

Avoiding perverse incentives

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A general dental practitioner was approached by a friend and colleague, a maxillo-facial surgeon, who had recently taken up rooms near her practice. He offered incentives to her for any surgical referrals she could provide. Furthermore, he said that since he was participating in a pharmaceutical research clinical trial, he could increase the incentive if she referred patients who were eligible for inclusion in the trial... should the specialist's offer raise ethical concerns?

Dentistry is first a profession, but the practice of dentistry usually involves financial compensation for professional services. Such compensation necessitates, by its very nature, some form of business structure to accommodate these transactions. Conflict of interests, whether actual or perceived, are common since dentists are in a position to gain financially from their professional recommendations. The patient is the beneficiary of the dentist's services. If the dentist is being compensated for professional services, then the dentist is also technically a "beneficiary" of his or her recommendations. Professional decision-making involves many factors, but financial gain to the dentist should not be a consideration in any of the dentist's professional recommendations. Professionalism is the quality of conduct and character that accompanies the use of superior knowledge, skill, and judgment, to the benefit of another, prior to any consideration of self-interest.

Integrity is generally defined as the adherence to moral and ethical principles; soundness of moral character and honesty. The Health Professions Council of South Africa (HPCSA) requires that health care practitioners should at all times act in the best interests of their patients and regard the clinical needs of their patients as paramount. Practitioners should therefore always try to avoid potential conflicts of interest and maintain professional autonomy, independence and a commitment to the relevant professional and ethical rules and policies applicable. Any conflicts of interest, incentives or forms of inducement that threaten such autonomy, independence or commitment to the professional and ethical rules or that do not prioritise the best interests of the clinical needs of patients, are unacceptable.¹ Professional integrity could easily be ruined by involvement in arrangements where financial or other kinds of inducement are offered or accepted with the aim of influencing your professional behaviour, or that of others. Such arrangements often involve financial and other inducements being paid in return for the referral of patients, or for expressing/promoting certain views.² Professional judgement should not be compromised or influenced by the subject on which a decision is about to be made.

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HPCSA guidelines regarding over servicing, perverse incentives and related matters are applicable to health care practitioners in both the public and private sectors: "It is an offence either to offer a perverse incentive or to accept one. The HPCSA may take in terms of other legislation that governs the health professions, at its own discretion and where it believes such action is warranted, lay a charge against any person, or corporate body or other legal entity in terms of the Corruption Act (Act No. 94 of 1992), should the actions or omissions of such person, body or other legal entity be in breach of the provisions of that Act".¹

"Improper financial gain or other valuable consideration" is defined by the HPCSA as... "money, or any other form of compensation, payment, reward or benefit which is not legally due or which is given on the understanding, whether express, implied or tacit, that the recipient will engage or refrain from engaging in certain behaviour in a manner which is either: (i) Illegal; and/or (ii) Contrary to ethical or professional rules; and/or (iii) Which, in the opinion of the HPCSA, may adversely affect the interests of a patient or group of patients, in order to procure some direct or indirect advantage, benefit, reward or payment for the person offering or giving the said money, compensation, payment, reward or benefit."

Perverse Incentive has the same meaning.¹

Dental practitioners may be tempted to engage in various acts or omissions that are not permissible nor ethical, including inappropriate referrals, over-servicing, using rental contracts as perverse incentives, paying or receiving commissions and inappropriate charging or receiving of fees.

Dentists are obliged to refer patients, when appropriate, during the course of clinical care to ensure the patient is provided with the best care. Patients are entitled to the dentist's best professional judgement when treatment is recommended, including appropriate referrals to specialists who have the requisite skills, knowledge and experience. Practitioners shall not accept commission or any financial gain from any person in return for recommending or referring patients. Practitioners should avoid any solicitation or business practice that undermines this principle. Being offered incentives might encourage an inappropriate decision in referring that may not be in the patient's best interest. Furthermore, dentists shall not charge a fee or receive any financial gain for referring patients for participation in drug trials or other research trials of a similar nature.¹ Importantly, fees should not be charged nor received for services not personally rendered by either the health care professional himself or herself nor by an unregistered person in his or her employ, except for services rendered by another health care practitioner or person registered in terms of the Health Professions Act (Act No. 56 of 1974), that regulates the particular profession with whom the health care practitioner is associated as a partner, shareholder or locum tenens.¹ In the case of self-referrals, the HPCSA states that health care practitioners "may only refer their clients or patients to any health establishment in

which such health care practitioner or a close family member or business associate has a financial interest or a potential conflict of interest if such interest has been declared to and approved by the HPCSA and on condition that such interest is discussed and agreement reached with the patient prior to the referral for the patient's consent".¹

In dentistry, there are many services that are provided on a regular basis that can be viewed as over-servicing. Over-servicing includes the provision of unnecessary, inappropriate, excessive or fraudulent treatment or referrals. The HPCSA defines it as "the supply, provision, administration, use or prescription of any treatment or care (including diagnostic and other testing, medicines and medical devices) which is medically and clinically not indicated, unnecessary or inappropriate under the circumstances or which is not in accordance with the recognised treatment protocols and procedures, without due regard to both the financial and health interests of the patient".¹ With regard to over-servicing, health care practitioners shall not: (i) Provide a service or perform or direct certain procedures to be performed on a patient that are neither indicated nor scientific or have been shown to be ineffective, harmful or inappropriate through evidence-based review and (ii) Refer a patient to another health care practitioner for a service or a procedure that is neither indicated nor scientific or has been shown to be ineffective, harmful or inappropriate through evidence-based review.¹

Hartshorne and Hasegawa³ suggested that the following questions should be asked prior to treatment planning: Is the chosen treatment necessary? Is the treatment based on good evidence? Will the treatment benefit the patient? If the treatment is omitted, will it cause the patient harm? Am I treating the patient or my pocket? Has the patient given informed consent?

In line with the obligations described above, South Africa has passed various anti-corruption legislation. The main anti-corruption law is the Prevention and Combating of Corrupt Activities Act 2004 ("PACCA").⁴ PACCA creates a general offence of corruption that is extremely broadly defined. It also criminalises certain specified corrupt activities. PACCA applies to both the public and private sector. Generally speaking, a person is guilty of an offence in terms of PACCA if he directly or indirectly accepts or offers to accept a gratification from another person, or gives or agrees to give a gratification to any other person for his benefit, or that of another. The giving or acceptance must be done in order to induce the other party to act in an improper manner, in the performance of that individual's duties. The underlying principle is that guilt will be determined by intention. The test is a subjective one which takes into account all surrounding circumstances, the particular conduct of the parties, and any other relevant information to decide the intention. The fact that the corrupt activity was unsuccessful is not relevant. It is sufficient that there is merely a threatened infringement of an interest. How far the corruption has extended for the parties to reach accord, may have a bearing on the sentence. Furthermore, the fact that the recipient of the gratification does not have the power or right to do what the giver wishes him/her to do, is also irrelevant. If for example, X gives Y a gratification in the belief that Y will give him/her a benefit to which he or she is not entitled, but it transpired that it is not Y who will decide upon the award of the benefit, such a mistake will afford neither X nor Y a defence to a prosecution for corruption. Corruption is a crime of double intent. The recipient of a gratification must not only have the intention of accepting the gratification, but also have the intention of acting in a certain way in return for the gratification.

To avoid rental contracts being misconstrued as perverse incentives, practitioners should avoid (i) "Paying rentals in lease agreements between health care practitioners and health establishments that are not market related or are at preferential rates; (ii) Enter into lease agreements with health establishments or services that wish to rent their consulting rooms at rates conditional on the health care practitioner achieving a certain turnover or targets such as admission of a specific number of patients at a private health care facility and (iii) Renting consulting rooms from health establishments or services under financial arrangements that are not openly available to other similarly qualified health care practitioners".¹

While PACCA is the primary anti-corruption legislation in South Africa, there are a number of other pieces of legislation dealing with corruption and crimes of dishonesty. These include the Financial Intelligence Centre Act (FICA), the Prevention of Organised Crime Act (POCA), the Public Finance Management Act (PFMA), the Municipal Finance and Management Act (MFMA), the Protected Disclosures Act (PDA), and the Companies Act. There is significant South African Legislation relevant to combating corruption and includes: The Prevention and Combating of Corrupt Activities Act, the Promotion of Access to Information Act, the Promotion of Administrative Justice Act, the Prevention of Organised Crime Act, the Financial Intelligence Centre Act, the Protected Disclosures Act, the International Cooperation in Criminal matters Act, the Criminal Procedure Act, the Public Finance Management Act, the Municipal Finance Management Act, the New Companies Act and the Protection of State Information Bill.

CONCLUDING REMARKS

Professionalism encompasses the conduct, aims, and qualities that characterize a professional or a profession. It relates to the behaviour expected from the professional and embodies positive habits of conduct, judgment, and perception on the part of both individual professionals and professional organizations and gives priority to the well-being and self-determination of the patients they serve. Professional integrity is a measure of the degree to which professional reputation and credibility remain intact. Anything which has the potential to reduce a professional person's reputation undermines professional standing. Professional integrity can be impugned not only because of a proven misdemeanour, but also by inappropriate acts or omissions. Professionalism does not rely on the guidelines, standards, policies and rules of professional bodies alone, but is intimately linked with self-regulation, where individual dentists develop and internalize their own guiding principles and values. True self-regulation occurs at a personal level where dentists take responsibility for their own performance and the performance of their colleagues.⁴

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