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Six Common Misconceptions about the Standard of Care in Dentistry

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Abstract

As a legal concept, standard of care refers to the set of practices that are accepted as appropriate based on the body of common case law decisions. This is contrasted with a concept of ethical standard of care, which is defined as the conscientious application of up-to-date knowledge, competent skill, and reasoned judgment in the best interest of the patient, honoring the autonomy of the patient. The article probes six areas where the understanding of standard of care is ambiguous.

"Standard of care" is a term frequently used when dentists discuss questions of appropriate clinical care of patients. Unfortunately, there are a number of misunderstandings about the term. This article seeks to clarify the concept for dental practitioners, first by exploring what the term is not and then by offering a clearer idea of what standard of care actually is. It will also introduce a distinction between ethical standard of care and legal standard of care. This essay explores a list of "mis-conceptions" to make its points. Let's start with what standard of care is not.

Misconception #1: The standard of care is a legal term and not an ethical one

Though definitions vary somewhat, a common definition of standard of care is best summed up by George Annas (1993):

> Standard of care is a legal term denoting the level of conduct a physician or healthcare provider must meet in treating a patient so as not to be guilty of negligence, usually called malpractice. That standard is generally defined simply as what a reasonably prudent physician (or specialist) would do in the same or similar circumstances.

Both dental law and dental ethics are concerned with appropriate behavior by dentists, and it is important to note that they are not the same disciplines. It is entirely possible to be acting unethically and not be in violation of a Dental Practice Act or be committing malpractice. Likewise, arguments can be made that—in rare instances—violating a law in the best interest of a patient may be an ethical thing to do. For instance, it is against the law in most states to operate a radiographic machine without a license to do so. From an ethical standpoint, if one has had the proper training and uses good judgment in the use of such a machine in the best interests of a patient in an emergency situation, the lack of a license is not necessarily an ethical breach. Too often, the disciplines of dental law and dental ethics are conflated, and with resulting confusion; practitioners often think that if they are in compliance with the law, they have met all their ethical duties. However, dental law is a subset of dental ethics, limited in scope and different in its intentions. As Annas (1993) notes:

> ...while the standard of care in the United States is strongly influenced by the law, for this standard to be beneficial to both patients and the public it must be based much more on doing the "right thing" (which is practicing good medicine with the informed consent of the patient) than doing what is legally safest in terms of potential liability.

The unavoidable argument here is that ethics often only begins where the law ends.

Granted, standard of care is a phrase most often used in the legal sense: How does a court decide whether or not a dentist has been negligent in his or her care of a patient? However, it would be hard to argue that dental ethics is not also concerned with what constitutes good and bad dental care. The difference is that the law is limited by the actual case history and statute; it is concerned with what has been demonstrated in court proceedings through expert testimony and mandated by legislation.

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Increasingly, "evidence-based" is taken to include (though not be determined by) the long-term anecdotal experience of the practitioner.

Dental ethics is concerned with what ought to be the standard of care... whether or not there is any case law or legislation to support its conclusions. In other words, dental law is more descriptive and thus after-the-fact, whereas dental ethics is more normative and thus proscriptive in nature. A great example of this is the concept of patient confidentiality. Where once this was the ethical standard of care: One would be acting unethically if one violated the confidentiality of a patient, it has in recent years been codified in the law through HIPAA. For a long time violating a patient's confidentiality was below the standard of care ethically. Now it violates the standard of care legally.

Though it is usually not presented this way, dental ethics is concerned with establishing a standard of care for dental practitioners over and above the legal standard. Ethics is concerned with what is best for the patient at all times. Malpractice law is more concerned about specific cases that actually result in damages and specifically in determination of negligence.

Misconception #2: The standard of care is determined by legal statute

Would not it be nice if the conscientious new dental school graduate could simply purchase a volume detailing the standard of care for each and every dental procedure? Alas, such a volume does not exist, and for good reasons. Legislatures that create laws and the courts that interpret them, generally, do not presume—and rightly so—to have the expertise required to determine the standard of care (abortion and end-of-life issues notwithstanding). Quite reasonably, they rely on those who actually research and practice the craft in order to determine the proper behavior by those within the profession. While one might be able to look to the dental practice act of the relevant state in order to determine whether or not one has committed a crime (such as allowing an auxiliary too much latitude), one is unlikely to find in that type of legislation guidelines regarding diagnostic technique, therapeutic regimens, and specifics regarding surgical technique. Thus, one must look elsewhere for what is generally understood to be the legal standard of care.

Misconception #3: The standard of care is determined by what is commonly practiced in a given community

For years this was indeed the accepted definition of the term in the legal world under the "Frye ruling," also known as the "locality rule" (Niederman, 2012). This is no longer the case. A subsequent ruling by the U.S. Supreme Court (1993), known as the "Daubert ruling," has substituted a more scientific basis for determining the legal standard of care. It is no longer legally defensible to claim that the treatment of a patient was within the standard of care because it was within the accepted standards of a given community. Despite this, one can still read such misinformation, especially on the Internet (see http://clinicallawyer.com/2010/09/what-is-the-standard-of-care).

From an ethical standpoint, arguing that it is acceptable to treat patients poorly just because "everyone else is doing it" is hardly justifiable. And yet, dentistry has an unfortunate history of condoning practices that support this herd instinct among practitioners. What follows are a few examples.

For years, research showed, with little doubt, that routine use of prophylactic antibiotics for dental patients reporting a heart murmur was bad practice. As it turns out, the risk of

death from the antibiotics was much larger than the risk of endocarditis. And yet it took many years to change this professional practice, and it is no doubt still being practiced this way in some offices. One of the reasons for this continued practice is the fact that many attorneys would advise that the odds of being sued (not to mention a successful outcome in such a case) for creating an endocarditis was far less than creating an adverse reaction to the antibiotic. The legal profession is not above using the standard of "what is commonly done" in order to defend clients from what actually should be done in the best interest of the patient.

More recently, research has shown that prescribing antibiotics before dental procedures for patients with joint replacements is also highly suspect (Olsen, 2010). Yet this practice continues in most dental offices, helped along by the fact that orthopedic surgeons sometimes follow their own herd instinct and have resisted incorporating these new findings into practice. The dentist is in the unenviable position of doing what is best for the patient (i.e., not prescribing antibiotics in most cases) yet risking legal action for going against the status quo.

Closer to home is the example of prescribing dental radiographs. Many if not most dental offices routinely take a full series of radiographs on any new patient. However, guidelines for prescribing radiographs, carefully researched and vetted by experts in the field (and available for over 25 years), do not condone such practice (Council on Scientific Affairs, 2012). Radiographs are to be prescribed based on the dental history, risk factors, and presenting symptoms of the patient. Those offices that "prescribe" radiographs before the dentist has examined or interviewed the patient are practicing below the ethical (and legal) standard of care, yet it happens all the time, justified (presumably) because such practice is common within the community. From a strictly legal standpoint, this practice most probably continues because the likelihood of being sued (as any attorney might, once again, advise) for taking too few radiographs is much higher than for taking too many.

Misconception#4: The standard of care can vary from community to community

As all dentists in all communities in the United States have access to the same information these days, it would be difficult to defend treating a patient differently based on geographic location. It is no doubt true that some communities lack the resources and facilities to provide ideal care, and here one might make a good ethical argument (based in the concept of justice) that when a dentist does the best he or she can do with what is immediately available it is within the ethical standard of care. From a legal point of view, however, it is unlikely that the geographic argument is going to be successful in court. Most states interpret standard of care as a national legal standard. (See the companion essay by Curley and Peltier).

Misconception #5: The Standard of Care Is Determined by the Latest in Technology and Best Practices

It would be hard to argue that a dentist performing root canal therapy without proper isolation of the tooth is practicing within the standard of care. But, what about performing the same procedure without a high-powered surgical microscope? Is this below the standard of care? Though such may well be the case someday, it is not generally accepted as a superior treatment now. David Ozar argues well that dentists have every ethical right to use their personal practice preferences (in fact, are obligated to do so) as long as the patient's general and oral health (as well as their autonomy) is not put at risk and that the dentist has every expectation that good results will be obtained (Ozar, 2002).

Moreover, technology is often slow to take hold within the profession and for good reason; adequate if not excellent results can be obtained with a variety of older technologies, and it is far better for a practitioner to use what is "tried and true" for him or her rather than to risk an outcome on new technology. New technologies, once in the spotlight, are notorious for fading after further testing and experience. From an ethical standpoint, a dentist who uses older technology may be well within the ethical standard of care if his or her concern is primarily with the patient's benefit and he or she obtains adequate results. Could we really argue against a practitioner's choice to use a technique that has reliably produced good results over many years of practice? On the other hand, avoidance of new technology that is clearly superior only in an effort to save money or save the effort in learning the new technique is hardly justifiable, either.

As for best practices and evidence-based clinical care, there is a growing awareness that these terms are problematic in real-life application. First, courts are increasingly made aware that the scientific literature is often less than

definitive on any particular procedure. Second, when trying to establish a standard of care, either legal or ethical, it is hard to discount a practitioner's experience and judgment. Increasingly, "evidence-based" is taken to include (though not be determined by) the long-term anecdotal experience of the practitioner.

Misconception #6: Bad outcomes are necessarily a result of practicing below the standard of care

Dentists who achieve a bad outcome from a procedure often believe that they must have committed malpractice or in some way acted unethically. Yet, it is quite clear from the dental ethics literature that one can have a bad outcome without being unethical. A conscientious application of accepted practices meets the ethical demands of practice. Being uninformed, incautious, unpracticed, or otherwise putting one's own interests ahead of good patient care is without a doubt below the ethical standard of care. However, no one can argue that dentists must be perfect in the outcome of a procedure at all times. The question is always whether or not a bad outcome was the result of negligence. From a strictly ethical standpoint, negligence is an absence of conscientiousness; did the dentist make every effort to achieve the best for his or her patient? One might argue that even without a bad outcome, one is guilty of practicing below the ethical standard of care if the ethical standard of care is taken to be the conscientious application of good technique, judgment, and action in the best interest of the patient. What happens when one is not conscientious and yet no bad outcome results? The "no harm, no foul" rule is more appropriate to the legal world than the ethical. Being lucky is not the same as being ethical.

In this sense, "standard" is an odd choice of words, given that what one is trying to describe is a contextually specific judgment that not only includes but goes beyond an agreed-upon set of criteria determined a priori.

Standard of Care Defined

If all of the above are misconceptions, then what exactly is the standard of care in dentistry? I hope by now it is clear that there is a distinction between the ethical standard of care and the legal standard of care, so we must therefore be more precise. Oddly, the ethical standard of care may be much easier to define than the legal one.

I offer the following definition for the ethical standard of care in dentistry: the conscientious application of up-to-date knowledge, competent skill and reasoned judgment in the best interest of the patient, honoring the autonomy of the patient.

To be within the ethical standard of care, the practitioner need only ask, "Am I up to date in my knowledge of the procedure, sufficiently experienced in the procedure and putting the best interest of the patient before my own interests while respecting the patient's autonomy, then acting accordingly?" This is what we mean by being conscientious. Acting below the ethical standard of care is to have never considered these questions at all or to act contrary to one's honest answers to them. Regardless of outcome, the question is always: Did one act conscientiously?

The legal standard of care, on the other hand, is much harder to define for any specific instance. When a dentist asks the question: What is the standard of care for this procedure? What he or she really wants to know is how to act in a particular case. It may well be that the

legal standard of care is of little help to the dentist due to the fact that the legal standard of care is determined on a case-by-case basis, after the fact, by expert testimony and with legislated judicial guidelines.

When one asks the question: "What is the legal standard of care for this procedure?" one can only look to similar legal precedent for an answer. While helpful, it does not provide necessary clarity for the practitioner who is faced with a unique patient under unique circumstances in a particular moment. To say to the dental practitioner that the legal standard of care is "what a prudent practitioner would do under similar circumstances" is just not very helpful. At best, an attorney can only advise the probability of losing a court case if one achieves a bad outcome. He or she cannot advise the practitioner on what to choose to do in the moment, as this must necessarily involve the clinical judgment and experience of the dentist. In this sense, "standard" is an odd choice of words, given that what one is trying to describe is a contextually specific judgment that not only includes but goes beyond an agreed-upon set of criteria determined a priori. It is no wonder that there is much confusion about this important issue. In essence, the legal standard of care is a moving target, an ever-evolving history of case precedent, always in hindsight, and not a set of rules to be followed by the profession. Though previous court rulings are certainly relevant to the practitioner, they offer no conclusive guidance and certainly no guarantee for legal success.

Conclusion

There is a significant difference between the legal and the ethical views of standard of care. Every dentist ought to aspire to the ethical standard as described here, and every patient should be able to expect this of his or her dentist. Whether or not following the ethical standard of care will result in legal safety for the dentist is a question that is, unfortunately, left to the courts and, unhelpfully, after the fact. ■

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