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Ethical and legal issues regarding the action and knowledge of orthodontists before civil liability

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ABSTRACT. This study evaluated the ethical and legal conducts of orthodontists regarding the professional/patient relationship, documentation used and degree of knowledge on the professional liability during the exercise of their specialty. This study sought to assess whether the time since graduation of the dentist as an expert interfered with their knowledge degree about the dental professional liability. The object population of the present study consisted of 56 dental surgeons, specialized in orthodontics, from the city of Belo Horizonte, Minas Gerais State, Brazil. The research was carried out using a survey addressed to these professionals, and descriptive statistics of the data. Chi-square test was used to check independence between factors and comparisons of proportions. 100% interviewed professionals request orthodontic documentation prior to the start of treatment; 71.5% request final documentation; 91% professionals affirmed they file this documentation; however, only 21.4% keep records for over 20 years; and most professionals (86%) use some sort of contract at the start of treatment, and a small percentage (30.4%) regard the liability of orthodontists as objective. It can be concluded that the interviewed professionals should acquire a higher level of knowledge regarding the professional liability and current legislation involving dental surgeons.

Keywords: orthodontics, civil liability, dental legislation, dental ethics.

Questões éticas e legais relacionadas à ação e ao conhecimento dos ortodontistas frente à responsabilidade civil

RESUMO. Este estudo avaliou as condutas éticas e legais dos profissionais ortodontistas quanto ao seu relacionamento profissional/paciente, à documentação utilizada e seu grau de conhecimento referente à responsabilidade profissional odontológica no exercício de sua especialidade, além de avaliar se o tempo de formação do cirurgião-dentista como especialista interferiu em seu grau de conhecimento sobre a responsabilidade profissional da área odontológica. A população objeto do presente estudo foi constituída de 56 cirurgiões-dentistas, especialistas em Ortodontia, da cidade de Belo Horizonte, Estado de Minas Gerias, Brasil. A pesquisa foi realizada por meio de um questionário dirigido a estes profissionais para posterior análise estatística descritiva dos dados. Foi utilizado o Qui-quadrado para verificação de independência entre fatores e comparações de proporções. A documentação ortodôntica é solicitada por 100% dos profissionais entrevistados a antes de iniciar o tratamento; 71,5% solicitam documentação final; 91% dos profissionais responderam arquivar a documentação. Entretanto, somente 21,4% deles arquivam por mais de 20 anos; a maioria dos profissionais (86%) utiliza alguma forma de contrato ao iniciar o tratamento e pequena parte dos profissionais (30,4%) considera a responsabilidade dos ortodontistas como de resultado. Pode-se concluir que os profissionais entrevistados necessitam adquirir maior grau de conhecimento acerca da responsabilidade profissional e sobre a legislação vigente que envolve os cirurgiões-dentistas.

Palavras-chave: ortodontia, responsabilidade civil, legislação odontológica, ética odontológica.

Introduction

The term liability (responsibility) from the Latin verb *respondere*, is related to "the fact that someone becomes the guarantor of something". There are several definitions of professional liability for dental surgeons (DSs), all based on the obligation of redressing the damages caused to another (PARANHOS et al., 2012).

The practice of dentistry in Brazil is regulated by Law no. 5,081 from August 24th, 1966, which created specific norms for the exercise of the profession, at a

time when Brazilian dental surgeons faced what came to be known as "dental liability", defined as the "DSs penal, civil, ethical and administrative obligation of suffering consequences for faults committed during the exercise of their professions, like as the result of damages caused to patients due to recklessness, negligence or malpractice" (BRASIL, 1966).

From an ethical point of view, the Dentistry Ethics Code (DEC) highlights that one of the fundamental obligations of DSs is to assume responsibility for the acts they practice Conselho Federal de Odontologia (CFO, 2006). It also reminds that DSs are responsible for committed acts in the professional exercise, and as such are also liable to responding in the Regional and Federal Dentistry Councils spheres (SILVA, 1994). According to Calvielli (1997) the Brazilian legislation regards professional liability as the damage caused without the harm intention (lack of malice), characterized by five elements: 1-The agent; 2-The professional act; 3-The absence of malice; 4-The damage; 5-The causal nexus. The existence of a link of dependence between the damage and the professional act that caused it is the final requirement to observe in characterizing the crime of professional liability (SILVA, 1994).

The Brazilian Consumer Defense Code (CDC) in the article 14, § 4 states that the liability of professionals will be assessed by attesting fault (BRASIL, 1990), a responsibility which has been frequently argued in the Brazilian judicial system, both by the dentistry class and the regular judiciary. Thus, according to Eto et al. (2002), it can be legally understood that DSs must repair the damage, and this reparation may be pecuniary or by restoring the "status quo ante" (prior state). The Brazilian Civil Code (BCC) mentions the obligation to repair damage(s) and specifically emphasizes cases that result from the exercise of professional activity, resulting from recklessness, imprudence or malpractice (FARAH; FERRARO, 2000).

The complexity of diagnosis and dental therapy requires ethical and legal attitudes from professionals, from the first contact with the patient. After the creation of the Consumer Defense Code, lawsuits increased rapidly; this in turn has directly reflected on the field of dentistry, including orthodontics. Thus, it is essential to keep thorough records on each patient (FERNANDES; CARDOZO, 2004). These documents are a set of declarations signed by the professional, in the exercise of his/her profession, which serves as evidence and can be used with legal, forensic and administrative purposes. They consist of anamnesis, informed consent, clinical evolution of treatment, patient x-rays and photographs, as well as copies of prescriptions and health certificates (GARBIN et al., 2006; PARANHOS et al., 2011). The evidences to be presented by the professional are "pre-constituted"; they are either produced over time, during treatment, in the patient's records, or in the documents presented to the court, forged during the defense or carrying only notes relating to costs and payments, mingled with sparse information of the treatment - with questionable legitimacy (HAAG; FERES, 1999).

Before the beginning of the treatment, all patients (or parents/guardians) should be clearly informed about the orthodontic treatment practice, and sign an informed consent form explaining all associated risks and affecting factors (PARANHOS et al., 2011, 2013). Therefore, the objective of this work is to evaluate the legal and ethical conducts of orthodontics professionals within the professional/patient relationship and their degree of knowledge regarding professional liability in dentistry, especially with regard to orthodontics, relating it to the time of specialist training.

Material and methods

This work was approved by the Research Ethics Committee of FOP/Unicamp, under protocol no. 181/2003, thereby shielding all participants and researchers from any ethical or legal inconveniences. After approval, surveys were given out to dental surgeons in Belo Horizonte, Minas Gerais State, Brazil. The survey contained structured and open questions, addressed to 150 dental surgeons, specialists in Orthodontics. The information confidentiality was assured to participants, as well as its exclusive use for research purposes.

The surveys were not identified and were sent to sample components by reply-paid mail, of which 56 (fifty-six) have returned. After receiving the completed surveys, data were submitted to descriptive statistics. As the variables in the questionnaire are categorical, which generates information on the type score, the used statistical tools were chi-square test to verify independence between factors and comparisons of proportions. The survey consisted of questions about documentation used and DSs civil liability. Professionals were asked whether they request documentation before orthodontic treatment and after the end of it, whether they were aware of statutes of limitation for legal complaints, whether they know the term "pre-constituted evidence", whether they employ any model or form of contract

pertinent to treatment, and whether any exceptions are mentioned in it; whether they are knowledgeable on the Dental Ethical Code, whether they regard the professional liability of DSs - obligation of means or results; whether they keep all documentation on file after the conclusion of treatment and how long they use to do that; and whether they have ever been involved in lawsuits from patients.

Results

Regarding the requirement of initial documentation, all professionals have acknowledged its importance, as 100% declared requesting it prior to starting orthodontic treatment.

As for the question "How do you consider the civil liability of dental surgeons, specifically with regard to orthodontic treatment?", the responses revealed that 44.6% professionals considered Orthodontics as a specialty with obligation of means, whereas 30.3% considered it as obligation of results. The remaining 25.1% have not responded.

In the present work, 76.7% have responded not knowing the term "Pre-constituted evidence".

When asked about the knowledge of Dental Ethics Code, 73.2% answered positively and 26.8%, negatively. Correlating these results with the time of professional experience of orthodontist, the Chi-square test evidenced that the Dental Ethics Code knowledge is independent of professional practice time (p = 0.336) (Table 1).

Table 1. Frequency distribution of orthodontists that has the Dental Ethics Code knowledge, stratified by the experience time as a specialist.

		Experience time as specialist in orthodontics			Total
		< 5 years	5 - 15 years	> 15 years	
Has knowledge of Dental Ethics Code contents.	No	7 (38.9%)	7 (22.6%)	1 (14.3%)	15 (26.8%)
	Yes	11 (61.1%)	24 (77.4%)	6 (85.7%)	41 (73.2%)
Total		18 (100%)	31 (100%)	7(100%)	56 (100%)

P = 0.336.

Professionals were asked about using contracts and the results showed that 83.9% of professionals use a model or form of written contract. When asked whether they included exceptions in the body of the contract, 57.1% responded affirmatively, and among them, 66% declared they are not aware of the validity of the exceptions.

Correlating the time of specialized training and the use of contract relevant to orthodontic treatment, although the range of professionals with training time of "5-15 years" submit response rate negative a little bigger than the other groups, has not been higher enough so that the Chi-Square test indicated that there is a correlation between this factor and the experience time as an orthodontic specialist (Table 2).

Table 2. Frequency distribution of Orthodontists that usually perform a contract relevant to orthodontic treatment, stratified by the experience time as a specialist.

		Experience time as specialist in Orthodontics			Total
		< 5 years	5 - 15 years	> 15 years	
Usually perform a contract in the beginning of the orthodontic treatment.	No	0 (0%)	7 (22.6%)	1 (14.3%)	8 (14.3%)
	Yes	18 (100%)	24 (77.4%)	6 (85.7%)	48 (85.7%)
Total		18 (100%)	31 (100%)	7 (100%)	56 (100%)

They were also asked whether they are aware of the statute of limitations for lawsuits involving dental treatments and 71.4% answered no.

In the present study, 7.14% of interviewed orthodontists had already been involved in lawsuits, and 91% answered in the negative. The remaining interviewees have not responded.

Discussion

"Pre-constituted evidence" is any dental documentation produced by professionals; that is, compiled over the course of clinical practice (CALVIELLI, 1997), and which could represent the evidence presented by professionals to prove the existence of a fact (MACHEN, 1989). In the present work, 76.7% responded not knowing the term; it is not a usual term in the dentistry field, which explains the result. This highlights the need for a course on Ethics and Legislation in graduate dental programs, with the objective of better guiding DSs on the need to keep complete records.

Full orthodontic documentation consists of intra and extraoral photographs, panoramic x-ray and lateral teleradiography, periapical radiographs and study models (MELANI; SILVA, 2006; PARANHOS et al., 2011). All professionals in our sample acknowledged the importance of requiring initial documentation, as 100% declared requesting it prior to starting orthodontic treatment. Conversely, with regard to requesting final documentation, in a recent study performed by one of our research groups (MAIA et al., 2012), 8.9% of the interviewed orthodontists responded that they do not request it and 19.6% informed that they sometimes request documentation at the end of orthodontic treatment. Final documentation is highly relevant in controlling the orthodontic completion and post-treatment, providing more favorable legal support (ETO et al., 2002).

The relationship between professionals and patients is contractual, derived from a contract freely established between the two parts, often tacit – even if nothing is written down, the implicit figure of the contract still exists (HAAG; FERES, 1999). The written contract aims to protect professionals and patients alike. Several jurists affirm that contracts must be expressed in the case of liberal professionals. The best way for professionals to legally protect themselves is by means of full and well-devised records (PARANHOS et al., 2011, 2013). Garbin et al. (2006) observed that most DSs (66%) do not have a formal service contract. Melani and Silva (2006) reported that 53% of patients affirmed having signed some sort of document prior to starting treatment. Paranhos et al. (2011), in a study with Brazilian DSs, cited that most orthodontics specialists (61%) utilize written and signed dental contracts. In the present study, the results showed that 83.9% of professionals use a model or form of written contract.

Dental surgeons should devise a contract in which clauses are pre-set by the professional – named the economically stronger party – and the consumer – known as the weaker party. The clauses imposed should be accepted and not modified. They should be written in clear language that can be understood by the consumer. It should be mentioned that professionals cannot stipulate clauses that benefit only them, as the contract can be deemed partially or totally void (PARANHOS et al., 2013).

In this study, professionals were asked whether they included exceptions in the body of the contract, and 57.1% responded affirmatively, and of those who did include exceptions, 66% declared they are not aware of the validity of the exceptions. The exceptions included in contracts, in the form of abusive clauses, occur when the provider, taking advantage of the lack of prior negotiation, unilaterally pre-establishes contractual dispositions that adversely affect consumer rights (ETO et al., 2002). It should be mentioned that the Consumer Defense Code states that contractual clauses are to be interpreted in the manner most favorable to the consumer.

Considering the question "How do you consider the damage liability of dental surgeons, specifically with regard to orthodontic treatment?" the responses revealed a critical variety of answers. Many regard orthodontics as an obligation of results (30.3%), as it is predominantly linked to aesthetics. However, most of DSs interviewed (44.6%) have considered orthodontics as having obligation of means. Correcting malocclusion represents a treatment with risks, as tooth movements are influenced by several factors, possibly causing undesirable results that should be previously explained and informed to the patient or legal representative, clearly and in detail (ANTUNES et al., 1998).

In relation to the legal issue of professional liability, there are professionals who believe it is a liability with obligation of means and others who regard it as obligation of results. Currently, given the technological and scientific development of dentistry, it is even more difficult to define the obligation of dental surgeons as either of means or results (ANTUNES et al., 1998).

It would be risky to try to identify certain specialties within orthodontics, characterizing which ones have obligation of means and which ones have obligation of results; therefore, each case must be analyzed individually (ETO et al., 2002).

The type of obligation for each specialty should not be generalized, pre-judged or defined, as individualized dental treatment features complexities whose prognosis depends on a large number of factors that should be carefully examined in legal forensic examination, always considering the characteristics of each case, patient peculiarities, patient type and the unpredictability of certain biological conditions (PARANHOS et al., 2012). An alert is due, however, to professionals who guarantee a given result, in whatever field of work, as the promised result must be fulfilled (FERNANDES; CARDOZO, 2004).

With regard to keep on file the documentation, the DEC, Conselho Federal de Odontologia (CFO, 2006) states it is the obligation of dental surgeons to prepare and update patient records, filing them properly. The current Brazilian Civil Code, in article 206, § 3, clause V, states that: "The pretense of civil redress expires in three years". The Consumer Defense Code, Law no. 8078/90 sets the limit as five years after discovery of the fact. It can be inferred that lack of knowledge of civil legislation and the contradictions on the theme contributed to the dispersion of results among the different responses given in this survey. It is important to highlight that most of jurisprudences indicates prescription within 5 years.

In Brazil, the number of suits against physicians and dental surgeons is still relatively low; however, with consumer protection movements and the increasing watchdog role of the media, a larger segment of the population has exercised their right to demand something that was not adequately performed by a professional (FARAH; FERRARO, 2000), or at least something considered adequate.

As for the involvement with any civil liability lawsuit, Paranhos et al. (2011) observed that 92.2% of the consulted sample had not had legal problems with their patients, while 7.8% had. In the present study, with quite similar results, it was discovered that 7.14% of interviewed orthodontists had already been involved in such lawsuits, and 91% answered in the negative. The remaining interviewees have not responded.

The main factor leading to lawsuits against orthodontists is an inadequate professional/patient relationship, particularly involving lack of information, from the diagnosis and its peculiarities up to treatment execution, with insufficient disclosure on the evolution of that treatment (ETO et al., 2002). The professional must present the diagnosis to the patient and/or guardian, in detail and in accessible language, emphasizing treatment options and their limitations, so that there is understanding, choice and acceptance by the patient regarding the proposed treatment (PARANHOS et al., 2013). It is important to emphasize the importance of keeping complete, organized and signed records from each patient, including advice on oral hygiene, broken brackets, cavities and damaged fillings, decalcifications, root resorption, relapse, TMJ problems, as well as patient complaints, cancelations or absences from consultations, assisting in the clinic and instructions (MACHEN, 1989; PARANHOS et al., 2011; WHEELER, 1992).

A good relationship between professional and patient prevents litigation, avoiding civil liability suits against orthodontists, who should have ethical and moral training (ANTUNES et al., 1998) compatible with the principles set in the Dental Ethics Code, implementing protocols for diagnosis and treatment plan, documentation and informed consent, including alternative treatment plans and complications, x-rays exams for periodic control during treatment, as well as follow-up visits for post-treatment control (ROSA, 1997).

Due to the great number of legal cases against the professionals, dentists should consider a professional development, particularly in Deontology in order to increase their knowledge of legal and ethical aspects that govern the exercise of dentistry; otherwise, dentists become vulnerable to litigation (PEREIRA et al., 2011).

Conclusion

Based on the obtained results, this study concluded that all interviewed professionals request initial orthodontic documentation and the majority make use of contracts for orthodontic treatment; and despite adopting some correct practices in the professional/patient relationship and in the documentation used, they still need to acquire a higher level of knowledge on dental professional liability and on the current legislation involving dental surgeons, especially with regard to orthodontists in the exercise of their specialty.

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