Dental Tech Law: Social Media & Confidentiality
AAO
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Health Care Law Firm
- Malpractice Defense
- Licensure Issues
- Practice Sale/Purchase
- Incorporation
- Employment Issues

Overview
- The Changing Legal Landscape
- Issues Presented
- Applicable Laws
- Digital Impact

Risk Management
Risk Recognition

Basic Law
Negligence >
Causing >
Any Injury =
Damages $$$

Professional Negligence
Below the Standard of Care
- What a Reasonable Health Care Provider Would Do Under The Same or Similar Circumstances, Time, Location.
- Failure = Malpractice
- Attorneys Can Not and Do Not Set the Standard of Care

Standards Of Care: Informed Consent Trends
- Known Risk, Serious Injury
- Alternative Treatments
- Reasonable Person Standard

Digital Systems Risks
- One Form does NOT fit all
- Customize Form
- Command to Get Form Signed
- Avoid Letting System Dictate Content

Remember – Every Patient is Unique
- Job
- Hobbies
- Just who they are......

11 Tip
- Strict Informed Consent Protocols
- Document without Exception
- Digital Requirement, Check List
- Yet.... Still happening
  - Not Signed
  - Wrong Form
  - Took Home, Didn't Bring Back

12 Risk Management
- No Assumptions – If Doubt, Confirm
- Independent Confirmation – Not Just Patient
  - Review – Film, Referral, Plan
  - Consent – Signed and Dated

13 The Law, Protocols, Trends and Standards of Care

14 Technology - Status
- All aspects of dentistry
- Increasing use
- New standards of care
- Transition technology - Fax
- Changing standards – Old is Substandard

15 The Tech Legal Exposures

16 Traditional Exposure Avenues
- Malpractice
- Record Alterations
- General Liability
- Employment Issues
- Licensure Problems

17 New Avenues Of Exposure
- Failure To Employ Technology
  - Have and Use; Or
  - Recommend
  - Informed Refusal
- Emerging Standards for 3D
  - Extractions
  - Ortho

18 Records

19 EDR - Status
- All aspects of Dentistry
- Increasing use
- New standards of care
• Transition Issues
• Changing standards – Old is Substandard

20 Ideal Content
• Patient’s personal information
• Medical history (all questions answered) and regular updates
• A description of the patient’s original condition
• Exam and treatment notes
• Oral cancer screening and TMJ evaluation
• Diagnostic test findings and exam notes
• Your diagnosis and treatment plan
• Progress notes on the treatment performed and the result of that treatment

21 Electronic Records
• Record Standard
  – Could be Used to Justify a Standard of Care
• Back-up, Off Site Storage
• No Alteration
• Electronic Signature
• Confidential; Internet

22 EDR Risks
• Templates – Easy to Repeat w/o Real Data
• Lack of Training
  – Use Just One Easy Format and Not Full Scale
  – Use Wrong Features – Don’t Apply
  – Not Signing, Logging
  – Programs Not Mature
  – IT Not Dental Trained, Not Readily Available

23 Transition Rx
• Scan Documents
• Scan Imaging
• E-mail Encryption – HITECH Laws
  – PDF Password
  – Secure Site – Kaiser Model
• Photos
  – Underused – Easy to Take and Store
  – Your Side of the Story – Happy or Sad

24 Patient Privacy Issues
Legal Mandates
Federal HIPAA Laws
State Laws
Digital Risks
e-Mail Security
Record Security
Communication Security
HIPAA
- HIPAA's Security Rule has three distinct types of security measures:
  - Administrative safeguards,
  - Physical safeguards and
  - Technical safeguards.

Administrative Safeguards
- The Security Rule defines administrative safeguards as, "administrative actions, and policies and procedures, to manage the selection, development, implementation, and maintenance of security measures to protect electronic protected health information and to manage the conduct of the covered entity’s workforce in relation to the protection of that information."

Physical Safeguards
The as "physical measures, policies, and procedures to protect a covered entity’s electronic information systems and related buildings and equipment, from natural and environmental hazards, and unauthorized intrusion." The standards are another line of defense (adding to the Security Rule’s administrative and clinical safeguards) for protecting EPHI.

Technical Safeguards
- The Security Rule defines technical safeguards in § 164.304 as “the technology and the policy and procedures for its use that protect electronic protected health information and control access to it.”

Confidentiality & HIPAA
- Telephone
- Reception
- Conversations
- Placement
- Office Systems
- Fax
- Self Audit

Records - HIPAA Rules
- Patient has Right to Ask for Amendment to Records
- HCP Does Not Have to Make Amendment
- HCP Should Note Request for Amendment

Breach of Duty Rules
- Health & Safety Code section 1280.15
- Requires certain health facilities to prevent unlawful or unauthorized access to, or use or disclosure of, a patient’s medical information. It sets fines and notification requirements for breaches of patient medical information and requires facilities to report such breaches to the California Department of Public Health.

Practical Effect
- Password Protect ALL Portable Devices
- Protect all Office Devices
- Security Protocols
- Policy for Ex-employees
- Office Policies for Internet and email

33 [ ] **Original Records Ownership**
- Business Records
- Data to Patient
- X-Rays

34 [ ] **Communications**
- Security Rules
- Authentication laws
- E-Mail
- Phones and Texting
- Taping of patients
- Fax documentation

35 [ ] **Phone Communications**
- Cell Phones – The Record You Forgot About
- Primary Device for Social Media Interactions
- Texting, Sexting, #@$*ing – Legal Issues and Intent
- Site Access – Evidence – *Weiner* Principle
- Patient Confidentiality - Protections and Waivers
- Employment Claims – Management vs. Staff
- Device Regulations – Federal and State Protection Mandates
- Security
- HIPAA

36 [ ] **Digital Taping of Patients**
- Audio, Video
  - Wire Tap Laws
- Notice Requirements
- Expectation of Privacy
- Consent Documentation – On Recording

37 [ ] **E-mail – Records sent from, and stored on Several Sites – Office, Home, Cell, Tablet, Notebook**
- HIPAA Regulated
- State Regulated – Preservation, Links to Recipients
- Legal Mandates for Protection – Anti-Virus, Spam, Malware, Phishing
- Judicial Regulations – Federal and State Production Requirement
- Patient Confidentiality Mandate
- Evidence in Litigation
- Staff Policies – Prohibitions, Use Not Private Policies
- Device Security Mandates – Federal and State Laws

38 [ ] **E-mail Security Issues**
- Retransmission
- Employee Misuse
Need for office policy
Confidentiality
- Need for office policy
Libel
Virus

Web Pages – Hidden Legal Exposures
- The New Billboard Ad
- Staff Use of Internet
- Office Protocols
- Audits
- Patient Access to Site
- Potential to Practice beyond Office
- Copyright Issues – Strict Liability
- Trademark Liabilities – Strict Liability
- Insurance = Advertising Injury
- Use in Litigation – Statements against Interest

Web Page Notice
- BY USING THE WEB SITE OR BY CLICKING "I ACCEPT" BELOW, YOU SIGNIFY YOUR AGREEMENT TO THESE TERMS AND CONDITIONS. IF YOU DO NOT AGREE TO THESE TERMS AND CONDITIONS, DO NOT USE THE WEB SITE.

Web Page Warning
- Information posted on one of our sites is not intended to be dental or medical advice and should not be considered dental or medical advice, nor is it intended to replace consultation with a qualified dentist, physician or other health care provider.

Social Media: Broad, Varied and Growing
- Facebook (1 billion users), Twitter, LivingSocial, FourSquare, Instagram, Linkedin, Pinterest, Google+
- Benefits – Marketing and Communications
- Legal Exposures
- HIPAA Violations – Surgeon and/or Staff
- Violations of State Confidentiality Laws
- Defamation Claims via Staff or OMS
- Anti-Fee Splitting Laws - Groupon
- Disclosure of Trade Secrets by Staff

Posting Guidelines
- Don’t – But If you Must – Get Counsel
- Be professional
- Be respectful
- Maintain confidentiality and privacy
- Respect third party content
- Know that the Internet is permanent
- Keep your personal views separate
- Use two separate Twitters

Rating Sites
Angie’s List, Yelp, Rate MD, etc.

- 1st Amendment Protections
- Legal Issues with Challenging False Claims or statements – SLAPP Laws
- Counter Reviews – Hired Consultants – Yelp Pride!
- Trends – Faster and Real Time
- Settlement of Law Suits
- TIP: Get on Early, and Control Site

Yelp! Legal Extortion

- Federal Decency Act
- Extortion is Protected by Levitt v. Yelp!
- Charging Fees to Move or Hide Postings
- Remember? How Laws are Made

Yelp – Sanctioned Extortion

- LOS ANGELES (CN) - A federal class action claims that Yelp!, a consumer review Web site, extorts businesses to buy advertising from it. Cats and Dogs Animal Hospital claims that after complaining about a posting on Yelp.com, the hospital "began receiving frequent, high-pressure calls from Yelp advertising employees, who promised to manipulate Cats and Dogs’ Yelp.com listing page in exchange for Cats and Dogs purchasing an advertising subscription."

Growing Claims

- Chicago’s Bleeding Heart Bakery joined 9 plaintiffs from across the nation in a class-action lawsuit against consumer review site Yelp. The bakery’s decision to join the suit sparked a debate between Yelp lovers and haters throughout the city, and not only over the "extortion tactics" alleged in the suit.

Statutes

- In the Communications Decency Act of 1996, Congress declared: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” (47 U.S.C. § 230(c)(1.).)
- FN1 “No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” (§ 230(e)(3.).)
- **We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.

Anti-SLAPP Laws

- CCP 425.16 – Provides for a special motion to strike a complaint where claim from activity exercising the rights of petition and free speech. Enacted 1992.
- CCP 425.17 – Limits Anti-SLAPP in public interest and limited business cases.
- CCP 425.18 – Allows for SLAPP – Back Motions
- CC 47 – Protection of Public Proceedings

Office Policy

- Explain at Orientation
- Written Policy
- Define Terms and Methods
- Protocols for Office Use – No Personal
- Not Private – Acknowledgement

Solutions
- Special Technical Safeguards
- Office Policy on Internet and Social Media Use
- Build Social Media Company Relationships
- Professional Web Design with Legal Terms
- Be the Best Example

Summary
- All Aspects Of Dentistry
- Risk Recognition
- New Record Keeping Obligations
- Elevating Standards Of Care
- Confidentiality Issues for Digital Office
- Office Policies for Staff use of Internet
- Plan for Rating Sites – Place Ads