

Records, Risks and Regulations for the Dentist, Hygienist, Assistant and Management Team

By

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RISKMANDMENTS

- I. Practice Ethics-Based Risk Management
- II. Maintain strong Dentist/Team – Patient Relationships

- I. Ethics-Based Risk Management

- Risk Management techniques alone, without adherence to fundamental ethical values, will not successfully protect dental practices from exposure to legal action.
- Following ethical principles assures dentists correctly place primary focus on the best interests of the patient not their own legal defense.

Ethical Principles in Clinical Practice and the Enforcing Laws/Rules/Regulations

“Legal but Unethical” Analysis

- Ethical Principles
 - Violation of Principle: Justice

Illegal but Ethical Case Analysis

- Ethical: “Do Good”
- Illegal: Fraud (technically)

- II. Maintain Strong Dentist-Patient Relationships: Informed Consent Process

- **Build trust**
- Treat patients with respect
- Treat patient needs
- Exhibit empathy and caring manner
- e.g. post-operative/injury call
- Provide informed consent: understandable process, illustrations
- Keep patients apprised of their treatment progress and untoward events

Risk Management Five Phase Plan for Dental Practice

1. Identify areas of risk
2. Prevent/reduce patient injury/dissatisfaction
3. Prevent/reduce patient formal complaints/claims
4. Defend defensible and settle non-defensible claims
5. Protect professional and personal assets

Cases:

1. Delegation beyond the scope/supervision
2. Abandonment/termination
3. Statute of Limitations
4. Consent/informed consent
5. Confidentiality
6. Pre-medication/Records

7. Failure to diagnose oral cancer
8. Aspiration/swallowing of foreign object
9. Soft tissue injury

1. DELEGATION BEYOND SCOPE

Personal Supervision

- Personally diagnose
- Personally authorize treatment
- Personally examine post-op

Analysis

- Probably unprofessional conduct of both Dentist and Hygienist
- Performing professional services without adequate degree of supervision
- Penalties: Public reprimand, Fine, License suspension or revocation

Vicarious Liability

- Employers are responsible for the acts and omissions of their employees whom employers are assumed to supervise and control
- A patient can claim the proximate cause of their injury was D's failure to supervise/train the employee, even if the employer D was not personally involved

Reasons Dental Hygienists Need Separate Malpractice Insurance

- Dentist has no malpractice insurance
- Dentist's policy is voided for any reason
- Dentist's policy excludes coverage of employees
- Dentist's policy coverage is excluded for criminal or administrative violations, intentional wrongdoing or providing care while impaired

Reasons Patients Sue Doctors

- Poor communication
- Poor attitude of dentist/staff
- Unmet expectations
- Criticism by subsequent treating dentist
- Financial considerations

2. ABANDONMENT

- Failure to treat a patient of record without patient's consent
- Without timely notice after stabilizing patient
- Without making reasonable arrangements for continuing care

Valid Reasons for Termination

- Threats of harm to dentist or staff or other consistent unpleasant interactions with dentist or staff
- Repeated failures to keep appointments or follow instructions
- Failure to make a good faith effort to pay for services rendered
- Reduction of # patients in the practice

Termination Letter – Certified Return Receipt Requested

- Explain reason for termination

- Inform patient of dental status, need for treatment and risks of no treatment
- Provide 30 day notice with emergency care
- Agree to cooperate in transfer of records and continuity of care
- Clarify responsibility for account balance
- Refer to dental society, school or yellow pages for new dentist

Release of Records

- Bd of Regents Rule 29.1(b)(7) makes it unprofessional conduct to fail to make copies of records available upon patient request
 - Must release records, but only after written authorization
 - Maximum charge: \$.75/page
- Public Health Law Section 18. Upon a patient's request:
 - Dentist must allow inspection within 10 days
 - Dentist must supply copies within 2 weeks
 - Patient can challenge factual accuracy

3. **NEW YORK STATE STATUTE OF LIMITATIONS**

- 2 ½ years from the date of injury
- EXCEPT: Continuous treatment, Foreign body, Minor patient

4. **CONSENT ANALYSIS**

- Only a parent or legal guardian is competent
 - Grandmother not competent
- Emancipated minor, obtain consent from both
- Marriage and pregnancy both emancipate a minor
- Telephone consent is valid in emergencies as follows:
 - Witness
 - Sufficient disclosure
 - Document
 - Send written consent after appointment

Telephone Consent

- If no answer after reasonable effort to contact parent, DOCUMENT:
 - Attempts to locate parents
 - Reason care needed
 - Treatment rendered

Although patients have a right of self-determination, the patient, unlike “the customer” is NOT always right. Patients cannot consent to professional conduct against their best interests.

Analysis

- Refuse to treat P without current radiographs if treatment could cause injury. Inform P of consequences of no treatment (**informed refusal**)
- **NEVER** provide any treatment which would be negligent, unwanted or inappropriate, at the patient's request.

Handling Non-Compliant Patients

- If you intend to allow P to remain a patient of record, ask P to initial your entry regarding refusal to have x-rays or obtain a written waiver before restorative treatment. (Against Dental Advice Form)
- Send letter(s) re-informing P of the importance of follow-up treatment and potential adverse results, in this case, the risk of no biopsy
- If treatment without updated x-rays could be harmful to P, then terminate D-P relationship

Patient Duties: The patient has the duty to cooperate in their care and avoid contributing to their own injury or deteriorating condition

- Keep appointments
- Cooperate in care
- Pay bill
- Report accurate and complete medical history and timely inform of changes
- Follow instructions/advice/home care

Informed Consent Process: 10 Elements

1. Dentist-Patient Relationship formation
2. Duties: Ethical and legal of the dentist
3. Voluntary consent of patient
4. Competent patient/legal guardian consent
5. Collaborative process starting prior to invasive procedures
6. Documentation appropriate to invasiveness, use written consent for all invasive procedures
7. Understandable terms, questions answered
8. Information disclosed appropriate to circumstances
9. Reasonable patient enabled to make informed decision
10. Except in emergencies, when risks are unknown or commonly known or when patient waives disclosure

5. CONFIDENTIALITY

Analysis

- D must respect D's autonomy and retain the confidence if at all possible.
- If P required no immediate treatment, then D would be ethically justified in keeping the pregnancy in confidence.
- However, P does require immediate treatment and D must consider risks to the fetus that may justify disclosure, but risks violating P's legal right to confidentiality.

6. FAILURE TO PRE-MEDICATE/RECORDS

Injury Prevention and Reduction Guidelines

- Medical Hx
 - 4 responses: yes, no, don't know, don't understand the question
- MD, t/c, letter, fax form
- Echocardiogram/MD letter

Dental office should obtain physician consults with written recommendations in the following situations:

1. Pregnancy
2. Bleeding disorders
3. Anticoagulant therapy
4. Determination of the need for pre-medication
5. High risk patients (e.g., heart condition, bisphosphonates)

Analysis

- Antibiotics can be effective up to six hours after procedure. Administer immediately.
- Antibiotics may not be indicated
- Antibiotics could lead to allergic reaction (anaphylactic shock)
- P could develop a resistance to antibiotics

Board of Regents Rules NYCRR Sec. 29.2(a)(3)

- It is unprofessional conduct to “fail to maintain patient records which accurately reflect the evaluation and treatment of the patient.”
 - Existence of record
 - Accuracy of completeness of entries

NEW YORK STATE CASE LAW REQUIREMENT

- Record entries must enable any other dentist or health care professional to determine the total dental experience of the patient without the assistance of the treating dentist.

Parties with Potential Access to Dental Record Entries

Recommendations

- Enter results of updating medical history at each visit (NCMH)
- Review Self-Administered Form
 - 4 responses
 - No blanks
 - Request consults in writing
 - Better to initial than T or O

Procedural Errors

- Inconsistent entry formats
 - Standardized format for all practitioners in a facility
- Entries in margin
 - Suspicion of spoliation, extraneous marks subsequently added
- Record entry alteration by erasure, obliteration or White-out; including subsequent insertions, deletions or re-writing

Medico-Legal Problems

- Record Spoliation
- Punitive Damages in a Malpractice Action (Punishment)
 - excluded from malpractice insurance coverage

- loss of credibility with jury- suspicion of hiding or cover-up
- Falsification of a Business Record

Recommendations

- NEVER, EVER, ALTER OR AMEND CHARTS
- Correction of present entry
 - single line (ruler) cross-out error, do not obliterate; date and initial
- Correction of past entry
- start new entry chronologically, new line, new date, refer to error and enter correct information

7. **FAILURE TO DIAGNOSE ORAL CANCER.**

Analysis

- D failed to review H's entries in chart
- H did not bring P's complaints to D
- D did not perform a complete soft tissue exam
- Failure to refer
- Failure to respond to P's complaints

Injury Prevention and Reduction Guidelines

- Soft tissue exam, customary tests, rads
- follow pt complaints- "quotes"
 - And respond
- refer ASAP
 - file lesions followed/watch
 - file referrals- follow-up
 - 2 calls, then 1 letter
 - Avoid supervised neglect!

Referral Tracking

Injury Prevention and Reduction Guidelines

- Repeat referrals each visit and record in progress notes
- Informed consent/refusal
 - risk of delay, no treatment
- Do not allow insurance plan to dictate treatment
- Withdraw/terminate care upon significant non-compliance

8. **ASPIRATION/SWALLOWING OF FOREIGN OBJECT**

Injury Prevention and Reduction- Swallowed Aspirated Objects

- Use throat screen
- Keep P upright when possible
- Use rubber dam for endo and whenever possible
- Attach floss to rubber dam clamps, etc.
- Keep equipment in good repair
- **REFER** immediately for radiograph to mitigate damages/injuries.

Claims incidence prevention and reduction

- Document P's sudden/violent movements
- Communication with P during and following incident
 - Follow up call
- Referral and follow up

Communication of Unexpected Events

- Be honest and open
- take immediate steps to resolve
 - refer for x-ray for possible aspiration
- avoid self-incriminating statements which admit liability
- never discuss malpractice insurance
- inform of foreseeable risks

9. SOFT TISSUE INJURY

Injury Prevention and Reduction

- **NEVER** remove handpiece from mouth revolving!
- Obtain clear access/retraction
- Protect patient - duty
 - "do no harm"
- Mitigate damages
 - Palliative treatment, sutures, refer if needed

Claims incidence prevention and reduction

- Inform patient
 - State clinical facts only
 - Do not discuss or admit fault
- Rapport
 - follow-up
- Record
 - cause of injury
 - Patient movements
 - Witnesses
 - Patient informed: "I discussed the outcome with patient."

Why Ethics-Based Risk Management and Strong Dentist-Patient Relationship?

- Best Interests of Patient
- Best Interests of Dentist and Practice

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From the Editor

Ethics-Based Risk Management: Do the Right Thing

By Chester J. Gary, DDS, JD



"Keep accurate and complete records". "Obtain written informed consent". "Practice defensively". These risk management mantras constitute good legal advice. However, risk management techniques alone, without adherence to fundamental ethical values, will not successfully protect dental practices from exposure to legal action. Only an ethics-based practice supplemented with sound risk management strategies can ensure dentists will do the right thing and be able to defend it.

The American Dental Association Principles of Ethics form the aspirational goals of our profession. Along with the Code of Professional Conduct, they challenge dentists to treat others the way they want to be treated or, in effect, to do the right thing.

The Code's principles form the basis of most of the laws which regulate clinical practice. For example: "Patient Autonomy" – Informed Consent; "Do No Harm" – Credentialing regulations, assault and battery, defamation; "Do Good" – Professional Negligence; "Be Fair" – Antidiscrimination, labor laws; and "Be True" – Contracts, confidentiality, fraud. These ethical values and bodies of law exist on a continuum, where the laws function as a minimum enforcement of the higher ethical values. Hence, ethical conduct stands far above the behavior mandated under law; an effective risk management guideline.

An ethics-based practice requires dentists to strive for higher values. It makes it more likely they will surpass minimum legal standards than if they merely aim for legal compliance. In so doing, the ethical guidelines assure they correctly place their primary focus on the best interests of the patient, not on protecting their own legal position. Acting in the best interests of the patient and trying to do the right thing will nurture the dentist-patient relationship and increase mutual trust.

This will, in turn, form the foundation for risk management activities.

Make no mistake, ethical practice alone is not enough to ensure protection from legal exposure. Risk management strategies are necessary to make good dentistry legally defensible. They function to establish, through good communication and documentation, admissible evidence of the existing ethical values. Hence, these strategies are most effective when applied in an ethics-based environment, not as an end in and of themselves.

Risk management techniques alone, without adherence to fundamental ethical values, will not successfully protect dental practices from exposure to legal action.

At times, dentists may be tempted to compromise ethical values for what may seem, at the time, good business reasons. Increasing overhead costs, combined with third party managed fee controls, can erode dentists'

resolve to invest the necessary time, effort and money in their practices and professional organizations. At some point, they lose sight of the ethical principles set forth by our profession and mistakenly believe that defensive dentistry alone will relieve them of the hard work required of an ethics-based practice.

A risk management program in the absence of ethical values allows and even encourages practitioners to "get by" with marginal compliance of standards. Under these circumstances, the program is being applied for the wrong reasons: to protect and defend the dentist rather than in the best interests of the patient. Most importantly, when dentists focus on their own defense, it alienates patients who are then treated as adversaries, not partners in treatment. It will have the reverse effect of decreasing doctor-patient trust which produces dissatisfied patients more likely to elect legal recourse.

Knowing the right thing to do in difficult situations will always present a chal-

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lenge to the practitioner. It is hard work and time consuming to proactively strive for higher values. It involves constant self analysis and courage to "catch yourself" in any potential violation. It is much easier to merely react to legal threats with defensive conduct and try to "not get caught". Dentists need to refocus their efforts on the best interests of the patient and reunite risk management with underlying ethical values; not only to experience reduced exposure to legal claims, but also to enjoy the greater satisfaction of meeting the needs of those we serve. So, when faced with a clinical crisis or ethical dilemma, don't merely do the defensive thing, do the right thing!

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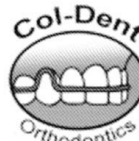
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