

Handbook
of
DENTAL
JURISPRUDENCE
and
RISK MANAGEMENT

EDITED BY

Burton R. Pollack

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FOREWORD

The first edition of this book appeared at a time when the malpractice crisis in the United States was in its infancy. Thus, while it was one of the definitive works on dental jurisprudence, it was not written with the idea of providing the dental profession with advice about how to cope with a serious problem of major proportion. The second edition has been updated to address this urgent need in the light of new legislation. To make the publication even more useful, a unique Risk Management Manual has been included as an appendix. Together, they form one of the most important dental publications to appear in recent years.

Few who read this book will find that their perceptions of dentistry as a profession remain unchanged. This is because looking at dentistry through the eyes of the law provides a perspective which is uncustomary to most readers. And because this is a new way of looking at the profession, it may at first be unsettling. Such feelings, however, should soon evaporate as readers begin to appreciate that this text is really not about how the law threatens dentistry but rather about how the law is challenging dentistry to rise to a higher level of professionalism.

The perspective of this book also provides important insights into why modern dental practice encompasses much more than the mechanics of providing diagnostic, treatment, or preventive dental services. Under the impetus of the law, the mouth has again become part of the body, and the body has been reintegrated with the mind. By detailing the importance of medical histories and informed consent, the book shows how the law has increased the relevance and importance of the basic and behavioral science foundations of dentistry. The integrative effects of the law on dentistry are also illustrated in the discussions about the interdependence of the dentist and auxiliaries in avoiding situations that give rise to legal action. No better case has been made emphasizing the need for respect and harmony among members of the dental team in a dental practice.

Most people will read this book for the sound advice that it gives about avoiding malpractice situations. But the reader will also gain an understanding of the ongoing evolution of the law related to malpractice. Armed with this understanding, the reader will be much better prepared to cope with future changes that occur, to decide what efforts to influence change in the law make sense, and to decide when opposition to change would be futile and counterproductive to the interest of the profession of dentistry.

If every dental practice were to make the study of this book and its Risk Management Manual an intra-office continuing education course,

much of the fear and confusion about the crisis in malpractice would be eliminated, and most malpractice suits would be avoided. If the study of this book were to be made in the first few days of the education of every dental, dental hygiene, and dental assistant student, their perspectives and attitudes regarding the significance of all that is to follow in the curriculum and its relevance to their development into professionals would be permanently improved.

The distinguished authors of this book are to be congratulated not only for having applied their expertise to create this important book but for having expressed its concepts and advice in language we can all readily understand and apply.

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INTRODUCTION

Changes that have taken place in legal issues related to the practice of dentistry since the original publication of this text in 1980 have made a second edition necessary. Unless texts on law are updated, they become outdated. Because the primary focus of the book is law and its effect on dentistry and dental practice, it was decided to publish a second edition.

A few chapters in the original text addressed generic issues and were extremely well done, and so are reproduced essentially unchanged. The majority of chapters, however, have been updated to reflect the most recent changes in law. To several chapters, entirely new material has been added. The second edition contains the latest in the law and addresses the most current political, social, and legal issues facing today's practitioner and the student soon to enter the profession.

Oliver C. Schroeder, Jr, editor of the first edition and now director of The Law-Medicine Center at Case Western Reserve University School of Law, is an acknowledged expert in the subject matter contained in chapter 2. The chapter is a classic on the basic principles of law. No one could make the complexities of the legal system more understandable to nonlawyers than "Ollie."

Chapter 3 describes the legal basis of the doctor-patient relationship — contract law. Chapter 4 is designed to clarify many of the principles of contract law that apply to dental practice. Chapter 5, on the subject of patient records, is entirely new material and incorporates recent court decisions and legislative changes that affect record keeping. Chapter 6 has been updated to reflect current concern about professional liability insurance contracts and the crisis in dental malpractice.

In Chapter 7, the clarity with which Schroeder presents information on law and dental malpractice has been preserved, but updating has been done in light of current problems in the practice of dentistry. Chapter 8, on evidence as it relates to malpractice, also has been supplemented with new material.

Chapter 9 covers procedures for professional hygiene in the practice and management of dentistry. It was relevant in 1980, is relevant now, and will continue to be relevant in the future. Chapter 10 deals with the matter of consent, an important issue in light of the current malpractice crisis.

Chapter 11, on state regulation of dental practice, has been updated with specific examples, and presents trends in state legislation that affect dental practice. Chapter 12 has undergone a major revision

because of the changing tax laws affecting corporate and nonincorporated practice. Chapter 13 has remained unchanged, but because forensic dentistry is increasing in importance as a community service, the chapter is included in this new text.

Chapters 14 and 15 bring to the surface current concerns of the dental profession, including legal, social, and political threats to the system and practice.

Chapter 16 presents, in capsule form, the “do’s, don’ts, and maybes” of law in everyday dental practice. Many questions have been added to the original chapter, and many answers to old questions have been changed because court decisions have changed the law and new legislation has been enacted.

Appendix I, on risk management, represents the practical application of all that is presently known about the laws regulating dental practice. The material that it is based on is specially adapted to dentistry and has its foundation in litigation involving health practices. It is “must reading” for those practitioners who wish to practice in a claims- and worry-free environment.

A careful reading of this text will enable the dentist, student, and educator to understand and prepare to deal with current issues of dental jurisprudence.

Burton R. Pollack, DDS, MPH, JD

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1 **Why This Handbook?**

Oliver C. Schroeder, Jr.

Jurisprudence is more than the rules of conduct generally associated with the word “law”: it is the philosophy or science of law. Thus, dental jurisprudence is the philosophy or science of law concerned with dentistry — its education, its research, and its practice.

Several conditions in modern dentistry are having profound impacts on dental practice: the explosive growth of the biologic and dental sciences, the rapid change of basic experimental methods, and the introduction of modern electronics and computers. To this list the author would add three other important indicators of the changing practice of dentistry: the presence of third party payers who are changing the dentist–patient relationship; the unionization of dentists into trade groups to protect their economic interests and rights to practice; and the participation of dentists as coequal members of the health delivery team. These profound changes now being experienced in the dental sciences and practice indicate the need for a new look at an old problem. We need to look at how dental practices relate to the legal demands of American society as we enter our third century.

This volume does not necessarily supersede such excellent publications as those of Sarnar,¹ Willig,² and Howard and Parks.³ Each of these works presents an intelligent and helpful analysis of the legal rights and duties of dentists that concerned dental practitioners and students will find useful. However, this present text examines additional aspects of dentistry as it relates not just to law, but more importantly, to justice: justice for the dentist, justice for the dental patient, and justice for the community. This approach includes substantial segments concerning the legal rights and duties of dentists.

The volume also seeks to meet the desires of practicing dentists by responding to their specific legal concerns as elicited in response to our questionnaire (Appendix II). One thousand practicing dentists randomly selected from all those associated with American schools of dentistry received the questionnaire; 27% of those contacted responded. The breadth of concerns and the degree of interest in the various legal matters presented were measured by an analysis of each item on the questionnaire. We have sought to respond to these interests throughout this book not only by setting down the rules of law, but also by indicating their practical significance.

Our analysis of the returns revealed the wide interest of dental practitioners in all phases of the law. Of special significance to us, however, were those categories that were of interest to more than 40% of the respondents. Negligent care of the patient was of concern to 60%. Informed consent matters and licensure were the selections of over 50% of those responding, and matters involving insurance companies as third party payers generated interest in half of the responders. Contractual matters concerning fees and the dentist's participation in the administration of justice by preparation and submission of records and reports were also areas in which more than 40% of the respondents indicated interest.

Even more important were the 56 respondents who wrote additional comments of concern under the several general subject areas. Some of these comments are reproduced here verbatim to provide a feel for the general attitudes of some dental practitioners toward specific legal problems:

1. "Emergency treatment (oral and maxillofacial) in hospital — liability for alleged deformity." "Doctors who carelessly criticize dental treatment previously rendered."
2. "Negligence in informing patients fully of their diseases and need for treatment — periodontal needs a major problem — also dentists who prefer not to provide certain kinds of treatment, ie, pedodontics, who tell parents that minimal or no care is needed. 'Negligent care of patients' covers a

very wide variety of problems, for it can be outright fraud, exceedingly poor dental care, lack of proper treatment, more treatment than needed, and so forth.”

3. “Lack of national licensure (lack of reciprocity), state lines, restriction of trade.”
4. “Regulations involving dental education specifically tying federal support to requirement of expanded auxiliary utilization training.”
5. “Government support of and/or training of health care personnel and associated programs which duplicate (and therefore compete with) existing methods of providing health care by the private sector.”
6. “Though it may not be strictly a legal matter, I am concerned about positive aspects of discipline such as peer review of treatment (similar to hospital rounds and tissue committees for physicians).”
7. “Attorneys and third parties freely impose on the time of a dentist, expecting it to be free. When an hourly rate is quoted for the time to be expended, all of a sudden the need for the reports no longer exists.” “Responsibility in uncovering real or assumed evidence of nondental significance by direct observation of patient and/or his or her x-rays in child abuse, drug abuse, or neglect.”
8. “Accidents on premises.”
9. “Excessive involvement of lawyers in unreasonable malpractice suits.”
10. “Failure to report suspected child abuse as required by state child protective laws.”
11. “Negligence in continuing education; insufficient physical examination by dentist; insufficient diagnostic acuity.”
12. “Limit of dentist’s liability once a treatment has begun.”
13. “Should have national licensure from any approved college of dentistry with office quality check at least every 5 years in your own office. Look at patients and patients’ records as a bank examiner would a bank.”
14. “General anesthesia.”
15. “The profession must give up its monopolistic attitude toward the public.”
16. “The biggest concern is with the ignorant patient who cannot understand the dentist is not God and therefore becomes dissatisfied.”
17. “Negligence in allowing improperly trained auxiliaries to perform duties they are not allowed to do by State Dental Practice Acts.”

18. "Common negligence: failure to perform thorough examination; failure to inform patients when they have periodontal disease."
19. "Standards for radiation and diagnostic treatment; pacemaker interference; successful treatment standards."

In addition to the individual dentist's responses, information from the American Dental Association is helpful in understanding how the dental profession interacts with the law. The Council on Legislation of the American Dental Association periodically makes available abstracts of legal decisions, either decisions rendered by courts or administrative decisions handed down by governmental agencies, involving dentists. The overwhelming number of these decisions cluster about several general areas of law. The subjects of these abstracts are presented below as a list of general topics and specific subissues found in each area:

Malpractice cases

- Failure to diagnose
- Anesthetics
- Paresthesia
- Bridge and crown, dentures
- Informed consent
- Surgical injury
- Extraction
- Nerve damage
- Referrals
- Drugs
- Malpractice insurance

Licensure and practice cases

- Membership in a dental organization
- Liability to employees
- Laboratory employees
- Criminal convictions
- Requirements for licensing
- Discipline by dental society
- Dental group practice
- Technicians
- Right to review when license suspended

Practice management and business cases

- Advertising
- Sale of practice
- Professional corporations
- Taxes

- Collection of fees
- Dental insurance
- Crimes
- Government regulations
- Employer-employee relations
- Zoning
- Investments
- Fee collections
- Social concern cases
 - Fluoridation
- Legal procedure cases
 - Statute of Limitations
 - Court appearances
 - Evidence

This volume also offers material essential to comprehend the proper relationships among three concepts that primarily affect modern dentistry: health, justice, and ethics. The practice of today's dentist, while traditionally involving the specialized health knowledge and technological skill developed in both predental education and schools of dentistry, has now become an integral part of the whole life experience, as have the practices of other health professionals, such as physicians, surgeons, and nurses. Dentistry is no longer practiced solely by the dentist. Patients, lawyers, government bureaucrats, insurance company representatives, labor union officials, and lay citizens all have a stake in the outcome of dental care. They are demanding a voice in the important decisions being made in dental health. While it is enjoyable to be so popular, it is also exasperating to have one's daily practice profoundly influenced by others who have neither a professional dental education nor health care experience.

With this volume we hope to relieve much of this exasperation and to generate considerable understanding of the legal aspects of the practice of dentistry. We hope to encourage the dental practitioner to make his or her concern felt in the legal practices and procedures. Better dental jurisprudence will not only elevate the dental profession, but it will also better serve the human society of which it is a most important component.

ED. — Although this chapter was completed in 1979, it is interesting to note that the concerns of the dentists 7 years later have not changed to any appreciable extent, nor have the issues. The only change has been in the intensity with which some of the issues have impacted dental practice, eg, those that relate to malpractice.

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