



# CDA Judicial Council: Blending Idealism and Practicality

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**ABSTRACT** The California Dental Association Judicial Council has the responsibility for interpreting and enforcing the Code of Ethics, for disciplining members and for fostering a climate of education and ethics awareness for CDA members. The Council recognizes the inherent difficulty in rigid enforcement of the Code of Ethics, and chooses to take an approach that educates and encourages members to embrace the highest standards of our profession as outlined in the Code.

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*Conflict of Interest*

*Disclosure: None reported.*

The California Dental Association (CDA) Judicial Council acts on behalf of CDA in the areas of ethics and member discipline. It is one of the many CDA committees and councils that work diligently behind the scenes to carry out the business of CDA. The Judicial Council consists of 11 volunteer members serving three-year terms with members eligible for a maximum of two consecutive terms. If you ask the average CDA member what the Judicial Council does, you would probably find that most would suggest that the Council is responsible for maintaining and updating the Code of Ethics and for reviewing violations of the Code of Ethics to determine if disciplinary action is necessary. While this is essentially true, the Judicial Council also carries out a number of other activities throughout the year that may not be as obvious.

The CDA Judicial Council serves as a support and referral service for our local component ethics committees. Most complaints about possible ethics violations are dealt with at the local component level and generally managed successfully by the component ethics committee. However, there are instances in which issues might not be settled at that level; those cases may then be referred to the Judicial Council. In addition, local ethics committee chairs may be confronted with situations where the necessary action may not be obvious; the Judicial Council may be asked to provide an opinion or to lend advice about how to proceed in handling the given situation. Many of the members of the Judicial Council have had previous experience serving as component ethics chairs, so the working relationship between the local component and the Council is comfortable and efficient.

If we look at the CDA Bylaws, some additional perspective can be gained about the role and function of the Judicial Council. The role of the Council is stated as follows:

- To consider proposals for amending the CDA Code of Ethics and related matters.
- To provide advisory opinions regarding the interpretation of the ADA Principles of Ethics and the CDA Code of Ethics.
- To consider appeals from members.
- To exercise the power of this Association to discipline members, either upon its own initiative or upon the request of any component society. Decisions of the Council shall be final unless a right of appeal is provided in the Constitution and Bylaws of the American Dental Association.
- To act on the recommendations of the Membership Application Review Subcommittee.

Essentially, the Judicial Council deals with complaints that are referred from individual component ethics committees and acts as a final arbiter in determining whether or not ethics violations are serious enough to warrant terminating a dentist as a member of the California Dental Association. The Judicial Council understands the need to help define the professional standards of ethical behavior. It plays an important role in disciplining those members who choose to violate our ethical standards. However, anyone who has served on a component ethics committee or on the Judicial Council soon understands how difficult it is to force people to be ethical. We also have to understand that our sense of what constitutes ethical or unethical behavior also changes with time and with the values of our society as a whole. Challenges that faced us 30 years ago may no longer be relevant.

Many of the issues that we deal with currently were not even anticipated five years ago. As an example, the issue of what constitutes ethical advertising has changed dramatically in recent years. There was a time when Yellow Page advertisements were discouraged as being inappropriate for the professional. Now it would seem that almost all dentists have accepted the need to be listed in the Yellow Pages. Print media is almost becoming irrelevant with the advent of social media interactions

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and the development of web pages and online advertising services. The questions that are raised today about what types of advertisements are acceptable are totally different from those raised five or 10 years ago.

### Historical Perspectives

If we look back in time, we can see that various events have influenced how the Judicial Council carries out its functions today. I entered the profession of dentistry as a CDA member in 1973, a time when many felt that the Code of Ethics could be used to compel members to act in a manner that was consistent with their image of the profession. "Enforcement" of the Code was expected as a means of ensuring that member dentists followed the letter and intent of the Code. Strict

adherence to guidelines regarding the type of advertisement allowed in the Yellow Pages, the size of lettering on an office door and the type of information that could be included on a business card was common. I can remember setting up a practice a number of years ago and asking my local component exactly what types of things I could and could not do, with the understanding that I needed to conform to the guidelines established in the Code if I wanted to be accepted by my colleagues. That type of attitude, common 30 years ago, has been replaced with new graduates asking how they can most effectively market themselves either in the printed or electronic media to ensure that they can compete for their share of the consumer dollar. The desire for new graduates to conform with their peers and be accepted as colleagues has largely been replaced by a need for new graduates to find a competitive edge to compete with their peers for their share of the patient pool.

Certainly the economic realities of private practice today have influenced this need to be more competitive. With increasing urgency, we realize that while dentistry is still a profession, it is also a business. In our current economic climate, the need for new graduates with considerable student debt to find practice opportunities, coupled with the additional costs added to the practice of dentistry by OSHA guidelines, mercury disposal regulations and clean water requirements, results in an even more urgent need to operate a dental practice with a focus on economic realities. The Federal Trade Commission in recent years has adopted the position that the profession of dentistry needs to be regulated as a business, rather than being regarded solely as a profession. If CDA, through the actions of the Judicial Council, attempts to dictate

the content of print or electronic media advertisements, we can be seen as interfering with the right to free speech. If a professional organization such as CDA attempts to limit advertisement of its members' professional services, it could be considered to be in violation of business practices that allow the consumer opportunity to choose and select their providers. If member dentists attempt to band together to influence reimbursement services for insurance companies, they can be viewed as violating anticompetition or antitrust statutes. More than ever before, the Judicial Council's decisions regarding enforcement of the Code of Ethics must be made with an understanding of the limitations imposed on organized dentistry that are the result of legal battles that have been fought and resolved in recent years. Therefore, CDA and the Judicial Council must now deal with the reality that dentistry is both a business and a profession. While our members might like to see more regulation of the profession of dentistry, and enforcement of its Code of Conduct and Ethics, they must also understand that the business of dentistry is going to be conducted in a manner that includes advertising, competition, self-promotion and other aggressive marketplace practices. It has now become necessary to find a middle ground between enforcing a code of conduct defining professional behavior and allowing for freedom of speech and action in the marketplace.

Many of the issues that develop currently, and many of the complaints that are referred to the Judicial Council for resolution, arise out of the inherent conflict that develops when our members engage in practices that are designed to promote their businesses. In a more authoritarian time, the component

ethics committees and/or Judicial Council may have had the opportunity to be more direct and forceful in regulating the activities of member dentists. The possibility that a dentist could lose his/her membership in a dispute over some of these practices may have been a significant deterrent. Ideally, because the Judicial Council is the CDA entity that interprets the Code of Ethics, it should also be able to determine what type of activity and behavior is ethical or unethical. It should be able to hold

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the membership to the high standard of ethical conduct expected of all dentists. If this were the case, the Judicial Council and component ethics committees would be able to exert leverage, as needed, to ensure that any member engaging in unethical conduct received a clear and urgent message that he or she should either comply with the expected ethical standard or risk loss of membership with its inherent privileges. However, this more coercive model fails us on two counts. First of all, there are very few activities that a dentist might engage in that are subject to discipline. Blatantly false and misleading advertising is a violation of the Code of Ethics and of the Dental Practice Act, and therefore is one area that can be readily monitored. However, even arguments about what

is "false" or "misleading" might be subject to interpretation in a court of law. Overbilling or overselling of dental care is even more difficult to monitor because regulation of that would involve infringement on the right of an individual dentist and his/her patient to come to agreement on fees and services. Secondly, the goal of the Judicial Council in enforcing ethical activity is to encourage the dentist to continue as a member of CDA, not to threaten him/her with loss of membership and privileges. Enforcing ethical standards that ultimately result in dentists relinquishing membership rather than embracing compliance will never serve our Association's best interests. So in recent years, the Judicial Council has become more sensitive to the need to be supportive and practical in its approach to enforcement, rather than being idealistic and rigid.

### Finding a Balance

So how does the Judicial Council balance this tension between idealism and practicality? My recent experience on the Council suggests that we have gradually moved toward an enforcement model that encourages members to embrace the ideals and standards of the profession rather than to fear discipline. For example, if a complaint is received about a print advertisement that appears to push the limits of good taste or truthfulness, the member is counseled to correct the ad and advised as to what part of the ad is deemed objectionable. If a complaint is received about a dentist who is making disparaging remarks about a colleague, the member is approached to see if the comments can be stopped and the dispute resolved rather than threatening more severe disciplinary action. If it appears that gift

cards are being used to reward patients for referring friends into the practice, the member dentist is advised that such a practice is a violation of the Code of Ethics and Dental Practice Act, and he/she would be encouraged to seek other ways of thanking patients for their referrals. To summarize, the actions of the local component ethics committees and the Judicial Council are now geared more to education of the membership to outline appropriate ethical behavior, rather than attempting to enforce or coerce acceptable ethical conduct. The fundamental approach to ethical activity is to assume that the member dentist wants to comply with the profession's ethical standards; that given the opportunity to be ethical or unethical, he/she would choose to be compliant and maintain the high standards of the profession as opposed to engaging in practices that push the boundaries of acceptable conduct and thereby diminish the image of the profession. Disciplinary action would not be needed or suggested in general, but would be reserved for those situations where a member is given the opportunity to comply, and foregoes the opportunity to be compliant, choosing instead to continue the unethical behavior.

### Examples of Current Activity

You may still be wondering in what type of activity does the Judicial Council actively engage. Perhaps a brief outline of the types of issues that come before the Council and an explanation of how those issues are resolved might be helpful. On a regular basis, the Judicial Council will review the Code of Ethics to ensure that the Code maintains its relevance in a changing practice environment. Most of the principles fundamental to the Code

remain unchanged and continue to be useful. However, how those principles are interpreted or applied may change from time to time. As an example, the Council recently recommended inclusion of some additional advisory opinions to the Code of Ethics to aid in resolving questions about patients' right to choose their dentist when practice associates separate, about billing issues when work is billed but not completed and about the use of social media for advertising purposes. An addition to

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the ADA Principles of Ethics regarding fee splitting was also reviewed, and similar language recommended for the CDA Code of Ethics. As other questions arise and are referred to the Council for review, the Code is continually reviewed for ongoing relevance and for the need for modification.

Another example of Council activity is ongoing review of disciplinary actions taken by the State Board of Dental Examiners. In situations where a member dentist may be convicted of a felony, action may be taken by the Board to place that member on probation. Those actions are forwarded by the Board to the Council for review, and by action of the Council's Investigative Panel, a member may be placed on probation

with CDA so that our action is consistent with the Board's action. Conviction for any felony is a violation of the Code of Ethics statement that it is unethical for a dentist to violate any law of the State of California. Violations of the Dental Practice Act or conviction of a crime are therefore interpreted as unethical conduct unbecoming a member of the dental profession. Such violations will be the basis for disciplinary action ranging from probation to loss of membership.

The Council also reviews applications for membership in CDA when dentists who have been disciplined in another state or disciplined in California apply for CDA membership. This review occurs through the activity of the Council's Membership Application Review Subcommittee (MARS). The primary concern is to ensure that a dentist applying for membership is not currently under sanction by another state organization, or that if disciplined in California, to ensure that all the conditions of the previous disciplinary action have been met. This is simply a process to ensure that applicants to our professional organization meet high standards of ethical conduct before they are admitted to the Association. We are under no obligation to accept into membership a dentist who has participated in unethical activity either previously or in another jurisdiction. On average, MARS may review 10-15 cases of this nature per year.

Disciplinary actions may be taken against a member dentist for significant ethical violations. The most common issue resulting in loss of membership is the failure of a dentist to accept the recommendations of a component Peer Review Committee. Failure to comply with recommendations of a Peer Review Committee constitutes a violation of

the section of the CDA Code that says that a member dentist has the obligation to comply with the requests of duly constituted committees, councils or other bodies of the component or CDA. Failure to comply with Peer Review Committee decisions places a member dentist in conflict with the standards of the profession and is also judged to be unethical.

When disciplinary actions are carried out, due process must be respected. Any member facing discipline is offered a chance to appeal that action by appearing before the Judicial Council's Hearing Panel. The opportunity to appear before the Hearing Panel and appeal actions and decisions of the Judicial Council ensures that fairness and oversight are part of the disciplinary process. Scheduling of Hearing Panels and identifying volunteer members to serve on the Hearing Panels are additional activities carried out by the Judicial Council.

Finally, the Judicial Council recognizes the need for ongoing education of member dentists with respect to ethical issues. Our basic assumption is that members who value their membership in CDA and who want to participate in the benefits of membership will take advantage of opportunities to become better informed about current ethical issues and concerns. The Judicial Council conducts a workshop for component ethics chairs and executive directors every two years, using a case-study format to work through examples of typical complaints. In addition, legal counsel is available at these sessions to discuss questions and concerns of ethics chairs in an attempt to bring everyone up to date on the current legal concerns that may influence the counsel that we provide to member dentists at the local level. Recognizing the need for ongoing

education, the Judicial Council has also established a subcommittee on ethics in dentistry. This subcommittee is active in developing a list of potential authors and speakers who will be available to provide continuing education courses, presentations at local component meetings and who will author brief articles on ethics as needed for inclusion in component society newsletters. The subcommittee is also working in collaboration with *CDA Presents* to develop an upcoming ethics course for

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the 2013 *CDA Presents* in San Francisco. Additional information on ethics will also be prepared and communicated through the CDA Compass. Print resources and case studies available from other organizations, such as the American College of Dentists, will be collated and cross-referenced on the Compass website, [cdacompass.com](http://cdacompass.com). Thus, the Judicial Council continues to meet its commitment to education and communication of ethics throughout CDA in multiple ways.

### Summary

The CDA Judicial Council is active and highly engaged in ethics education, interpretation of the Code of Ethics, resolution of member concerns and

disputes, and effective communication with membership. We recognize that as a result of limitations placed upon us by FTC regulations, recent legal decisions, our current social climate and legal challenges to our ethical code by members of our profession, interpretation and enforcement of ethical standards has become increasingly difficult. Our response as a Council has been to renew our commitment to providing the best possible advisory opinions regarding ethical issues, to be as instructive as possible in educating component officers and membership as to how to meet the ethical challenges of the day and to create an atmosphere conducive to mediation and support for members attempting to find answers to their concerns.

The Judicial Council is motivated by a sincere desire to maintain and promote for CDA and its members the highest standards in the area of professional ethics. All professionals must meet the challenge to maintain their standards and integrity in the world in which we live. Your Judicial Council is committed to the task of assisting CDA membership in maintaining the ethical principles embodied in the CDA Code of Ethics. However, the only way this goal can be achieved is for each individual member dentist to recognize the need to incorporate integrity, service and empathy into every aspect of his/her daily activities. The Judicial Council attempts to serve as a guide and a resource for those CDA members who value ethical standards and who desire to see those standards reflected in their day-to-day activities.

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