Issues in Dental Ethics

American Society for Dental Ethics

Correspondence relating to the Issues in Dental Ethics section of the *Journal of the American College of Dentists* should be addressed to:
Bruce Peltier
bpeltier@pacific.edu

Standard of Care

The Legal View

Arthur W. Curley, JD
Bruce Peltier, PhD, MBA, FACD

Abstract

The standard of care is a legal construct, a line defined by juries, based on expert testimony, marking a point where treatment failed to meet expectations for what a reasonable professional would have done. There is no before-the-fact objective definition of this standard, except for cases of law and regulation, such as the Occupational Safety and Health Admintration (OSHA). Practitioners must use their judgment in determining what would be acceptable should a case come to trial. Professional codes of conduct and acting in the patient's best interests are helpful guides to practicing within the standard of care.

Continuing education credit is available for this and the following article together online at www.dentalethics.org for those who wish to complete the quiz and exercises associated with them (see Course 22).

It is hard to imagine a concept in health care more important than standard of care. Virtually every clinical decision must conform to that standard. It seems strange, then, that there is so much confusion and misconception about the concept. This confusion is rarely articulated.

To be fair, standard of care is an intrinsically vague concept that is hard to pin down with any precision. You may recall the time when you were first exposed to the term in dental school. Dental students have a very hard time with it, especially when they are told that:

- They must always practice within the standard of care
- (Therefore) they must know the standard of care
- There is nowhere on the Internet where they can look it up

It may or may not be helpful to expose them to the following PowerPoint slide in class, but this is how they are taught about the standard at the University of the Pacific. Students are told that many powerful forces or agents influence the specifics of a standard of care.

In the end, students are informed that the standard of care is, in fact, not written down in any one place. Rather, it is a group effort, the consensus opinion of practicing dentists, and if one wants to know the standard, one needs to know what colleagues think. They are also taught that the standard is dynamic and constantly changing as materials, techniques, and scientific and clinical wisdom evolve.

Attorneys typically cite the following short legal definition of the standard of care: "The level of care that a reasonably prudent dentist would exercise under the

Arthur Curley is senior trial counsel for the dental malpractice defense firm of Bradley, Curley, Asiano, Barrabee, Abel & Kowalski, and Assistant Professor of Dental Jurisprudence at the Arthur A. Dugoni School of Dentistry in San Francisco. **Dr. Peltier** is Professor of Psychology and Ethics at the Arthur A. Dugoni School of Dentistry, University of the Pacific in San Francisco.

Figure 1. Elements of the Dynamic Standard of Care

The standard of care turns out to be the result of competing experts, judged by a jury of lay citizens in specific cases.

same or similar circumstances, time, and location." This is fine, as far as it goes, but still pretty vague.

This essay (and the companion article by Larry Jenson) attempts to answer, with some measure of clarity, the following questions:

- What exactly is the definition of standard of care?
- Who (or what) determines the standard?
- Is there a specific set of laws or regulations that determine the standard of care?
- Is standard of care a legal term, an ethical concept, or both?
- Do you always have to follow the standard of care?
- Is standard of care local, or is there a national standard in the United States?
- Are all dentists held to the same standard regardless of their training?

It is anticipated that this and the companion essay will not clear things up completely, nor will they meet with universal agreement, and such is a healthy thing in a profession. In the meantime, all dentists must still practice within the standard of care.

Legal Analysis

Negligence and Malpractice

The task of unpacking standard of care from a legal viewpoint ends with an examination of the ways that legal claims are adjudicated. Four facts must be established for a successful dental malpractice suit:

- The dentist owed a duty to the patient.
- That duty was breached (the dentist's behavior or treatment failed to conform to the relevant standard of care).
- The patient was harmed, damaged, or injured.
- The breach of duty caused the damage (the breach of duty was a direct, proximate cause of the injury).

Component number two is called "negligence," and in the case of licensed healthcare providers, it is professional negligence, defined in reference to the standard of care. In everyday injury cases such as auto accidents, negligence is defined against the reasonable efforts that should have been exercised by the average reasonable person to avoid causing injury to another party. However, in cases involving licensed healthcare providers, negligence is defined as failure to meet the standard of care. The standard of care is generally defined as what a reasonable healthcare provider would do under that same or similar circumstances. Implicit in the term "circumstances," are the conditions of the same or similar time and location.

Expert Witnesses

It turns out that expert witnesses play a definitive role in the determination of standard of care in specific legal cases, although they do not actually define that standard. The standard of care in claims against healthcare providers is typically determined by the testimony of expert witnesses except when the standard is

determined by statutes such as OSHA. There is one exception: when a lay person can readily determine whether the conduct was negligent, such as when a sponge is left inside a patient's torso or a patient falls out of bed because safety rails were not in place. More commonly, juries determine whether or not the standard of care has been violated by assessing the credibility and veracity of expert witnesses. Expert witnesses, using their understanding of the community standard of care, evaluate the evidence, records, and testimony to determine and then offer an opinion as to whether the defendant was negligent under the specific circumstances of that case.

Science and Evidence

Expert witnesses often support their opinion by citing references such as learned texts, treatises, and literature. The courts (meaning judges) in most states are the gate-keepers of the introduction of such evidence and may preclude testimony from writings if they do not meet the standards set forth by the U.S. Supreme Court in the case of *Daubert v. Merrell*. Those threshold admissibility questions are based upon sound scientific principles and testing, dissemination by peer review publications, or approval by another court of distinction (or if a product, approval by regulatory agencies). Courts in most states are liberal in allowing expert witnesses to testify as to the standard of care. The task of evaluating or testing expert opinions is handled through cross-examination by the opposing party, and judgments as to the veracity and correctness of expert opinion are ultimately left to a jury.

Locality and Expert Testimony

The locality rule aspect of the standard of care (the notion that standards differ necessarily from place to place) had its origin in geography and physical distance, and the generic definition usually includes language such as "under the same or similar circumstances, time, and location." Until recently rural health care providers did not have ready access to specialists, educational programs, continuing education, and cutting-edge, sophisticated equipment. Therefore, rural generalists were permitted to take on more treatments that were in the realm of specialists than urban or suburban generalists were, without being held to the same standard as a specialist. Also, given the time to publish, print, and mail paper journals and texts, there was a time lag for information to reach more remote practitioners. However, with growth of the Internet, digital transmission of education courses and lectures, and the increased number of specialists practicing in rural communities, things have changed. Recent trends in judicial decisions and case law clearly indicate that the locality rule, for the most part, has given way to a uniform national standard of care.

That said, nuances of the locality rule vary somewhat from state to state because of the nature of expert testimony and differences between experts. While there are state-to-state distinctions, most courts will allow expert witness testimony from healthcare providers practicing in other states. Experts from as far away as Alabama and Florida have been allowed to come to California to testify as to the standard of care in malpractice cases. Variances occur because some states have more restrictive laws regarding the nature of expert testimony. It is still the job of the jury to determine the credibility of those experts regardless of where they reside. Generally, any licensed healthcare provider can testify against another similar provider, even one who does not have the same specialty training or is not in active practice. Courts in most states allow that differences of expert opinion are simply credibility issues for the jury to sort out and weigh after cross examination. The following are examples of expert witness or locality rule variations: In Alabama and Arizona an expert must be of the same specialty as the defendant and have practiced for a year prior to the incident. In Alaska the court may appoint a three-expert panel that conducts a minitrial and then reports to the court. In Pennsylvania experts must be board certified in the appropriate specialty, and in Virginia the expert must have practiced for one year prior to the incident in the same or similar specialty as the defendant. That said, the differences from state to state are generally not substantial.

With the aforementioned exceptions, the locality rule is currently limited to situations where a patient would be better served by a specialist, but such treatment is impractical because the closest specialist is far away (generally thought to mean over 90 miles or two hours of travel time). In those cases, a reasonable general practitioner may not be held to the higher levels of care that would be expected of a specialist in the same circumstances. Such would be the substance of a locality rule defense. But this standard is not absolute, and may be subject to expert testimony as to whether or not the patient's condition was so far beyond the skill of the local healthcare provider that a referral was mandated without exception, regardless of time or distance. Ultimately it is a jury that will determine (based on the facts of a specific case) whether or not the standard of care required referral to a specialist. The jury must also decide whether or not a defendant's failure

to meet the standard of care caused an injury.

None of this, of course, excuses care that is below the standard that other general dentists would deliver in other places, meaning that general dentists in rural areas must perform at the same level as their urban colleagues. Rural patients are not required to endure a lower quality of dental treatment.

Duty of Referral

A healthcare provider, whether a generalist or a specialist, has a duty of referral to another health care provider or specialist when a reasonably careful healthcare provider would be compelled to do so under the same or similar circumstances, time, and location. A more practical way of evaluating the need for a referral under the standard of care involves a triad of conditions. The treating generalist must:

- know and be prepared for the potential complications or limitations of a proposed treatment;
- make a timely diagnosis of the occurrence of a complication or limitation; and
- appropriately treat or refer the patient with such a complication for evaluation and treatment by a specialist or provider of a higher level of care.

Failure to reasonably perform these three duties may be an indication of breach of the standard of care. It can, of course, be tempting for a rural practitioner to provide treatments that might better be done by a specialist, especially when patients make it clear that they would prefer to avoid a two-hour drive to the city for more expensive care.

FAQ

Question 1: What exactly is the definition of standard of care and what does it include?

Readers seeking a clear, concise, consistent answer to this question will be disappointed. There is no clear answer, except in those relatively rare circumstances where one of the following is true. First, questions of standard can be determined with confidence in advance of legal action where specific laws or regulations have been established. OSHA, Health Insurer Portability and Accountability Act (HIPAA), and some specific prohibitions related to advertising are examples. When they exist, laws must be followed, and they are a (relatively) clear component of the standard of care. The other before-the-fact guide involves behavior that is obvious to even the casual observer, such as the extraction of the wrong tooth. However, even in this example, there are often mitigating circumstances that make the standard less clear to a layperson.

Question 2: Who (or what) actually determines the standard?

The standard of care turns out to be the result of competing experts, judged by a jury of lay citizens in specific cases. These interpretations must still be anticipated by practitioners in day-to-day, real-life clinical care. This involves clinical judgment by individual dentists who are treating individual cases. The commonly accepted legal standard of care includes the term "would," as in "The level of care that a reasonably prudent dentist would exercise..." So, the standard of care is really an abstraction, a prediction held in the mind of the practitioner who is first of all (it is hoped) focused on the well-being of the patient and remains vaguely cognizant of the possibility that his or her behavior might be criticized or defended by competing experts in front of a jury someday.

This, of course, creates a big problem for dental schools that are obligated to teach the standard of care to students. This is generally framed as "the clinical truth" as understood by dental faculty. (That said, dental schools are exquisitely aware of the standards used by state boards to determine licensure, so they must factor the board's view into the design of their curricula, course materials, and lectures). Clinicians often assert that the way they practice is standard of care as if they somehow represent the truth of the matter. In actual fact, unless a similar case or situation has been litigated or regulated, their opinion is just that, an opinion.

The idea that reasonable, competent dentists determine and reflect the standard of care (as opposed to a fixed set of regulations created by others) reinforces the value and importance of professional autonomy. Members of the profession set standards to be followed to care for patients who are otherwise vulnerable because they cannot effectively evaluate the situation. Patients must be able to trust professionals to use good judgment, skills, and materials.

Question 3: Is standard of care a legal term, an ethical concept, or both?

It's both. Law is generally a lower standard of behavior, mandated by the community for its basic protection. Laws are typically written by legislators, most of whom are people without dental experience or a vested interest in the profession. Typically, their work is informed by members of the dental profession. Professionals often interpret "ethics codes" (sometimes called "codes of professional conduct") as aspirational and personal. Such codes are written by members of the profession, but their enforcement power is very limited, typically resulting only in sanction or expulsion by a professional organization.

There is an absolute legal obligation to follow, or practice within, the standard of care, but this assumes that a clinician's questionable behavior is detected or litigated. Much of daily, clinical behavior is not noticed by others, and patients typically cannot evaluate the full implications of their treatment needs or of care received. This means that dentists could violate the standard of care without consequence, and that makes the ethical question all the more important. Dentists must self-monitor. There are several important reasons to practice within the standard, and the obligation to be trustworthy (to protect the public trust that dentists enjoy) is high on the list. Self-management of high ethical standards protects patients and results in positive feelings for dentists at the end of the day and the end of a career. Because law and ethics inform each other and tend to be aligned, high personal standards also tend to keep a clinician out of trouble.

It is reasonable to conclude that the concept of standard of care is fundamentally an ethical responsibility because the law so rarely weighs in definitively (through regulation or rulings). Independent practitioners must make clinical decisions based upon their judgment of the correct thing to do without supervision or sanction.

Question 4: Is there a specific set of laws or regulations that determine the standard of care?

Not generally. Each state has a dental practice act, but these documents provide a framework typically lacking in clinical detail. You will not find much treatment guidance in a dental practice act. While a few specifics are provided (e.g., the California Act prohibits some specific language in advertising), the dental practice act essentially dictates that you follow the community standard of care, but without providing clinical definitions. If you think about it, practice acts are updated infrequently, perhaps every eight to ten years, while the standard of care is more dynamic. Clinical standards, materials, and practices cannot wait for the legislative process to catch up.

Codes of professional conduct provide some additional written guidance, and they certainly inform the standard of care in a powerful way. But, such codes tend to be general and aspirational, and as such do not provide specific clinical advice on a case-by-case basis. Readers seeking clear, centralized, agreed-upon written standards are bound to be disappointed.

Question 5: Do you always have to follow the standard of care?

The short answer is "yes." The law, the profession, and the public expect this of you. There may be rare clinical situations where you are tempted to do something that you perceive to be different from the way your colleagues do it, in variance from the way that most agree is "correct." Should you choose to do something that seems outside the standard of care, the only defensible reason is that it would be in your patient's best interest, assuming it does not violate a law or regulation. While you might be criticized by colleagues, your actions would ultimately be judged in court. If your case is not adjudicated, the rightness of your actions would remain an open question.

Question 6: Is standard of care a local thing, or is there a national standard in the United States?

It turns out that the answer to the locality question is: maybe, or sometimes, or it depends. The most durable answer is "it occasionally does vary," but one cannot generally count on a local

Recent trends in judicial decisions and case law clearly indicate that the locality rule, for the most part, has given way to a uniform national standard of care.

standard of care. In the relatively rare instances where a specific law or regulation covers a clinical situation, there is little room for variation within the jurisdiction covered by the rule. So, if the law is federal, then practitioners across the nation should follow it. In situations not covered by formal rules, local variation will be determined by the expert witness process, and even then, only when relevant cases are actually adjudicated. This implies that dentists can make clinical decisions based on their (perhaps unfounded) perception of a local standard of care without consequences–as long as treatment turns out well and they never end up in court.

More local consistency is to be expected in states where experts must be licensed in the state where the court is located. But, in a large state such as California, diversity prevails. Experts in northern, rural areas may indeed differ in their views from experts in a heavily populated, technically cutting-edge metropolitan area.

As the Internet and dental technologies evolve, it may become implausible for a defense expert to assert that a country doctor does not have access to the same or similar diagnostic and treatment information. High-tech equipment is getting smaller, more portable, and less expensive, and "virtual" offices allow dentists from one geographic area to intervene in distant clinical cases using real-time video over the Internet. Radiographs can be instantaneously transmitted cross-country, evaluated by a specialist, and shot back to the generalist within minutes. While local variation may never completely disappear, it has become difficult to justify. Once again, individual practitioners will still have to speculate as to how experts (in court) might judge the treatments they provide in order to determine whether they are practicing within the legal standard of care.

National professional organizations, such as the ADA, the American Association of Endodontists, and the American College of Dentists tend to influence the behavior of American practitioners, and they tend to imply a national standard. But, once again, the rubber hits the road when experts (who presumably read the journals of these organizations) testify and juries deliberate.

Question 7: Are all dentists held to the same standard regardless of their training?

The law does not recognize differences in circumstances of professional training. There is no margin of error or buffer of benefit given someone because of advanced years or, conversely, because of youth. All are held to the same standards. Older dentists may claim that their techniques are tried and true and have evolved and been refined over the years and are therefore superior to those taught to recent dental school graduates. That may be true. Once again, the matter of standard of care is only factually resolved when those techniques are adjudicated in a court case and argued by "experts" in that venue. In the meantime, one hopes that all clinicians submit their techniques and judgment to empirical testing and research on an ongoing basis.

Sometimes a younger practitioner has an advantage, having been born with a laptop and raised with a cell-phone and tablet. Some have no problem embracing technology and its benefits. As just one example, recent electronic advances really do make it easier to create detailed and abundant records. When compared to brief, handwritten chart notes, such records often challenge the traditional standards of care in charting. Similar examples can be seen in radiology, endodontics, caries control, continuing education, computer versus paper treatment planning, and perhaps, the taking of impressions.

Conclusions

The standard of care is a crucial but challenging concept. Practitioners must understand it and practice within it. Nonetheless, it is impossible to actually know for certain what the specific standards really are unless they have been recently tested in court. This means that clinicians must continuously speculate about the standards they follow on a day to day basis.

While such a statement is unnerving, there are clear guidelines and ways through the ambiguity.

First, learn and know available laws and regulations and stay current with changes in clinical methods and standards. This probably requires involvement in organized dentistry along with continuous reviews of practitioner literature. It is essential to stay connected with colleagues, as the standard is a group opinion, tested only occasionally in court.

Use effective and thorough informed consent procedures, including discussions with patients in lay language, so that patients have understood and agreed to any treatment you provide.

Refer liberally and intelligently. If you want to be safe, make referrals on the conservative side, not just to protect yourself, but to protect patients.

Finally, the patients' best interests are a valuable proxy for standard of care when things are unclear. That guideline is likely to modulate potential standard of care problems in clinical practice. If what you do is in a patient's best interest, that case is unlikely to end up in front of experts in court and is good for patients as well. ■