

# Standard of Care vs State of the Art

## *Legal Liability and the Digital Revolution*

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AGD 2015 SAN FRANCISCO

*a golden opportunity*

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# Stated Goals and Objectives

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- ◆ Create a fundamental understanding of the American Legal System
- ◆ Sensitize the clinician to the rights and obligations encompassed in the doctor-patient relationship
- ◆ Recognize those clinical areas where a doctor is most susceptible to legal intervention
- ◆ Integrate advanced diagnostic imaging and treatment modalities into the fabric of malpractice law
- ◆ Appreciate the ongoing legal changes and challenges of providing health care in the 21<sup>st</sup> century

# LIMITING MY LIABILITY

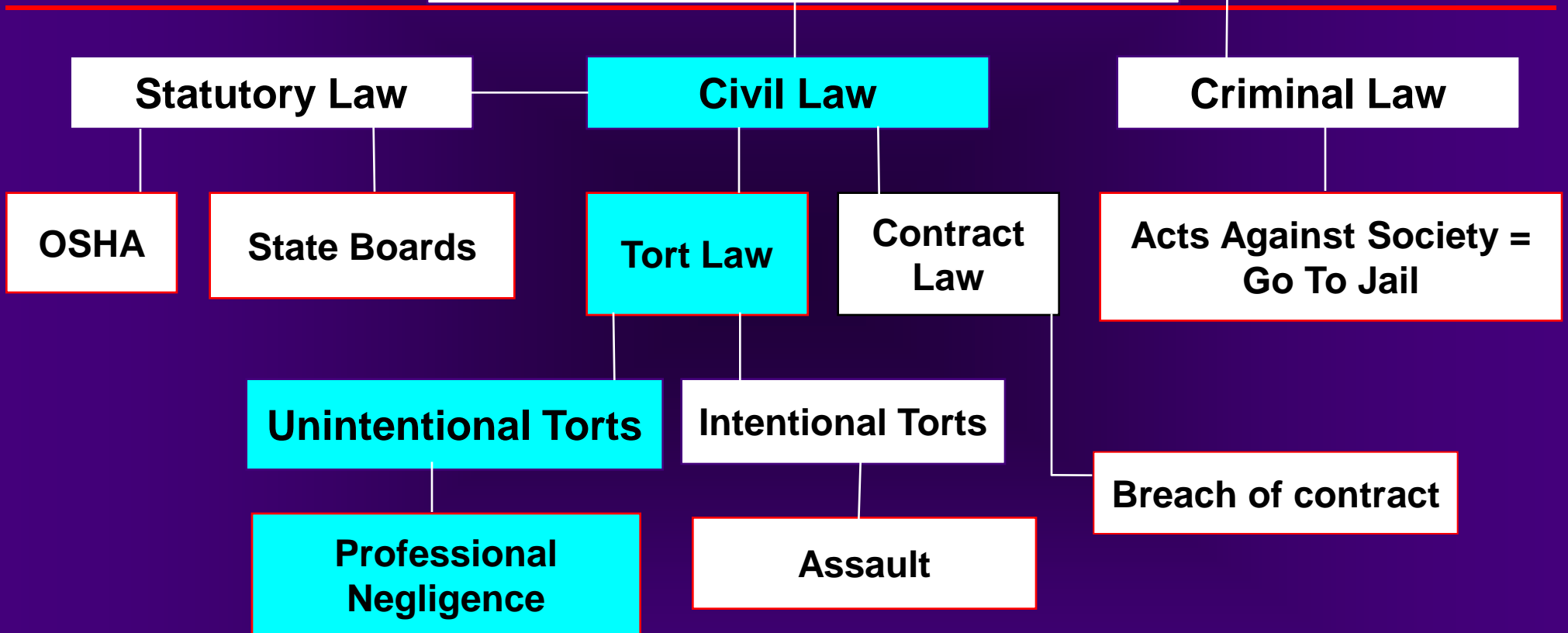
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- ◆ This presentation is not intended to provide legal advice. General principles of law are discussed which may or may not be applicable to a given legal situation.
- ◆ Various jurisdictions will interpret the law in a manner inconsistent with the opinions of the speaker.



**YOUR RIGHT  
TO KNOW**

# Legal System in the U.S.A.



# Negligence

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Negligence is conduct which falls below the standard of skill, care and knowledge ordinarily possessed and exercised in similar circumstances by a reasonable member of the profession.

# Establishing Negligence

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- ◆ Acceptance of duty
- ◆ Breach of duty
- ◆ Causation
- ◆ Damages (injury)

# Standard of Care

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- ◆ What a reasonable and prudent practitioner would do in the same or similar circumstances



# How would a reasonable clinician act?

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- ◆ A reasonable clinician would act with Skill and Due Care

# Due Care

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- ◆ Inform patient of diagnosis
- ◆ Refer when indicated
- ◆ Complete treatment
- ◆ Obtain informed consent

# Informed Consent

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- ◆ Informed consent obligates the clinician to supply that amount of medical knowledge necessary to make an intelligent decision whether or not to undergo treatment.

# Informed Consent

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- ◆ The *process* by which a patient is provided enough information to make an informed, reasoned decision regarding the proposed treatment
- ◆ It is consent given without coercion or fraud, based on the patient's understanding of what will take place.

# Informed Consent Discussion

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- ◆ Nature of the proposed treatment
  - ◆ Necessity
  - ◆ Benefits
  - ◆ Prognosis
  - ◆ Prognosis if no Tx
- ◆ Reasonable alternatives
- ◆ Foreseeable, material risks

# Disclosure of Risks

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The practitioner has the duty to disclose those risks which are “significant enough” to influence the patient’s decision whether or not to undergo treatment.

# Standard of Care

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- ◆ No specific reference or standard
- ◆ Dynamic concept - evolves over time
- ◆ Determined by a jury
  - ◆ Expert witness testimony
    - ◆ Specialty care
  - ◆ State practice acts
  - ◆ Educational teachings

# Specialization and Standard of Care

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- ◆ When a specialist performs treatment, h/s is held to the SOC of a reasonable specialist
- ◆ When a GP performs treatment normally done by a specialist, h/s is held to the SOC of a reasonable specialist



# Fact

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A health care professional can refuse to treat any patient, unless the refusal is based on the patient's status in a statutorily protected group.

# Referrals

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- ◆ Explain why the referral is indicated
- ◆ Make a written/digital referral
- ◆ Refer to skilled clinicians
  
- ◆ Negligent referral
  - ◆ Doctor referred to is *known* to be unqualified

# Record Keeping and Documentation

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- ◆ Written/Digital patient record
  - ◆ Preserves the memory
  - ◆ Shares information
  - ◆ Allowed in court under BER
  - ◆ “do it rite – rite it down”

# Record Confidentiality

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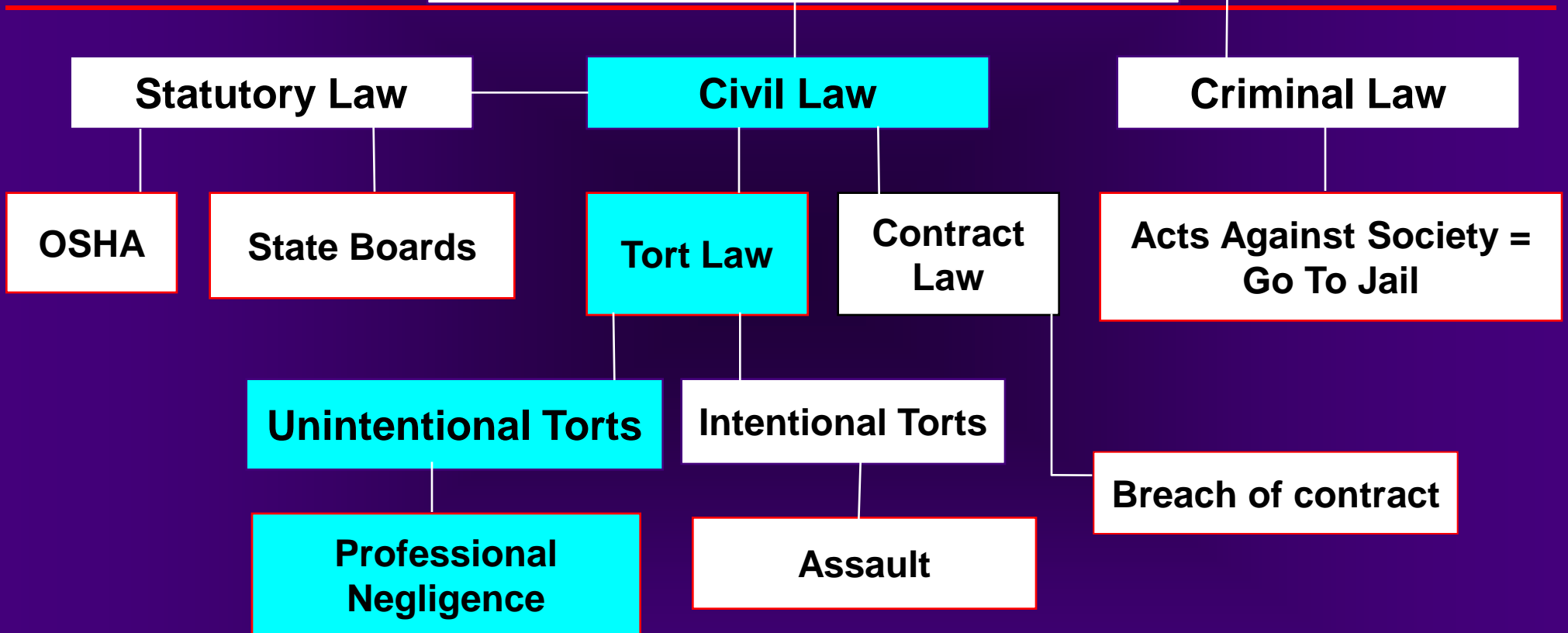
- ◆ Release of confidential records
  - ◆ Upon signed written request (preferred)
  - ◆ Based on phone call from patient (may be acceptable in some circumstances)
  
- ◆ Train your staff
  - ◆ Avoid breaches at office and after-hours

# Vicarious Liability

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- ◆ “Captain of the Ship” principle
- ◆ Liability for others who work under your supervision or control
  - ◆ Employees
  - ◆ Independent contractor
  - ◆ Auxiliary care providers

# Legal System in the U.S.A.



# When You Have Insufficient Diagnostics

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- ◆ A patient **CANNOT** waive a dentist's professional duty by consenting to a negligent act
  - ◆ A negligent act will *always* be negligent
- ◆ A patient **CANNOT** waive his or her right to bring an action against future treatment
- ◆ Any consent given is not "informed" consent

# Images

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- ◆ Obtain as needed per your judgment
- ◆ Be certain the image is of diagnostic quality
  - ◆ Retake films that are not diagnostic
- ◆ Date and label all films with patient's name
- ◆ Original radiographs are owned by the dentist
  - ◆ Patients are legally entitled to copies



# Patient Termination

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- ◆ The dentist-patient relationship continues until one party properly ends it
- ◆ Reasons for termination
  - ◆ Missed and cancelled appointments
  - ◆ Unreasonably demanding
  - ◆ Refusal of treatment recommendations
  - ◆ Failure to pay
- ◆ Finish multi-visit treatment you have started

# Law School: the basics

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- ◆ Discredit
- ◆ Confuse
- ◆ Contradict

# The Good News

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- ◆ Our legal system indulges in the presumption that the clinician did in fact perform h/h services within the confines of the law.

# Establishing Negligence

Patient must prove:

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- ◆ Acceptance of duty
- ◆ Breach of duty
- ◆ Causation
- ◆ Damages (injury)

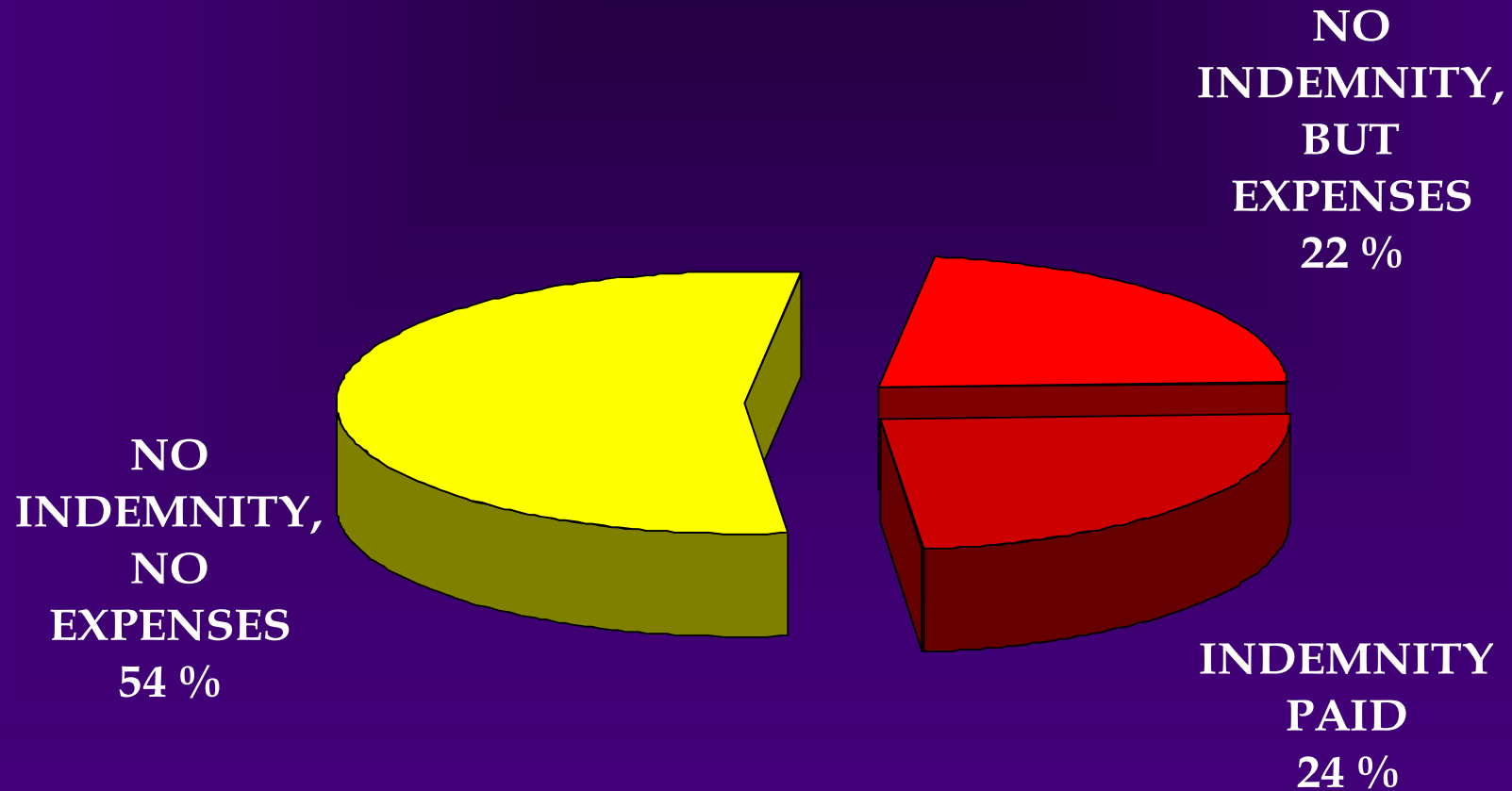
# Claim Statistics: Dental Profession

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- ◆ 75% of the total number of claims have an ultimate resolution value of \$15,000 or less
- ◆ 5% of the total number of claims account for half of the total dollars spent
- ◆ only 15% of the claims filed against DDS ever get into the courtroom
- ◆ 20% plaintiffs prevail in courtroom vs DDS

# Claim Outcomes: Dental

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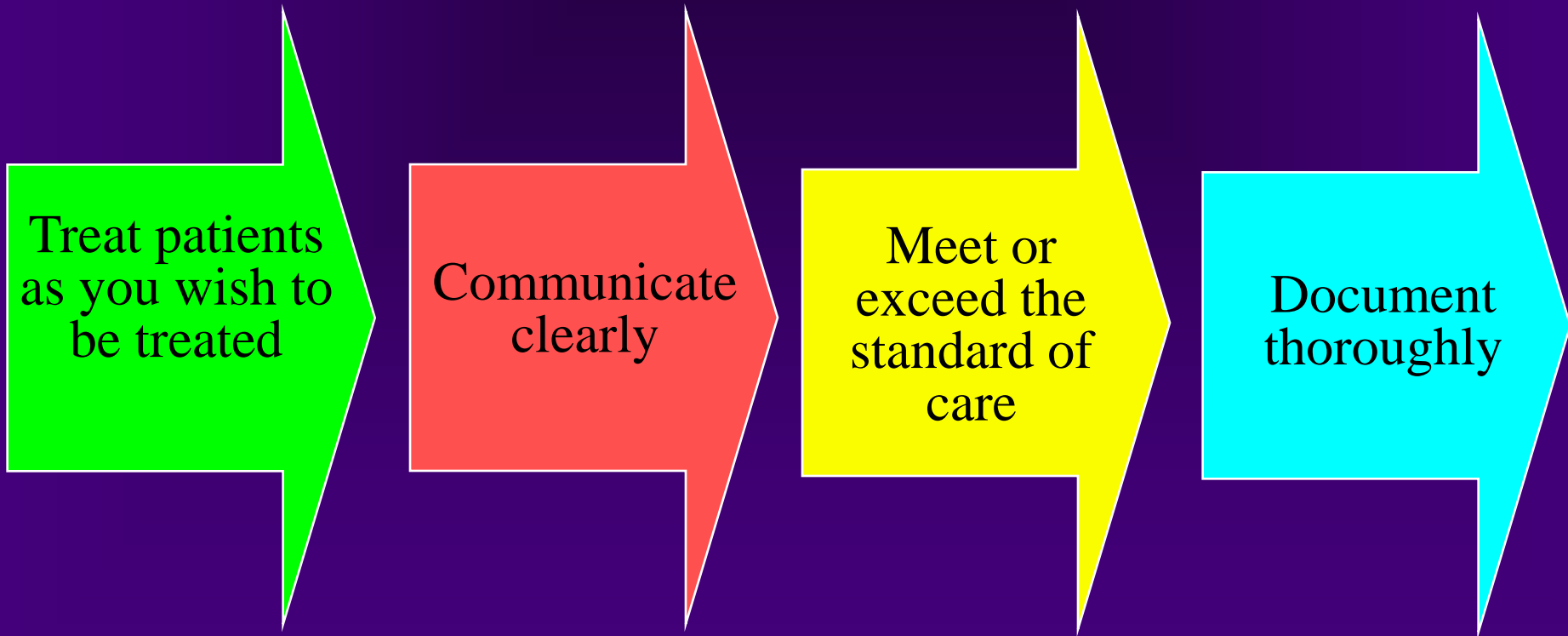
# Claims by Dental Procedure

## 2010 - 2014

<u>% of Total Claims</u>		<u>Rank</u>		<u>% of Total Dollars</u>
15	Crowns	1	Crowns	14
15	Root canal therapy	2	Extractions, surgical	14
10	Extractions, simple	3	Root canal therapy	14
5	Non-cast rests.	4	Extractions, simple	12
5	Extractions, surg.	5	Implants	6
4	Examinations	6	Veneers – lab fabr.	5
4	Implants	7	Perio surgery	3
3	Partial dentures	8	Other restorative	3
3	Complete dentures	9	Examinations	3
2	Prophylaxis	10	TMJ - Non-surgical	3

# *RM: Follow this Path*

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Thank you for your attention.