

DENTAL LEGAL UPDATE

Who Owns Your Website and More

by Jeanine Lehman, Attorney

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Websites are a critical part of the marketing and presence of dental practices. Often overlooked are the legal aspects – Who owns your website?

Websites are a critical part of the marketing and presence of dental practices. Often overlooked are the legal aspects – Who owns your website? What more do you need to do for your website? Have you consulted your attorney?

Contract. First, do you have a contract with your website developer for ownership of the website? What does the contract say? If you do not have a contract, can you get one that clearly indicates that you own the website? Is your ownership for the visual and audio content only or does it include the computer code that underlies what the user sees and hears? Do you have the means to transfer the website to a different host either directly or with the help of an IT consultant? Is the copyright notice on your website in your practice’s legal name? Having a clear contract concerning your ownership of the website is critical.

Domain Name Registration. The website domain name is registered with a registrar. The domain name locates your website on the Internet; an example is www.xyzdental.com. It is important to review the registration information at the registrar’s website for your dental practice’s domain name. First, you want to check the expiration date and be sure to timely renew your registration. Second, you want to check the persons listed as the Registrant, Technical and

Save the Date – 4/27/2019

**Central Texas Medical Orchestra
Concert to Benefit
Capital Area Dental Foundation**

Saturday, April 27, 2019
7:30 p.m. - 10:00 p.m.

Westover Hills Church of Christ
8332 Mesa Drive
Austin, Texas 78759

Support CADF, enjoy great orchestral and contemporary music from the medical community & guest musicians, easy parking, reasonably priced, reception afterwards to mingle! Great for family and friends!

Tickets at the door or online at:
<http://ctmorchestra.org>

CADF transforms lives in Central Texas with healthy smiles by offering life-changing access to charitable dental care. Local dentists generously donate their skills and time to patients in need through CADF. For CADF info and tickets to CADF’s April 13, 2019 Gala fundraiser, visit: www.capitalareadentalfoundation.org

Administrative contacts. Only trusted persons should be indicated as those contacts, because they have the ability to change your registration and potentially hijack it. For example, you would not want a disgruntled employee to

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Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at **(512) 918-3435** or jeanine@jeanine.com

**Website Favorites**

Law Offices of
Jeanine Lehman P.C.
www.jeanine.com

Capital Area Dental Society
www.capitalareadental.org

Texas State Board of
Dental Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental
Association
www.ada.org

TX Dept. of State Health
Services: Radiation Control
www.dshs.texas.gov/radiation

ICANN
www.icann.org

Website (cont.) --

have such authority. Domain names are subject to the policies of the Internet Corporation for Assigned Names and Numbers (ICANN).

Dental Board Rules. The Texas State Board of Dental Examiners has detailed Business Promotion Rules, i.e. advertising rules, which are applicable to websites and other forms of business promotion. Your website should be vetted against all of the Business Promotion Rules, as well as other rules and applicable law. For example, Board Rule 109.59 requires dental practice websites to clearly disclose:

- ownership of the website
- services provided
- office addresses and contact information
- licensure and qualifications of dentist(s) and associated health care providers

HIPAA. Websites and the Internet can also land you in HIPAA trouble. Here are some cases.

Internet-Based Calendar. An Arizona cardiology practice was reported as posting clinical and surgical appointments for its patients on an Internet-based calendar that was publicly accessible. In 2012, for violation of HIPAA, that practice agreed to pay the U.S. Department of Health and Human Services (HHS) a \$100,000 settlement and take corrective action to implement policies and procedures to safeguard the protected health information of its patients.

Testimonials. In 2016, a California physical therapy provider settled violations of HIPAA with the U.S. Department of Health and Human Services Office for Civil Rights (OCR) by agreeing to payment of \$25,000, adoption and implementation of a

corrective action plan, and annual reporting of compliance efforts for one year. This settlement was in response to an August 8, 2012 complaint alleging that the physical therapy provider impermissibly disclosed numerous individuals' protected health information (PHI) when it posted patient testimonials, including full names and full face photographic images, to its website without obtaining valid, HIPAA-compliant authorizations.

Website Accessibility. There have been claims made against dental practices and other health care providers in Central Texas that their websites were not accessible under the Americans with Disabilities Act. See my article on this topic in the April 2017 issue of my Dental Legal Update at my website: www.jeanine.com

**Dental Board Gets Nailed:
Pays Judgment in Specialty
Ad Case**

The Texas State Board of Dental Examiners (Board) lost the federal lawsuit involving specialty advertising under Board Rule 108.54 brought by the American Academy of Implant Dentistry, the American Society of Dental Anesthesiologists, the American Academy of Oral Medicine, the American Academy of Orofacial Pain, and five dentists (Plaintiffs).

The Plaintiffs sought reimbursement of their attorneys' fees from the Board. The Plaintiffs' original request for attorneys' fees was for \$733,335. U.S. District Court Judge Sam Sparks entered a judgment awarding Plaintiffs' legal fees, costs and expenses in the amount of \$269,764.12, plus post-judgment interest. The Board paid that judgment to the Plaintiffs. This is the

end of the lawsuit, in which Judge Sparks held that Board Rule 108.54 is an unconstitutional restriction on the Plaintiffs' First Amendment right to free commercial speech. This judgment sends a strong message to state agencies concerning the risk of litigation.

For background, see the May 2014, March & December 2016, and September 2017 issues of my Dental Legal Update at: www.jeanine.com

Custodian of Dental Records

After the Texas State Board of Dental Examiners (Board) underwent the Sunset process, the Texas Legislature in 2017 added a requirement to the Texas Dental Practice Act that the Board adopt rules regarding the designation and duties of the custodian of dental records. The Board has proposed such a rule that could be adopted at its February 22, 2019 Board meeting. This proposed rule on custodians is an addition to the Board's existing rule 101.11 concerning handling of the practice of a dentist who is deceased or mentally incompetent.

The proposed rule provides for the designation or appointment of a person as custodian of a dentist's billing or dental patient records if the dentist dies, becomes mentally or physically incapacitated, or abandons such records. If such a dentist has already entered into a records transfer agreement in compliance with Board rule, the custodian of records is the person designated as the transferee under that agreement. Records transfer agreements are used in various contexts including in employment agreements, independent contractor agreements, dental practice sales agreements, and other agreements. Board rule 108.8 requires dentists to notify the Board within 15 days of entering into a records transfer agreement. If the dentist to which the proposed rule applies has not entered into a records transfer agreement in compliance with Board rule, the dentist may, upon initial licensure as a dentist, and in each renewal period, designate a custodian of records who shall act as temporary or permanent custodian for the dentist in the event of the dentist's death, incapacity, or abandonment

of the records. The custodian of records designated shall maintain the records in a manner consistent with Board rule 108.8 and will be responsible for providing records to the Board and patients as provided in that rule.

A custodian of dental records may be employed by the administrator or estate of the dentist or be designated as needed during an unexplained disappearance of the dentist or in the event of the abandonment of the dentist's patients without reasonable cause.

If a licensed dentist has designated a person, who is not a licensed dentist, as the custodian of records, that person may serve as custodian for a reasonable period of time, which is defined as no more than 12 months from the date of the dentist's death or the date the dentist is lawfully determined to be mentally incompetent, whichever is applicable, and must ensure safe transfer of the patient records to each patient or another licensed dentist as soon as reasonably practicable.

If the designated custodian is unable to serve, or if there is neither a records transfer agreement nor the appointment of a custodian for the dentist's most recent license period, the Board will attempt to appoint an available custodian of records in the immediate area of the dentist's practice who may serve as custodian.

Under the proposed rule, the custodian of records

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Jeanine Lehman is an Austin, Texas health law attorney who practices dental, health, employment, real estate, and business law.

Past issues of the Dental Legal Update are available at www.jeanine.com

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Custodian of Dental Records (cont.) --

shall not be held responsible for violations of the Dental Practice Act or Board rules before the custodian possessed the records, or any violations attributable to the actions of the dentist who previously held the records. The proposed rule provides that designation as a custodian of records does not create a dentist-patient relationship between the custodian and patients of the licensed dentist.

This rule is proposed and is likely to be adopted. Therefore, dentists need to check to see if they have entered into a records transfer agreement in compliance with Board rule, which is currently in effect. Then, dentists will need to review the options for how to answer the “custodian” questions that the Board may ask for initial licensure and renewal of licensure. Very importantly, dentists will need to decide whom to designate as the custodian. For example, is it better to appoint the dentist’s executor or spouse as custodian to further the estate planning for the sale of the dentist’s practice after the dentist’s death? Alternatively, does the dentist want to appoint a trusted colleague who has the same electronic dental record system? Certainly, the dentist will want to discuss with the custodian in advance, if the custodian is willing to serve. Then, there are expenses for serving as custodian, which may include the maintenance of electronic dental records, security protections, storage and retrieval costs, and com-

pliance with applicable law. There are many considerations in the designation of the custodian and obtaining legal advice is prudent. The final adopted rule should be reviewed and a plan for compliance implemented.

Dental Radiation Rule

On January 11, 2019, the Texas Department of State Health Services proposed the complete rewrite of Rule 22 TAC sec. 289.232, concerning Radiation Control Regulations for Dental Radiation Machines and published the proposed rule in the Texas Register. The proposed changes to the rule include, but are not limited to, changes to strengthen qualifications for radiation safety officers; require radiation safety officers to review operating and safety procedures at intervals not to exceed 12 months; clarify inspection compliance and hearing procedures; and clarify the requirement for an equipment performance evaluation to be performed on radiation machines within 30 days of installation or reinstallation. In addition, the changes clarify timelines and requirements for equipment performance evaluations on the x-ray units; add safety requirements to Operating and Safety Procedures; add requirements for controlling operator’s occupational radiation exposure; and strengthen the requirements for digital imaging. For updates on this proposed rule, which will affect dental practices, see the Radiation control website at www.dshs.texas.gov/radiation

**Have you moved?
Please send us a
change of address
to receive future
issues.**

**Please share this
newsletter with
your dentist col-
leagues, office
manager, and ad-
visors.**

Thanks!

**To receive this
newsletter by
email, call
(512) 918-3435.**

About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists and physicians. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as practice sales/purchases/buy-ins, contracts and incorporations, office/facility leases, building purchases/condos, build-to-suits and real estate law, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com