The vast majority of orthodontic professional negligence malpractice lawsuits are avoidable. This is one of the main reasons that effective risk management in professional health-care practice, and especially in an orthodontic practice, is such a vital and high return activity. The return on investment (ROI) received from effective risk management implementation is significant and almost incalculable.

The overriding reason for effective risk management is that patient care is optimized, especially when consistent and appropriate procedures and protocols are followed. Briefly mentioned in this article (and to be followed in a subsequent article), the use of the Encounter-Based Risk Management (EBRM) System eliminates the initiating factors for a lawsuit as well as those aspects that are implicated with the loss of a lawsuit. EBRM represents an integration of evaluation, treatment and communication protocols and procedures that can be relied upon in detecting deviations from expected progress and create the proper pathways for treatment, while keeping all involved completely current. This professional approach eliminates the initiators of lawsuits and the reasons for their loss.

Of equal importance is why are these lawsuits lost? The reasons for losses are not quite as clear. However, surveys conducted over many years suggest several reasons that are grouped into frequency clusters.

From the surveys that our group conducted, the highest frequency cluster (30-44 percent) includes: failure to diagnose, which includes unrealistic expectations, necessitating the spending of adequate time interviewing the patient to learn what they really want treatment to achieve; failure to respond, including failure to treat, failure to refer, failure to follow-up; and, and lack of adequate informed consent.

The next cluster (27-38 percent) consists of: poor records, missing records and altered records. And, finally the last cluster (three to eight percent) is treatment negligence.

The EBRM System functions to eliminate Cluster 1 orthodontic professional negligence actions by:

• Developing and maintaining an optimal interpersonal relationship,
• Careful patient selection,
• Effective informed consent presentation and documentation and communication protocols and procedures to all involved practitioners and the patient/parent,
• Appropriate diagnostic evaluations and treatment planning protocols and procedures and effective communication as above,
• Providing transparent, consistent and inclusive communication among all involved (especially the patient).

By incorporating an effective risk management overlay to every aspect of your orthodontic practice, the most frequently cited reasons for the lawsuit being initiated and lost by the orthodontist are eliminated!

Cluster 2, composed of poor records, missing records or altered records, is also avoidable. Keeping records is an integral part of health-care practice. Many practitioners use a computer-based system. As long as the entries are complete and regular and/or automatic, secure backup is employed, little extra effort needs to be invested to incorporate the recommendations that are needed for effective risk management. Some systems permit diagnostic materials, images, worksheets, informed consent and treatment planning inputs to be stored as well. If not, these should be preserved traditionally in the event they are needed to
demonstrate what the clinician considered pre-treatment and how the treatment plan was determined.

These supporting documents should be maintained along with the other components of the patient’s record. An important document not used in the majority of orthodontic offices is a summary checklist describing what was presented to the patient/parent during the consultation/informed consent conference. Initials/signatures of all present, alongside each of the five critical aspects, which need to be discussed, should be maintained to evidence the discussion. These aspects are: the nature of the problem, the primary treatment plan recommended, any alternative treatments recommended, the potential material complications of the primary and alternative treatments and the potential material complications should the patient elect to have no treatment.

Further, correspondence to all involved practitioners, as well as the patient/parent, should include a review of this information along with other aspects of the orthodontic care and any other care needed. Implementing this protocol will avoid the patient alleging a failure to diagnose and/or inform, refer and/or treat.

Professional negligence actions can be costly and time consuming for a plaintiff’s lawyer, and since these kinds of legal cases are taken on a contingency fee basis (i.e.: the lawyer only gets paid if he or she wins, but the lawyer generally fronts the costs which can cost tens of thousands of dollars), lawyers have become very good at selecting the right cases. High quality and complete records may be the key factor in a lawyer’s decision to take a case.

For those practitioners using a paper-based chart/record system, precautions need to be considered. Unexpected events such as fires, flooding or other catastrophes that can destroy records should be considered and adequate means to preserve all records should be implemented. One suggestion is to scan and keep an extra copy of all patient records off-site and to do so on a regular and updating basis. There are several inexpensive, double-sided scanners available for this purpose.

Lost or destroyed records can be problematic. The orthodontist who avers that he or she no longer has the patient’s records might be received by the plaintiff’s lawyer, the court and the jury with skepticism.

Altered records are even more problematic. They have been the basis for punitive damages, which are not covered under most malpractice insurance policies since altering a patient’s record is not part of the scope of a professional practice and is an intentional act, not an act of negligence. Punitive damages can be large and relatively unrelated to the amount of the award for malpractice. Being exposed by an expert in the field of document alteration detection can be devastating to your malpractice case and may by itself sway the jury against a practitioner. Also, such actions could serve as a basis for punitive damages and/or dental board/professional conduct complaints.

One of the main reasons that practitioners feel that they can alter records and that such alterations will go undetected is that without the extensive and elaborate communication protocol suggested herein, the producer of those records knows that only they have access to the record. Unfortunately for these practitioners, the sophisticated scientific methods that have been available for many years enable the easy detection of alterations.

Amending or correcting a chart entry is something that needs to be done from time to time. There is a protocol for doing so. However, the original entry is always preserved and the revision or new entry is added. It must be plain for anyone to see that no attempt was made to conceal the original or obliterate it. The damage to a practitioner’s credibility, integrity and professionalism from allegations and proof of altering professional records is devastating and the practitioner’s reputation should never be jeopardized.

The last cluster for our discussion is unrealistic expectations and treatment negligence. Although both can serve as malpractice lawsuit initiators, they play a larger role as basis for losing a malpractice case. Unrealistic expectations need special attention and are discussed at length in my book, Managing Risk in Orthodontic Practice, in the sections describing the initial exam and pre-treatment phase. Care in interviewing and verifying the real reason for the patient presenting is vitally important and should be clearly understood. Under most circumstances, following the suggestions included in these sections will eliminate this type of professional negligence action especially if the patient and practitioner cannot agree on a set of realistic expectations. In that case, treatment should not be initiated. Although declining treatment for a patient can be a difficult decision and requires an

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empathic manner, it is far easier to accomplish and less problematic than dismissing a patient who is in treatment and infinitely less difficult and painful than enduring a professional malpractice case as a defendant. Malpractice court cases frequently develop lives of their own and can last three to five years and have extended even to seven years.

As previously mentioned, treatment negligence in dentistry represents a low percentage of lawsuits initiated, but a larger percentage of the reasons that lawsuits are settled or lost when taken to verdict. Practitioners are well trained and generally keep current with continuing education to preserve and improve their skill sets. Negligence does occur. One of the benefits of developing a good interpersonal patient-practitioner-staff relationship is that in the vast majority of instances, this type of optimal patient relationship will preclude the filing of an orthodontic professional negligence malpractice lawsuit by the patient.

Solid risk management protocols and procedures, effective pre-treatment procedures including understanding and incorporating optimized situational patient psychology, before and during treatment, and implementing in-depth pre-acceptance interviewing techniques especially designed to learn the real reasons that treatment is desired and why now are suggested protocols to incorporate into the orthodontic practice.

The occurrence of complications, that in many instances have a known occurrence frequency, is not negligence, providing effective informed consent has been used. It is not possible to completely eliminate complications. If informed consent is defective in one or more ways, negligence with regard to informed consent will be a basis alleged in the orthodontic professional negligence lawsuit. The EBRM System assists the orthodontist in incorporating optimal patient treatment including effective informed consent and thereby avoiding these lawsuits. Effective risk management and communication practices, protocols and procedures assist with the earliest possible detection of and attention to any complication and as a result can reduce and/or mitigate the damage that could occur if the condition is left undetected. The timely recognition of deviations from the expected treatment plan or any complications that may occur, will eliminate the allegations of failure to diagnose and/or failure to treat or refer for treatment, that as discussed, serve as major reasons for loss of orthodontic professional negligence lawsuits. Implementing these protocols rightfully deserves our attention and by their use the orthodontist will be practicing at or above the standard of care by any definition.

A relatively significant but overlooked and emerging area of increasing lawsuit risk involves the sale/purchase of an orthodontic practice. Transitions are inevitable with retirement, disability, death, etc. Over the past 20-25 years, practice sales have been increasingly associated with the initiation of litigation, both malpractice cases and dental licensing board actions, against sellers and buyers.

There are many aspects to be considered in the sale/purchase of an orthodontic practice. Many are unique aspects to orthodontics. A partial list includes:

- The contractual, long-term and ongoing care
- Due diligence in auditing the patient treatment and fee records
- Patients in treatment longer than predicted and whose fees have been paid
- Retention (initial retainer appliances and the retention observation period)
- Allocations of goodwill, referring dentists, seller agreeing to stay for introductions
- Allocations and tracking of accounts receivable vs. ongoing fees
- Liability for assuming the care of an orthodontic patient
- Disagreement with the treatment plan and changes thereto
- Mechanism for resolving disputes over fee allocations, treatment plans, seller failing to stay for transition period, etc.
- Access to records after sale in the event of any legal/board actions
- Mechanism for gaining patients’ permission for buyer to treat
- The need for new informed consent
- Purchaser desiring to charge additional fees if treatment extends past estimate
- Negotiation and the use of “standard” contracts and non-negotiable issues
- Contractual terms and definitions and interpretation
- A forum for resolving disputes
- Legal fees, in the event of a dispute
- Who represents whom, and whether each party should be represented individually or agree to waive any conflicts and if a broker is involved, allowing the broker to handle the entire transaction
- Association/purchase transactions
- Many more.

A careful review of the proposed contract is needed. Modification, where appropriate to customize for the specific needs of both the seller and the buyer, should be made rather than having an agreement which favors only one party. All contracts need to be arrived at after “arms length” negotiation. A “take it or leave it” attitude by one side should be carefully considered in light of the nature of such agreements since there are likely to be issues that will arise subsequent to the sale. It is suggested that developing a
relationship which lays the ground work for resolving these issues, whether addressed in the contract or not, will establish a pattern that will serve all parties, but most importantly, the patients very well.

Having reviewed hundreds of contracts, it is distressing to see healthcare practitioners being treated in a manner that involves anything other than each party working professionally and using their best efforts to resolve inevitable problems.

One important aspect, and one of the main bases for including a discussion in this presentation of the sale/purchase of orthodontic practices as an initiator of litigation, is the mechanism for handling patient treatment issues including patient complaints and/or purchasing orthodontist complaints, disagreements about the treatment plan, treatment progress, fees, etc. The transfer of the care of a patient who initially came for treatment by one orthodontist and without consultation is to be continued by another orthodontist can be difficult enough without the added layer of stress related to dissatisfaction with the treatment and/or fee arrangements.

It is suggested that each sale/purchase should include an audit of the patient status from every perspective, upon which a more accurate allocation of fees and treatment could be based. It is ideal to have this discussed before the transaction is since it will serve as a basis for allocations providing all involved with a clear picture of remaining treatment and fee allocations. Reasonable sellers and buyers can usually and quickly resolve any issues that arise in a cordial and friendly manner. This is best for them and most importantly; it is best for the patient.

Few agreements, standard or otherwise, have these mechanisms in place. They need to be negotiated and then drafted for inclusion. These are often unique to the specific needs of the parties. Some contracts have formulas with or without examples but may contain vague and undefined terms. It should be clear how these could lead to catastrophic outcomes, for the seller and/or buyer.

Problems are more easily minimized or avoided with careful planning and negotiation in a transparent and open exchange between the professionals and their individual representatives, always understanding that no matter what the final contract looks like, the patients’ best interests are of paramount importance.

As a baseline, it is suggested that the selling orthodontist prepares a patient summary for each active patient. The summary should include all the vital details and thoughts about the patients’ care, i.e. diagnosis, treatment plan, time in treatment and projected time left, fee allocations, retention plan, etc. A listing of retention patients and their status is also suggested, especially those patients in “active” retention whose visits and/or appliances are covered by the agreement.

It is also suggested that at a minimum, the purchasing orthodontist should, as part of their due diligence, review at least a representative, random sample of the patients, if not the entire list of active patients, so as to verify agreement with the treatment summary and time remaining estimates. Disagreements can easily be resolved before hand and the manner of resolution can be incorporated into the agreement in the event of any issues after transition. Most potential conflicts can be avoided by doing so, and the possibility of any “negative” goodwill, a lawsuit occurring or dental board action is all but eliminated. Such incidents, especially with the popularty of social networking in small communities, could completely eliminate the value that the purchaser perceives the practice to have and could cost the seller all of the proceeds received, both outcomes are easily avoided.

Inclusion of these procedures and protocols along with other mechanisms in a transition audit will go a long way in an effort to have a smooth and professional transition. A pre-sale audit takes very little time and has very little cost. Unfortunately, the problems that can arise if it is not done can be expensive and very time consuming and can also be a disaster to the patients, the orthodontists and the practice. At the very least, consider the inclusion in the contract of a clause that would outline the use of an independent orthodontist auditor in the case of a disagreement between the parties. This person would be retained and compensated by both the seller and buyer to mediate any issues quickly and less expensively, in a professional and private manner.

The issues raised in this article are significant and will receive additional attention in future articles. ■

Author’s Bio

Donald E. Machen, DMD, MSD, MD, JD, MBA, CFA, is the recognized authority on risk management in orthodontic practice having initiated the discipline in the mid-1980s. He developed, moderated and presented at the AAO’s first national risk management telecast to more than 2,600 orthodontists. He has represented orthodontists, dental specialists, general dentists and physicians in malpractice lawsuits and other legal matters as a trial lawyer and currently is a trial court judge in Pennsylvania having served for over 14 years. He is a board certified orthodontist maintaining a part-time practice and is on the orthodontic faculty of Case Western University Dental School and The University of Pittsburgh School of Dental Medicine. He is also an Adjunct Professor of Law at Duquesne University School of Law where is teaches malpractice litigation. Dr. Machen was the editor of the Legal Aspects of Orthodontic Practice column in the AJO, writing a monthly column and has authored columns in JCO and Ortho Tribune. He lectures extensively to orthodontic groups, both large and small, focusing on developing highly effective systems for eliminating lawsuits, optimizing patient care and increasing practice referrals. Dr. Machen is the author of Managing Risk in Orthodontic Practice and is managing director of Risk Management Consultants, LLC. He can be contacted at: drmachen@orthormc.com.