



Second opinions reports and expert evidence

Second opinions

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1.00

Introduction

We are practising in the middle of a society which is becoming more consumer-orientated and litigious than ever before. Our patients are more aware of their rights, and more prepared to speak up for them, and on occasions, members of our profession will encounter patients who are unexpectedly demanding, critical and unforgiving. Certainly, a typical patient is more questioning and assertive and will have higher expectations than in the past. Add to this the fact that many patients are highly knowledgeable and articulate, and consumer support agencies (such as the Citizens Advice Bureaux, Community Health Councils etc) are readily available to offer help and advice, as well as practical support, and it should be little surprise that today's patients are less ready to accept the opinion of their dental surgeon without question.

Patient dissatisfaction is the prelude to all complaints and civil litigation (claims), and there are plenty of situations where the patient needs no help in order to be satisfied that something has gone wrong, or that expectations have not been met in some way.

The nature of dentistry is such, however, that in many circumstances, the patient lacks the specialist knowledge in order to be able to make an informed and balanced judgement as to whether or not the treatment they have received is satisfactory. It is often in precisely these circumstances that a patient will request an independent opinion which can come from many different sources including

- a clinical policy adviser
- a Consultant, or a senior dentist working within the hospital or community dental service
- a second dentist - usually one with no connection with the dentist whose work might be in question.

Sometimes there will be a conflict of opinion which the patient finds confusing; sometimes it is simply reassurance that the patient is seeking.

In altogether different circumstances, a patient might need a report and / or an opinion regarding an injury following an assault or accident, or simply to assess the current situation at a given time for a host of other possible reasons. Here the kind of advice / information needed, and the way it needs to be presented (see 2.01 below) will vary according to the circumstances.

The purpose of this information pack is to offer practical guidance on the relevant considerations when asked to supply a second opinion, and / or provide a dental report under various circumstances. Later in the information pack we will turn to the question of the "expert" report and to the logical conclusion of the process, which might be an appearance in Court to give expert evidence in a given case.

2.00

Second opinions and expert reports

A question that frequently troubles members of Dental Protection is how to react to patients who complain that they are dissatisfied with the treatment which has been provided elsewhere. Such patients often request an opinion or report on the standard of the treatment in question. It is open to the practitioner to decline to become involved, but the interests of the patient should always be the practitioner's first concern.

One general dental practitioner's opinion on the work carried out by another practitioner is "expert" in the sense that a registered dental surgeon is likely to be better placed to form a judgement on the quality of treatment provided, than a "lay" person for example, but this is not an "expert" opinion in the generally accepted sense. There are two categories of expert whose special knowledge of a situation might be called upon in dento-legal claims. The first is a dentist who has no particular claim to a greater level of expertise in general than his colleagues might have, but who has special knowledge of a particular case. The second type of expert is someone who is acknowledged as having particular expertise in some clinical area (eg, Restorative Dentistry, Orthodontics etc).

2.01

Accidents & Personal Injury

Most practising dentists receive requests from insurance companies, the Criminal Injuries Compensation Board and other bodies, for reports on the dental conditions of patients who are already known to the dentist.

The report should be factual but as brief as possible. Details such as the patient's past dental history may or may not be relevant to the report and if not, should be excluded.

A typical example is when an established patient of the practice attends with dental injuries which they attribute to an assault or to a road accident. In the first case they may be claiming from the Criminal Injuries Compensation Board and in the second case from the insurance company of the vehicle involved. Although these are two of the commonest types of injury, all sorts of bizarre events appear to happen to patients, and dental injuries have been caused by everything from supermarket trolleys to uneven paving stones.

The report should be limited to the facts. The date of the clinical examination should be recorded and if this was shortly after an alleged injury, the period of time since the injury was reported to have occurred should also be recorded.

General, extra oral and intra oral observations should be made. Did the patient appear confused, had there been a head injury, were there soft tissue injuries and had these been treated at a local hospital accident and emergency department? What are the intra oral hard and soft tissue clinical observations and what do the radiographs show?

Short and long term treatment options should be listed, together with an estimate of the prognosis of each. For example, if a couple of upper anterior teeth are lost it may be possible to replace them by a partial denture, a conventional or minimum preparation bridge, or perhaps by an implant retained prosthesis. The most appropriate treatment for the individual patient should be recommended, not necessarily the most elaborate or expensive. The cost of the treatment is relevant in some cases and in certain situations the patient is entitled to expect private dental treatment rather than relying on the National Health Service.

It is reasonable for the general dental practitioner to express an opinion on some aspects of the case in this type of report, but it is unwise to be too sweeping and general in expressing an opinion. For example, it is reasonable to say that the nature of the injury is consistent with the report of the incident and it is also right to report that, for example, the teeth knocked out were vulnerable because they were already periodontally involved and had a reduced prognosis in any case.

2.02

Second Opinions

Another situation in which the general dental practitioner becomes involved is when a patient is unhappy with the treatment which has been provided, or is being proposed by another practitioner, and seeks a second opinion. In some cases an emergency situation has arisen and immediate treatment is necessary.

Not only is it unethical to wantonly criticise the other practitioner's treatment or proposals, it also commonly backfires on the dentist giving the second opinion. In these circumstances it is even more important than usual to maintain good records and to record factual observations rather than opinions. For example, it is much better to record that a crown had an overhanging margin of 1mm rather than simply to say that it was a poor fit or "defective". If the work has to be removed as part of the emergency treatment, then objective records of its condition, such as photographs and models should be taken as well as radiographs.

Patients will usually want to know what the dentist thinks, but it is unwise to express a subjective opinion. It is better to stick to observable facts. For example, the patient can be shown a periapical radiolucency on a radiograph and the probable aetiology explained; however, without previous radiographs it is usually not possible to say how long the lesion has been there and whether or not it resulted from the previous dentist's treatment.

These are difficult situations to handle and so the following guidelines may be helpful:

In general, second opinions should not be refused, but if the situation appears complex or may lead to litigation, it is often better for the patient to have this second opinion from an independent authority such as a local hospital consultant rather than from another general dental practitioner.

If it is a straightforward situation then the second opinion should be given in factual rather than subjective terms.

If the patient needs emergency treatment and cannot return to the original dentist, then this treatment should be provided and a full record of what was done (and why) sent to the original dentist, as a professional courtesy.

If the second dentist takes over the treatment of a non-emergency nature, he / she should communicate with the original dentist before starting treatment.

If in doubt, consult Dental Protection.

2.03

The Recognised Dental Expert

Many dentists are entitled to claim special expertise in one field or another by virtue of their qualifications or experience. Those most commonly called upon to act as experts are hospital consultants. The reason for this is not only their expertise but also the fact that they are salaried and usually not expecting to benefit directly or financially from the future treatment of the patient. They are therefore truly independent.

As well as consultants, some dental practitioners may legitimately act as experts if they have additional qualifications or experience, and in the future it is probable that practitioners on the proposed General Dental Council specialist registers would qualify as experts in their field.

2.04

The Expert's Report

This is best written on headed note paper giving the full details of the expert including his or her qualifications. It is helpful to break the report up by subheadings. Not only does this make the report easier to read and to dip into if necessary, it also helps to structure the thoughts of the expert in writing the report. The subheadings will vary from case to case but usually include:

- Terms of Reference for the Report
- History
- Examination (when the patient has been seen - some reports are written without seeing the patient), investigations and findings
- Radiographic report
- Discussion
- Conclusions / summary

The language of the report should be professional and include the appropriate technical terminology. The potential readers of the report should be assessed and their ability to understand technical reports should not be underestimated. Barristers and judges do not like to be patronised by having relatively common terms explained in words of one syllable, but they do need a definition of more unusual terms. In particular they seem to find the Palmer tooth notation system easier to cope with than the FDI or other alternative systems.

2.05

Special Kinds of Report

Most reports are requested in situations where the terms of reference are “present condition and prognosis”, which is self-explanatory. Here, the purpose is obviously to report upon what you find, and what you anticipate the future treatment needs to be. A report of this nature should deal with **history** (what is given to you both in written instructions, and directly from the patient), and proceed to set out **present condition** (ie what you find on examination) and then the **prognosis**.

Experts in civil claims, both for the plaintiff and the defendant, might be asked to report on “causation and liability” - both of which must be established if a civil claim is to be successful.

“Causation” is the direct link between act (or omission) and outcome, i.e. cause and effect. It may be a fact that a tooth needs to be root filled, but this may not necessarily have resulted from the filling provided by a practitioner six months earlier, i.e. “causation” cannot be established with certainty.

Similarly “liability” can only be demonstrated if it can be shown that a given practitioner is responsible for a certain outcome.

In the case of lingual nerve damage, resulting in paraesthesia following the surgical removal of a lower third molar, causation may be beyond dispute - but this is an entirely different question to whether or not a practitioner has acted “negligently” in any way i.e. is “liable”.

Finally, a report on “quantum” (i.e. the likely cost of remedial work) is often required, to assist solicitors in valuing a claim. It is one thing to state what you would charge, but quite another to suggest a basis of

calculation which would find broad acceptance within the profession. It is also relevant to bear in mind the fact that the quantum should reflect a rate which is appropriate to the area of the country in question. It may be helpful on some occasions to offer your opinion regarding the degree of pain and suffering likely to have been experienced by a patient.

3.00

Common pitfalls

1. Facts and opinions should be clearly differentiated in any report. It is perfectly reasonable to express a personal opinion where appropriate, but before doing so, it is wise to satisfy yourself that:-
 - a) There is a scientific basis for holding such an opinion, as far as possible or at least, no prospect of your argument being demolished by authoritative scientific evidence that could be produced by the other side.
 - b) You must be prepared (and able) to stand up in Court and justify such an opinion publicly before a judge, and be cross examined on your evidence - perhaps rigorously. A competent cross-examination of your evidence will be based upon instructions from a dental expert briefing the opposing party, which will be able to pinpoint any potential weaknesses in your argument.

2. The "independence" of a second opinion or an expert report is often a key factor influencing the weight which a Court will place upon it. Clearly once the "second dentist" or "expert" is carrying out any remedial treatment - particularly if a fee has been or is due to be received for this treatment - his / her independence is hopelessly compromised, and the evidence will carry far less weight. There is, of course, no problem if the second dentist has simply received a fee for the purposes of examining the patient and producing a report.

3. It is unwise to rely too heavily upon the patient's version of events, although it is quite proper to record this as the patient's presenting history. For example:-

"The patient stated that her previous practitioner had provided crowns to the 4 upper incisor teeth, approximately 11 months earlier"

or perhaps -

"The patient reported that the UR1 had been fractured during an assault which was alleged to have taken place on 11/10/95"

4. Don't jump to conclusions. When faced with a fractured endodontic instrument within LL6, which the patient reports to have been root filled by a previous dentist only two months ago bear in mind that, the situation can look entirely different when it later comes to light that the previous practitioner had never actually treated LL6 but had in fact provided an immaculate root filling to LL5.
5. When writing a report to assist a patient in a personal injury claim, do not fall into the easy trap of leaning over too far to help the patient. You must be able to substantiate and justify what you say. Your opinion may have to be argued and tested in a Court, against that of an eminent expert in the field in question. If careless statements and excessive / inappropriate treatment proposals can easily be undermined, one can be made to look very foolish and to feel extremely uncomfortable. In one celebrated opinion from Lord Justice Clark, he observed,

"This is an issue upon which the medical witnesses are not at one. Indeed, one finds an individual witness who is not always in agreement with himself".

Once you have examined the patient, you cannot back out from the responsibility which comes with this, because you could be compelled by subpoena to attend Court as a witness of fact. The more robustly supportive of the patient's case your report is, then the more value you will have to the patient's solicitors and the more likely you are to be required to attend Court.

6. There will be occasions when statements you have made, will need to be qualified by important caveats - for example, if a tooth which has been lost, loosened or taken out in error, was hopelessly compromised periodontally, and was likely to have been lost in any event. Occasionally, a patient's solicitors might ask you to delete sections of your report (such as this) because it weakens their case. If, however, you feel that it is professionally important to make the statement, in order to maintain the proper balance of your report, then you should stick to your guns.
7. Solicitors will frequently ask, when requesting a report, whether the previous work constitutes negligence on the part of the previous practitioner. As a general rule, it is not the role of a report to make a definitive judgement on this; in the final analysis, this is for the Court to decide. It is easier if less emotive words, with less precise legal connotations are used, for example *"in my opinion this crown fell below an appropriate professional standard, and needs to be replaced"*.
8. Although it sounds obvious, a report should always be complete enough to fulfil the purpose for which it was sought. If specific questions were asked in the terms of reference, then answers must be provided as far as possible. A report which is hastily prepared and (perhaps deliberately) a bit "thin" on content, might well evoke a reply requesting further information and / or details, and it is easy to slide into a prolonged exchange of correspondence with the solicitors, which can be more time consuming than a more considered, fuller report, would have been in the first instance.
9. A perennial problem associated with the preparation of reports and the provision of second opinions generally, is that of the fee for doing so. Dental Protection is often asked "how much should I charge?" which is obviously a question with no single answer. Your fee should be reasonable, i.e. commensurate with the time you have taken not only in examining the patient (plus x-rays, models, photographs etc) but also in preparing, checking and forwarding your report.

Patients will sometimes ask for (and receive) a written report, but on receipt of the accompanying invoice will:-

- a) Decline to pay the fee because the report did not suit their purpose
- or
- b) Suggest that they cannot pay you for the report until the case has been settled and they have received their compensation.

The only way to avoid this situation is to agree a fee (or estimated fee) in advance, and when the report is ready, notify the patient and confirm that the report can be released on payment of the invoice. The same approach can, in theory, be adopted with requests for a report from firms of solicitors acting on the patient's behalf, although this is rarely necessary; most experienced firms of solicitors will undertake to pay your "reasonable fees and expenses" for the report, at the time of requesting the report. If in doubt, get this confirmed in writing, and always establish who it is that is commissioning the report (i.e. is it the patient, or is it the solicitors?).

When patients are Legally Aided, there are two further potential problems. Firstly, the Legal Aid Board can scrutinise costs and rule that the fee for an expert report is excessive; under these circumstances it is not unknown for firms of solicitors to invoice the dental surgeon for the balance of the fee already paid out, over and above the level later agreed by the Legal Aid Board.

Secondly, due to the workings of the Legal Aid system, it is not unusual to encounter a delay of at least 6 weeks, and even as much as 20 weeks in some cases, before you are paid for your report. If you are not prepared to accept these conditions, then make alternative arrangements (eg payment in advance) before agreeing to examine the patient and provide the report.

Reports prepared for the Criminal Injuries Compensation Board are made a pro-forma sheet, and are always on a fixed-fee basis.

4.00

Summary

When asked to provide a second opinion, or report, the best interests of the patient must remain the dentist's primary concern. Not uncommonly, a factual and balanced report based upon the second dentist's clinical findings, together with a careful and full explanation of any problems, can be sufficient to satisfy a patient, and the matter proceeds no further.

A fine balance needs to be struck between over-protection of the previous dentist (where applicable) and unjustified and ill-founded judgmental criticisms, or implied criticisms of another dentist's work (see appendix).

Appendix

Report Design

The headings which will be appropriate to each type of report will obviously vary, but the following checklist may be helpful.

1. Your name, address, qualifications and (if appropriate) a brief Curriculum Vitae if your report is in the context of being a recognised dental expert.
2. Identify the documents and other material (including x-rays) which you have considered as a basis for your report.
3. History.
4. Examination. If you have examined the patient confirm the date of the examination - use subheadings such as extra oral / intra oral etc.
5. Radiographic Reports.
6. Specific comments on expert reports for the other side or any other documents supplied to you.
7. Evaluation of the evidence and / or discussion of the issues.
8. Opinion on liability and / or causation (for example).
9. Opinion on quantum (where relevant).

In some circumstances, you may need to make some supporting comments, outwith the report, which is best done in a covering letter clearly marked "**Not For Disclosure**".