



**THE LAW APPLIED**

**Dental Risk Management:  
Covering Your Assets**

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**Overview**

- Pitfalls in the dentist-patient relationship
- How to handle difficult patient situations
- How to handle unflattering social media posts about your practice
- Obligations to provide accommodations to patients with special needs

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### Patient Relationships

- A new patient calls you for emergency treatment. You see the patient in your office. When you examine the patient, you see that the patient needs a great deal of dental work. The patient has no insurance and the treatment will be long and expensive.
- Are you required to continue to treat this patient?

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### When is the Dentist-Patient Relationship Established?

- The dentist-patient relationship is created when professional services are rendered to and accepted by the patient.
- Relationship can be established by:
  - Formal consults
  - Telephone calls if you give treatment advice
  - In-person treatment

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### Relationship = Duty to Patient

- Once the relationship is established, there is a legal duty
  - to use best judgment, reasonable care, and skills as are ordinarily possessed by dentists in the community
  - not to abandon the patient
- Breach of these duties can lead to malpractice liability and allegations of professional misconduct

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### What is Patient Abandonment?

- Section 29.2(a)(1) of the Rules of the Board of Regents defines unprofessional conduct as:
  - Abandoning or neglecting a patient ...under and in need of immediate professional care without making reasonable arrangements for the continuation of such care,
  - or abandoning a professional employment by a group practice, hospital, clinic, or other health care facility without reasonable notice and under circumstances which seriously impair the delivery of professional care to patients or clients."

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### Before You Cancel an Appointment, Consider...

- Will necessary care be delayed to the detriment of the patient?
- Will the patient *realistically* be able to obtain timely alternative care?
- Is the patient angry and therefore likely to file a complaint against you?

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### Practical Points

- Lapse of time, by itself, does not end the relationship.
- If the patient transfers care, confirm it in writing.
- Confirm in writing if the patient tells you they are not coming back.
- Do not cancel appointments at the last minute.
- Do not abruptly withdraw from care.

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### Managing Patient Relationships

- A patient has a large balance and has not made any payments, in spite of promises to do so. The patient is still undergoing treatment.
- Can you refuse to see the patient until the bill is paid?

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### Non-Payment

- You cannot abandon a patient even if you have not been paid.
- If the patient is undergoing active treatment, you cannot discharge the patient until:
  - Treatment is completed
  - The patient has refused to return for completion
  - Another provider will continue treatment without interruption
- You cannot withhold the patient's record for non-payment.

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### Informed Consent

- A patient is transported from a local nursing home. The appointment was booked by a telephone call from the facility. The patient is new to the office and the purpose is a hygiene visit.
- The records sent with the patient indicate the patient takes medication for dementia. No family member accompanies the patient. How and what should you do to treat the patient?

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### Informed Consent (cont'd.)

- Informed consent requires discussion of the procedure/plan, anesthesia to be used (if applicable), the risks, benefits, and alternatives, including the risks of no treatment.
- The patient must **understand** and **agree**.

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### Lack of Consent = Malpractice

- Lack of informed consent is defined as:
  - the failure to disclose alternatives to the patient and reasonably foreseeable risks and benefits as a reasonable dental practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation (*Public Health Law §2805-d (1)*)

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### Adults Without Capacity

- A health care proxy agent may make health care decisions for someone who is unable to do so. The authority to consent does not exist *until patient loses capacity to make decisions*. Lack of capacity should be documented in your record.
- Power of Attorney (POA): may grant access to records, but does not authorize consent for treatment
  - A health care proxy and POA terminate on the patient's death

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### Can You Treat?

- Routine visits: ok as long as you can get an accurate history and nothing increases risk to the patient. If the patient is aware they are in a dental office, implied consent exists for examination.
- You can attempt to reach family member and take a verbal consent. Document the conversation with a witness.
- Anything invasive or that carries risk (e.g., pre-medication) needs the appropriate person to give consent. Reschedule the appointment.

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### Office Procedures

- Be proactive. The front desk should ask:
  - Can the patient make their own decisions about health care?
  - Before giving an appointment, understand the patient's status, who will accompany the patient, and obtain legal documents

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### The Non-Compliant Patient

- You have a patient who repeatedly refuses to have dental x-rays taken after you have spoken to them on several occasions about the necessity for x-rays. You are upset at the patient's refusal.
- Are you required to continue treating the patient?

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### The Right of Refusal

- Every adult of sound mind has the right to refuse medication and treatment after being fully informed of and understanding the consequences.
- Treat the refusal as you would informed consent. Fully document in progress notes.
- Do not compromise on the standard of care because of cost concerns.
- You may decide to withdraw from treating the patient (be aware of timing).

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### Dental Record Documentation

- Patient writes on history and consent form that she is allergic to novocaine with epinephrine and does not want to receive it. She does not explain her reaction.
- You feel novocaine with epinephrine would be beneficial to the patient during treatment and ask the patient if it would be ok to administer it. She says yes. You do not document that conversation.
- The patient leaves the office, feels unwell, and goes to ED. A week later, the patient calls and wants you to pay their ambulance and ED bill plus lost wages.

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### What Should You Do?

- Should you now document your entire conversation with the patient at this time?
- How do you respond to their request to pay their bills and reimburse them for lost wages?

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### Legal Guidelines

- The definition of professional misconduct includes:
  - failing to maintain a record for each patient that accurately reflects the evaluation and treatment of the patient
    - Education Law §6530(32); 8 NYCRR 29.2(a)(3).

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### Alterations to the Record

- Alterations can be viewed as a deliberate attempt to misrepresent the facts.
- Don't **ever** delete an original entry.
- Be sure there is an objective basis if you go back to change an entry
- If a provider receives notice of a claim or lawsuit you should not alter the original entry without speaking to legal counsel.

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### Pitfalls

- The audit mechanism in an EHR will identify all changes, when and by whom
- The record may already have been sent to third parties, conflicting versions are a huge problem
- Changes to the record may conflict with billing codes already submitted
- May conflict with documentation in the record from others

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### If You Must Make a Change...

- Create a new entry with the new date.
  - An EMR will “time stamp” the date and time the entry was actually created.
- Refer to the date the original note was written.
- Add the new information, state how the information was obtained.
  - “Review of notes dated 6/19/16 reveals an omission relevant to the patient’s care.”
- Sign the new/late entry.

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### Penalties for Alterations

- OPD proceedings
- Criminal charges
  - False entries or deletions with intent to defraud is a Class A misdemeanor
  - If done with the intent to commit another crime, then it becomes Class E felony
  - If done with purpose to thwart an official proceeding, becomes a tampering with evidence felony

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### Litigation

- An alteration discovered during malpractice litigation is extremely damaging.
- Professional liability policies may exclude coverage for claims in which the dental record was altered.
  - which means you may end up paying for a defense costs or a judgment out of pocket.

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### Refunds to Patients

- Patients may make verbal or written demands for refunds or reimbursement.
- Do not immediately commit to what the patient has requested.
- Tell the patient you will review the request and the record.
- Any return of fees or reimbursement must be for a definite amount; “re-dos” are problematic.

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### Refunds and Reimbursement

- *Refunds* are **not** the same as *payment* of expenses.
- Should always be done carefully under the guidance of legal counsel.
  - The patient should sign a general release prepared by an attorney
  - A release does **not** protect you against a complaint with the Office of Professional Discipline.
  - A parent cannot release a minor’s claim
  - A report to the National Practitioner Data Bank **may** be required.

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### Unanticipated Outcomes

- You discover that your autoclave was not working properly on one specific day and, as a result, your dental instruments were not sterilized properly.
- Looking back, you had a full day of patients.
- Do you tell the patients?

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### Do You Tell the Patient?

- Unanticipated outcomes should be disclosed to the patient (*ADA Code of Professional Conduct, Section 2.E*)
- Patients want to understand what occurred and why.
- Promotes trust, honesty, caring, compassion, and respect.

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### First: Investigate

- Thoroughly investigate all the facts about possible exposure.
  - What patients were seen that day, in that room, using that equipment?
  - What were the patients' known medical histories?
  - What is the risk of transmission?
- Provide relevant, objective facts to calm the patient's fears.

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### How to Disclose

- If many patients are involved, letters may be sent.
- Direct the patient to one dedicated staff member to answer questions. Include fact sheets and guidelines for post-exposure testing:  
<http://www.cdc.gov/niosh/topics/bbp/guidelines.html>
- Do you offer to pay for testing?

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### Fielding Questions

- The mother of a pediatric patient requests a meeting with you. She wants to record the meeting. What do you say to her?
- She wants to bring her lawyer to the meeting. How should you respond?

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### Requests for a Meeting

- Do not meet with the patient's attorney.
- Do not agree to be recorded.
- Do not meet in a public place.
- Have a witness present.
- Stick to the facts and don't speculate.
- Be prepared for anger.
- Use an interpreter if necessary.
- Document the discussion.
- Do not make rash promises. Instead, inform the patient you will review the situation and get back to them.

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### Social Media Posts

- A patient posts a negative review of your practice on Yelp, stating that your office gave them wrong information about their insurance and overbilled them.
- Should you respond, and, if so, how?

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### Consumer Review Sites

- A 2015 study showed that 53 percent of physicians and 39 percent of patients visited a rating website at least once.
  - YELP.com, VITALS.com, RATEMD.com, AngiesList.com, etc.
- Public forums for consumers (patients).
  - Used for posting experiences
  - Frequently used for negative comments

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### Consumer Review Sites (cont'd.)

- Considered a positive marketing tool until a negative review is posted
- Challenging to get posts removed
- Strong urge to respond to negative post but could result in HIPAA violation
- Can result in even more negative publicity if you lash out

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### Options

- When a negative review is published, a dentist can:
  - (1) Ignore it.
  - (2) Respond to it.
    - Be careful, if you lash out it can cause more negative comments.
  - (3) Bury it with good reviews.
    - Good critiques can dwarf the negative one.

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### Patient Privacy

- In many instances, responses to complaints about medical care turned into disputes over patient privacy.
- Complaints were filed with the Office of Health and Human Services, Office of Civil Rights (OCR) under HIPAA for violation of privacy.
- Patients say they are doubly injured - first by poor service or care, and then by the disclosure of information they considered private.

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### Website Protections

- Challenging to get a post removed; usually need patient's cooperation
- Cannot sue the website for defamation; Websites that publish information provided by other third parties are given immunity under Section 230 of the Communications Decency Act of 1996

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**"Doctors fire back at bad Yelp reviews — and reveal patients' information online"**  
*The Washington Post, May 27, 2016*

- One Washington dentist responded to a patient who blamed them for the loss of a molar: "Due to your clenching and grinding habit, this is not the first molar tooth you have lost due to a fractured root."
- A California dentist scolded a patient who accused him of a misdiagnosis: "I looked very closely at your radiographs and it was obvious that you have cavities and gum disease that your other dentist has overlooked... you can live in a world of denial and simply believe what you want to hear from your other dentist, or make an educated and informed decision."

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### Negative Postings

- Did the post actually affect the practice?
- If patient can be identified, follow up by encouraging them to contact the office to discuss.
- If responding online, keep the comment general. "According to privacy laws, we cannot comment on a patient's treatment. However, we are always available to discuss concerns with our patients. Patients are welcome to contact us directly."
- Do not engage in discussions online.
- **Most important:** Encourage your patients to post **positive** reviews!

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### Appropriate Response

- OCR Deputy Director:
- "If the complaint is about poor patient care, they can come back and say, 'I provide all of my patients with good patient care' and 'I've been reviewed in other contexts and have good reviews.' But they can't take those accusations on individually by the patient."

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### Responding

- First, consider: does the post actually affect the practice?
- If patient can be identified, respond by encouraging them to contact the office to discuss.
- If responding online, keep the comment general. "we are always available to discuss concerns with our patients. Patients are welcome to contact us directly."
- Do not engage in discussions online.
- Encourage your patients to post **positive** reviews!

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## Sue the Patient?

- Lawsuits are very tricky and expensive
- Patients can post opinions but must be careful about posting facts which are not true
- Manhattan endodontist Nima Dayani filed lawsuits against five patients over the last four years, seeking damages of up to \$100,000, after they posted poor reviews online about the services they received (*NY Daily News 2016*)
  - Publicity was not flattering

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## Bad publicity

Recommended Reviews for Nima Dayani, DDS

Search within reviews  Sort by Yelp Sort Language English (82)

### Consumer Alert: Questionable Legal Threats

This business may be trying to abuse the legal system in an effort to stifle free speech, including issuing questionable legal threats against reviewers. As a reminder, reviewers who share their experiences have a First Amendment right to express their opinions on Yelp.



Got it, thanks!

around with teeth, and this day in age, you really have to fight for good medical care. Dr. Dayani is a nice guy and a great doctor. He is very professional and so is his assistant John and Elizabeth at the front desk. The office is very clean and nice, with a modern design.

I had an abscessed tooth that I failed to self diagnose until it

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## Just when you think it couldn't get any worse...

- HEADLINE on Techdirt.com (July 28, 2016)
- *“Dentist Sues Another Unhappy Patient; Offers To Let Journalist See Patients' Private Files To Dispute Claims”*
- “When a medical professional offers to potentially violate HIPAA privacy protections to protect his reputation, it's a pretty good sign the medical professional doesn't have much reputation left to burn.”
- “Even if his position was 100% correct, the instant he made this offer, he lost.”

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### Cosmetic Services

- You have given Botox injections as part of your treatment for bruxism and temporomandibular joint disorders.
- Since you are an expert in Botox injections, you would like to offer Botox treatment to your patients for cosmetic purposes.
- Are you permitted to do this?

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### Practice of Dentistry

- Section 6601 of the NY Education Law defines the practice of dentistry as any treatment of the oral and maxillofacial area related to restoring and maintaining dental health.
- It is unprofessional conduct to practice or offer to practice beyond the scope permitted by law (Rules of the Board of Regents, 29 (1)(b)(9))

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### Professional Misconduct

- No modalities of treatment are specified, except that they must be related to “restoring and maintaining dental health.”
- Therefore, Botox injections are only permitted if they are used as part of “restoring or maintaining dental health”.

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### From a dentist's website....

BOTOX® Cosmetic targets one of the underlying causes of frown lines and crow's feet—the repeated muscle contractions from frowning and squinting over the years. Your specialist will inject these muscles with BOTOX® Cosmetic to temporarily reduce muscle activity. You will begin to notice a visible smoothing of your crow's feet lines and frown lines between your brows.

- Some before and after examples. Find more by clicking [here](#).

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### Patients With Special Needs

- A family member calls to make an appointment for a new patient who is deaf and requests that you provide a sign language interpreter.
- Must you provide a sign language interpreter?
- Can you charge the patient for the cost?

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### Americans With Disabilities Act: Non-Discrimination

- The Americans With Disabilities Act requires equal access to places of public accommodation for all individuals with disabilities.
- A private dentist's office is considered to be a place of public accommodation.

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### Deaf/Hearing-Impaired Patients

- There is a duty to provide “reasonable accommodations” to ensure access to services.
- A place of public accommodation must furnish appropriate auxiliary aids and services to ensure effective communication with individuals with disabilities.

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### What is a “Reasonable Accommodation”?

- Dentist is not obligated to provide a sign language interpreter in all instances.
- But you **must** consider what the patient requests.
- The accommodation may depend upon the length and complexity of the visit, the communication involved, and the abilities of the patient.
  - Written communication, computers
  - New York Relay Service

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### Undue Burden

- The dentist is not required to provide an interpreter if it would result in an “undue burden” (significant difficulty or expense).
- The burden is **not** determined by the fees for the service, but the overall financial resources of your practice.
- It is likely not an undue burden if the interpreter costs more than your professional fee for the visit, considering the assets of your practice as a whole.

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### Interpreters

- You cannot charge the patient for the cost of providing an interpreter or interpretation services.
- You cannot discharge a patient from the practice because of the need to provide interpretation services.

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### Who Let the Dogs Out?

- A patient shows up at an appointment with a service dog. The dog wears a vest and is identified as a service animal. Another patient in the waiting room is allergic to dogs.
- You want to ask the patient about their disability, why the dog is needed, and you want a copy of the dog's rabies vaccination for your records.
- What are you allowed to do?

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### Service Animals (cont'd.)

- Places of public accommodations are required under the ADA and NY law to permit service animals to accompany individuals with disabilities to all areas where the public is allowed.
- A service animal is defined as a dog that is **trained to perform specific tasks** for the patient.

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### Service Animals (cont'd.)

- You may ask **only two** questions:
  - Is the dog a service animal required due to a disability?
  - What work or task(s) has the dog been trained to perform?
- You cannot ask about the patient's disability, or request medical documentation of the disability, the training the dog has completed, or vaccination forms.
- Allergies and fear of dogs are not sufficient reasons to deny access to a service animal.

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### Service Animals (cont'd.)

- Service animals may be excluded from areas if its presence would compromise a sterile environment.
- The service animal must be harnessed, leashed, or tethered, unless this interferes with its tasks or the patient's disability.
- The owner must maintain control of the animal and must provide food and care.
- The animal must be housebroken.

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### Miniature Horses



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**Service Animals  
Miniature Horses**

- Sometimes, a person prefers to use a miniature horse, particularly to pull a wheelchair. Miniature horses are generally 24 – 34 inches tall and weigh 70 – 100 pounds.
- The horse must have been trained to perform tasks for disabled persons.
- There are four assessment factors designed to assist a place of public accommodation in determining whether or not a miniature horse can accompany an individual.

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**Assessment Factors**

- The horse must be housebroken.
- The horse must be under the individual's control.
- The office must be able to accommodate the horse's type, size and weight.
- The office must determine whether the presence of the horse will compromise legitimate safety concerns.

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**Emotional Support Animals**

- An "emotional support" animal is one that alleviates symptoms or effects of a person's disability.
- An emotional support animal is not the same as a service animal under the ADA.
- There is no requirement that the animal be individually trained or certified.
- Any animal can be considered an assistance animal.
- "Emotional support" animals do not have to be accommodated.

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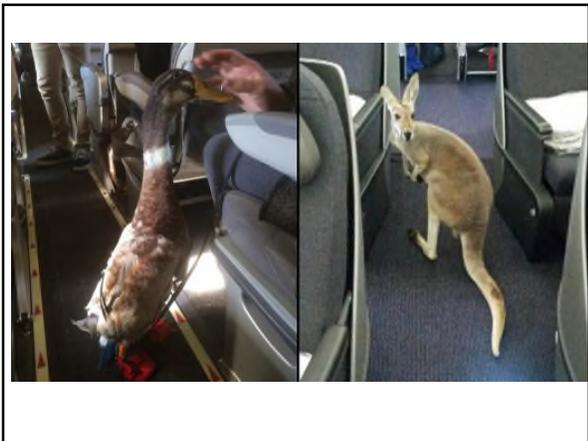
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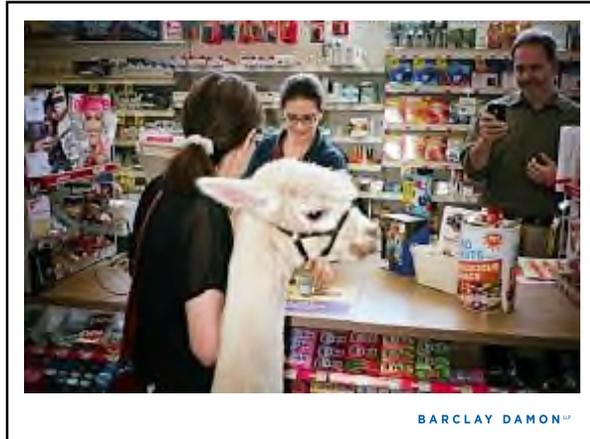
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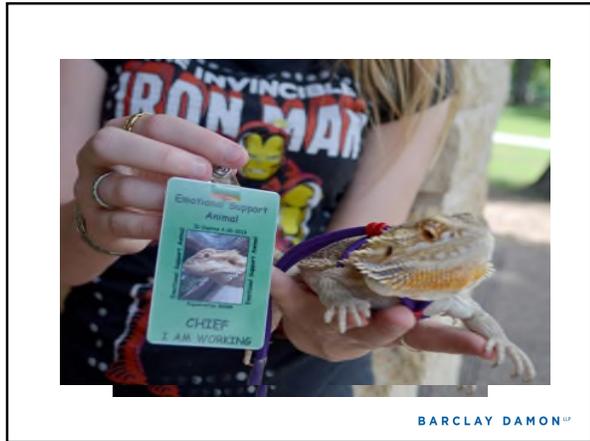
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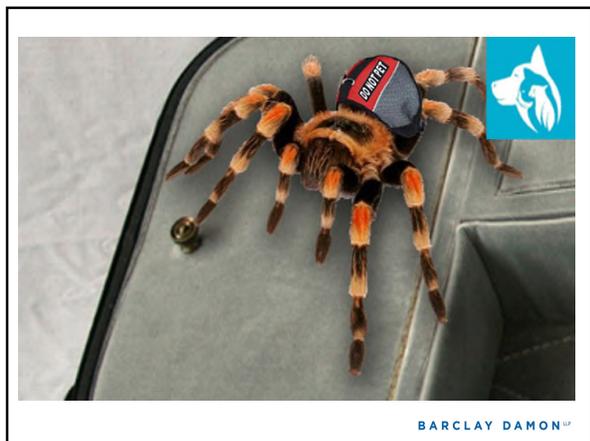
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### Patients With Limited English Proficiency (LEP)

- A new patient arrives in the office and does not speak English, but brings their 12-year-old child to interpret.
- How do you handle this patient?

BARCLAY DAMON<sup>SM</sup>

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### Language Interpreters

- From a risk-management perspective, language barriers can lead to poor care.
- Effective communication with patients is required for diagnosis, treatment options, proper use of medication/appliances, obtaining informed consent and insurance/payment questions

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### Statutes/Regulations

- The NYS Human Rights Law prohibits places of public accommodation from discriminating based on race, color, creed, or national origin.
- Section 1557 of the Affordable Care Act prohibits providers who accept Medicaid from discriminating based upon race, color and national origin
- Language access protections are required to prevent discrimination against LEP patients and immigrants
- If you accept Medicaid, you must provide qualified interpreters to LEP patients and use a qualified translator when translating written content.

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## Requirements

- You cannot require a patient to bring their own interpreter.
- Cannot use minor children as interpreters except in an emergency
- The use of family members and friends are restricted except in an emergency or when requested by the patient
- Bilingual/multilingual staff are restricted from interpreting if they do not have formal training

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## Requirements (cont'd.)

- Obligation to provide an interpreter extends to family members, spouses, or same-sex partners who are LEP
- New standards for use of video remote interpreting\*
- Written materials must also be translated
- Written notice to patients and signage is required in the top 15 languages spoken nationally \*\*

*\*Proposed regulation issued June 14, 2019 would require only audio remote interpreting*

*\*\* Proposed regulation issued June 14, 2019 would eliminate this and other administrative requirements*

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## Questions?



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