

NATURE AND CONSTRAINTS OF GUIDELINES AND OTHER INSTRUMENTS OF “SOFT LAW”

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Our members often ask for information on the legal scope and constraints of guidelines and other similar documents adopted by the Ordre des dentistes du Québec. Here we attempt explain the nature of what is sometimes called “soft law,” as opposed to the legislation and regulations themselves, as well as the connection between soft law and professional standards.

THE ORDRE DES DENTISTES DU QUÉBEC adopts policies, guidelines and other statements of principle¹ on a regular basis. During the 2013-2014 financial year, the Board of Directors gave the Examination and Accreditation Committee a mandate to review practice guides, standards, guidelines and scientific studies published by the Order.

As we will see in this article, while protocols, guides and statements of professional conduct essentially promote certain behaviours, they are not necessarily obligatory in and of themselves.² However, not only does the Order take these tools into consideration in terms of members’ conduct, but the Disciplinary Council and the courts also consider them in their deliberations on matters of professional conduct or professional treatment.

“PROFESSIONAL STANDARDS”

“A dentist shall practise his profession in accordance with scientific standards generally recognized in dentistry.”³

To define the concept of “scientific standards generally recognized in dentistry,” it is useful to look at a ruling by the Tribunal des professions on a related concept, “data from current medical science”:

(Translation) This is not discretionary; these data exist independently of any disciplinary committee and are recorded in medical journals, in doctrine and in university teaching. Similarly, it is not the Committee that states current scientific data. It confines itself to considering the evidence based on what is revealed.

[...]

As we said earlier, data from current medical science are based on evidence of the doctrine on the subject, university teaching and the testimony of medical experts who give their opinions on the matter. If a consensus arises from all this evidence, we must say that on this subject, the object of the evidence, the syndic has discharged his burden of proof. We further stated that the burden is that of preponderance.⁴

When it comes to a disciplinary complaint regarding the behaviour of a member or the quality of or need for dental treatments, the plaintiff (normally the Syndic of the Order) must in fact prove that the standard was not applied by the dentist and demonstrate the discrepancy between the behaviour for which the dentist is being criticized and that standard at the time when the procedure in question was performed.

Such evidence is provided with the assistance of expertise from one or more persons, and this is where soft law sometimes applies. It may be because the expert confirms the recommended practice based on a document adopted by the Order or by another authority, establishing that it does in fact correspond to “scientific standards generally recognized” in a given field at a given time. It may also be because, on the contrary, the expert opinion (or the opinion of the member who is the subject of the complaint) contradicts such a “normative” existing document: in that case, the opinion will not be endorsed by the Disciplinary Council or the courts and may even be used to cast doubt on the expert’s qualifications.

1. These documents are designated according to the Order’s objectives, but left to the discretion of the authors as well. The Publications / Policies, Guidelines and Position Statements section of the ODQ website includes documents organized under the headings of statements of principle or position statements, declarations and reminders, guidelines and practical guides, information documents, protocols and policies.

2. For an in-depth study of the legal status of these documents in Quebec and the rest of Canada, see Campbell, A. and Glass, K., *The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research*, (2001) 46 McGill L.J. 473.

3. Section 3.01.03, Code of Ethics of Dentists.

4. *Médecins c. Windisch-Laroche*, AZ-91041099.

In a decision rendered by the Disciplinary Council of the Order, the members came to the following conclusion as to the guilt of the respondent on the charge of failing to observe the rules of asepsis:

(Translation) *On the other hand, the respondent defended and attempted to justify to the committee her habit of not wearing gloves while working in a patient's mouth. She based her argument on her vast experience, which enabled her to decide when it was necessary to wear gloves. She did not produce any authority to justify her way of doing things, which runs counter to what is generally accepted in medical circles, according to the expert witness.*

Yet since 1987 the Center for Disease Control has recommended that precautionary measures for the handling of blood and bodily fluids be applied to all patients, hence the term "universal precautions." Such measures are intended to prevent the exposure of mucous membranes or skin that is not intact to infectious agents in the blood or bodily fluids.

The committee consulted a brochure on this subject put together by the Fédération des infirmières et infirmiers du Québec entitled "Piquer sang danger." Universal precautions recommend not only the wearing of gloves but also the wearing of masks, as well as various measures to be taken when handling needles. These measures have proven to be necessary since the appearance of the AIDS virus and the broad proliferation of the Hepatitis B virus.⁵

In another decision rendered by the Superior Court of Quebec, the judge referred to the *Guidelines for Implant-Supported Rehabilitation* produced by the Order in May 2000 to spell out the dentist's obligations:

(Translation) [67] *Under the Code of Ethics of the Ordre des dentistes, the professional is obliged to set out for the patient "in a simple, and easily understandable objective manner... the nature and scope of the problem which, in his opinion, arises from the patient's condition." In addition, "Before undertaking any treatment, a dentist must inform his patient... of the extent and terms and conditions and the cost involved, and obtain his agreement thereto" [15];*

[68] *The Guidelines stipulate the scope of these obligations:*

"The patient must be informed (and this in terms he understands) of the nature of the problem; diagnosis; treatment contemplated and all the steps related to realizing the same; procedures to be followed;" the professionals involved (if a multidisciplinary approach is contemplated) "possible (elective treatment) and probable consequences, both favorable and unfavorable; operative risks (both real and those perceived by the patient); prognosis and specific determining factors; alternative treatment plans including their cost and prognosis; the time-frame for completing treatment; and, the costs associated with the same. The follow-up phase (periodic visits, replacement of implants, repairing prostheses, etc.), as well as, related costs, should also be discussed. Proper record keeping and annotations in a patient's record are of primary importance.

The information that a patient requires to consent to treatment in a free and clear fashion is dependent on the patient's individual needs and the treatment to be rendered." [16];

[69] *There is no question of requiring the practitioner to reveal and indicate to the patient at all times risks that have a minimal probability of occurring, as in the case of painful and permanent dysesthesia or paresthesia;*

[70] *However, it would not be appropriate either to confirm a practice that would require a professional to be able to discharge this essential obligation by delegating its execution to a dental hygienist, thereby avoiding having to spend a long time in discussions with the patient rather than devoting him or herself to performing surgical interventions. Efficiency and profitability are certainly legitimate objectives, but not at any price.⁶*

For some (Translation), "guidelines, directives or minimal standards issued by various professional orders may, in many cases, be considered generally recognized standards in a profession," even without the intervention of an expert.⁷

5. *Dentistes c. Farazli*, [1999] DDOP 113.

6. *Meloche c. Bernier*, 2005 CanLII 6452 (QC CS). Note that this was a civil liability case, not a disciplinary complaint. New guidelines for implant-supported rehabilitation prepared by the Examination and Accreditation Committee will be adopted by the Order's Board of Directors in the next few months and will be circulated to members.

7. Cournoyer, G., Cournoyer, N. La faute déontologique: sa formulation, ses fondements et sa preuve. *Développements récents en déontologie, droit professionnel et disciplinaire*, Barreau du Québec, vol. 271, 2007. The authors add, farther on: (Translation) "We can certainly imagine situations in which evidence of a minimal standard or guideline will be insufficient to establish the generally recognized standard in a profession. For example, it could be necessary to present an expert to show that the established standard should have been respected in the case at hand. / However, these minimal standards, set forth in a recognized, available document that is distributed to the whole profession, are likely to be very useful in establishing the generally recognized principle in all cases where the application of an objective standard is not derived from professional judgment."

Some have asked why these instruments are not systematically adopted in the more rigid form of regulations. By studying the origin and features of soft law, we come to understand the usefulness of this approach in the scientific and professional context, but also the limitations inherent in its legal scope.

PREPARATION, ADOPTION AND APPLICATION OF CODES OF CONDUCT AND OTHER SIMILAR TOOLS

Science is in a constant, rapid state of evolution, with professional standards keeping pace. It is difficult to “freeze” standards for fields that are often complex in the form of a legal instrument that cannot easily be changed; hence the usefulness of the practical guides, protocols and other tools mentioned above.

Instruments of soft law usually follow practice rather than change it. In a climate of professional self-regulation as it exists in Quebec, “good practices” are frequently determined by the scientific community and by practitioners themselves, once a consensus has been reached. The Order, assisted by general dentists and specialists (whether from dentistry or another field), draws up and adopts documents that set these practices down in writing; it will then use these instruments in various ways as part of its mission to protect the public, including improving practice and thus ensuring follow-up by members.

The objective of certain documents, such as *Temporomandibular Joint Disorders: Some considerations concerning diagnostic methods and treatments*, adopted in November 2012, is to inform members regarding the Order’s position on certain questions, while guiding them through a therapeutic approach that reflects current scientific data.

Other documents, such as the *Continuing Dental Education Policy* that was adopted in 2009 and updated in 2014, delineate the reference framework that provides support and direction for members’ general ethical obligation to “keep [their] theoretical and clinical knowledge up-to-date in accordance with the evolution of the art and science of dentistry” (section 2.04 of the *Code of Ethics of Dentists*). The required number of units corresponds to what experts deem necessary to fulfill that obligation in the current context of rapidly evolving science and technology.

Lastly, some codes of conduct or directives require that in certain specific fields, dentists must take courses with defined content. While they do not oblige the dentist to submit certifications of appropriate technical and theoretical training to the Order, as a regulation could require, failure to respect these recommendations could be discussed with the member during a professional inspection or an investigation by the Syndic’s office. The Disciplinary Council could also take this failure into account in determining an appropriate sanction.

CONCLUSION

When instruments of soft law are built into a law or regulation or ratified by legal decisions, the recommended rules or good practices become real and obligatory “professional standards.”

However, before being enshrined in this way, instruments of soft law should be seen as concrete tools that improve quality of care and also constitute an “ethical reference” that could be considered by the Order and by the courts and tribunals themselves⁸ – hence the importance of complying with them. ●

8. *Clairmont c. Médecins-vétérinaires*, 1999 QCTP 1, in which the Tribunal des professions refers to the guide to minimum standards adopted by the Order of Veterinarians as possibly constituting an “ethical reference.”