

Your duty to refer

If you're not qualified to perform a specialty procedure—or if you run into problems while attempting it—you are obliged to make a referral. The author takes a look at the law on referrals.

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As a dentist, it's likely that you make referrals on a regular basis. But do you know your legal obligations in this area?

This article provides an overview of some of the basic issues surrounding your obligation to make proper referrals. Though based on California law, the discussion is generally relevant to dentists in any state. To determine the specific requirements in your jurisdiction, it's important for you to consult with your personal attorney.

A general dentist has a duty to refer a patient to a specialist in situations where other dentists would make a referral under similar circumstances. Factors that might indicate a referral include the patient's condition and the general dentist's relative inexperience or lack of training to perform the necessary procedure or treatment within accepted professional standards.

The dentist who declines to make a referral, choosing instead to perform the needed procedure or treatment, will be held to the standard of care for specialists in that discipline.

Although a referring dentist generally cannot be held liable for the outcome of treatment performed by another dentist on a referral, a dentist can be held liable for making a negligent referral if he or she knew or should have known that the other dentist was incompetent or

unqualified to perform the treatment.

A dentist who treats a patient on referral from another dentist may have limited immunity from liability if treatment involves an injury caused by the referring dentist.

Duty to refer

While a dental license gives a dentist the right to perform all dental procedures, few dentists actually possess the knowledge, skill, desire or facilities to perform every procedure within accepted legal, professional and ethical standards.

Common sense, professional ethics and the law all recognize the occasional need for a dentist to refer a patient to a specialist or to seek a specialist's assistance whenever the patient's needs exceed the dentist's abilities or desires to treat—or the treatment rendered so far has not been sufficient to resolve the patient's condition.

The duty to refer to a specialist has been defined in California for most of this century through a variety of court decisions. Key decisions defining the duty to refer are reflected in the Book of Approved Jury Instructions, written by the Jury Instruction Committee of the Los Angeles Superior Court and adopted by the courts throughout the state.

Instruction 6.04 summarizes the general dentist's duty to refer a patient to a specialist or recommend the assistance of a specialist if, under the circumstances, a reasonably careful and skillful

general practitioner would do so.

Instruction 6.04 states that if the dentist fails to fulfill that duty and undertakes or continues to perform professional services without the aid of a specialist, it is the further duty of the dentist to have the knowledge and skill ordinarily possessed and exercise the care and skill ordinarily used by reputable specialists in the same field and in the same or a similar locality and under similar circumstances.

A failure to fulfill any such duty is negligence.

Reasons to refer

California law does not specify

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the reasons for making a referral, but instead imposes a relative standard by which a dentist's actions are measured against those of dentists treating similar patients in similar situations.

Some factors that may indicate a referral include the relative seriousness and complexity of the patient's condition, the relative complexity of the required treatment, the patient's expectations about the outcome of treatment and the benefits to the patient from receiving treatment from a

specialist.

The duty to refer is not confined to general dentists and does not indicate referrals only to other dentists. Specialists frequently encounter conditions that are best treated by a specialist in another discipline.

For example, prosthodontists may refer to oral surgeons for extractions, while orthodontists typically refer adult patients to periodontists for treatment of active periodontal disease. Medical conditions may indicate the assistance of a physician.

A dentist's geographical location may affect the decision to refer. Dentists practicing in small communities and remote areas of the state generally are prepared to perform a wider variety of procedures than their counterparts practicing in areas where a greater variety of specialists is more readily available.

However, the relative absence of specialists does not relieve a dentist of the duty to refer where a referral is indicated, even though doing so may be inconvenient for the patient.

At the same time, the absence of specialists in an area does not require the area's general dentists to perform certain procedures or treat certain conditions where they do not feel prepared to do so.

In other words, the absence of a qualified specialist in the community neither authorizes a dentist to decline to make a referral nor obligates a dentist to attempt to treat a patient he or she otherwise would refer to a specialist.

Involve the patient

The patient should play a central role in the decision to refer. The dentist can help the patient understand all these factors when a referral is recommended, including the nature of the recommended treatment and the relative urgency of receiving the treat-

ment in a timely manner (including the consequences of failing to do so), as well as the possibility that such treatment might involve additional costs for the patient.

If a patient refuses a referral, the dentist must decide whether he or she will attempt to perform the procedure or treatment. While patients have a limited right to dictate the extent of the dental care they receive, that does not obligate a dentist to attempt a procedure he or she normally would not perform.

If the patient's refusal of a referral makes it impossible for the dentist to render care within accepted legal, professional and ethical standards, the dentist should consider the legal and clinical benefits of formally withdrawing from the patient's care.

Documentation

California law does not address documentation in referral situations. Nevertheless, sound record-keeping practices have a clear legal as well as practical benefit for all concerned. Detailed records help to demonstrate a dentist's capability to perform specialty care where a referral to a specialist might be an option.

If treatment by a specialist is indicated, the records should reflect a discussion with the patient about the referral as well as the patient's decision.

Once a patient accepts a referral, the referring dentist is not obligated to ensure that the patient follows through with the referral, although the dentist should make a reasonable attempt to see that the patient does so.

The records should reflect the dentist's reasonable attempt to determine whether the patient actually received the treatment, including any reminders to the patient about the need to follow through with the referral and the

consequences of failing to do so.

Sound records also help to ensure continuity and coordination of care among the various practitioners involved with treating the patient. A referral can be documented in the form of an order or introductory report from the referring dentist to the specialist describing the patient's condition, the reason for the referral and any other information that can assist the specialist in treating the patient.

Any specialist who fails to receive adequate information about the patient and the reason for the referral should postpone treatment until the information can be obtained from the referring dentist.

Limited immunity from liability

Occasionally a dentist may initiate treatment he or she is qualified to perform, only to encounter unforeseen difficulties that are beyond his or her capacity to resolve.

Common examples include the separation of an endodontic file during a root canal procedure and the retention of a root tip during a nonsurgical extraction. In such cases, the dentist may conclude that the patient's interests are best served by having a specialist complete the procedure.

California state law and the courts both confer limited immunity from liability on dentists who treat patients in emergencies that were caused by another dentist's care.

The California Dental Practice Act protects from liability any dentist who is called on by another dentist to provide emergency care due to a complication arising from the other dentist's care. It also extends this protection for emergency care rendered outside the office setting.

Similarly, the courts will generally shield a specialist from lia-

bility for the patient's injury, unless the specialist's own actions contributed directly to the adverse outcome or could reasonably have been modified to avoid the injury. The extent of the potential liability of both dentists depends on the specific circumstances and facts of the case.

Specialists will want to carefully evaluate and document the patient's baseline condition upon presenting for treatment, the dental care rendered, and the patient's condition following

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treatment. Besides promoting sound clinical decision-making, thorough records document the patient's pretreatment condition and demonstrate the extent of the specialist's involvement in the outcome of the case.

Liability for negligent referral

Various appellate court decisions have established a dentist's legal duty to refer a patient to a qualified specialist whom the referring dentist reasonably believes will provide reasonable and prudent treatment to the patient.

The referring dentist generally cannot be held responsible for the outcome of treatment performed by the other dentist if the other dentist, in treating the patient, acted without the referring dentist's participation or control.

A dentist may be liable if he or she refers a patient to an unqualified specialist or to a dentist

whom the referring dentist knows or should know is not qualified or otherwise competent to provide reasonable and prudent treatment.

Similarly, in cases where several dentists are participating in a patient's care, the referring dentist may be liable for the specialist's care, so long as the referring dentist is participating in or controlling the patient or the treatment rendered. Under this theory, for example, a general dentist cotreating with a periodontist and an oral surgeon in an implant case could be held liable for treatment performed by both of the specialists.

Fortunately, patients very seldom make negligent referral claims in malpractice lawsuits against California dentists. However, dentists should be well aware of their duties in a referral.

In addition to the general legal guidelines for referrals, dentists should be familiar with laws regarding compensation for referrals. California law forbids a dentist to offer, deliver, receive or accept any kind of consideration—such as a rebate refund, commission, preference patronage dividend or discount—as compensation for making a referral.

Dentists also are barred from making a referral to a clinical laboratory or other health care facility in which the dentist has a financial interest, except where the return on that financial interest is based on the dentist's capital investment or proportional ownership and not on the number or value of the patients referred. Your attorney can update you on these or any other requirements in your state.

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