Legal and Ethical Issues in Periodontal Practice

MIDWEST DENTAL CONFERENCE
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Law and Ethics

Legal duties are often ethical duties.
- Individuals have an ethical obligation to obey the law.
- Legal duties are also ethical duties because ethical duties would exist even in the absence of legal counterparts.
- Legal and ethical codes frequently draw on the same sources of authority.

Ethical duties are not necessarily legal obligations.

Autonomy

Greek origins: autēs (self) and nomos (governance)
- We do not give autonomy to patients, they have it and we choose to honor or violate it.
Autonomy

- Make an effort to understand, appreciate and incorporate the cultural and world view of the patient when making treatment decisions.
- Be certain about patient capacity of the patients to make an informed choice.
- Give complete and honest information.
- Encourage full participation of the patient in treatment decisions.
- Inform patient of risks, costs, benefits and alternatives to any treatment decision.
- Keep patient information confidential.
- Listen as well as talk.

Non-maleficence

- Do not harm or hurt people and prevent harm whenever you are able.
  - Do not take advantage of patients by deception or coercion.
  - Do not be careless or unprepared.
  - Do not recommend treatment, exams or tests that have not therapeutic benefit to the patient.
  - Do not treat beyond your scope of competence.
  - Do not do anything that increases risk of harm to the patient relative to the expected benefit.
  - Decline to treat a patient who exhibits behavior that will impede good outcomes.
  - Do not treat anyone if your physical or psychological state prevents you from performing in an optimal manner.
  - Prevent harm to patients by reporting impaired colleagues.

Beneficence

- Do some positive good for patients; patients should benefit from contact with dentists.
  - Work to contribute to the general health and well-being of patients.
  - Take actions to remove patients from the risk of further harm.
  - Promote preventive practice
  - Promote patient understanding of their health status.
  - Collaborate with colleagues and specialists in a manner that can enhance patient care.
  - Share the results of research
  - Report instances of abuse
  - Support public health initiatives and public policies that support oral health.
  - Support dental education
Justice

Treat people equally; the fairness principle
- Treat all patients equally.
- Support public policies that enhance the health of people.
- Support the most effective and appropriate use of society's dental care resources.
- Make a reasonable effort to open your practice to all people.

Ethical Principles

Fidelity
- Keep your promises and commitments

Trust

Confidentiality

Reported Ethical Dilemmas in Dental Practice

- Insurance fraud
- Failure to report abuse (child/adult)
- Harassment (ethnic/sexual)
- Over-treatment
  - Providing unnecessary care
- Under-treatment/poor quality care
- Marketing of non-dental therapies or products
- Bullying or disruptive behavior
- Mistreatment of patients
- Others?
Ethical Dilemma
Decision Making Model

- Define / describe an ethical dilemma or conflict.
- Collect relevant information.
- Identify alternatives.
- Determine what is ethically at stake.
- Prioritize the alternatives.
- Make a choice.
- Act on the choice.

Legal Vulnerability – Sources of Law

- Constitutional Law: U.S. Constitution and State Constitutions
  - Examples:
    - Federal: Civil Rights Act of 1964
    - Missouri Civil Rights Laws
- Statutory and regulatory law
- Legislation
- Common law or case law
- Local statutes

Definitions of Key Concepts

- **Civil offense** is a wrongful offense against a person, for which satisfaction is sought, usually money.
- **Criminal offense** is a wrongful act against society, to protect the public as a whole against the harmful acts of others.
- **Administrative offense** is a violation of laws regulating *the powers, procedures, and acts of public administration.* (Dental practice acts)
Levels of Proof: Guilt or Innocence

Civil acts – preponderance of evidence
Criminal acts – beyond a reasonable doubt
Administrative board violations – reasonable or substantial proof

Legal Concepts: Civil Law

Contract: Expressed or implied relationship with specific responsibilities.

Tort: Interference with someone’s right to enjoy their person, property or privacy.

Civil Law-Contracts

Two types of contracts

Implied: agreement through inference by signs, inaction or silence
Express: entered orally or in writing
Legal Primer - Contract

**Provider Contractual Responsibilities**

- Be properly licensed and registered.
- Exercise reasonable skill, care & judgment in diagnosis and treatment.
- Use standard drugs, materials and techniques.
- Never abandon the patient.
- Do only those things consented to by the patient.
- Give adequate instructions to the patient.

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Legal Primer - Contract

**Provider Contractual Responsibilities**

- Charge a reasonable fee.
- Arrange care for the patient during an absence.
- Refer appropriate cases to specialists.
- Maintain patient confidentiality.
- Employ competent personnel and supervise.

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Legal Primer - Contract

**Provider Contractual Responsibilities**

- Never exceed the scope of practice.
- Keep accurate records.
- Comply with the laws regulating the practice of the profession.
- Practice in a manner consistent with the code of ethics.
Legal Primer - Contract

Patient Contractual Responsibilities

- Pay reasonable fee in a reasonable time.
- Cooperate in care.
- Keep appointments.
- Provide accurate history information.
- Follow instructions.
- Keep dental provider aware of health status.
- Follow home care instructions.

Related Duties

- There is no obligation to treat everyone seeking care.
  - Provider has a discretionary right – the decision not to accept a patient or terminate a patient is acceptable if the decision is not based on race, creed, color or national origin.
  - Provider must decline care if the individual does not have requisite skill to deliver treatment.

Legal Issues – Intentional Torts

- Assault: threat of bodily harm to another
- Battery: bodily harm/touching without permission
- False imprisonment: violation of personal liberty
- Mental distress: extreme and outrageous behavior
- Interference with property: damage
- Deception: damage to a person's reputation - spoken or written word
- Deceit and misrepresentation
Legal Issues – Unintentional Tort

Negligence: failure of one owing a duty to another to do what a reasonable and prudent person would ordinarily have done under the circumstances.

- Duty or responsibility recognized by law
- Failure to satisfy the duty
- Harm occurred

Key Concepts

- **Standards of care**: Level of care that a reasonably prudent practitioner would do in the same or similar circumstances
- **Duty**: act or conduct based on moral or legal obligation

Duties Frequently Not Met

- Adequately assessing patient status.
- Documentation of diagnosis.
- Treatment not meeting **standard of care**.
- Outcomes unsuccessful, patient not informed.
- Failure to obtain informed consent or informed refusal.
- Patient abandonment.
Related Issues

- **Vicarious responsibility**: legal mechanism by which an individual or institution is held liable to a third party for the negligent acts of another.
- **Respondeat superior**: let the master answer; a common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope of employment.
- **Statute of limitations**: state law or part of a statute that specifies the time period during which a legal action must be taken.
- **Good Samaritan Laws**: protect health care professionals from liability while providing emergency care to an accident victim.

Elements of Informed Consent

- Information presented in understandable language
- Describes:
  - Nature & need for procedure
  - Benefits of the procedure
  - Material risks
  - Prognosis if procedure is performed/or not performed
  - Alternatives to the procedure
- Opportunity provided to respond to patient questions
- Informed consent is a process; not just a “signed” document

Informed Refusal

- The recommended treatment or procedure and justification.
- The educational documents, brochures, handouts, or presentations that were given to or viewed by the patient.
- Oral and health risks.
- The questions asked and the answers that were provided (by both parties).
- That the patient was informed of the risks of not following the dentist’s recommendations.
- The patient’s reasons for refusal.
- The consequences of the refusal were re-explained and indicate the patient still refused the recommended treatment or procedures. Note that the patient understood the risks of refusing care.
- Individuals present and a signature of the patient, witness and provider.

Modified from CNA Health Pro
Informed Refusal

The dentist who chooses to keep the refusing patient and continue with care must be aware of several additional duties:

- A continued duty to examine and diagnose the patient’s condition for as long as the dentist-patient relationship exists and for as long as the patient continues to refuse treatment.
- A continued duty to inform the patient about the condition and its associated risks for as long as the dentist-patient relationship exists, the condition exists, and the patient continues to refuse treatment.
- A heightened duty to tell the patient how the refused treatment might affect treatment of other structures.

The failure to meet these obligations has resulted in numerous failure to diagnose and failure to inform allegations.

Patient Dismissal

<table>
<thead>
<tr>
<th>NON-COMPLIANT</th>
<th>UNCOOPERATIVE</th>
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<tr>
<td>Fail to schedule maintenance visits</td>
<td>- Lack of agreement about prevention</td>
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<td>Refuse to provide information for the</td>
<td>or care</td>
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<td>record</td>
<td>- Failure to follow recommendations</td>
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<td>Refusal of recommended precautions</td>
<td>- Inappropriate or mistreatment of staff</td>
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<td>or procedures:</td>
<td>- Personality conflicts</td>
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<td>- Radiographs</td>
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<td>- Specific treatment</td>
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<td>- Pre-medication</td>
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<td>- Preventive therapies, e.g., sealants</td>
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Legal Concept - Abandonment

Defined: Unilateral dismissal of the patient by the provider without ample and proper notice.
Appropriate Termination In Writing

- State relationship is ended with specific endpoint – May 1, 2019.
- Indicate current status of care and further treatment needs.
- Offer to provide only emergency care.
- Indicate resources to identify other providers i.e., Local dental society.
- Offer to forward copies of records with patient permission. (Note if fee required)
- Document in correspondence sent return/receipt.
- Maintain a copy of letter in the record.
- DO NOT change your mind and/or change your position.

Employment and Practice Issues

The Process

Considerations: Employer/employee perspective

- Advertising- written clearly and within legal parameters
- Job description- appropriate for scope of practice.
- Evaluation of applicants
  - Interview
  - Resume
  - Education, certifications, licensure
- Reference checks
- Background checks
- Credit check if handling money
- Pre-employment testing
The Process: Illegal Inquiries

- Place of birth
- Height or weight (in some jurisdictions)
- Religion
- If the applicant is pregnant, has children, or plans to have children
- Race or national origin
- No photograph can be required
- Marital status
- Sex
- Age or date of birth, or other dates indicating age
- Arrests which did not include conviction
- Physical or mental condition, unless related to the job
- Maiden name, or original name if changed by court order
- Prior work injuries or if ever filed a worker compensation claim
- Garnishments
- Clubs, societies or lodges

Employment Relationship

- At will: indefinite duration, relationship take place at will of either the employer or employee.
  The employment can be terminated at any time for no reason or the employee can quit at any time.
- Contractual: definite duration with guidelines for termination by either the employer or employee e.g., July 1–June 30th.

Independent Contractor

Facts that provide evidence of the degree of control and independence fall into three categories:

- Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- Financial: Are the business aspects of the worker’s job controlled by the payer? (These include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

Employee Office Manuals

Employee handbooks are not legally required, but recommended. An employee handbook provides a centralized, complete and certain record of the employer’s policies and procedures. In some states, employers can inadvertently create enforceable contracts in an employee handbook. An employment at‐will relationship may be rebutted by statements contained in an employee handbook.


21st Century Issues

Dress Code Policies

Employers are allowed to implement a dress code that covers all employees or employees who occupy a certain job category, even if the dress code conflicts with a worker’s beliefs or practices. However, a dress code can’t treat an employee differently strictly because of their national origin.

Source: https://www.eeoc.gov/laws/practices/

Compensation

- Employee: An individual that provides services on behalf of an employer
- Payments occur weekly, bi-weekly or monthly.
- The IRS definition of full-time is for a calendar month, 30 hours per week or 130 hours of service per month, thus full time benefits must be offered for work over 30 hours.
- Overtime must be paid if there is an excess of 40 hours worked. The rate is 1.5 the hourly rate; however salaried employees are not paid overtime.

Termination/Dismissal

**Justified**
- Incompetence
- Inappropriate behavior
- Placing patients at risk
- Resignation
- Layoffs

**Unjustified termination**
- Occurs for individuals based on a particular characteristic or status
- Federal and state legislation was initiated and passed to protect certain classes of individuals

Bullying

One person or a group of people in a workplace single out another person for unreasonable, embarrassing or intimidating treatment.

Repeated over a period of time and becomes a pattern.

Health Care – horizontal Violence

**Contributing Factors:**
- Person in a position of authority feels threatened by victim
- Co-worker who is insecure or immature
- A single individual acting as a bully
- In person or electronic media; cyberbullying.
- May rise to the level of harassment

Difference between constructive criticism and bullying?

Constructive criticism – help someone improve something, provide information.

Three elements to bullying:
- Intent
- Repetition
- Delivery – bullying is about the person and the issue
Disruptive Behavior

Disruptive behavior is interactions among dentists, dental hygienists, dental assistants and other staff that interfere with patient care. The ADA Principles of Ethics and Code of Conduct specifically addresses disruptive behavior in section 3.F.1.

- The section of the code indicates that dentists who engage in disruptive behavior in the workplace risk undermining professional relationships among team members, decreasing the quality of patient care provided, and undermining the public’s trust and confidence in the profession.

Legal Concepts: State Laws

- Similar to Federal laws, in some instances, more restrictive
- State law cannot conflict with Federal law
- State law may add additional factors or broaden a definition

Workplace Safety

Federal and state laws require a place of employment is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. An employee may anonymously complain to a state or federal agency about an unsafe work environment and be protected against employer reprisals.
Sexual Harassment Defined
Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment, unreasonably interferes with an individual’s work performance or creates an intimidating, hostile or offensive work environment. (EEOC)

Sexual Harassment
Quid Pro Quo: includes unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a nature or submission to them is basis for hiring, firing or advancement
Hostile environment: occurs when any type of unwelcome sexual behavior creates an offensive or hostile environment. The harassment does not have to result in tangible or economic job consequences.

Intent vs Impact
- Intent is NOT relevant.
- Behavior is judged by impact upon recipient.
- “I didn’t mean anything by it”...not a valid defense.
  
  Intent -- Humor
  Impact -- Allegation of a hostile environment

  Intent -- Help someone to relax, e.g. shoulder massage
  Impact -- Inappropriate touching
Ethnic Intimidation: Recent Cases

Three men accused of attacking an African-American man while using racial slurs were arraigned on ethnic intimidation charges, more than 10 months after the incident outside a home in West Bloomfield.

Bloomfield Hills dentist K.M. will spend 30 days in jail after pleading guilty to felony ethnic intimidation for writing an anti-Semitic letter to another dentist. K. admitted sending the letter — which included a picture of Adolf Hitler — to M.S., with whom he was involved in a civil lawsuit.

Dental Practice Acts

Definitions
Delegation requirements
Scope of practice for specific members of the dental team
Dental specialty information
Guidelines for licensure
Guidelines for continuing education

Reasons to Engage Social Media in Dental Practice

Patients
Marketing and patient acquisition
Directory information (office location, telephone number)
Community building with current patients

Community
Oral health education
Engagement
Resource
Online reputation management

Professional Network
With colleagues
Connected with professional associations
Professional Relationships Have Boundaries

- To avoid mixed messages, establish professional boundaries.
- Patients are your patients, not your friends.
- In social media, no distinction exists, the private and the professional get mixed.

Social media can allow for “boundary violations.” Patients can get information or interact in a way that changes the nature of the professional relationship.

Problems with Boundary Violations

- Are you a doctor or a friend?
- Problems can be caused by competing roles because the nature/goal of the relationship is changed.
- Patients “may fail to respect appropriate professional boundaries and limits...calling at inappropriate times, making inappropriate treatment requests, ignoring advice about treatment”
- The doctor may discover information as a friend, but that they now also know as a treatment provider; Confidentiality becomes an issue.
- Range of scenarios from “I didn’t know you smoked” to “I can’t believe what I found out when I Googled Patient X.”

Social Media Protections

FIRST AMENDMENT: FREEDOM OF SPEECH

The First Amendment protects an individual’s right to speak, write, and gather freely – so far, it does not cause harm or incite violence.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT: SEARCH AND SEIZE

Individuals are protected from illegal search and seizure and guaranteed due process unless information is found in plain view.

Lesson: Social media postings are “user generated content.” In a search and seizure consideration, an individual can “consent” to a search. Users have chosen to post, thus “consent” has been given.
Right to Express Yourself

Some of the applicable laws and regulations:
- Title VII of the Civil Rights Act
- Americans with Disabilities Act of 1990
- Health Insurance and Portability and Accountability Act (HIPAA) of 1995
- General Tort Principles that include defamation, slander, libel, intentional infliction of emotional distress
- NLRB (National Labor Relations Board) Regulations
- Federal Trade Commissions' Guidelines Concerning the Use of Testimonials and Endorsements
- State mandated regulations

Social Media as a Screening Tool

Employer Cautions:
- Civil Rights Protections
- Invasion of privacy
- Bias

Information beneficial but beware:
- Specific topics remain off-limits even though information was evident in social media, e.g. religious affiliation based on holidays celebrated.

Information available may include:
- Individual’s age
- Heritage
- Religious background
- Ethnicity
- Sexual orientation
- Disabilities
- Political ideals

Comments provide information:
- “Congratulations on the baptism”
- “JNRM for President”
- Photos
- Favorites
Beware and Be Aware!

Offensive or threatening postings. Safety concerns.

Staff postings
- Breach of confidentiality concerning patients
- Discriminatory comments
- Harassment of colleagues or patients
- Criminal activity

Beware and Be Aware!

Cyber stalking
- At least 1/3 of the states have specific laws addressing cyberstalking. Drafted to address stalking using the internet or with other electronic communication devices, such as cell phones and pagers. All fifty states have laws related to stalking.
- Federal law protections exist

Cyber bullying

Thank you

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