Legal and Ethical Considerations (Chapter 3- Mosby’s Dental Hygiene)

Brief Overview of the Legal System

A brief review of the fundamentals of how the legal system in the United States operates is important before learning about how the dental hygienist must successfully function within the system. Law defines the minimal acceptable level of conduct for a society; morality requires more. Society expects more than this minimum from healthcare providers such as dental hygienists. The Code of Ethics for Dental Hygienists was created to address this expectation. Laws must be obeyed and followed; otherwise, the result is legal consequences (Box 3-1).

Note
Law is a system of principles and rules devised by organized society for the purpose of controlling human conduct individuals (i.e., civil law) and between government and individuals (i.e., criminal or quasi-criminal law).

The foundation of the U.S. legal system is the common law or the law that was common in England. It originated in England after the Norman invasion in 1066 and was used in the early United States. The doctrine of stare decisis was developed by this common law system. Stare decisis enables courts to examine past disputes involving similar facts to determine the outcome of the current case on the basis of earlier decisions. Courts are given some flexibility in modifying the legal rule when the facts vary from the precedent or previous case, or they may completely overturn their own earlier decisions. Stare decisis generally applies vertically to higher courts but not to equal or lower courts in the same system or to other courts in other systems. This application means that courts make decisions based on previous decisions by their own court or by courts above them in the same jurisdiction. A court may look to courts in other jurisdictions for guidance, but it does not have to abide by their decisions even if it has never made a similar decision in its own court. Res judicata is another important common law concept. Res judicata means that once a legal dispute has been decided by a court and all appeals exhausted within higher courts in that jurisdiction, the same parties may not later bring suit regarding matters that have already been decided by the court. Without res judicata, few cases would ever be brought to conclusion.

Risk Management

The English common law system usually redressed acts after an event occurred using very harsh and specific rules; consequently, England developed a separate court, the Court of Chancery, and the concept of equity. Courts of equity created new remedies and were able to enforce moral obligations of fairness and justice when the common law courts could not. Today, equity is administered by most U.S. courts and is able to provide preventive relief before a wrong occurs. An injunction, which restrains a party from doing certain acts until a final legal solution is provided, is an example of a preventive equitable remedy. The process of risk management used in health care is similar in that it also is proactive or preventive, rather than reactive after an event. Risk management continuously measures levels of legal risk and is designed to protect the financial resources of a business from losses resulting from legal actions. Three activities commonly associated with risk management are (1) identifying areas of legal vulnerability, (2)
instituting corrective or preventive measures, and (3) purchasing liability insurance. Liability insurance of this sort does not provide protection against criminal or quasi-criminal allegations. Quasi-criminal allegations are those made by governmental agencies.

Functions that can place the dental hygienist at risk include the following:

- Assessing a patient's oral condition
- Delivering care
- Communicating with patients
- Maintaining confidentiality

Causes of Action

A discussion of the most common civil causes of action affecting dentistry must first begin by explaining the differences between criminal or quasi-criminal and civil law. These differ particularly with the parties involved, resulting penalties, and standards of proof.

A violation of criminal law (i.e., statutes written by a legislative branch of government) might result in imprisonment or death. A felony is an offense usually punishable by death or imprisonment for a term exceeding 1 year. A misdemeanor, which is any criminal offense other than a felony, may be punishable by imprisonment up to 1 year. Quasi-criminal cases involve the state against a citizen and represent violations of administrative law (i.e., rules and regulations written by administrative agencies) and may include any criminal penalty but will exclude imprisonment or death.

Note
Criminal law, for example, involves the state against a citizen, whereas civil law involves a citizen against a citizen.

Penalties in civil law usually result only in monetary damages or compensation. Criminal convictions require the highest standard of proof, beyond a reasonable doubt (i.e., any doubt based on reason). Quasi-criminal cases (i.e., cases involving administrative law violations) require only substantial evidence (i.e., adequate evidence) to issue penalties. Civil cases require a preponderance of evidence (i.e., a degree of proof that is more probable than not).

Note
A violation of a state board of dental licensure rule or regulation could result in loss or suspension of a license to practice, mandatory psychological counseling, drug rehabilitation, mandatory continuing education, or fines.

Contracts and Torts

The most common civil causes of action brought against dentists and dental hygienists are divided into two groups: contracts and torts. The penalties differ between these two causes of action. A contract cause of action can result only in compensatory damages, whereas a tort cause of action can result in both compensatory and punitive damages. Compensatory damages
compensate a plaintiff for an injury; punitive damages are intended to punish the defendant and act as a deterrent to future similar cases.

**Contracts** are promises or sets of promises between two parties, for breach of which the law gives remedy. A breach occurs when one party who has a duty to perform does not perform according to the terms of the contract. Contracts can be either expressed or implied between patients and healthcare providers. A **tort**, or twisted conduct, occurs when a legal duty other than a contract that is owed to a plaintiff is violated. Two types of torts exist: intentional and unintentional.

The four common intentional torts that can occur in dental practice are assault and battery, deceit, defamation, and breach of confidentiality. These behaviors are intentional and unlawful.

- **Assault** and **battery**. An assault occurs when a believable threat to harm with no bodily contact is expressed. A battery is an unpermitted or unauthorized touching or contact. When a dentist exceeds a patient's consent and extracts the wrong tooth, a battery occurs. Assault and battery usually exist together and are both a tort and a crime.
- **Deceit**. Deceit is a knowingly untrue statement used to trick another into acting. For example, informing a patient that periodontal surgery is required to save a patient's teeth when it is not is deceit.
- **Defamation**. Defamation, a third intentional tort, includes both libel and slander. **Libel** is any false publication that is injurious to the reputation or good name of another. **Slander** is the speaking of a false and defamatory statement concerning another to a third person.
- **Breach of confidentiality**. Breach of confidentiality occurs when information obtained from or about a patient in confidence is shared with another outside the scope of the patient's care. Exceptions to these privileged communications, such as requirements to report communicable diseases, are often included in various state statutes.

**MEDICAL MALPRACTICE**

**Malpractice** is a term of common usage referring to certain types of misconduct or improper performances of professional duties by a dentist or other healthcare provider, for which he or she becomes legally liable to compensate a patient who is the victim of these wrongful acts.

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**Negligent malpractice,** which is the failure to perform a duty that the law imposes on one person for the benefit of another, is the predominant cause of action in medical malpractice cases. A plaintiff must prove each of the following four elements to recover from a negligence cause of action:

- 1. Existence of a legal duty
- 2. Breach of that duty
- 3. Causation or a connection between the breach and injury
- 4. Injury (i.e., emotional or physical harm to the plaintiff)

Note
Medical malpractice, an unintentional tort, is the most common example of a cause of action in dentistry and therefore should be of the greatest interest to dental hygienists.

These four elements can serve as a checklist during risk management evaluations and when being threatened by a negligence lawsuit.

**Health Insurance Portability and Accountability Act**

The Health Insurance Portability and Accountability Act (HIPAA) was signed into law in 1996 and took effect on October 16, 2002; it covers three primary areas:

- 1. Patient privacy
- 2. Patient rights
- 3. Administrative requirements of personnel and institutions in the healthcare industry

All individuals who are provided any form of health care must sign a protected health information (PHI) form before treatment. This form informs the patient of how his or her health information will be protected and to whom the healthcare provider or administrative personnel can provide personal health information. ([Box 3-2](#) provides information on the application of HIPAA in the dental environment.)

How the Health Insurance Portability and Accountability Act Will Affect Your Next Dental Visit
The U.S. Department of Health and Human Services has issued national health information privacy standards. The Health Insurance Portability and Accountability Act, a federally mandated law known as HIPAA, is designed to:

- Provide protection for the privacy of certain identifiable health data (called protected health information [PHI])
- Ensure health insurance coverage when changing employers
- Provide standards for facilitating electronic transfers of healthcare-related information

While the privacy of a personal PHI will remain confidential, certain aspects of this law will permit disclosures of a PHI to facilitate public health activities. The following charts review the types of health data disclosure allowed under HIPAA:

**ABANDONMENT**

A healthcare provider generally has no legal or ethical duty to provide care and may refuse to provide care for any reason except on the basis of discriminatory reasons. However, once the patient-provider relationship is created, the healthcare provider has a duty not to abandon the patient.

In *Domurad v Hill*, the court ruled that a dentist is held to the same standard as a physician. More specifically, when a dentist terminates a dentist-patient relationship, the dentist must provide due notice to the patient and give the patient an opportunity to secure other dental services. Such notice should be in writing and include the reason for the termination. A copy should be retained in the patient's file. All patient treatment that has started should be completed. Therefore between the time that notice is given and the termination date, the dentist should try to complete any dental treatment in progress. The dentist should also be available to provide emergency care during this time to ensure that the transition to a new dentist does not compromise the patient's oral health. In addition, dental professionals are strongly urged to contact their lawyers to ensure that all their state's legal requirements are met.

**Dental Hygienists' Responsibilities in Providing Care**

**PRACTICING WITHIN THE LIMITS OF THE LAW**

Individuals who meet all the criteria for licensure in a particular state and are granted a valid license must recognize that licensure is a privilege, not a legal right. To maintain that privilege, the dental hygienist must practice within the law. The dental hygiene practitioner cannot exceed the legally delegable scope of practice for dental hygiene in a particular state.

Additionally, dental hygienists must practice with the legally required level of supervision. Dental hygienists, as licensed dental professionals, must accept their legally delegated responsibility to provide competent dental hygiene care. This responsibility requires that contemporary dental hygiene care always meets or exceeds the standard of care. The standard of care is generally recognized as that degree of skill, care, and knowledge possessed and exercised by dental hygienists in similar situations. This standard may be affected by and derived from a
multitude of professional sources, including criteria developed in educational programs for health professionals and professional organizations. For example, “Patient Bill of Rights” developed for a school of dentistry (Box 3-4) establishes a basis for the standards of care relating to patient services.

**Patient Bill of Rights**

- You have the right to the most appropriate care we can provide for your problem, without regard to race, sex, color, religion, marital status, age, national origin, or disability.
- You have the right to receive treatment that meets or exceeds the standards of care that exist in the dental community.
- You have the right to be addressed by your proper name and without undue familiarity and to be assured that your individuality will be respected and that your treatment will be confidential.
- You have the right to know the names of the providers who are directly responsible for your care.
- You have the right to ask questions and to receive answers at any time concerning any aspect of your dental condition or care.
- You have the right to voluntarily consent to or refuse any treatment and to expect that the nature of each dental treatment procedure, its alternatives, its risks and benefits, and the risks and benefits of no treatment be disclosed prior to your decision.
- You have the right to request and receive an estimate of the cost of all planned dental treatment and to be informed of any changes in the cost before any treatment begins.
- You have the right to withdraw consent and to discontinue treatment at any time.
- You have the right to receive all planned dental treatment in a timely manner.
- You have the right to receive immediate care in the case of a dental emergency.

In return for these considerations we have a just claim, or right, to expect that you, the patient, will fulfill the following responsibilities in order to help us accomplish our mutual goal of providing you with the best dental treatment possible.

- We have the right to expect that you will provide complete and accurate information regarding your past and current health status and any medications that you are currently receiving.
- • We have the right to expect that you will be available for and keep scheduled appointments and arrive for appointments on time.
- • We have the right to expect that you will understand that fees will be charged for each dental treatment procedure and that you will pay for treatment as treatment is provided.
- • We have the right to expect that you will cooperate with and follow the instructions of the providers directly responsible for your care and that you will ask questions if you do not understand those instructions.
- • We have the right to expect that you will express concerns, complaints, or problems as soon as they arise to providers directly responsible for your care.
- • We have the right to expect that you will be respectful and considerate of providers, staff, and other patients.
• We have the right to expect that you will understand that there are limits to the success or permanence of dental treatment.

A court may find healthcare professionals liable for harm to patients when the services they provide fall below the standards of care. Historically, tracking lawsuits against dental hygienists has been difficult because many complaints filed ended in settlement and were not concluded in trial. Case law demonstrates that dental hygienists have been held accountable for their actions in addition to their dentist employers by patients who believed they sustained injury as a result of the dental hygiene care received.16 Patients are also more likely than in the past to file complaints against dental hygiene licensees, complaining about the care they received. A national unpublished survey completed by the ADHA Governmental Affairs Division during 1987 and 1988 indicated that the complaints most often filed against dental hygienists were based on the following:

• Practice without a license
• Performance of procedures beyond the role of practice
• Substance abuse or dependency
• Practice while under the influence
• Performance of duties outside required supervision