Seeing before doing

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A colleague wrote:

> It has become routine in many orthodontic offices for a child who has come in for a new patient examination to have a panoramic x-ray taken before the doctor examines him or her. Now that cone-beam computed tomography (CBCT) imaging is coming into wider use, I'm aware of doctors whose standard protocol is for the child to be placed in the CBCT unit, and then the images are acquired and downloaded, all before the doctor examines the patient. This is all apparently in the interest of facilitating the "1-step consultation" that is encouraged by so many practice management experts.
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> It has been my understanding, correctly or incorrectly, that doctors are required to examine a patient before they order any tests, radiographs, and so on to have some justification for ordering them. I know that in medical offices it is quite common for patients to have a nurse obtain their weight and vital signs before the physician examines them. However, these are all noninvasive procedures that do not involve exposing the patient to ionizing radiation. How, for example, does one justify taking a CBCT image, or even a panoramic radiograph, of a Class I patient with minor crowding before examining him or her and determining the clinical need for such imaging? What if, after the initial screening examination, the patient or parent thinks that correcting the minor crowding is not warranted because of the time, expense, or whatever, and decides not to undergo further diagnostic analysis or treatment? Is this problem merely one of ethical conduct, or is there a serious legal issue at the heart of this matter: eg, with the state dental practice act?
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> Speaking as a parent, I would be troubled (and ask a lot of questions) if I had taken my child to see a specialist whom I have never met before, and, before the doctor has either met us or examined my child, an assistant whisks my child off to obtain x-rays, the need for which has not yet been established. To compound the dilemma further, these doctors insist that there is no problem with this, because they don't charge for records. -A.S.

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I've had this question thrown at me more than once, and for the longest time I thought I knew the answer; it turns out that I didn't. Let's tackle the easy part of the question first: that there is no problem because there is no fee for the records. Having said this 1000 times, I'll go for 1001: money has nothing to do with treatment. By that I mean that you are doing whatever procedure it is because the patient's condition warrants that treatment. It is irrelevant whether you receive a fee for your ministrations. Suppose it was a family member whom you were not charging. You would still have to conform to whatever the standard of care was. It was either correct or incorrect to do whatever, regardless of whether a fee was attached. Now, let's go back to the rest of the question.

I searched the state statutes of 4 of the most populous states, thinking that they would have addressed this issue in some fashion. I looked at the rules and regulations of their state boards of dentistry: nothing there. I looked at statutes dealing with health care providers and at the rules of their boards of health: ditto. I called legal colleagues in these states but to no avail. The bottom line is that I could not find any law that deals with this issue. So, I guess from a legal standpoint, there is no statute, rule, or regulation that requires a doctor to first examine a patient before ordering an x-ray.

However, let's assume there was. The easy way for the doctor to get around this is to issue a "standing order." That order, in essence, says that it is the procedure in the doctor's office that all new patients get an XYZ x-ray, a scan, or whatever, so that when the doctor meets the parent, the doctor will know the facts and be able to provide a more comprehensive opinion. Does that mean that if a doctor uses standing orders he would be off the hook from a legal perspective? Of course not.

There are 3 distinctly different legal arenas in which health care practitioners conduct their practices: administrative, civil, and criminal. Examples of administrative issues might be breaches of administrative rules and regulations of your state's dental practice act, other statutory authority that deals with the practice of dentistry, or acts of unprofessional conduct. If such was the case, the most likely consequences are a fine or some type of action against your license. Examples of civil actions are, of course, claims of malpractice,

nonprofessional negligence (eg, slip and fall), and other tortious conduct. The usual and customary sanctions resulting from such claims are monetary awards and are for the most part covered by insurance. Examples of criminal charges might be insurance fraud or sexual abuse, and these consequences could be drastic.

Since our colleague's initial question and concern do not deal with criminal activity, and I'm assuming from my research that it doesn't deal with any administrative concerns, that leaves us with only civil causes of action, if indeed there are any. Since a plaintiff must prove that there was a duty to conform to a certain standard of care, the doctor breached that duty, and as a direct cause of that breach of duty the plaintiff suffered a compensable injury, the gravamen of this issue would seem to concern proving that the scan, x-ray, or CBCT actually caused an injury. It can't be that maybe, at some point in the future, the patient will suffer an injury as a result of the act. The injury must be real and in the present. In short, I think we must look elsewhere.

The only other place to look, as suggested by our colleague, is to consider the ethics regarding the routine taking of preexamination "potentially invasive" images. Since ethics violations can result in the finding of unprofessional conduct and since acts of unprofessional conduct can lead to administrative sanctions against one's license, we should take this seriously. Looking at the American Dental Association (ADA) Code of Ethics, in Section 1 dealing with Patient Autonomy, we see the following: "The dentist has a duty to respect the patient's rights to self-determination and confidentiality." By way of clarification, it is noted: "This principle expresses the concept that professionals have a duty to treat the patient according to the patient's desires, within the bounds of accepted treatment, and to protect the patient's confidentiality. Under this principle, the dentist's primary obligations include involving patients in treatment decisions in a meaningful way, with due consideration being given to the patient's needs, desires and abilities, and safeguarding the patient's privacy."

One could argue that not all patients would accede to a preexamination image involving ionizing radiation unless the doctor first determines the need for such imaging. At a minimum, the patient was not involved in this "treatment" decision, as innocuous as some might argue it is. Section 1A dealing with Patient Involvement notes that "The dentist should inform the patient of the proposed treatment, and any reasonable alternatives, in a manner that allows the patient to become involved in treatment decisions." Again, one could easily take the position that the patient, in this case the patient's parent, was not informed or involved concerning the preexamination radiographic treatment decision.

The "standing order" argument is still a good defense, but it only rises to that level if the patient is informed of the standing order beforehand. Thus, when a new patient is given an initial screening appointment, the parent should be told that it is office policy for all potential new patients to have a "whatever image" taken before the doctor sees the patients and consults with the parents because the doctor believes that patients cannot be fully informed of their status without doing so, or some other language to that effect. This allows them to bring a recent image that was acquired elsewhere or to know that this will happen upon their arrival.

If we look at Section 2 of the ADA Code dealing with nonmaleficence, we see that "The dentist has a duty to refrain from harming the patient." This statement is further fleshed out by noting: "This principle expresses the concept that professionals have a duty to protect the patient from harm. Under this principle, the dentist's primary obligations include keeping knowledge and skills current, knowing one's own limitations and when to refer to a specialist or other professional, and knowing when and under what circumstances delegation of patient care to auxiliaries is appropriate."

It is still arguable as to what degree of harm results from any type of radiographic image, and certainly an argument can be made that on a risk-benefit ratio, the benefits far outweigh the risks. The other factor concerning this section of the Code relates to the delegation of certain procedures to auxiliaries. Some states prohibit certain employees from taking certain radiographic images. If the standing order runs afoul of any such regulation, then administrative sanctions could result even without any injury.

Section 3 of the Code deals with Beneficence, the principle to do good, by stating: "The dentist has a duty to promote the patient's welfare." This is later defined: "This principle expresses the concept that professionals have a duty to act for the benefit of others. Under this principle, the dentist's primary obligation is service to the patient and the public-at-large. The most important aspect of this obligation is the competent and timely delivery of dental care within the bounds of clinical circumstances presented by the patient, with due consideration being given to the needs, desires and values of the patient." The problem is the circuitous language in the last sentence. The clinical presentation may not provide a reason to obtain a radiographic image; however, without a radiographic image, does one really and fully know the entire clinical picture? Also, once again, we are faced with the requirement of conforming our ministrations to the needs, desires, and values of a patient who may unknowingly be submitting to possibly unnecessary radiation.