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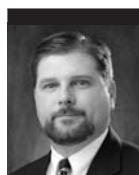
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THE INTERSECTION OF DENTAL ETHICS AND LAW

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ABSTRACT

Dentists are regularly confronted with situations that involve interrelated ethical, risk management, and legal and regulatory compliance issues. This article discusses six of the most common such situations where dentists must sort out various ethical and legal issues. Sometimes taking steps to minimize exposure to liability or comply with legal and regulatory mandates is also consistent with applicable ethical standards. At other times, however, in order to meet the highest ethical standards, dentists must go beyond mere legal compliance and risk management. By acting in accordance with the highest ethical standards, dentists ensure they are protecting not just their own interests but their patients' interests as well.



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This article is intended to be informational only and should not be construed as legal advice. Dentists should always seek the advice of their own attorneys regarding specific circumstances.

The Ohio Dental Association (ODA) has a hot line its member dentists call to discuss dental practice issues with ODA staff members who have expertise in, among other areas, law and dental ethics. Currently, the ODA's staff includes two full-time attorneys and a full-time dental services director. Together, they have nearly 40 years of experience in dealing with dental practice issues. In addition, the staff works closely with ODA council and committee members who provide regular guidance in specific cases. When necessary, the ODA staff also consults faculty members at The Ohio State University College of Dentistry and the Case School of Dental Medicine. The ODA's most recent membership survey shows that members rate the provision of dental practice information as one of the ODA's most valuable services.

Member dentists' questions often involve ethical considerations, risk management, and regulatory and legal compliance. Many times, the issues dentists wrestle with include interrelated ethical and legal considerations. The "right" answer from an ethical perspective is often also the prudent approach to minimize exposure to liability or to ensure compliance with applicable state and federal laws. At other times, however, a dentist's ethical duty requires more than just minimizing legal risk or merely complying with the law.

Following the law or minimizing legal risks may help protect the dentist from civil liability or administrative discipline by a state dental licensing board. By going further and following the highest ethical standards, the dentist will do more than just protect his or her own interests. In most cases, the dentist's commitment to following ethical standards will also ensure the patient's interests are protected and, in the process, may enhance the dental profession's reputation and image.

This paper is based upon representative issues raised by callers on the ODA hot line and the experiences of the ODA staff in responding to them. Where possible, examples from our callers are used, as are "real life" answers from ODA staff. Below is a discussion of six of the issues about which ODA members regularly inquire.

OBLIGATION TO TREAT PATIENTS

THE ISSUE

Oftentimes, dentists call to inquire about accepting new patients and especially about their obligations to continue to treat patients who are already in their practices. Dentists describe scenarios where the patient is in the middle of a somewhat complex multi-appointment treatment plan, but difficulties have arisen because of the patient's behavior. In some cases, the patient is behind in payment, regularly misses appointments, or refuses to follow the dentist's recommended oral care instructions between appointments. Dentists want to know what their legal and ethical obligations are to these patients.

ETHICAL CONSIDERATIONS

Dentists must avoid acting in a discriminatory manner when selecting patients for their practices. Dentists should avoid "abandoning" patients when terminating the dentist-patient relationship by providing the patient adequate notice and an opportunity to secure the services of another dentist.

DISCUSSION

There is a difference between refusing to treat new patients and terminating an existing patient relationship. Generally, dentists are free to accept new patients into their practices as they see fit.

However, there are exceptions to this general rule. The "Obligation to Treat Patients" section of the American College of Dentists *ACD Ethics Handbook for Dentists* states that dentists should "avoid actions that could be interpreted as discriminatory" and advises that dentists "must be aware of laws and regulations that govern discrimination" (*ACD Ethics Handbook*). Similarly, the American Dental Association *Principles of Ethics* and *Code of Professional Conduct* mandates that dentists avoid refusing to treat a patient based solely on his or her race, creed, color, sex, or national origin (*ADA Code*, Sec. 4.A.). Of course, state and federal laws provide heightened protection for people in these protected classes as well. (See *Ohio Revised Code*, Sec. 4112.02.)

Similarly, pursuant to the Americans with Disabilities Act, a dentist should not refuse to treat a patient because he or she has a disability (*42 United States Code*, Sec. 12101). For example, a dentist should not refuse to treat a patient solely because the patient is HIV positive or has been diagnosed with AIDS (*Bragdon v. Abbott*, 524 U.S. 624, 1998). In general, when accepting new patients, dentists

must be aware of the laws and ethical guidelines that govern discrimination and must avoid acting in violation of those laws and guidelines.

Once a dentist-patient relationship is established, however, the dentist's obligations change, and a duty may exist beyond the traditionally protected classifications based on race, creed, color, sex, and national origin. In terminating an existing relationship with a patient, the dentist must avoid "abandoning" the patient. In defining "patient abandonment," the *ADA Code* states, "Once a dentist has undertaken a course of treatment, the dentist should not discontinue that treatment without giving the patient adequate notice and the opportunity to obtain the services of another dentist" (*ADA Code*, Sec. 2.F.). The concept of "abandonment" may also be the basis of a civil lawsuit if the dentist does not exercise care in terminating the dentist-patient relationship. Liability for patient abandonment can arise when the dentist does not give adequate notice of termination and the refusal to treat causes injury to the patient.

The best way to avoid a claim of abandonment is to avoid terminating the dentist-patient relationship during the course of treatment. If the relationship must be terminated prior to the completion of treatment, the dentist should discuss the problem with the patient, offer to assist in finding the patient a new dentist, and obtain the patient's consent to end the relationship, if possible. Even if the patient is behind in payment or otherwise uncooperative, the dentist must make every attempt to ensure the patient's oral health is in a stable condition before terminating the dentist-patient relationship. It may be necessary to see the treatment plan through to its completion in order to fully satisfy the dentist's ethical obligations to the patient before terminating the dentist-patient relationship.

If the dentist does act to end the relationship, he or she should document each step in writing. The best practice may be to send the termination letter via certified mail so that the dentist can document termination and the date notice was provided. Because both dental ethics and the law generally favor the patient having adequate notice and opportunity to secure a new dentist, a dentist's duty to the patient does not necessarily end with the sending of the termination letter. If a dental emergency arises before the patient has a reasonable time to establish a relationship with a new dentist, the terminating dentist may have an obligation to provide emergency care.

PATIENT RECORDS

THE ISSUE

Dentists are often confused about how to handle issues related to patient records. Dentists seem to understand that patient records are confidential but do not always take the steps necessary to ensure such confidentiality. Many dentists believe that the records belong to them and do not fully appreciate their obligation to make relevant records available to patients or patient representatives. On occasion, dentists will inquire if they can make the provision of records conditional upon the patient paying an unpaid bill.

ETHICAL CONSIDERATIONS

Dentists should protect the confidentiality of patient records. Upon request of the patient, a dentist should provide copies of dental records to the patient or another dentist designated by the patient, in accordance with applicable laws.

DISCUSSION

Both the "Patient Records" section of the *ADA Code of Ethics* and the "Confidentiality" section of the *ACD*

Ethics Handbook recognize the importance of safeguarding the confidentiality of patient records (*ADA Code*, Sec. 1.B.; *ACD Ethics Handbook*). In addition, most states have laws providing that communications between a dentist and a patient are privileged (i.e., confidential). (See *Ohio Revised Code*, Sec. 2317.02.) Privileged communications may include, among other things, dental records, charts, diagnosis, and lab results. Dentists should take steps to limit accessibility to the health information included in patient records. For example, dentists should have specific policies prohibiting staff discussion of a patient's oral health issues in front of other patients. And dentists should avoid placing patients' health status information on the outside of the physical patient record where other patients might see it.

Dentists, who use electronic transactions, including electronic claims submissions to third-party payers, may also have a duty to protect patients' health information under the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Regulations (*45 Code of Federal Regulations*, Parts 160, 162, & 164).

The confidentiality of the patient's record is a privilege that belongs to the patient and may only be waived by express consent of the patient. Generally, a dentist should not provide patient records to a third party absent a signed written release from the patient, the patient's legal representative, a court order, or other mandate under law. Patient releases or court orders to testify or release documents should be included in the patient's file in order to protect the dentist from future claims of breach of confidentiality.

While dentists enjoy the same legal rights of free speech as others, they also have the ethical obligation to maintain professionalism in their communications with patients.

In many jurisdictions, court rules or codes of professional conduct for lawyers prohibit contingency fee arrangements for expert testimony...such arrangements create undue financial incentives for biased testimony in favor of the hiring party.

Generally, a patient waives the dentist-patient privilege when he or she directs a claim to be submitted to Medicaid, an insurance company, or other third-party payer. Accordingly, the dentist may provide copies of patient records to third-party payers regarding services submitted for coverage.

In many states, while a dentist may technically “own” the original patient records, the patient still has an absolute right to a copy of his or her records. When possible, depending on applicable state laws, dentists should provide copies of the record and retain the originals because original records are generally the best defense in the event of a malpractice lawsuit or state dental board disciplinary action. In most states, the dentist may charge a reasonable, cost-based fee for copying records. Some states specifically define in statute or rule how much health care providers may charge for copies (See *Ohio Revised Code*, Sec. 3701.741).

In general, both the courts and dental ethics favor patients having access to the information included in their health care records. Even if the dentist-patient relationship has broken down, the dentist must still make the records available so the patient can get subsequent dental treatment. An advisory opinion related to the “Patient Records” section of the *ADA Code of Ethics* provides that the fact that a patient has not paid for services performed by the dentist is not sufficient reason for withholding a copy of the records. (*ADA Code*, Sec. 1.B.1.) Accordingly, a dentist must not hold patient records hostage as a means of attempting to secure payment for an unpaid bill.

DUTY TO REPORT CHILD ABUSE

THE ISSUE

Occasionally, dentists report stories about minor patients who have suspicious bruises or other injuries around the face, head, or neck. Parents or guardians sometimes offer reasons for the injuries that raise suspicions of abuse. While they are genuinely concerned about the safety of their minor patients, some dentists may be reluctant to “get involved” because they feel their suspicions of abuse might prove to be unfounded.

ETHICAL CONSIDERATIONS

Dentists should understand how to detect child abuse. Dentists should report good faith suspicions or actual knowledge of abuse of a minor patient to the appropriate authorities.

DISCUSSION

A significant percentage of child abuse injuries involve the head, neck, and mouth areas. Accordingly, dentists are sometimes confronted with the situation where they suspect that one of their minor patients is being abused. The “Abuse and Neglect” section of the *ADA Code of Ethics* and the “Child Abuse” section of the *ACD Ethics Handbook* recognize that dentists are in a position to detect abuse and have an ethical obligation to be familiar with the signs of abuse and report suspicions of abuse to appropriate authorities (*ADA Code*, Sec. 3.E.; *ACD Ethics Handbook*).

Furthermore, many states have laws that place an obligation on dentists and other health care providers, who are working in their professional capacity and come to know or suspect a child has been abused, to immediately file a report with the appropriate government agency. (See *Ohio Revised Code*, Sec. 2151.421.)

In most cases, confirmed knowledge of abuse is not required before filing a

report. A dentist's duty to report arises when he or she has a reasonable suspicion that abuse has occurred. The intent of these laws is to encourage health care professionals, including dentists, to report suspicious signs of child abuse. In many states, a dentist who makes a good faith report of suspected child abuse is immune from civil or criminal liability which might otherwise arise as a result of filing the report. (See *Ohio Revised Code*, Sec. 2151.421.) Accordingly, dentists should not be reluctant to make a report for fear of liability should their suspicions eventually fail to be confirmed. Ultimately, state laws and dental ethics recognize dentists are in position to detect abuse and place a corresponding obligation on dentists to act on any suspicion of abuse they gain through their treatment of minor patients.

Dentists have a respected and valued position in society because of their compassion and commitment to their patients. By educating themselves on how to recognize signs of abuse and understand what to do when such signs are present, dentists are not only fulfilling their legal and ethical obligations, they are also protecting those in our society who can least protect themselves.

UNJUST CRITICISM AND EXPERT TESTIMONY

THE ISSUE

Dentists often inquire as to what they should do when patients come to their practices with concerns about prior dental treatment. Specifically, they want to know what they can say to patients about the treatment provided by previous dentists. Additionally, a growing number of dentists report being asked to testify as expert witnesses in civil or administrative actions. Many want to testify but are unsure what their obligations are with respect to providing such testimony.

ETHICAL CONSIDERATIONS

Dentists should inform new patients of their current oral health status without unjustified disparaging comments about prior services. When providing expert testimony, dentists should provide their honest, objective opinions, free from any financial influences that could lead to bias.

DISCUSSION

While dentists enjoy the same legal rights of free speech as others, they also have the ethical obligation to maintain professionalism in their communications with patients. Accordingly, dentists ought to exercise care when discussing prior treatment with their patients. The *ADA Code of Ethics* provides that "Patients should be informed of their present oral health status without disparaging comment about prior services" (*ADA Code*, Sec. 4.C).

The advisory opinion related to the "Justifiable Criticism" section of the *ADA Code of Ethics* states that "Patients are dependent on the expertise of dentists to know their oral health status" (*ADA Code*, Sec. 4.C.1). Because dentists are in this position of trust, they should exercise care to ensure their comments are "truthful, informed, and justifiable" (*ADA Code*, Sec. 4.C.1). In some instances, it may be appropriate for a dentist to consult with the prior dentist to determine the circumstances and conditions surrounding the previous treatment.

For example, a dentist in Ohio had concerns about whether a new patient's prior treatment plan was appropriate and decided to call the patient's former dentist. During their conversation, he learned that the previous dentist had recommended a treatment plan that the patient rejected. Ultimately, the patient chose to pursue a different, less optimal, treatment plan. The previous dentist explained the pros and cons of each approach and secured a signed informed consent document before treatment

commenced. By making a call to the previous dentist in addition to reviewing the patient's records, the dentist was able gain a complete understanding of the patient's situation, including the fact that he chose a plan different from the one recommended for him.

In the situation where the patient and the dentist have significant concerns about prior dental treatment, the dentist may suggest that the patient contact the state or local dental society's peer review process, which is designed to resolve dentist-patient treatment issues outside of the traditional court system. The ADA advisory opinion makes clear, however, that a "difference of opinion as to preferred treatment should not be communicated to the patient in a manner which would unjustly imply mistreatment" (*ADA Code*, Sec. 4.C.1.)

In the end, the dentist's main goal should be to explain to the patient his or her current oral health status and develop a treatment plan to get the patient on a path to improved oral health. Unjustified criticism of prior treatment does nothing to advance the patient's oral health.

Occasionally, a patient's dissatisfaction with treatment may lead to litigation or the filing of a complaint with the state dental licensing board. Dentists often have the opportunity to testify as expert witnesses in such civil lawsuits or dental board disciplinary proceedings. In fact, the *ADA Code of Ethics* contemplates dentists testifying "when that testimony is essential to a just and fair disposition of a judicial or administrative action" (*ADA Code*, Sec. 4.D).

However, it is considered unethical for a dentist to provide expert testimony where his or her fee is contingent upon the favorable outcome of the litigation

or administrative proceeding (*ADA Code*, Sec. 4.D.1). In fact, in many jurisdictions, court rules or codes of professional conduct for lawyers prohibit contingency fee arrangements for expert testimony. (See *Ohio Supreme Court Rules of Professional Conduct*, Rule 3.4). The main objection is that such contingency arrangements create undue financial incentives for biased testimony in favor of the hiring party.

When giving expert testimony, dentists should provide their opinions in an honest, objective manner, based on the information before them. They should also be willing to acknowledge any limitations on their ability to speak definitively regarding the issues under scrutiny.

The role of the expert is to assist the fact-finding body—whether a jury, judge, or administrative agency—by providing objective, scientific testimony. Doing anything other than that when providing expert testimony is not only unfair to the parties but is detrimental to the administration of justice.

ADVERTISING

THE ISSUE

The amount of advertising by dentists has grown dramatically in recent years. Many dentists are unsure what they can or cannot say when advertising their services and credentials. Others feel their colleagues go too far in their advertisements.

ETHICAL CONSIDERATIONS

Dentists who choose to advertise should develop a full understanding of the advertising regulations in their state. Dentists must avoid placing advertisements that are false and misleading,

DISCUSSION

In today's competitive marketplace, there has been a marked increase in the number of dentists who advertise via print, broadcast, and electronic means. Ensuring such advertisements are consistent with legal mandates and professional ethics can present significant challenges.

The regulation of advertising related to the announcement of available services and professional dental credentials varies greatly from state to state. For example, many states expressly allow announcement of credentials in specialty areas recognized by the ADA. (See *Ohio Administrative Code*, Sec. 4715-5-04 & Sec. 4715-13-05.) Some states require a state-issued specialty license in order to advertise as a specialist. (See *South Carolina Code of Laws*, Sec. 40-15-220). When announcing available services, some states require general dentists to disclose that they are general dentists in their advertisements. (See *Texas Administrative Code*, Title 22, Part 5, Section 108.54.) Additionally, when announcing credentials in an area not recognized as a specialty by the ADA, some states require dentists to specifically disclose that the practice area announced is not a specialty recognized by the ADA. (See *Texas Administrative Code*, Title 22, Part 5, Sec. 108.55.) The *ADA Code of Ethics* states that "Dentists who choose to announce specialization should use 'specialist in' or 'practice limited to' and shall limit their practice exclusively to the announced special area(s) of dental practice, provided at the time of the announcement such dentists have met in each approved specialty for which they announce the existing education requirements and standards" set forth by the ADA (*ADA Code*, Sec. 5.H).

Dentists are generally entitled to announce the services they provide and, in fact, such information may be useful for patients in finding a dentist right for them. Accordingly, for example, it may

be entirely appropriate for a general dentist to advertise that he or she provides "cosmetic dental services." Advertising oneself as a "certified cosmetic dentist," however, may be problematic if patients might reasonably interpret such a claim to indicate specialization.

Because of the wide variety of regulations related to the advertising of credentials and specialty status, it is important that dentists are fully aware of their own state's specific advertising regulations as well as the guidelines contained in the *ADA Code of Ethics*.

Underlying the specialty advertising rules is the principle that professional advertising should be truthful and should help members of the public make informed decisions related to the care they seek. Accordingly, the *ADA Code of Ethics*, *ACD Ethics Handbook*, and many states forbid any dental advertising that is false or misleading. Establishing what is false and misleading, however, can be tricky. Both the *ADA Code of Ethics* and the "Advertising" section of the *ACD Ethics Handbook* provide specific examples of things to avoid in order to protect against false and misleading advertisements. For example, dentists should avoid advertisements that: (a) contain material misrepresentations of facts, (b) create deception by only partially disclosing relevant facts, (c) create unjustified expectations of favorable results, (d) represent or imply that the services of a practitioner are superior to those of other dentists unless such representations can be reasonably verified by the public, or (e) misrepresent fees for dental services (*ADA Code*, Sec. 5.F.2. and Sec. 5.B.; *ACD Ethics Handbook*).

Dentists, like all professionals, have protected commercial speech rights when it comes to advertising. Courts, however, also recognize that states and professional associations have the ability,

and some would argue the responsibility, to protect the public from false and misleading advertising, especially considering the disparity of information and knowledge related to dentistry between dentists and the public.

Some commentators believe that the prevalence of dental advertising may have a negative impact on the public's perception of dentists. They suggest that ads implying that some dentists are superior necessarily imply that other dentists are inferior. Ads that focus on cosmetic and elective services may lead the public to view dentists as "oral cosmetologists," thereby undermining their long-standing reputation as dedicated healthcare professionals committed to promoting patients' oral health care. And the burgeoning number of ads may give the overall impression that dentists are more concerned with the commercial aspects of dentistry than delivering quality oral health care services.

Invariably, the regulation of professional advertising involves subjective determinations as to what rises to the level of false and misleading. Because such subjective decisions can be difficult and tend to raise significant legal questions, enforcement of advertising laws, rules, and professional guidelines vary from state to state. Regardless of the level of enforcement activity, however, the dental profession's long-term reputation depends on each dentist's willingness to act ethically and professionally when developing and placing advertisements. The "Advertising" section of the *ACD Ethics Handbook* reminds dentists that the "best advertising is always word-of-mouth recommendations by satisfied patients" (*ACD Ethics Handbook*).

DELEGABLE DUTIES AND SUPERVISION OF STAFF

THE ISSUE

State laws and regulations are changing with rapidity regarding permissible delegable duties and supervision of staff. Many of these changes create flexibility in the office by permitting additional delegation that results in greater office efficiency or may even permit, under certain circumstances, a dental hygienist to work on a patient when the dentist is not physically present in the office. Dentists often have questions regarding staffing when they learn of changes in the law or regulations in this area. They may be considering adding a dental assistant to take advantage of additional delegation of duties or a dental hygienist in order to keep the office open longer for hygiene services even when the dentist is away.

ETHICAL CONSIDERATIONS

Dentists should know, and comply with, the laws in their own states regarding delegation of duties to, and supervision of, dental assistants, hygienists, and other staff members. A dentist should consider the impact on the quality of patient care when determining whether to delegate a task to, or permit relaxed supervision of, a dental staff member, regardless of what the law permits.

DISCUSSION

While dental staff members play an important role in assisting in providing care to patients, the delegation of duties in the dental office is another area that presents interrelated issues of law and ethics. Both the "Use of Auxiliary Personnel" section of the *ADA Code of Ethics* and "Delegation of Duties" section of the *ACD Ethics Handbook* provide that dentists may only delegate duties to dental hygienists, dental assistants, and

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Talking to an attorney, however, may not be enough. Dentists should also take steps to understand their ethical obligations in such situations.

others that are consistent with applicable laws and regulations, which vary from state to state (*ADA Code*, Sec. 2.C.; *ACD Ethics Handbook*). The *ADA Code of Ethics* also mandates that “Dentists shall be further obliged to prescribe and supervise the patient care provided by all auxiliary personnel working under their direction” (*ADA Code*, Sec. 2.C). Accordingly, it is important for a dentist to know his or her own state’s laws and regulations on the delegation of specific duties (coronal polishing, administration of nitrous oxide and local anesthesia, scaling, etc.) and the corresponding required level of dentist supervision for specific dental staff members.

Dentists should also remember that in the context of delegable duties and supervision, there is an ethical responsibility to maintain the quality of patient care. The *ACD Ethics Handbook* notes that in addition to determining the legality of delegating a specific task to a particular staff member, the dentist should ask him or herself whether the quality of care for the patient will be maintained (*ACD Ethics Handbook*). Just because the law permits delegation of a duty or relaxation of supervision does not relieve the dentist of his or her ethical duty to ensure the provision of quality dental care.

Conclusion

The issues discussed in this essay demonstrate the interconnectivity of dental ethics and legal issues. In many cases, complying with the law and taking steps to limit exposure to liability will also be consistent with the dental profession’s principles of ethics. For example, acting to protect the confidentiality of patient records, taking steps to avoid patient abandonment, and reporting child abuse are all actions that are consistent with the ethical tenants of the dental profession. As shown above, such

actions are also consistent with legal mandates and may help to limit dentists’ exposure to civil liability.

In other cases, however, merely complying with the law or acting to limit potential liability is not enough. Being an ethical professional sometimes requires a dentist to accept additional obligations beyond what is required by the law. As discussed above, despite a dentist’s right to engage in free speech like anyone else in society, professional ethics requires dentists to respect their patients, colleagues, and the dental profession generally, by avoiding making unjust criticism of prior treatment. Similarly, regardless of the likelihood of legal jeopardy, dentists should avoid placing advertisements that may mislead the public or potentially depict the dental profession in a negative light. Finally, dentists should not delegate duties to staff members merely because the law permits them to do so. Dentists also have the ethical obligation to ensure that the delegation of a specific duty to a particular staff person can be done in a manner that does not jeopardize the quality of patient care.

The issues discussed above are just a few examples of the many situations where dentists must confront their ethical and legal obligations together. In such cases, it is important for dentists to consult legal counsel to get advice related to their specific situations and gain a full understanding of the underlying legal issues. Talking to an attorney, however, may not be enough. Dentists should also take steps to understand their ethical obligations in such situations. Following the law and limiting exposure to liability are important considerations. The ethical practice of dentistry, however, sometimes requires more. ■