia providers.¹

Options for Handling Dental Claims

PPM Dental Claims Handling

Regardless of how PPM policyholders choose to handle a dental claim, they should always contact PPM as soon as possible to discuss the available options. In situations where the PPM policyholder wishes to turn over a patient's dental claim to PPM, it is extremely important to avoid an assumption of liability and responsibility for payment before PPM conducts an investigation. Dental injuries, especially those involving bridges, implants and crowns may be much more expensive than expected. The following case study underscores why PPM policyholders should not assume responsibility for payment until PPM has fully investigated the dental claim.

Case Study One

A 60 year-old male presented for an upper endoscopy procedure with total intravenous anesthesia (TIVA) provided by a PPM insured anesthesiologist. The patient reported that he had a lower bridge during the preanesthesia evaluation. The gastroenterologist's nurse inserted a bite block in the patient's mouth for the procedure. During the procedure, the patient began to

Informed consent is a key factor in managing dental claims.

desaturate so the gastroenterologist removed the scope. When the nurse attempted to remove the bite block, she noticed the patient's bridge had become dislodged and was laying in his mouth. The nurse removed the bridge and the bite block from the patient's mouth. The anesthesiologist placed an oral airway and oxygenated the patient with an Ambu bag. The patient's saturations quickly improved and the procedure was completed without complication.

Over one year later, the anesthesiologist received copy of a letter that was addressed to the hospital in which the patient made a claim for the damage to his upper permanent bridge and natural teeth during the endoscopy procedure. The patient submitted a proposed treatment plan for the "full restoration of his bridge" in the amount of \$40,377.00. The anesthesiologist turned this dental claim over to PPM and an investigation was opened.

With the patient's authorization, PPM obtained copies of the patient's medical records from the endoscopy procedure and his dental records. The hospital records included a signed Anesthesia Consent form that documented general anesthesia would be provided and listed the risk of injury "to mouth or teeth." The patient's dental records showed the patient had extensive dental restorations and poor dental health. The patient's dental records also revealed the patient told his dentist that he was only concerned with his front teeth. However, the

patient's dental claim included a treatment plan for both an upper and lower bridge.

PPM's investigation confirmed the patient was never intubated and the only devices and instruments that were placed in his mouth were placed by the gastroenterologist and his nurse. PPM's review of the patient's medical and dental records and investigation of his dental claim found no negligence on behalf of the anesthesiologist and the claim was denied with no payment.

Risk Management Analysis

Assuming responsibility in advance of PPM's investigation may contractually obligate the anesthesia provider or practice group to pay damages that did not result from anesthesia care. Stating something as simple as, "Go to your dentist, submit your bill and we will take care of it" might be sufficient to support an argument that the anesthesia provider entered into an oral contract and is legally obligated to pay for the total amount of the patient's claimed dental damages. As highlighted in the case study, assuming liability before the patient's dental history is known may obligate the anesthesia provider or practice group to take responsibility for years of dental neglect. Assuming responsibility may also prevent PPM from handling the claim appropriately.

As a general rule, PPM recommends payment of dental claims only in rare cases where the injury results from a failure to meet the appropriate standard of care. PPM defends dental claims when there is no evidence to suggest a breach of the standard of care. PPM does not pay dental claims under a no-fault provision in order to maintain appropriate premiums and to avoid reporting those settlements to the National Practitioner Data Bank and state medical licensing boards. At the same time, PPM is committed to evaluating dental claims on a case by case basis consistent with our policy.

For example, PPM may recommend payment for dental injuries that result from multiple intubation attempts if there is no anatomical structure or condition to explain the difficulty with intubation. On the other hand, PPM would typically recommend denying a dental claim that cannot be reasonably prevented, e.g., patients who bite down on the oral airway in the recovery room.

Note: *In order for PPM to handle your dental claim, PPM will be required to establish a claim file. This file may be reflected on your credentialing report and you may need to disclose it on applications for hospital or insurance company privileges.*

Direct Handling by PPM Policyholder

In order to avoid a blemish on their credentialing report or just the additional paperwork, some PPM policyholders and anesthesia practices prefer to handle dental claims without turning them over to PPM. Under this scenario, dental claims are commonly resolved by a direct payment to the patient's dentist or by reimbursing the patient to cover any dental charges that are not paid by the patient's insurance. This option avoids the National Practitioners Data Bank reporting requirement, most state reporting requirements, and does not appear on credentialing reports provided by PPM on the policyholder's behalf to hospital and insurance organizations.

If the PPM policyholder decides to make a direct payment to the patient or to the patient's dentist, the PPM policyholder should still contact PPM to obtain guidance and assistance to properly resolve the dental claim. PPM's in-house claims attorneys and specialists can provide a draft cover letter and a general release to send to the patient **before** providing any reimbursement or compensation. As highlighted by the following case study, PPM policyholders should not make any payment or reimbursement before obtaining a signed general release.

Case Study Two

A 48 year-old female patient underwent liposuction with general anesthesia provided by a PPM insured anesthesiologist. At the end of the procedure, the patient bit down on the oral airway and chipped two veneers. The patient saw her dentist the following day. The patient's dentist's office contacted the anesthesiologist and requested payment for the repair of two veneers. The anesthesiologist paid \$4,344.00 for the repair without first obtaining a general release from the patient.

The anesthesiologist later heard from the plastic surgeon's office that the patient was unhappy with her repair because the color did not match. The patient had another dentist remove the veneers and replace them with temporary veneers, and she wanted the anesthesiologist to pay for the temporary and new permanent veneers. The anesthesiologist contacted PPM and we opened an investigation.

Upon receiving PPM's dental claim letter and medical authorization release, the patient contacted the anesthesiologist's practice to complain further. She believed that the anesthesiologist's willingness to pay the initial cost of her dental repair was an "admission of guilt" and the anesthesiologist should be responsible for payment for her permanent veneers.

Following PPM's investigation, there was no finding of negligence on behalf of the anesthesiologist and the dental claim was denied with no payment. Four months later, PPM received a letter from the patient's attorney demanding payment in the amount of \$18,547.50 for replacement of all of her veneers. The patient's

attorney's letter threatened litigation and a medical licensing board complaint if payment was not made in full. PPM reviewed the file and sent the patient's attorney a letter denying his client's claim. The patient did not file a lawsuit or a complaint with the anesthesiologist's medical licensing board.

Risk Management Analysis

Like many PPM's policyholders whose patient has a dental injury, the anesthesiologist in this case felt badly that her patient had this complication. While she did not believe her care was inappropriate or caused the patient's dental injury, the anesthesiologist wanted to help the patient as a good will gesture. Unfortunately, the patient in this case took advantage of the anesthesiologist's kindness and generosity and tried to use that against her to extort additional payments. The anesthesiologist's payment for her initial dental repair was not an "admission of guilt" or liability. However, this is a common question from PPM's policyholders. PPM can defend our policyholders if they make a payment or reimburse a patient as a good will gesture or patient relations. Additionally, thirty-six states have enacted what are commonly referred to as "apology laws" that prohibit certain statements, expressions, payments or other evidence related to disclosure from being admissible in a lawsuit.⁸ Obtaining a general release before making any payment or reimbursement will ensure that a dental claim is resolved completely.

Note: If you request PPM's assistance to resolve a dental claim directly, PPM will establish an incident file. Incident files, however, are confidential and not reflected on your credentialing report.

Based on the options discussed above, PPM has resolved or assisted our policyholders in resolving dental claims quickly and efficiently. The majority of claims turned over to PPM are resolved without litigation or payment. PPM's experience in this regard indicates that the majority of dental claims are defensible.

Defending Dental Injury Lawsuits

In the last 10 years, PPM has defended 20 dental injury lawsuits. PPM obtained dismissals on behalf of the PPM policyholders in 16 of those lawsuits. PPM tried two dental injury lawsuits and obtained a defense verdict in one case and a plaintiff's verdict in the other case. The plaintiff's verdict was in the amount of \$1,298.70.⁹ Two dental lawsuits are pending. According to Danon Williamson, Claims Attorney, "While we receive many informal claims for dental injuries, litigation involving dental injuries is extremely rare. When a lawsuit is filed, often the patient represents themselves because most plaintiff attorneys will not accept dental cases due to the

limited damages and expenses involved in litigation. PPM has been very successful in educating plaintiffs about the necessity to produce expert testimony and the costs of pursuing litigation to convince them to dismiss the lawsuit.

If the plaintiff chooses to pursue the lawsuit, PPM typically prevails at trial due to the fact that most dental cases are fully defensible on the medicine.”

References:

1. Warner ME, Benefield SM, Warner MA, Schroeder DR, Maxson PM. Perianesthetic dental injuries: frequency, outcomes, and risk factors. *Anesthesiology* 1999;90:1302-5
2. Abeyesundara L, Creedon A, Soltanifar D. Dental Knowledge for Anesthetists. *BJA Education*, 2016;16(11):362-8. Available at: <https://doi.org/10.1093/bjaed/mkw018>
3. Warner, *supra* note 1.
4. Idrees SR, Fujimura K, Bessho K. Dental Trauma related to General Anesthesia: Should the Anesthesiologist Perform a Preanesthetic Dental Evaluation? *Oral Health and Dental Management* 2014;13(2):271-4.
5. *Id.* at 271.
6. Abeyesundara, *supra* note 2.
7. Idrees, *supra* note 4, at 273.
8. Sorry Works! Making Disclosure A Reality for Healthcare Organizations. Available at: <http://sorryworkssite.bondwaresite.com/apology-laws-cms-143> (accessed 3/14/2019).
9. The plaintiff filed the lawsuit in small claims court representing herself. Despite the fact that the plaintiff failed to produce any evidence or expert testimony to support her lawsuit, the court ruled in her favor. In PPM’s experience, small claims courts, in some circumstances, will not strictly apply the law and give the plaintiff the benefit of the doubt, especially when the plaintiff is representing themselves without the assistance of an attorney.

DID YOU KNOW PPM HAS...

- Obtained 44 consecutive defense verdicts on behalf of PPM policyholders in 44 upper extremity nerve damage jury trials
- Secured over \$1.5 million in post-trial judgments against plaintiffs who filed and pursued frivolous lawsuits against PPM anesthesia providers and practices
- Never settled a lawsuit without the PPM policyholder’s consent
- A team of anesthesia-specific in-house claims attorneys and claims specialists whose only job is defending and managing anesthesia claims and litigation

PPM Upcoming Events

May 2019

May 4-5, 2019

Missouri Society of Anesthesiologists Annual Meeting
InterContinental Kansas City at the Plaza • Kansas City, MO
Jim Humphrey, Regional Representative-Business Development

May 16-17, 2019

Advanced Institute for Anesthesia Practice Management
The Cosmopolitan of Las Vegas • Las Vegas, NV
Steve Stark, Vice President-Business Development and Jim Humphrey, Regional Representative-Business Development

June 2019

June 1, 2019

Wyoming Society of Anesthesiologists
Jackson Lake Lodge • Jackson, WY
Guest Speaker: Brian J. Thomas, JD, Vice President-Risk Management

**PREFERRED PHYSICIANS MEDICAL
RISK RETENTION GROUP**

11880 College Boulevard, Suite 300
Overland Park, KS 66210-2141

T 913.262.2585 • 800.562.5589
F 913.262.3633

NEWSLETTER EDITOR

Brian J. Thomas, JD
Vice President-Risk Management



In This Issue

Dental claims continue to be the No. 1 anesthesia-related claim reported by PPM policyholders. Perioperative dental injuries are a known risk and complication and infrequently caused by clinical negligence. However, many patients who experience dental injury assume the anesthesia provider was negligent and should be responsible for payment for dental consultation and repair. To respond to a significant number of questions and concerns from PPM policyholders regarding dental injuries and claims, PPM developed updated guidelines to minimize the number of dental claims, as well as reducing the inconvenience associated with processing, investigating and resolving dental claims. In this issue, we examine some of the causes of dental injuries, provide risk management strategies to prevent dental injuries and claims, and options for handling dental claims if they occur. We also highlight some of PPM's successes in defending dental injury lawsuits.

Thanks for reading,

A handwritten signature in blue ink, appearing to read "Brian J. Thomas".

Brian J. Thomas, Editor

Note: The purpose of this newsletter is to provide information to policyholders and defense counsel regarding professional liability issues. Risk management analysis is offered for general guidance and is not intended to establish a standard of care or to provide legal advice.

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