

An Overview of Law Issues for the Hearing Healthcare Professional

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Our primary focus as hearing healthcare professionals involves the positive impact we aspire to create in our patients' lives through the provision of quality hearing healthcare. We balance the needs of our patients with our need to conduct business in an ethical and legal manner. Maintaining that balance requires hearing instrument specialists to recognize and understand certain basic concepts of law and ethics, and the implications they often have in the daily operations of our everyday business activities.

Ethics constitutes the most essential nature of leadership and involves one's personal value system that underscores every decision one makes. Ethics are often personified and personalized by an organization. These ethics are often based upon a system of codes or morals as well as standards of practice (including licensure and certification), and codes of conduct. Furthermore, general ethics are also founded in public policy. Ethics and the law are routinely highly intertwined and integrated. However, they in actuality are very different in their focus. While ethics involves how one acts based upon their personal value and belief systems, the law is the body of rules and principles created by a recognized authority that describes expected conduct and have binding legal force—including the enforcement of legal consequences and/or sanctions for violations of those rules and principles.

Actions that are ethical are also always legal since their appropriate actions do not violate any principles of law. Illegal acts are always unethical since one performing a known illegal act would not be operating under a value system that

would be supported through adherence to a system of codes or standards of practices permitting such an illegal act. Organizations risk sanctions by allowing the performance of illegal acts under their auspices. Those illegal acts would therefore violate the recognized ethic of following established codes or standards of practice and therefore become unethical as well. However, being unethical does not necessarily mean one is being illegal if the act itself is not covered or addressed by recognized body of laws. Therefore, the Theorem of Ethics is as follows:

Ethical always equals legal; illegal is always unethical; but unethical does not always equal illegal.

Torts are "twisted" or private civil wrongs that involve a breach of a legally recognized duty. That duty involves an infraction of a public or private obligation or direct invasion of an individual legal right resulting in ascertainable damage. The four elements of torts that must be met for a tort claim to be successful involve the presence of a duty or obligation, a breach of that duty, proof of a causation, nexus or direct connection between the duty and breach and damages that are quantifiable. Torts are classified into three categories: 1) intentional—ones that are declared by law as wrong and whose performance by the person is willful, deliberate or intentional; 2) strict liability—those where no proof of fault or guilt is required and whose acts often endanger the public welfare; and 3) negligence—the breach of a legal duty owed to another with a causal connection between the breach and injury with requested damages. Negligence often involves actions that are careless and/or

outside one's accepted scope of practice. Negligence is the category of torts that is most potentially applicable and is of most concern for healthcare practitioners.

Principles relating to the law of contracts have an enormous effect on hearing instrument dispensers. A contract is a legally enforceable agreement between two or more competent parties (either written or oral) creating an obligation to do, or not do a particular thing. All contract parties have a legal duty to the other and have a legal right to seek a remedy for breach of those duties. The four elements necessary for a valid contract include mutual assent, consideration, capacity and legality. Mutual assent involves a "meeting of the minds" resulting in the intent to do something. Intent is conveyed by a party through their offer to perform or not perform an act resulting in an acceptance of that action by the other party(s). Consideration is "bargained for legal detriment" involving an act of promise to do or not do something in return for a reciprocal act (e.g. remuneration for providing services, etc.). Capacity involves the mental ability or legal qualification to make a rational decision and includes issues of competency involving age, power, representation or fitness. Legality is the conformance to or requirements of an act not forbidden by law. One must show appropriateness or sufficiency to be recognized by law. A valid contract requires satisfaction of all four of these elements. In satisfying these elements all properly constructed contracts, including those used in the practice of hearing instrument dispensing, must address the following questions: 1) Who are the contracting parties? 2) What is the subject matter being addressed? 3) Where is the transaction occurring? 4) When is it occurring? 5) Why is it occurring? 6) How much (money, quantity, etc.) is involved in the transaction? 7) An explanation of any applicable warranties and representations.

Contracts and other legally recognized vehicles are prone to violation through actions involving fraud and abuse. Fraud is a very egregious action requiring the presence of the following five elements: 1) misrepresentation of a fact, position or information by one party to another; 2) scienter (knowledge) of that misrepresentation by the perpetrator; 3) attempt by the party perpetuating the fraud to obtain reliance by the aggrieved party; 4) reliance by the aggrieved party is reasonable; and 5) legitimate claim for damages based upon the perpetuated fraud.

When contracts and other agreements are violated there are remedies that must be available to compensate the aggrieved individual for their loss. The two types of remedies are classified as legal (monetary damages) and equitable (non-monetary). Legal damages are further classified into categories including nominal, punitive, compensatory, consequential or liquidated damages. Equitable remedies may include such actions as injunctions, specific performance and contract reformation.

Hearing healthcare professionals must have an increasing understanding of employment law. Employers must have a firm grasp and understanding in dealing with a variety of issues including but not exclusive of hiring, termination, background checks, pre-employment screenings, interviewing, benefits, employee relations and pertinent

employment laws. While certain federal laws such as those under the Fair Labor Standards Act and Title VII apply to virtually all organizations, small business owners are often under a mistaken belief that federal laws such as the Americans with Disabilities Act and the Family and Medical Leave Act do not apply to them because of their small size. Many states have taken these federal laws and codified them under state law to apply to small organizations through state enforcement. Hearing instrument dispensers are no different than any other occupation regarding the most visible problems in the employment law arena. Those three problems involve issues of negligent hiring, negligent entrustment and sexual harassment. Dispensers must be cognizant of an employee's skill sets and abilities both at the time of hire and post-hire. Employers are responsible both for their own injurious actions as well as their employees' actions in most cases. The employer must ensure their entrustment of an employee in performing job duties is appropriate given their education and experience. Furthermore, they can also be liable for improper and unwarranted advances/harassment accusations (whether sexually based or not) levied against themselves or their subordinates, be it direct harassment (*quid pro quo*) or actions creating a hostile work environment.

These problems as well as others should all be properly addressed through the development and adherence to an organizational employee handbook. A business is never too small to have one. While an employee handbook should be tailored to address the type of business and activities one is engaged in, there are many general areas that should also be addressed that are consistent throughout society. Issues such as sexual harassment/misconduct are important to reference and relevant applicable laws should be described. Other issues that should be addressed include employment status and classifications, record-keeping, grievance procedures, organization description and mission and safety/security. These are just a few of the many issues a good employee handbook should clarify. A well-written employee handbook can often be considered the "organizational bible" when a need arises to defend and absolve potential employment-based claims that could arise against one's business.

Hearing healthcare professionals provide essential patient care services to hearing impaired patients and in general education of our overall society. Our altruism and desire to help others often go without saying. Because we do provide a compensable service, our altruism and desire to do good does not immunize us as "Good Samaritans" in the legal sense. Therefore, we as providers must follow the relevant laws affecting and dictating our profession. This brief synopsis of some of the relevant laws merely serves as a "snapshot" of a much greater body of laws and standards whose compliance is mandated and whose basic understanding we are accountable for, respective of the magnitude of our position. Ignorance of or lack of familiarity of those legal principles is not an excuse or invitation to violate. Our good name and reputation behoove us to adhere to those established standards and to both be a role model and teach those who follow in our footsteps to do the same. *THP*

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Law Issues for the Hearing Healthcare Professional

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1. The Ethics Theorem is as follows:

- ethical does not equal legal; illegal does not equal unethical; but unethical always equals illegal
- ethical never equals illegal; illegal sometimes equals unethical; but rarely results in prosecution
- ethics always equals legal; illegal always equals unethical; but unethical does not always equal illegal
- there is no relationship between ethics and the law
- none of the above

2. What elements must be legally proved to show a tort has occurred?

- breach, exclusivity, confirmation, damages
- damages, suspicion, timeliness, confirmation
- duty, breach, causation, damages
- approachability, breach, confirmation, damages
- causation, duty, timeliness, unconscionability

3. The three categories of torts practitioners must be concerned with include:

- negligence, fraud, abuse
- intentional, negligence, strict liability
- contracts, remedies, criminal
- strict liability, fraud, abuse
- none of the above

4. A contract involves which of the following:

- must be between two or more competent parties
- creates an obligation to do or not do something
- legally enforceable agreement
- all of the above
- none of the above

5. Required contract elements include which of the following:

- legality, ethical, offer, preference
- mutual assent, consideration, capacity, legality
- illegality, unconscionable, acceptance, ethical
- reconsideration, voidability, mutual assent, ethical
- capacity, exclusivity, offer, capricious

6. Contracts tell the following:

- damages, decisions, detrimental behavior, drive, diligence
- legal, equitable, arbitrary, warranty, consistency
- time, theory, trial, torts, triage
- compliance, cost, consistency, credit, capacity
- who, what, where, when, why

7. The types of remedies one may be able to obtain include:

- illegal and jail time
- legal and illegal
- equitable and inequitable
- legal and equitable
- indentured and ethical

8. Elements of fraud that must be shown for proof include:

- misrepresentation
- scienter
- attempt to obtain reliance and that reliance is reasonable
- damages
- all of the above

9. The three most common problems found in employment law are:

- negligent hiring, negligent entrustment, sexual harassment
- sexual harassment, emotional distress, negligence
- negligent hiring, background checks, unions
- negligence, strict liability, invasion of privacy
- none of the above

10. Employee handbooks should have sections addressing:

- relevant employment laws
- harassment and misconduct issues
- employment status
- all of the above
- none of the above

LAW ISSUES FOR THE HEARING HEALTHCARE PROFESSIONAL—MAY/JUNE 2006—DEADLINE: JUNE 2007

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