



In order to safeguard your license and avoid dental regulatory investigations, dentists must adhere to rules set forth by their licensing agency. Any departure can lead to serious implications.

Spring 2012

A Risk Management resource published by The Dentists Insurance Company, a California Dental Association company.

In this issue

Beware	5
Questions and Answers	7

License Protection

A general dentist recently received a letter from the Dental Board investigating a patient's complaint that his dental assistant had stuck herself with a needle while preparing to give an anesthetic injection to a patient. According to the complaint, the dental assistant failed to change both the needle and her gloves after the needlestick accident and proceeded to administer the injection. The patient watched the assistant take off her gloves and noticed that one contained a "large amount" of blood.

Dentists reading this summary will recognize the red flags that prompted the Dental Board investigation, and will likely think, "Well that's not me."

According to Attorney Robert Zaro, there is a pattern of thinking when dentists hear about Dental Board cases. "They say, 'That's not me. That's a substandard practice out there that should not be practicing in any event.'" This attitude has held true with dentists historically and into the present day, said Zaro, who has spent more than 20 years representing dentists facing Dental Board investigations. He said this type of thinking is understandable, but emphasized the importance of recognizing that dentists are highly regulated. He said, "You want to be cautious and aware without drawing Draconian conclusions."

Zaro cautioned against a "cavalier" attitude concerning the Dental Board, and while he said a high number of dentists never have to deal with the Dental Board, when there is a problem, it can be quite significant.

Dental Board sanctions can include probation, license suspension, license revocation and fines, penalties and payment for the costs of the board's investigation.

Sheila Davis, Assistant Vice President of claims for TDIC, said that in the event of a Dental Board accusation, TDIC pays only for the defense of regulatory actions which includes attorney fees and expert witness fees. Dentists are responsible for fines issued by the board and are often required to pay for the board's investigation of the case.

License Protection continued on page 2



from page 1

After investigating the general dentist's case, the Dental Board concluded that he violated several sections of the Dental Practice Act (DPA), including allowing a staff member to practice outside the scope of her license and failing to adhere to OSHA guidelines.

The board suspended his license for 30 days and placed him on probation for five years. His name and probation status were posted on the Dental Board's website, which is available to the public. The board specified that the dentist could not mislead patients regarding the reasons for suspension from practicing dentistry nor could he practice dentistry directly or indirectly, including the supervision of allied dental staff.

The dentist was required to participate in the board's probation surveillance program and submit quarterly declarations indicating whether he had been compliant with the conditions of probation. He was required to complete an ethics course within the first year of probation. Further, he was mandated to perform 40 hours per year of services for two years of his probation at a nonprofit or charitable facility. Additionally, he had to reimburse the board \$5,000 for its investigation and prosecutorial costs.

During the interview with Dental Board investigators, the dentist said he felt badly about the matter and would fully cooperate. The investigation revealed that he often assigned his dental assistant duties that were beyond her scope including prophylaxis, scaling and root planing and anesthetic injection. It was also discovered that his assistant received financial incentives to perform hygienist level duties.

Although the dentist admitted to allowing his assistant to work beyond her scope, he attempted to justify his actions by arguing that she is a licensed dentist in Mexico and knew what she was doing.

The dentist clearly violated the DPA, which defines allowable duties for allied dental professionals. According to Zaro, there is no

defense for this type of situation. "It is a strict liability," he said.

As practice owners, dentists are responsible for the actions of all employees, including ensuring licensed staff practice within the scope of their licenses, maintain a current license and are up-to-date on safety measures such as OSHA's Bloodborne Pathogens Standard.

Another aspect of this case is that the dentist succumbed to scheduling pressure on the day of the needlestick accident. He was running late for an appointment with a patient scheduled for endodontic therapy and called to ask his dental assistant to prepare the patient by "numbing her up." Even if this had been an isolated incident in the practice, it illustrates how one deviation from the DPA can lead to major implications.

"The rule of the day is to practice in a safe and defensive manner," Zaro said. "Licensure issues have significant implications that carry into the future."

Safe and defensive practice measures

There are a number of things dentists can do to ensure issues with the Dental Board do not arise. These practices include:

Keep the DPA on hand. Have a copy of the DPA (some states call this "dental law" or "dental regulations") available in your office, either in print or online. Dental Board websites link to DPA information and state dental associations often offer additional information about regulatory compliance to members. In California, CDA offers members a free guide to DPA compliance, available on the CDA Compass website.

The DPA outlines unprofessional conduct that can lead to Dental Board scrutiny, including allegations of billing and insurance fraud, drug violations, patient battery, unlawful sexual conduct with patients, unlicensed practice of dentistry, excessive treatment recommendations and record alterations with intent to deceive.

Post allowable duties for dental staff. The licensing agency defines allowable duties for dentists and staff. These duties dictate whether the staff should be under general or direct supervision while carrying out these procedures. Some states mandate posting a list of allowable auxiliary duties in the dental office. Even if your state does not mandate posting the list, it is good risk management to post the list in a common area such as the breakroom. Have a copy on hand for reference if a question comes up about which procedures are permissible for each allied dental professional license.

Have all current licenses on file or display.

The practice owner is responsible for ensuring all licensed staff have current licenses and permits. Designate a staff member to secure copies of all current licenses. Many dentists display current licenses in their offices, which eliminates any questions about license status and gives patients confidence in the professionalism of the dental team. For staff whose job is dependent on a license, the individual should not be scheduled to work until an active license is provided.

Have a system in place to respond to any inquiry from the Dental Board. Notice of a Dental Board investigation can come in different ways, including a letter, phone call or personal visit by an investigator. The Dental Board is obligated to investigate all complaints. Patients, a patient's attorney, other dentists or employees can file complaints to the Dental Board.

A letter from the Dental Board will outline the complaint and ask the dentist for a written account of the care provided, including clinical diagnosis, prognosis and treatment plan. The board will also request the patient's dental records and related information such as radiographs, billing records, consent forms and medical history.

In the event you receive a letter from the Dental Board, TDIC urges dentists to call the Risk Management Advice Line immediately. TDIC is familiar with the best way to respond and can assist dentists in preparing a written account for the board.

Attorney Zaro cautions that a dentist who independently submits a written response to the Dental Board is taking an unnecessary risk. "A written response is evidence," he said.

It is essential to respond to the Dental Board within the time frame specified by the board, which in some states is 15 calendar days. Not responding to an inquiry from the dental board can lead to further disciplinary action.

Check the mail daily and be alert for any letters from the Board, attorneys or unhappy patients. If you are going on vacation or are going to be out of the office, designate a staff member to review the mail in your absence and notify you of letters requiring immediate attention. Dentists are also advised to be aware of any billing disputes. TDIC risk management experts report that many Dental Board complaints originate from billing disagreements.

In the event you receive a phone call or personal visit from a Dental Board investigator, TDIC recommends dentists obtain the name and phone number of the investigator and indicate they are willing to cooperate fully with the investigation. However, dentists should not provide any information when put on the spot during a telephone conversation or personal visit. Contact TDIC's Claims department before getting back to the investigator.

Address patient complaints immediately and professionally. Upset or angry patients are often compelled to file a complaint with the Dental Board or call an attorney. Any miscommunication can lead to serious consequences. TDIC risk management experts advise that attitude plays a strong role in conveying cooperation and commitment to the patient. Risk management recommendations for working with angry or dissatisfied patients include scheduling a consultation at no charge with the patient. Be courteous and honest. Listen attentively and repeat back to the patient the issues as you understand them. Being an active listener works in many situations where a patient is angry. Anger



from page 3

can be minimized if a patient feels he is heard.

Explain the reasons behind your methods and answer the concerns the patient has identified. Document all interactions with an upset patient and use objective language. Do not add to or delete from a patient's chart. Recognizing and skillfully managing patient anger can help minimize miscommunication and misunderstanding before it escalates into a complaint to the Dental Board.

Other situations that can affect dental license

A complaint filed directly to the Dental Board is not the only action that can affect a dentist's license to practice. Civil litigation, peer review and small claims cases can also lead to Dental Board investigations and potential license sanctions. Here's a run down:

Civil Litigation: Civil cases revolve around the concept of negligence or breach of the standard of care. Dental Board cases and civil cases can run parallel or a civil case can lead to a Dental Board investigation, according to Sheila Davis, Assistant Vice President of claims for TDIC.

Many states require professional liability insurance companies to report to the Dental Board settlement or arbitration awards of \$10,000 or more for any claim that injury or death was caused by the licensee's negligence, error or omission in practice or by rendering unauthorized professional services. Reporting must be done within 30 days of the written settlement or award.

Peer Review: Peer review is a process offered by local/state dental associations or societies that resolve disputes that may arise in the delivery of dental services; in particular, disputes regarding the quality or appropriateness of dental treatment, utilization (issues related to dental insurance benefits when treatment is questioned) or potentially irregular billing practices.

A peer review committee is comprised of dental society member dentists who volunteer to evaluate all available evidence pertaining to each dispute

and follow specific procedures to make a fair and impartial determination. The parties involved are then notified of a committee's decision by a letter of resolution.

Similar to settlements or arbitration awards, many states also require professional liability insurance companies to report to the Dental Board adverse peer review decisions where the dentist pays the patient for services related to dental treatment of \$10,000 or more.

Small Claims: Small claims actions are also known as conciliation court actions against health care providers. Small claims amounts vary state to state, with some states, such as California, allowing a sum up to \$10,000. Some states allow counsel to be present in small claims court while other states do not.

If a small claims situation arises, TDIC recommends calling the TDIC Claims department for information about what to expect and for assistance with defense of the case.

TDIC and other liability insurance companies are required to report to the Dental Board small claims settlement awards of \$10,000 or more. ■

Beware of releasing patient information in billing disputes

TDIC Risk Management Advice Line reports an increase in calls from dentists facing inquiries from credit card companies or financial services about billing disputes in which patients allege they should not be financially responsible for charges for dental treatment because the treatment was substandard. Typically, the patient will dispute the charge with the credit card company and, in turn, the company sends a letter to the dentist asking for a response.

The issue arises when dentists try to defend their treatment by releasing treatment notes and diagnostic records such as photos and radiographs that these companies are not entitled to.

“The concern is that while the treatment can be supported, the dentist may create a separate issue of violating the patient’s confidentiality by releasing protected health information,” said Sheila Davis, Assistant Vice President of claims for TDIC.

According to CDA Policy Analyst Greg Alterton, HIPAA establishes minimum standards to ensure the privacy and security of patient health information and prohibits the disclosure of patient information in a number of situations, including settling or reconciling a payment for dental care when the payment is made by any means, including credit, debit or other payment card. “This is very specifically referenced in section 1179 of the HIPAA law,” Alterton said. Confidential patient information includes diagnostic records, treatment notes, radiographs, photos and health history forms.

Dentists who violate HIPAA can be sued by the patient, fined under HIPAA and subject to disciplinary action by the Dental Board. It is the responsibility of the practice owner to ensure patient information is accessible only to those authorized to have access.

Jaime Welcher, a senior risk management analyst for TDIC, said people most often want a refund or charge back on their credit card when they feel the dentist doesn’t care or that their complaints or concerns are not heard or recognized. “As soon as possible, address any situation where a patient is upset or angry,” Welcher said. “It is not likely the situation will just go away.” TDIC advises dentists to schedule a time for the patient to come in, discuss concerns, and try to come up with a plan that is agreeable for both parties.

TDIC advises dentists to have each patient sign a financial agreement. If a credit card is the preferred form of payment, have the patient sign a credit card agreement form. State dental associations often have sample financial agreement forms dentists can customize for their offices. Additionally, TDIC offers a number of useful forms on its website at thedentists.com, including an esthetic approval form. Agreements and approval forms are valuable in the event of a dispute, providing practitioners solid documentation of patient consent.

In a situation where a patient is disputing a credit card payment and alleging treatment below the standard of care, it is important to remember that claims of unsuitable treatment can’t be decided by a person who is not qualified to provide this assessment. This includes most patients and credit card personnel.

“Disputes involving allegations of improper treatment can’t be decided by anyone without first obtaining an expert dentist opinion stating the treatment failed to meet the standard of care,” said Deborah Boyd, TDIC claims supervisor.

If a dentist is contacted by a credit card company about a billing dispute, TDIC recommends a written response to the company including the following points:

Beware continued on page 6

from page 5

Professionalism: State that the treatment was responsibly delivered, clinically sound and within the standard of care.

HIPAA: State that the complaint involves confidential health care information that cannot be released without violating privacy and security law, known as HIPAA, which regulates the sharing of health data.

Peer Review Information:

Recommend to the credit card company that the patient request peer review where a committee of professional dentists follow specific

procedures to review disputes and reach fair and impartial determinations. Include the phone number of your local dental society where peer review can be initiated, and state that as a dental professional you are obligated to comply with the findings of the peer review committee.

Contact Information: Give your contact information and invite the company to call if questions remain.

Questions about releasing patient information? Contact TDIC's Risk Management Advice Line at 800.733.0634. ■



Questions and Answers

Q: I recently saw a 6-year-old new patient. During the appointment, I noticed the patient had bruising and scars on each wrist, matted hair and dirty clothes and fingernails. His demeanor was subdued, not what you would expect from a 6-year-old child. He had an unusual amount of decay on his teeth and several cavities. I asked the child how many times he brushed his teeth. He said he did not very often because they had no running water. My gut feeling was that something was very wrong, but I did not mention anything to the mom. I reported it to child protective services soon after they left. This morning, the mom left a message on the practice voicemail questioning whether I was the one who reported her. What do I say?

A: As a dentist, you are a mandated reporter for any reasonable suspicion of child and elder abuse. The choice was not yours whether to report or not. Legally mandated reporters can be criminally liable for failing to report suspected abuse or neglect. The reporter's identities are safeguarded so your patient's mother is working off of a suspicion. As long as a report is filed in good faith, a mandated reporter cannot be held liable in civil or criminal court. Some states offer mandated reporter training classes. File any notes about the report separately from the patient chart.

Abuse comes in many forms (physical, sexual, emotional and neglect) and it is tricky whether you should "tip" the parent or custodian off about your concerns. Depending on the situation, any conversations (prior to making a report) about your concerns and observations could put the individual at greater risk. This is a difficult situation. There are several ways to respond and you are the only one to determine what will work best for you and your practice. A suggestion could be something like, "Mrs. Jones, I am responding to the voice message you left. As mandated reporters, dentists

are obligated to report any reasonable suspicion of both child and elder abuse. Office protocol is not to comment on this topic."

The US Department of Health and Human services provide information for mandated reporters at the following link: <http://www.childwelfare.gov/responding/examples.cfm>

Q: A patient recently asked if I offered discounts through Groupon. While I do not currently use Groupon, I would like to increase my patient base by trying it. Is that ok?

A: Increasing your patient base is an expected, understandable and reasonable goal. However, there are restrictions to how you can do this. For example, some states prohibit dentists from offering incentives to patients who refer others to a dental practice. Groupon requires the participating business to pay a percentage of each coupon sold. Check with your Dental Board to ensure this is an acceptable practice before you sign up for the program. Additionally, patients attracted by discount offers may not be the kind who return after the discount expires. ■

TDIC Risk Management Advice Line:

800.733.0634



Liability Lifeline

Liability Lifeline is published by:
The Dentists Insurance Company
1201 K Street, 17th floor
Sacramento, California 95814

©2012, The Dentists Insurance Company



**Protecting dentists.
It's all we do.®**

Risk Management Advice Line: 800.733.0634



ENDORSED BY:

Also selling in: Arizona and North Dakota



TDIC reports information from sources considered reliable but cannot guarantee its accuracy.