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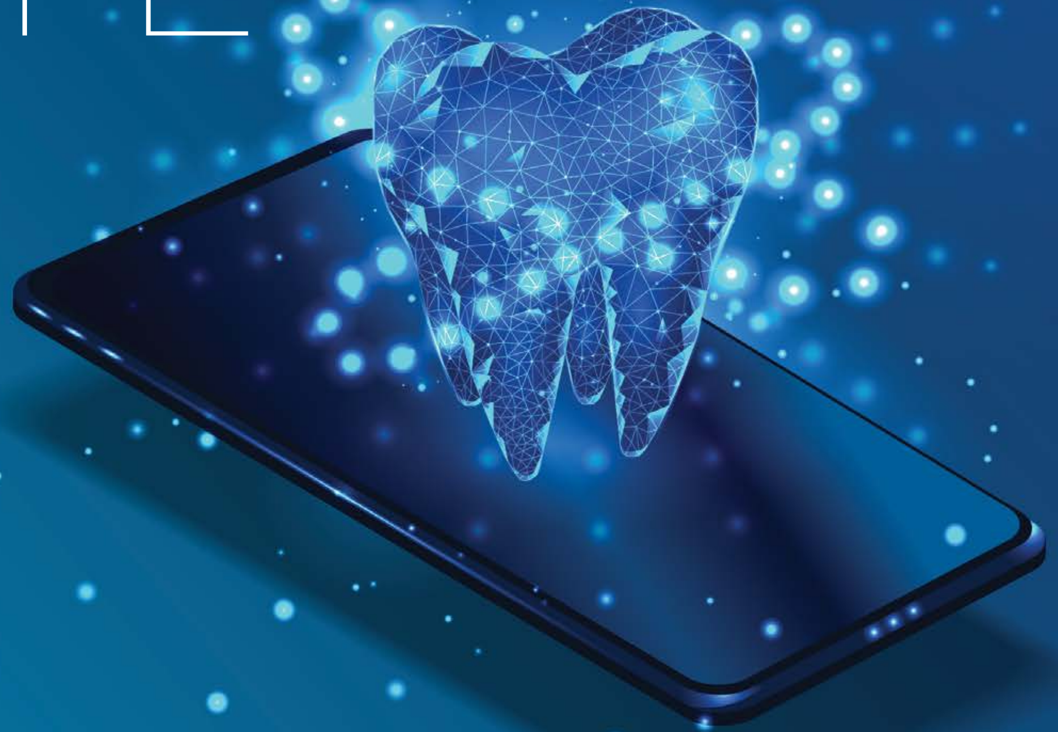

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EXECUTIVE MESSAGE

Dear Policyholders,

As technology advances in all aspects of healthcare, the traditional practitioner-patient relationship has taken some hits. Patients report that the time they see their provider continues to shrink, and the likelihood that they see the same person visit to visit lessens. This more transactional encounter can result in poor communication and an unsatisfying experience.

I'm happy to say that my relationship with my dentist remains as it always has. My dentist and his/her hygienist and staff know me, have seen me for years, and have come to see my children as they have outgrown pediatric dentistry. So far, this relationship has survived changes brought on by the increased use of telehealth in dental practice.

There may be a perception that telehealth is not very useful in dentistry, but, while cleanings, cavity fills, and extractions will always be hands-on, telehealth in dentistry can work as it does in general medicine. Patient history discussions, symptom assessment, advice for oral care, post-procedure follow-ups, and cosmetic dentistry discussions can all be conducted with the convenience of teledentistry.

We at MLMIC study the ways dentistry is evolving and monitor losses attributable to telehealth with the goal of helping our insureds practice safely and in compliance with changing laws. This issue of *The Scope* discusses some of the changes in dental tools, laws, and practices and offers risk management advice for your consideration. Our case study, while not focused on telehealth, raises communication and follow-up issues that can be well-managed with the tools of telehealth.

As always, I welcome your requests for education and article topics as well as nominations for recognition of an outstanding practitioner in the dental field. I'd like to thank Stacy McIlduff and all the folks at NYSDF for their continued commitment to the art and science of dentistry.

Warmest regards,

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Teledentistry in New York State: Its Past, Present, and Future

Teledentistry in New York is a relatively recent practice, with the laws that recognize and codified it having only been enacted in 2014 and 2015. Chapter 550 of the New York Laws of 2014 required health insurers and Medicaid to cover the provision of telehealth services, including dental services rendered through telehealth, in the same manner as those services would be provided in an in-person setting. In 2015, the Legislature modified the previous year's law implementing payment parity for health services provided via telehealth and telemedicine technology in response to the Governor's request for certain clarifications to the statutes.

More specifically, as a result of the 2014 and 2015 legislation, a new article in the New York State Public Health Law (PHL) was created. PHL article 29-G, **Telehealth Delivery of Services**, contains the primary New York statutes governing teledentistry. Dentists are recognized in PHL section 2999-cc as a "Telehealth provider" and thereby officially authorized to provide teledentistry within the rules and guidelines set forth in PHL article 29-G and other New York State laws and regulations applicable to teledentistry.

When 2020 arrived and the Covid-19 pandemic swept through New York, starting at the beginning of March, the PHL telehealth article 29-G saw its first significant revisions since 2015. Chapter 328 of the New York Laws of 2020, signed by Governor Cuomo on December 15, 2020, added new subdivisions 3 and 4 to PHL section 2999-dd.

Subdivision 3 specifically addresses teledentistry in New York. This new subdivision mandated that dental telehealth services adhere to standards of appropriate patient care as is required in other dental healthcare settings, including but not limited to appropriate patient examination, taking of x-rays, and review of the patient's dental and medical history. Furthermore, the new law requires all teledentistry providers to identify themselves to patients, including providing the teledentistry provider's New York State license number.

Subdivision 3 also prohibits any teledentistry provider from attempting to waive liability for its telehealth services in advance of delivering such services. In addition, teledentistry providers are prohibited from attempting to prevent a patient from filing any complaint with any governmental agency or authority. This new statute also stipulates that this subdivision is not to be construed as diminishing requirements for other telehealth services.

This new statute also stipulates that this subdivision is not to be construed as diminishing requirements for other telehealth services.

Finally, subdivision 4 expressly states that nothing in article 29-G shall be deemed to allow any person to provide any service for which a license, registration, certification, or other authorization under NY Education Law title 8 **THE PROFESSIONS** (which includes dentists under the **Medicine** section of title 8) is required and which the person does not possess.

The Present Status of Teledentistry

According to the University at Albany's Center for Health Workforce Studies (CHWSNY) 2023 report,[1] teledentistry can be employed as a method to conduct dental appointments that involve triage, consultation, diagnosis, referral, follow-up, and health education. The CHWSNY report examined state laws, regulations and policies related to teledentistry in the 50 states and Washington, D.C., with respect to eight categories. These eight categories consisted of the following: source of authority to provide teledentistry services; types of allowable services; required modality for synchronous teledentistry; other modalities allowed (for example, mobile apps, email); patient of record required; patient informed consent required; allowed providers; and Medicaid reimbursement for Current Dental Terminology (CDT) codes D9995 and/or D9996.[2]

As mentioned above, New York's source of authority to provide teledentistry services derives from a telehealth statute. New York allows both synchronous and asynchronous teledentistry

[1] See **https://www.chwsny.org/our-work/reports-briefs/teledentistry-adoption-and-use-during-the-covid-19-pandemic/**
[2] Ibid page 12

services. PHL section 2999-cc (5) expressly states that "telemedicine means the use of synchronous, two-way electronic audio-visual communications to deliver clinical healthcare services." Asynchronous telehealth services in New York are permitted under PHL section 2999-cc (6) as "store and forward technology," which is defined as "asynchronous, electronic transmission of a patient's health information." New York's required modality for synchronous teledentistry consists of video or audio only, not just video as in some states. New York also permits the use of other modalities, such as mobile apps or email. Teledentistry in New York does not require a patient of record, and there is no specific patient informed consent required for teledentistry in the state. The only allowed providers of teledentistry in New York are dentists. Finally, New York does not allow Medicaid reimbursement for CDT codes D9995 or D9996.[3]

> New York allows both synchronous and asynchronous teledentistry services.

The Future of Teledentistry

Assemblymember Linda Rosenthal has introduced a bill, A365, that would require health insurance coverage for store and forward telehealth (which includes teledentistry). Store and forward teledentistry, also known as asynchronous teledentistry, commonly occurs through the acquisition of patient imaging, oral health screening and assessment, and recording of a patient's medical history by a dental hygienist in a remote location such as a nursing home or school.[4] The process then involves forwarding the dental patient's records to a dentist, who will diagnose and conduct treatment planning.[5]

Assembly bill A365, which currently does not have a companion bill in the New York State Senate, could have a significant positive impact on teledentistry's use of this asynchronous process to deliver telehealth by increasing the financial incentive for this process.

Another legislative measure, which is also pending and has not yet been passed into law but could potentially increase the use of teledentistry, is Assemblymember Aileen Gunther's bill A4584-A. Unlike A365, Assemblymember Gunther's bill has a Senate companion with Senator Fernandez sponsoring S3526 in that legislative house.

While the current law does mandate that health insurers cover teledentistry, it does not explicitly require on a permanent basis that health insurance coverage for teledentistry be reimbursed at the same rate as an in-dental office visit. Bills A4584-A/S3526 would implement this requirement on a permanent basis, which could provide a financial incentive for dentists to more frequently use teledentistry.

Using Teledentistry in Your Practice

The use of teledentistry can come with considerable costs associated with obtaining and maintaining the necessary equipment and software. As with any electronic platform, it can also come with an increased risk of privacy breaches. Additionally, when considering the implementation of this technology, practices must consider their patient population. Specifically, whether the care provided in the practice makes teledentistry a tenable option for care, whether a sufficient number of patients will engage the practice via teledentistry to justify the purchase and maintenance of the platform, and whether the practice's providers and patients will "buy-in" to the service.

> As with any electronic platform, it can also come with an increased risk of privacy breaches.

When using teledentistry in your practice, there are a number of legal and risk management considerations to make. We will address a few of them here.

[3] Ibid
[4] Ibid page 7
[5] Ibid

Platform Selection

You should first assess the needs of your providers and patients to determine which teledentistry platform is best suited to your practice. The assessment should include the need for Live Video-Conferencing and Asynchronous Video (store and forward) functionality and whether a Mobile Health (mHealth) platform is needed. As part of the selection process, ensure the technology offers a secure, HIPAA-compliant platform that also provides data encryption, which allows you to protect patient data and comply with privacy regulations and disclosure protocols in case of privacy breaches. Platform vendors should also provide you with an executed Business Associate Agreement.

> Platform vendors should also provide you with an executed Business Associate Agreement.

You should consider including key staff and providers in the selection process to determine the best system for your practice and patient population when exploring the ability of vendors to customize options that fit your needs. However, keep in mind that customized options may not function properly after software updates, so ensure your vendor has a process to address any software issues that may arise with an update.

As with in-person visits, communication when practicing teledentistry is an important aspect of all patient encounters, and professionals have a legal obligation to provide care equally. For example, communication with deaf or hearing-impaired patients via your teledentistry platform must be as effective as with any other patient, and you should consider using platforms that provide closed captioning. Also, when language barriers are presented, you should have access to an interpreter and consider using telehealth platforms that allow for three-way communication.

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The NYSDA Foundation — The Latest Programs Furthering the NYSDF Mission

MLMIC had the pleasure of talking with **Stacy McIlduff**, Executive Director of the New York State Dental Foundation, to get an update on their new and ongoing initiatives. Ms. McIlduff joined the Foundation in February 2023.

Q: Thank you for taking the time to speak with MLMIC. What are the Foundation's primary mission and objectives?

A: It's my pleasure. MLMIC has always been one of the Foundation's strongest supporters, and I can't begin to express how much that is appreciated.

Our mission is to improve the oral health of New York State's most vulnerable populations, including access to care for underserved and low-income communities, the elderly, Veterans, children, and those living in rural areas of the state.

The Foundation also provides support for dentists as needs arise, as was the case in the aftermath of Superstorm Sandy, where we worked to provide much needed relief funding.

One of the ways we fund our mission is by offering continuing dental education courses for dentists. For example, The Foundation was able to quickly develop an opioid training course for prescribers when the DEA mandate came out last year.

We also provide financial assistance to dentists who are seeking in-patient substance abuse treatment. If you visit our **website**, you can see all Foundation programs.

Q: You mentioned access to care being an important part of the Foundation's mission; tell us more about that.

A: The Foundation's new program, **Salute Vets with a Smile**, is connecting volunteer member dentists with Veterans needing care, including patients directly referred by Veteran's Administration (VA) facilities. Veterans can request care by completing a simple **online form**.

Those dentists wishing to volunteer can visit the program page on our website to sign up. They can specify the services they provide, as well as their level of availability.

The **Salute Vets page** displays in real time the number of vets that have received care, the number waiting for care, as well as the number of volunteer dentists ("Dental Heroes").

Q: What are some of the other important ongoing programs?

A: Champions for Change is centered around engaging the next generation of dental professionals. We do this in a few different ways, including providing volunteer and mentorship opportunities for dental students to connect with dentists.

For example, at The Foundation's Annual Brunch at the New York State Dental Association's (NYSDA) House of Delegates, we seat student attendees alongside their sponsor dentists with the hopes of fostering a lasting connection.

Q: Is dental student outreach a large part of The Foundation's efforts?

A: Absolutely. For example, The Foundation is very proud of the work we do with Special Olympics New York. We help dental students with transportation to get to the Special Olympics State Games, where they provide oral health screenings for athletes who visit the Special Smiles booth.

At the 2023 Special Olympics Summer Games in Ithaca, NY, volunteer students travelled from NYC and were able to screen 110 athletes in one day. It was a tremendous success and a tradition that we're planning to continue this year.

We strive to engage students to get them involved in not just organized dentistry but also in giving back to their community, perhaps leading them to plant roots in New York State.

Q: What new initiatives does The Foundation have on the horizon?

A: On April 1st, we launched **My Healthy Smile New York**, a new pilot program to bring the Community Dental Health Coordinator (CDHC) model to scale in New York. A CDHC serves as a member of the dental team very much like a community health worker. Boots on the ground working with patients to help them navigate their dental care.

With this new program, we want to have CDHCs in different regions of the state. While we will gather data over the next four years to demonstrate this model's efficacy, we do know it is working with community health workers. Why not dentistry?

Similarly, Tennessee has "Smile On 65," an effective program with CDHCs working specifically with the senior citizen population.

Q: What are the biggest challenges for keeping each program not only running but also expanding?

A: Funding, both private and State. The Foundation has received funding from organizations like the Henry Schein Cares Foundation, and has had the honor and privilege of working with NSYDA's generous member dentists who help their community with significant contributions each year.

Q: What goals are you focusing on at the moment?

A: We want to leverage the support The Foundation has, examine the programs we offer, and gather data that might help inform policy changes that will make significant advancements in improving access to care.

Another goal we have is to broaden corporate and community philanthropy and engage with partners who are interested in helping us get these programs to the level where they make the biggest impact. NYSDA members have always been very generous with their financial support, but we also need to expand our family of supporters to ensure that the work we do will continue for generations to come.

For more information on the New York State Dental Foundation, please do not hesitate to contact: (518) 689-2772 or smcilduff@nysdental.org.

CASE STUDY:

Undiagnosed Oral Cancer and a Faulty EDR System

Treatment and Diagnosis

A 36-year-old patient was treated by the dentist, who was an employee at a MLMIC-insured facility, for routine examinations. The patient's history included bone cancer as a child. During an examination, the dentist noted a deep lesion on the side of the patient's tongue that appeared irritated. The patient reported that the lesion had been there for years and was painful when consuming acidic food or beverages. Photographs were taken of the lesion, and the patient was instructed to return in 6 months for further examination.

When the patient returned 6 months later for his scheduled appointment, the dentist noted the lesion had changed, and he recommended a biopsy. A referral was made to an oral surgeon, who biopsied the lesion. Pathology confirmed that the lesion was Stage II moderately-well defined differentiated squamous cell carcinoma.

Pathology confirmed that the lesion was Stage II moderately-well defined differentiated squamous cell carcinoma.

The patient underwent a soft tissue neck CT and flexible laryngoscopy that revealed findings of no obvious lesions. A partial glossectomy and neck dissection were then performed, and a 3 cm ulcerative lesion was removed from the tongue. The patient underwent an 8-week course of radiation, which caused significant burns, oral sores, and painful muscle spasms in the neck. He sustained tongue disfigurement, a speech impediment requiring extensive speech therapy, and head, neck, and throat pain. He responded well to treatment and is currently in remission.

Lawsuit Filed

The patient commenced a lawsuit against the employed dentist and the professional corporation alleging failure to diagnose and treat a lesion on the side of the tongue resulting in a delayed diagnosis of oral cancer. The plaintiff claimed that the dentist failed to properly measure, photograph, and document the lesion; obtain a biopsy of the lesion; and properly advise the patient of the lesion. Additional allegations pertained to the professional corporation for failure to preserve the photographs.

Although photographs of the lesion were taken, unfortunately, they were not successfully saved in the electronic dental record (EDR). The dentist testified at his deposition that the photographs should have been automatically uploaded to the patient's dental record, but he could not explain why they no longer exist.

The patient testified at his deposition that the dentist's only recommendation was to monitor the condition. He recalled that the dentist merely discussed the lesion with him and examined and palpated the area.

Expert Reviews and Settlement

MLMIC's expert reviewers opined that the absence of photographs of the lesion severely compromised any possible defense in this case. Without a photograph or a description of the lesion in the dental record, they could not comment on the accuracy of the

dentist's recommendation for the patient to return in 6 months.

Failure to retain the photographs rested entirely on the practice, as the dentist was an employee. However, the dentist should have brought the patient back sooner for closer follow-up, rather than asking him to return in 6 months for his next appointment. In addition, billing records reflected multiple charges to this patient for services that were not rendered by the dentist.

> **In addition, billing records reflected multiple charges to this patient for services that were not rendered by the dentist.**

The plaintiff's attorney issued a demand in the amount of $3,000,000. The case ultimately settled on behalf of the dentist and the professional corporation in an equal apportionment for a total amount of $1,750,000.

A Legal and Risk Management Analysis

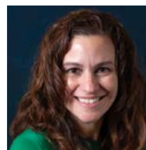
Although the dentist is to be commended for diagnosing and being suspicious about a lesion, he failed to follow through with an approach that could have saved the patient from more invasive disease had the matter been addressed in a timelier fashion. The dentist was remiss by failing to take a more aggressive approach when he initially saw the lesion. A follow-up appointment 6 months later is an inordinate length of time to schedule a subsequent evaluation. Any suspicious lesions should be followed up much sooner and more frequently, or patients should immediately be referred to an oral surgeon for an assessment.

It is strongly recommended to always take and maintain a clinical picture of oral lesions for proper documentation. It is quite possible that, had the photographs been appropriately stored in the patient's record, it would have revealed a lesion that was smaller and more manageable than it ultimately was so many months down the road. This would have provided concrete proof that the dentist deprived the patient of an opportunity to address this finding before it became more serious. In a way, it was fortuitous for the dentist that the photographs were mishandled because the professional corporation was dragged into the suit, which afforded the dentist a partner in making the ultimate settlement payout. It is the patient, however, who suffered the most due to the misguided management of his care by the dentist.

> **This would have provided concrete proof that the dentist deprived the patient of an opportunity to address this finding before it became more serious.**

It is imperative to involve patients in their own care by providing a description of, and documenting, possible signs, and any further symptoms for them to be on the lookout for, and to contact the dentist immediately should symptoms become worse or more serious. However, the burden in this case rested exclusively on the dentist, who brushed the potential gravity of this lesion aside by asking the patient to wait 6 months before returning for further evaluation or seeking the opinion of a specialist.

As this case exemplifies, it is strongly discouraged to leave a lesion undiagnosed, even if it looks benign. Proper and timely referrals to specialists are always indicated to correctly guide patients for a definitive diagnosis and suitable treatment. Dentists do and should play an active role in the early diagnosis, monitoring, and management of oral lesions. Rather than taking a dismissive approach, any identification of lesions must always be taken seriously.



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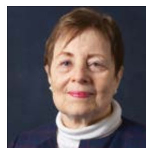

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Teledentistry in New York State: Its Past, Present, and Future — continued

Practical Considerations

Technology requires consideration of "how will my practice function should the technology fail?" A contingency plan should be prepared for use in case of a technological failure. Any disruptions in service that may impact teledentistry (or other care) should be communicated to the patient as soon as possible, and consideration should be made as to whether the patient's symptoms or complaints warrant the patient coming to the practice or, if needed, seeking appropriate care at the nearest hospital.

> A contingency plan should be prepared for use in case of a technological failure.

Practices should establish a monitoring program and quality improvement process to evaluate patient care outcomes and technical performance issues that should include responses from patient satisfaction surveys regarding the telehealth experience.

Also, both providers and staff should receive ongoing education regarding updates to the practice's telehealth system, along with refreshers on patient privacy and engaging patients via telehealth.

Patient Selection Considerations

Beyond the need for patients and providers alike to "buy-in" to the teledentistry process, it is important to use the right platform for the right patient and under the right circumstances. Guidelines should be established to effectively answer "Are the patient's complaints or condition(s) appropriate for a virtual teledentistry encounter, or do they require an in-person visit?"

One such consideration could be a patient's cognitive abilities and the availability of a support system, including family members or significant others, to assist with the patient accessing the technology.

Patient Encounter Guidelines

Patients must understand privacy breaches can occur from a remote visit, whether from a third party overhearing the encounter or from a potential cybersecurity breach. Practices should create an informed consent process for the use of telehealth services as recommended by the Agency for Healthcare Research and Quality.[6]

Verify that the patient has sufficient internet access and the appropriate equipment required to participate in the visit, and that their software

[6] https://www.ahrq.gov/health-literacy/improve/informed-consent/index.html

is compatible with that of the practice, before engaging through teledentistry.

To evaluate the appropriateness of teledentistry visits for senior patients, verify that the patient can see and hear you clearly. Closed captioning and headphones that allow for volume adjustment are effective for those with a hearing impairment.

Documentation of Care

As with in-person visits, you should create and retain formal documentation of all teledentistry patient care. This documentation should be part of the patient's record, and all aspects of the encounters should be thoroughly documented, including the patient's agreement to use teledentistry for the encounter.

Licensure

Whether providing dental care in person or through teledentistry, it is imperative to ensure that the person performing the services maintains the necessary license to perform those services. It is considered professional misconduct to delegate responsibilities to a person when the dentist knows or has reason to know that such person is not qualified by training, by experience, or by licensure, to perform those services.[7] Likewise, for licensure purposes, the location of the patient determines where the care is rendered. In order to avoid allegations of practicing dentistry without a license, dentists should verify that the patient is located in a state where the dentist maintains a license to practice.

It is expected that the prevalence of teledentistry will increase in the coming years as patients and providers become more familiar and comfortable with its use and technology improves to address the current limiting issues. Should you have any questions regarding offering teledentistry in your practice, please do not hesitate to reach out to MLMIC at any time.

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[7] 8 NYCRR §29.1(b)(10)

FROM THE BLOG

MARCH 7, 2024

"The Verdict" Podcast: A Conversation with Dr. Maria Maranga

In celebration of Women's History Month, MLMIC's Content Marketing Manager Tammie Smeltz sat down with endodontist Dr. Maria Maranga, a leader in dental medicine not only locally but also at the state and national levels.

During **Part One** of this podcast, Dr. Maranga and Tammie chat about her experience as a mentor to dental students and residents, both male and female.

During **Part Two**, Dr. Maranga and Tammie chat about "Scrubs and Stilettos"...

Read more **From the Blog.**

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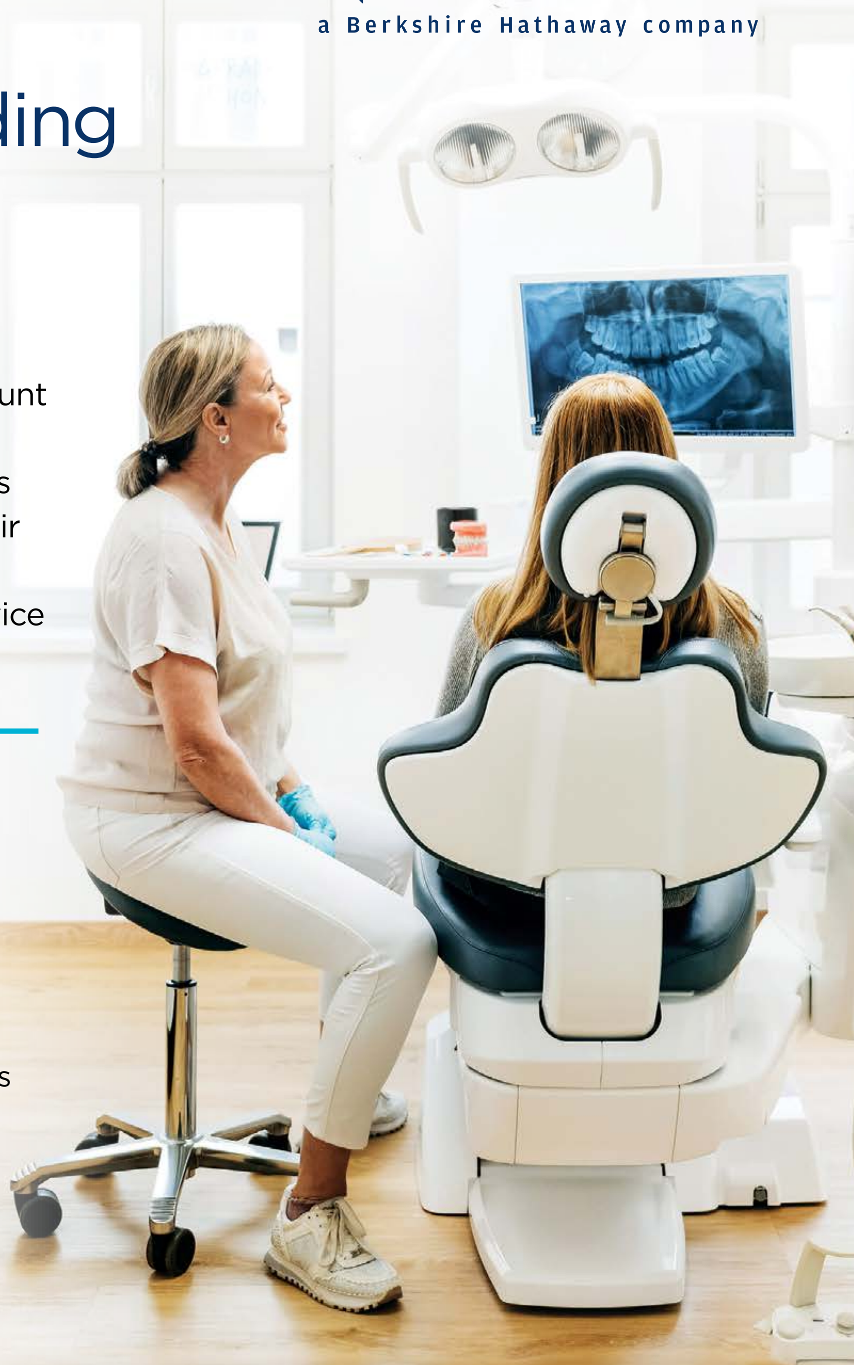

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