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## New Dentists' Most-Asked Legal Questions

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# New Dentists' Most-Asked Legal Questions

By Dan Schulte, JD  
MDA Legal Counsel



**We asked MDA Legal Counsel Dan Schulte, JD, to update his list of the legal questions that are asked most frequently by new dentists. Whether you're a new dentist or an experienced practitioner, this is information worth knowing!**

**E**ach month the MDA receives dozens of phone calls and emails from members asking a variety of legal questions — a valuable member service. Back in 2017 the *MDA Journal* published a list of the “most-asked” legal questions received from new graduates. Not too surprisingly, some of these same questions were also among the most-asked by the general membership as well. Many of these same questions are still being asked six years later.

With that in mind, we have updated this article so that the information is current as of 2023. The answers given below are relatively short. If you need more information on a particular topic, check the Legal Services section at [michigandental.org](http://michigandental.org), or download the MDA’s free e-book, *Most-Asked Legal Questions*, also on the MDA website at [store.michigandental.org](http://store.michigandental.org).

As always, if you have additional questions, feel free to contact the MDA office in Okemos at 800-589-2632 or email the MDA’s Neema Katibai, JD, at [nkatibai@michigandental.org](mailto:nkatibai@michigandental.org). You may send questions for publication to *Journal* managing editor Dave Foe at [dfoe@michigandental.org](mailto:dfoe@michigandental.org).

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## Most-Asked Legal Questions (Continued from Page 35)

### Question: What licenses do I need in order to practice?

**Answer:** You will need a license to practice dentistry issued by the Michigan Board of Dentistry. In addition, you may seek to obtain a specialty certification (in prosthodontics, endodontics, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics, oral pathology, oral medicine, orofacial pain, dental public health, oral and maxillofacial radiology, and dental anesthesiology) upon meeting the Board's requirements. However, such a specialty certification is not necessary to enable you to practice in that specialty. Finally, in order to administer, prescribe or dispense controlled substances you must obtain a controlled substance license from the state of Michigan and you must also register with the Federal Drug Enforcement Administration.

### Question: In general, what dental records am I required to maintain, and what disclosures can be made of this information?

**Answer:** The Administrative Rules of the Michigan Board of Dentistry require that a dentist make and maintain a dental treatment record on each patient. This dental treatment record is required to include the following information:

- Dental procedures performed upon the patient, including the charting of all restorations, missing teeth, or other developmental deformities.
- The date the procedure was performed.
- The identity of the dentist or the dental auxiliary personnel performing each procedure.
- The date, dosage and amount of any medication or drug prescribed, dispensed or administered to the patient.
- Radiographs taken in the course of treatment and, if the radiographs are transferred to another dentist, the name and address of that dentist shall also be included in the record.

These rules also require that dental records be maintained by the dentist for not less than 10 years from the date of the last treatment provided to the patient.

The Health Insurance Portability and Accountability Act of 1986 now governs the disclosures of information contained within a patient's dental record. Generally, once you have provided a patient with the Notice of Privacy Practices in the form required by HIPAA and made a good faith attempt to obtain the patient's signature on a written acknowledgment of the patient's receipt of the Notice of Privacy Practices, you are free to make disclosures of the information contained in that patient's record for the following purposes:

- Treating the patient.
- Obtaining payment for your services.
- Health care operations, which is defined by HIPAA to include your practice's quality assessment, evaluation, training, business management, and the other general administrative activities of your practice.

If you desire to make a disclosure that is for other than treatment, payment, or health care operation purposes, HIPAA requires that you first obtain the patient's signature on a written authorization form. HIPAA imposes very strict requirements for such a form. You should contact a health care attorney to ensure that you have a properly drafted authorization form.

One final note with respect to dental records: They are owned by the dental practice and not the patient. However, pursuant to both Michigan law and HIPAA, the patient always has the right to request and receive a copy of his or her dental record. You are allowed to charge a prescribed fee for preparation of the copy.

### Question: Am I required to provide special accommodations to hearing-impaired patients or patients with



### limited English proficiency?

**Answer:** The Americans with Disabilities Act and Section 1557 of the Affordable Care Act (“Section 1557”) prohibit you from discriminating against patients who are hearing-impaired, and also requires you to “reasonably accommodate” such hearing-impaired patients in your practice. What will constitute such a reasonable accommodation is not specifically identified by any law.

Instead, the regulations and court cases involving this issue have stated only that what constitutes a dentist’s reasonable accommodation of a hearing-impaired patient will vary from case to case, taking into account the particular circumstances. As a general rule, a patient cannot compel a dentist to pay for a commercial sign-language interpreter if another reasonable accommodation can be made at no cost to the dentist. These might include passing notes, allowing a friend or family member of the patient to accompany the patient for treatment to provide interpretation, etc. It is the dentist’s responsibility to insure there is effective communication with hearing-impaired patients.

Patients with limited English proficiency are not considered “disabled” by the AwDA. However, pursuant to Section 1557 and Department of Health and Human Services regulations, health care providers receiving payment for their services through federally funded assistance programs (such as Medicare and/or Medicaid) are required to provide patients with limited English proficiency with assistance necessary to ensure that these patients have “meaningful access” to these services.

Similar to the situation with hearing-impaired patients under the AwDA, the Health and Human Services Regulations with respect to patients with limited English proficiency do not detail exactly what assistance is necessary to meet the

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requirement. In this situation, too, the dentist may allow family members, friends, etc., to provide language translation during the patient's sessions in the office.

Depending on the volume of patients with limited English proficiency who are present in your practice, you may be required to provide a professional language translating service to your patients. Section 1557 has other requirements (posting a notice of nondiscrimination, using taglines in multiple languages) beyond the scope of this article that apply regardless of the volume of limited English proficiency patients in your practice. You should consult with legal counsel to make sure you are in compliance.

### Question: Are covenants

### not to compete binding?

**Answer:** Generally yes, if the covenant not to compete is included in an employment agreement, a shareholder agreement, a limited liability company operating agreement, etc. The covenant not to compete to be binding must also be "reasonable" in both the time period to which it applies, its geographic scope, and with respect to the specific activities restricted.

Whether or not these items will be deemed to be reasonable is determined on a case-by-case basis. Covenants not to compete that are shown to be limited in scope such that only the current business activity of the dental practice is being protected are generally upheld and enforced.

You may recall some recent news about covenants not to compete. In January 2023 the Federal Trade Commission issued a notice of Proposed Rulemaking that would ban covenants not to compete in employment agreements. Then, in May

of this year, a National Labor Relations Board General Counsel memorandum was issued stating that covenants not to compete violate the National Labor Relations Act and are therefore an unlawful employment practice. Neither of these actions render covenants not to compete or liquidated damages provisions in employment agreements unenforceable. For that to be the case the FTC would have to complete the rule-making process and its proposed rule would have to become final. A final rule would also have to survive anticipated legal challenges. It is questionable whether the NLRB General Counsel opinion would have any application to employed dentists who would likely be deemed "supervisory" employees. The NLRB would have to adopt the opinion, and, like an FTC final rule, it would have to survive legal challenges that will very likely be brought.

### Question: Should I insist on a written employment agreement? If so, what terms should I insist be included?

**Answer:** There is no legal requirement that you have a written employment agreement. However, it is highly recommended that you do have a written employment agreement so that the rights and obligations of both yourself and your employer are clearly understood and have been agreed to.

All employment agreements should contain the following:

*A Stated Term and Events of Termination.*

Typically, an employment agreement will provide that you are being employed on an "at-will" basis. This means that the employer may terminate you at any time for any reason or for no reason at all (except for a discriminatory reason). Employment agreements often also contain a "for-cause" termination



provision, where specific for-cause events are listed that will result in a termination of the employment agreement. With respect to the for-cause termination provisions, employers sometimes provide that you will be given advance notice of the existence of such a cause and a period of time (such as 30 days) to remove the cause. Whether and how much advance notice must be given to you prior to you being terminated on an at-will basis should also be specifically stated in the employment agreement.

**Duties.** The hours you are expected to be in the office seeing patients and any other additional duties (such as taking part in practice administration, completing dental records, etc.) should be clearly spelled out.

**Compensation.** Your salary, fringe benefits and other benefits the employer has agreed to provide you with should be expressly stated in the employment agreement.

**Ownership of Patient Records.** Whether you or the employer owns the dental records of the patients you treat should be stated in the employment agreement. In addition, what happens to these dental records upon your departure from the dental practice should be carefully spelled out in the employment agreement. For example, do they stay with the practice, go with you, are patients to be notified — etc.

**Buy-In Opportunity.** If your potential employer has promised that after a year or two you will be offered the opportunity to buy-in to the practice, the terms of the buy-in (i.e., when you may exercise this option, what percentage of the ownership of the practice you will be able to purchase, the price you will be expected to pay, the terms of payment, etc.) should all be expressly stated.

**Question: What do I do when I see bad dental work in one of my patients? Should I say something to the patient?**

**There is no legal requirement that you have a written employment agreement. However, it is highly recommended that you do have a written employment agreement so that the rights and obligations of both yourself and your employer are clearly understood.**

**Answer:** You have a legal duty to communicate openly with your patient regarding all aspects of your dental treatment and examination. If you in good faith believe that a previous dentist has provided improper or deficient services and that the patient may suffer or is suffering harm as a result, this duty would include you providing them with this information. So long as the information you are providing to your patient is made in good faith and is based on your professional opinion, the dentist being complained of will not be able to maintain a claim of defamation against you.

**Question: Am I allowed or required**

**to report child and/or adult abuse that I suspect is occurring to one of my patients?**

**Answer:** As a health care professional practicing in the state of Michigan you are required by statute to make a report any time you have reasonable cause to suspect either child abuse or adult abuse. In either case, the report is required to be made to your local county's Department of Social Services.

For more information, visit the website links below:

■ Michigan's Child Protection Law:  
<https://www.michigan.gov/mdhhs/inside-mdhhs/legal/laws/child-protection-law>

■ Mandated Reporter's Resource Guide:

[https://www.michigan.gov/documents/mdhhs/Mandated\\_Reporter\\_Training\\_Guide\\_727442\\_7.pdf](https://www.michigan.gov/documents/mdhhs/Mandated_Reporter_Training_Guide_727442_7.pdf)

**Question: Can I prescribe drugs to friends and/or family members if I feel it is appropriate?**

**Answer:** Michigan's Public Health Code states that a dispensing prescriber "shall dispense prescription drugs only to his or her own patients." Therefore, you should only prescribe drugs to friends and family who are your patients. In addition, you should always observe the appropriate standard of care (i.e., perform a proper  
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## About the Author

**Dan Schulte, JD**, has served as MDA legal counsel with the law firm Kerr Russell since 2004. He is the author of "Dentistry and the Law," a monthly column appearing in each issue of the *MDA Journal*. He authored the *MDA's Most-Asked Legal Questions*, available as a free e-book. As a benefit of membership, MDA members receive 5% off legal services from Kerr Russell. For more information, contact the MDA office.



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examination) and prescribe drugs only within the scope of practice of dentistry (e.g., to relieve pain in the teeth, gums, jaws or dependent tissues).

You should not under any circumstances prescribe drugs for conditions outside the scope of the practice of dentistry. Examples of this would be pain medications unrelated to the dental cavity, hormone replacements, Viagra, decongestants, and so on.

**Question: I'd like to sign up for several different dental plans, such as Delta Dental and others. How long are these contracts binding? If the terms of these plan contracts**

**change, what can I do about it?**

**Answer:** The length of time a contract is binding is equal to the length of notice each party must give when terminating. For example if a contract provides both that its term is three years and that either party may terminate by providing 60 days written notice, then the contract is really only binding for 60 days. It is extremely important to fully read and fully understand all contracts that you sign, before you sign them. Don't just sign a contract and hope for the best. You should seek the assistance of an attorney experienced in these types of contracts. As a benefit of membership, the ADA offers a free Contract Analysis Service that you may utilize for assistance in understanding contract terms. You are strongly encouraged to utilize this valuable service. To do so, contact

the MDA's Kesha Dixon at kdixon@michigandental.org.

**Question: Can I offer certain patients discounted fees?**

**Answer:** Dentists are free to set the fees for their services so long as they are set in a nondiscriminatory fashion and so long as the dentist is not contractually restricted from offering discounts by a contract with an insurance company, a health plan, or other entity. For example, insurance company and health plan participation agreements often state that all enrollees in a particular plan will be charged the exact same fee. The Medicare and Medicaid programs contain mandates that you file claims for payment for all Medicare and Medicaid beneficiaries you provide services to, and also contain restrictions on your ability to waive these beneficiary's obligations to make co-payments and make payment of deductible amounts. Finally, Michigan's Health Care False Claims Act makes it illegal for you to submit a claim for payment to Delta Dental or Blue Cross Blue Shield of Michigan without disclosing the fact that you have waived the patient's co-pay or deductible obligation.

**Question: If I treat a patient who has suffered injuries in an automobile accident and am being paid by the patient's no-fault automobile insurance company, what am I allowed to charge? Can I balance-bill the patient in this situation?**

**Answer:** Michigan's No-Fault Act requires the No-Fault Automobile Insurer to pay you a statutorily prescribed amount. You may not balance bill the patient

**Question: How do I handle suspected theft by an employee?**

**Answer:** First of all, prior to making any accusations of theft you should be very sure and have objective proof that the employee is actu-





ally stealing from the practice. This objective proof should be provided to the local police department. The police department will investigate, and if sufficient grounds exist the police department will refer the matter to the local prosecutor. Obviously, at this point, if you have not already done so, the employee should be terminated and escorted from your premises.

*(The MDA endorses Prosperident to assist members to protect practices from internal theft, or if there is a suspicion that internal theft is occurring. For more information visit [mdaprograms.com](http://mdaprograms.com) under the MDA Services Programs tab. —Ed.)*

**Question: I am employed by a dental practice. The owner of the dental practice has been dictating my treatment plans, which I do not agree with. Can I be held liable for malpractice if I am following the treatment plans of the owner of the practice?**

**Answer:** You can be held liable for dental malpractice for the services that you provide regardless of whether you are following orders or not. The dentist who is supervising the performance of your services and the entity that the supervising dentist owns are also potentially liable for this malpractice. If you do not agree with specific treatment plans, you should take every possible step to work out the differences with the supervising dentist. The only way to insulate yourself from this potential liability is to remove yourself from this employment situation.

**Question: I am not certified in any of the dental specialties. However, I like to do orthodontic work. How do I advertise this legally?**

**Answer:** Michigan's Public Health Code provides that any dentist licensed by Michigan's Board of Dentistry may also receive a specialty certification from the Board

of Dentistry in prosthodontics, endodontics, oral and maxillofacial surgery, orthodontics, pediatric dentistry, periodontics, oral pathology, oral medicine, orofacial pain, dental public health, oral and maxillofacial radiology, and dental anesthesiology upon meeting the Board's requirements. However, the Public Health Code does not prohibit a general dentist from practicing in any one of these designated specialty areas if not so certified (e.g., a general dentist is permitted to practice in the area of orthodontics even if not certified as an orthodontic specialist).

Pursuant to the Board of Dentistry's rules, if a general dentist is not certified in a specialty but wishes to advertise the specialty, the advertisement must disclose that the dentist is "not certified as a specialist." Therefore, if you are not certified as a specialist you must disclose this fact in any advertisement including reference to the specialty that you are practicing.

**Question: If I am convicted of drunk driving, do I have to report the conviction to the state?**

**Answer:** Yes. Section 16222(3) of Michigan's Public Health Code requires any health professional licensed in Michigan to notify the Michigan Department of Health and Human Services of any criminal conviction (and of any disciplinary licensing or registration action taken by another state against the licensee) within 30 days of the date of the conviction. *(For more on self-reporting, see "Keeping Current," Page 12 – Ed.).* ●

*Editor's Note: For additional legal resources, visit [michigandental.org/Legal-Services](http://michigandental.org/Legal-Services), or email [membership@michigandental.org](mailto:membership@michigandental.org).*

*Portions of the foregoing article have previously been published in the MDA Journal.*



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