

With A Common Voice



Royal College of
Dental Surgeons of Ontario

Ensuring Continued Trust

Ending the Work Relationship Between a Dentist and a Registered Dental Hygienist

All four dental organizations – College of Dental Hygienists of Ontario (CDHO), Ontario Dental Hygienists' Association (ODHA), Ontario Dental Association (ODA) and Royal College of Dental Surgeons of Ontario (RCDSO) – are often asked for advice and direction from dentists and dental hygienists about how to end an existing work relationship and what the dentists' and dental hygienists' obligations are when the relationship ends.

As health care professionals, the overriding principle is always to ensure compliance with regulatory requirements, provincial legislation and safe patient/client care. Within that framework, there are sometimes practical questions that arise when a dental hygienist leaves a working relationship within a dental practice.

Guiding Principles

In making business decisions both dentists and dental hygienists are governed by the following principles:

- 1 Professional obligations take priority.**
The primary professional obligation is to the welfare of the patient/client. In addition, both dentists and dental hygienists must comply with the rules and regulations of their own regulatory College.
- 2 One must comply with the law.**
For example, the *Personal Health Information Protection Act, 2004 (PHIPA)* provides detailed rules about maintaining the privacy and security of patient/client records and of the patient's/client's right to control, within limits, the collection, use and disclosure of personal health information about themselves.

- 3 One must comply with one's contractual obligations.**
Courts require dentists and dental hygienists to comply with valid contractual agreements. Contracts can be verbal, written or in some cases established by the conduct of the parties. The court, however, will not enforce a contractual term if it considers it in violation of another (overriding) law (e.g. *PHIPA*) or in violation of public policy.

Dentists and dental hygienists need to keep these guiding principles in mind when ending their working relationship.

Nature of the Work Relationship

The contractual obligations will vary depending on whether a dental hygienist is an employee of the dentist, or an independent contractor (self-employed). To determine what the relationship is, one needs to review the written documentation outlining the relationship. If there is no written documentation, then one needs to review any oral agreement that has been entered into as well as the nature of the actual relationship.

Whatever the nature of the work relationship, every office should have a privacy policy that describes who has responsibility for ensuring the privacy, security and retention of the records under *PHIPA*.

Generally speaking, the owner of the practice will be the person who owns the assets of the practice including its patient/client records and goodwill. Goodwill includes the list of the patients/clients of the practice. This does not, however, preclude a dental hygienist from owning a dental hygiene practice which is operated in the same location where a dentist owns a dental practice. Again, a

determination of the nature of the work relationship would have to be made, namely, whether the dental hygienist is an employee of the dentist or an independent contractor (self-employed). The nature of the work relationship is of critical importance to determine fundamental rights and obligations and, therefore, should be properly reflected in the contractual relationship between the dentist and dental hygienist.

Legal advice should be sought by the parties if there is no written agreement in place and there is a dispute between the parties as to the nature of the relationship.

Scenario 1 – Change of Contract

A dental hygienist has worked in a dental practice on a full-time basis for several years. There have never been any issues with her employer and all of her performance reviews have been positive. Without notice, the employer demands that the dental hygienist sign a contract changing her status from employed to that of an independent contractor which contract removes the benefits which she had previously while employed. The dental hygienist recognizes that this may cause problems with the tax authorities. The employer is adamant about the change.

Contracts are the subject of negotiation; however, generally speaking, one party to a contract cannot unilaterally and without notice change the terms of that contract. Both parties should obtain legal advice and attempt to resolve this matter in order to maintain the relationship and to avoid unnecessary and expensive litigation which would likely include a claim for damages for wrongful (constructive) dismissal. As with any negotiation, the dental hygienist can make a counter-proposal or pursue negotiating tactics (e.g. mediation, seeking common ground, threatening to sue for wrongful dismissal). In addition, the tax laws have to be complied with by both parties. The dental hygienist can suggest that the lawyers for both parties talk about the tax implications.

Removal of Patient/Clients' Records and Lists

Unless permitted by the contractual relationship, the office privacy policy and *PHIPA*, a departing dental hygienist, who is employed by a dentist, cannot unilaterally remove patient/client records, or patient/client lists. The original records remain with the office.

Similarly copies cannot be removed unless this is permitted by the contractual relationship, the office privacy policy and *PHIPA*. In this situation the removal of copies should be addressed not only in the contractual documents, but also in the privacy policy so that patients/clients consent to the possibility that copies of their records could be made and removed.

Scenario 2 – Patient/Client Lists

A receptionist in a dental office informs the dentist that a dental hygienist, also employed by the dentist, has been taking a list of the office patients/clients for several months. In this instance, the receptionist reports that the dental hygienist also confided that she was going to be establishing her own dental hygiene clinic in the neighbourhood and was using the list to directly advertise to the patients/clients of the dental office regarding opening her office and informing them that they have the right to have copies of their patient/client records transferred to the dental hygienist in her new dental hygiene practice. The office owner has invested in the establishment of a practice, hiring staff and providing infrastructure to build a patient/client base. The dentist understands that patients/clients have the right to choose their practitioner; but also wonders about the duty of employees in such circumstances.

This scenario assumes that the dentist owner is the custodian of the records, including patient/client lists. The dental hygienist has no right to remove the patient/client list. The dentist is correct in believing the patients/clients have a right to choose who their healthcare practitioners will be and, therefore, the dentist has a professional obligation to give patients/clients who requested it the contact information for the departing dental hygienist. If a patient/client list(s) was removed, it should be immediately returned and all copies destroyed. The unlawful removal of patient/client list(s) or anything else belonging to the dental practice could result in both civil litigation and disciplinary action. This is avoided where both the dentist and dental hygienist act professionally and ethically to ensure that the welfare of the patient/client is dealt with as the overriding priority.

Notification of Patients/Clients

Sometimes there are competing interests about the notification of patients/clients of the departure of a dental hygienist. The dental office may wish to preserve the goodwill associated with the office and want as many patients/clients as possible to remain with the office. On the other hand, patients/clients are entitled to continuity of care and have the right to choose who they go to for care. There are also courtesy considerations where a patient/client has developed a rapport with a departing dental hygienist and might be offended by not being notified of a departure.

The following considerations apply in balancing these interests:

- 1** A departing dental hygienist, particularly one who will be continuing in practise elsewhere, must not solicit patients/clients.
- 2** If there are continuity of care concerns (e.g. the office is closing or there will be no one to take over the ongoing care of patients/clients) both the dentist and the dental hygienist have a professional responsibility to ensure that patients/clients receive adequate notification to permit appropriate continuity of care.
- 3** Patients/clients have the right to choose their care providers. Contractual obligations cannot create barriers to patients/clients who wish to continue care with the departing dental hygienist. Therefore, patients/clients should be advised of the departure of a dental hygienist with whom they have developed a professional relationship in a constructive, timely and appropriate manner and, if requested by a patient/client, contact information for the departing dental hygienist should be provided.

There are many effective ways in which these principles can be achieved. To ensure a smooth transition for patients/clients, it would be wise for the dentist and dental hygienist to work out a protocol dealing with notification issues. If agreement cannot be reached, legal advice should be sought. Under no circumstances should the dentist or dental hygienist utilize patients/clients to influence the other party's actions. To do so would be considered unprofessional or unethical.

Scenario 3 – Refusal to Notify Clients

A dental hygienist leaves a dental practice. The practice denies to enquiring patients/clients any information on the whereabouts of the dental hygienist and makes suggestions or implies that a dental hygienist is no longer available to provide ongoing care.

As previously indicated, patients/clients are entitled to be informed, if they ask, of where a departing dental hygienist has gone. If the practice does not have that information, it can direct the patient/client to the CDHO website which contains information on the business address of all dental hygienists. It is unprofessional and unethical for a dentist to refuse to provide information of this type to a patient/client who requests it or to attempt to mislead patients/clients in an effort to make them believe that they do not have the right to obtain ongoing care from the departed dental hygienist.

Scenario 4 – Request for Notification of Patients/Clients

A dental hygienist has been a long-standing employee in a dental practice. In anticipation of leaving that practice to open her own dental hygiene practice, she has recommended that all patients/clients be informed that she is leaving the practice to establish a dental hygiene practice in the community. Traditionally, the dental hygiene care has been provided to patients/clients on a rotational basis by one of the three dental hygienists in the office. When there is a change in the dental hygiene staff, there has not been a practice of proactively informing patients/clients. Instead, the new dental hygienist would be introduced to patients/clients in an efficient manner and, in the limited circumstances where a patient/client asks about a former employee, that information has been provided to the patient/client.

There is no absolute duty to notify patients/clients of the departure of a staff person or to provide detailed reasons that might invade the privacy of the departing staff person. What is appropriate depends on the circumstances including the reasonable expectations of the patients/clients of the practice. In the case of the dental hygienist leaving to set up her own dental hygiene practice, the dental office does not have to agree to become an advertising vehicle for her. On the other hand, the dental office should not refuse to provide any information at all. At a minimum, the dental office would provide information that the dental hygienist had decided to leave the practice and contact information for the dental hygienist if requested by a patient/client.

Transfer of Patient/Client Records

As noted already, the original records remain with the owner of the practice. *PHIPA* provides specific guidance for transferring all original records when an office ceases operations.

Issues sometimes arise, however, about the transfer of a copy of a specific patient/client record to a subsequent treating practitioner, whether that be a departing dental hygienist or another dentist previously associated with the practice. The general principles are as follows:

- 1** With rare exceptions, the original record stays with the owner.
- 2** Patient/client consent is generally required for such a transfer. An exception exists where the transfer is needed for ongoing treatment of the patient/client and consent is impractical (i.e. the “circle of care” concept).

- 3 With rare exceptions (e.g. threats of serious physical harm) the wishes of the patient/client about transferring a copy of the record are to be honoured.
- 4 The transferring office can ask for reasonable documentary confirmation of the patient's/client's wishes. However, the transferring office should not impose artificial documentary requirements that create a barrier to such a transfer (e.g. requiring a special form to be used) where the wishes of the patient/client are not in doubt.
- 5 The transferring office can charge a reasonable fee for this service. However, such fees should not be used to create barriers to ongoing care and as with any fees, must be reasonable.

Scenario 5 – Make a Choice

A patient/client requests that a copy of his dental chart be sent to an independent dental hygiene practice. The dental hygienist previously practised in that dentist's office. The office indicates that they will no longer see the patient/client for restorative work if the patient/client decides to have his preventive services performed elsewhere.

The patient/client has the choice of providers. The patient/client also has the right to have a copy of his/her file transferred. It is unethical and unprofessional for a dental office to attempt to coerce patients/clients to remain in the dental office for all services. Neither a dentist nor a dental hygienist is entitled to terminate services for a patient/client because she or he is not happy with the patient/client's choice of (other) healthcare providers.

Ongoing Access to the Record by the Dental Hygienist

Dentists have a duty to ensure that dental hygienists have access to patient/client records where the dental hygienist needs access to meet a professional obligation. That obligation cannot be defeated by a dental hygienist agreeing to the dental office retaining records upon the dental hygienist's departure from the office. The dental office should provide reasonable access to the records to a dental hygienist who requires it in order to fulfill his or her professional obligations. Often such disclosure can be made on the basis of implied patient/client consent or without consent because some overriding legislative provision applies. However, if one is in doubt about the issue or the patient/client asks that the information not be disclosed, the dentist or dental hygienist should seek legal advice. Some examples of such a professional obligation include where the dental hygienist has to do one or more of the following:

- 1 respond to a complaint;
- 2 prepare for a quality assurance assessment;
- 3 prepare a medico-legal report of his or her care at the request of a patient/client; or
- 4 prepare to defend himself or herself from a civil claim.

If the dentist has a legitimate concern about whether there is sufficient consent from the patient/client to release the record, the dentist should contact the RCDSO or the dentist's lawyer.

Scenario 6 – Complaint After Departure

After a dental hygienist leaves, a patient/client sends a complaint to both the RCDSO and the CDHO about the TMJ pain suffered by the patient/client. The dental hygienist asks for a copy of the chart in order to respond to the complaint. The dental office is reluctant to do so for fear of a further complaint about breaching the patient's/client's confidentiality.

Ideally the dental office's privacy policy already permits this disclosure to the dental hygienist to be made. The information cannot be considered to be confidential from the dental hygienist to the extent it was information that the dental hygienist had access to prior to her departure from the office. Furthermore, the *Personal Health Information Protection Act, 2004* permits the disclosure for the purpose of legal proceedings. In the alternative, the dental office can provide the chart to the CDHO (another explicit exception under *PHIPA*) so that the CDHO can assist the dental hygienist in responding to the complaint.



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