

DENTAL LEGAL UPDATE

Dental Practices' Illegal Stock Issuances: New Remedy

by Jeanine Lehman, Attorney

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Dentists use professional entities to operate their dental practices, including professional associations and professional corporations, as well as professional limited liability companies. The ownership of professional associations and professional corporations is evidenced by shares of stock. In order for stock to be legally issued, the stock must first be authorized. Due to an anomaly in the law applicable to professional associations, a professional association may be formed without the necessary provision that authorizes shares of stock. When reviewing the existing corporate papers of dental practices operating as professional associations, I have been discovering this failure to authorize shares of stock. When shares of stock are not authorized but are nonetheless issued, those shares of stock are not legal. Recognizing this problem, the Texas Legislature created a remedy to ratify and validate these illegal issuances of shares of stock – thus fixing the problem retroactively. Given the complexity of implementing the remedy, the services of a knowledgeable attorney are needed for the cure.

This problem of illegal issuance of stock can also occur in professional corporations, when more shares of

stock are issued then are authorized. The new remedy is also available for those situations.

Failure to have the proper professional entity documents in place can have negative consequences, including when bringing in a partner, having a partner exit, being in a divorce, obtaining financing, selling or buying a dental practice, and facing a lawsuit or tax audit.

Sometimes, the documentation for a dental practice's professional entity is incomplete. One common example of incompleteness is the failure of a professional limited liability company to have a company agreement or operating agreement.

It is advisable for dentists to have the documents of their professional entities reviewed by a knowledgeable attorney for legality, completeness, proper signature, and appropriateness to the needs of their individual practices.

Prior to entering the private practice of law, Jeanine Lehman was a senior securities analyst and attorney for the Texas State Securities Board and reviewed over 1,000 public securities offerings, including corporate documents.

When shares of stock are not authorized but are nonetheless issued, those shares of stock are not legal.

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



Texas Legislature was busy.

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

Texas Legislature Online
www.capitol.state.tx.us

Texas Statutes
www.statutes.legis.state.tx.us

EPA
www.epa.gov/eg/dental-effluent-guidelines

Opioid Epidemic

Our nation is facing an unprecedented opioid epidemic. Deaths by overdose are commonplace. The Texas Legislature and Texas State Board of Dental Examiners ("Board") are taking action to address this scourge.

Under the 2017 Sunset Bill for the Texas Pharmacy Board (House Bill 2561), beginning on September 1, 2019, prescribers, including dentists, will be required to review the Texas Pharmacy Board's Prescription Monitoring Program (PMP) database for the patient, prior to prescribing opioids, benzodiazepines, barbiturates, or carisoprodol, and may access the PMP for the patient before prescribing any controlled substances. This requirement is to help avert "doctor shopping", when an addict acquires multiple prescriptions from several doctors. Queries of the PMP for the prescriber's own prescribing history can also help unearth drug diversion, including by dental practice staff and others. Texas dentists already have access to the PMP and do not need to wait until 2019 before querying the PMP.

Under current Board rules, Texas dentists, who have DEA permits to prescribe controlled substances, must annually conduct a minimum of one self-query of the PMP for the issuance of a controlled substance, and must complete a minimum of two hours of continuing education in the abuse and misuse of controlled substances, opioid prescription practices and/or pharmacology every three years.

In 2017, in Senate Bill 584, the Texas Medical Board was instructed by the Texas Legislature to adopt guidelines for the prescribing of opioid antagonists in conjunction with the prescribing of opioids. Senator West noted in his Bill Analysis: "According to the Centers for

Disease Control and Prevention, overdose deaths from opioids have more than quadrupled since 1999. In 2015, more than 33,000 people died from an opioid-related overdose. This number is more than any year on record. Nearly half of all opioid related overdose deaths involve a prescription opioid. Opioid overdose deaths could be reduced by establishing guidelines for the appropriate co-prescription of naloxone, an opioid antagonist, alongside opioid prescriptions when a patient is at a high risk of overdose."

Earlier, the 2015 Texas Legislature in Senate Bill 1462 added section 483.101 to the Texas Health and Safety Code to expand the ability to prescribe, possess and administer opioid antagonists. Senator West noted in his Bill Analysis: "Approximately 80 percent of opioid overdose deaths are unintended. At highest risk are the elderly and medically ill who are already medically compromised (this is typically not someone addicted to opioids, but taking opioids for pain as prescribed by a medical doctor). As most of these overdoses are witnessed (family and friends often say they heard the victim "snoring loudly"), there is frequently the opportunity to intervene."

The Texas Legislature has not passed a law requiring the Texas State Board of Dental Examiners to adopt guidelines for the prescribing of opioid antagonists in conjunction with the prescribing of opioids. Nonetheless, it may be helpful to review the Texas Medical Board's guidelines for prescribing opioid antagonists, when the guidelines are available.

Amalgam Separators Rule

The United States Environmental Protection Agency (EPA) on June 9, 2017

Amalgam Separators Rule (cont.) --

issued a final rule on amalgam discharges into publicly owned treatment works (POTW), i.e. sewage systems, by dental facilities.

The rule establishes pretreatment standards under the Clean Water Act to reduce discharges of mercury and other metals from dental facilities into POTW, including by requiring the use of one or more amalgam separators or other devices and the prohibition of use of certain kinds of line cleaners. The compliance date for this rule is July 14, 2017 for new dental facilities, whose first discharge of dental amalgam occurred after July 14, 2017 (New Sources). The compliance date for existing dental facilities which are not New Sources is July 14, 2020 (Existing Sources).

The rule applies to Dental Dischargers meaning a facility where the practice of dentistry is performed, including, but not limited to, institutions, permanent or temporary offices, clinics, home offices, and facilities owned and operated by Federal, state or local governments, that discharge wastewater to a POTW.

The rule does not apply to mobile units, or facilities that exclusively practice one or more of the following dental specialties: oral pathology, oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics, periodontics, or prosthodontics. The rule also does not apply to Dental Dischargers that do not place dental amalgam, and do not remove amalgam except in limited emergency or unplanned, unanticipated circumstances, and that certify such to the Control Authority.

Reporting under the rule is to the Control Authority. It may take some detective work for dentists to determine the identity of their Control Authority. The Control Authority is defined in 40 CFR 403.3(f) as the POTW if the POTW's pretreatment program submission has been approved, but if not approved, then the Control Authority is the Approval Authority as defined in 40 CFR 403.3. The good news – the POTW for the City of Austin wastewater system users is City of Austin - Austin Water and its One-Time Compliance Report is available at:

www.austintexas.gov/sites/default/files/files/Water/SSD/Pretreatment/DentalDischarger_OneTimeComplianceReport_Form.pdf

For Existing Sources, a One-Time Compliance Report must be submitted to the Control Authority no later

than October 12, 2020, or 90 days after a transfer of ownership. For New Sources, a One-Time Compliance Report must be submitted to the Control Authority no later than 90 days following the introduction of wastewater into a POTW. If a Dental Discharger transfers ownership of the facility, the new owner must submit a new One-Time Compliance Report to the Control Authority no later than 90 days after the transfer. As long as a Dental Discharger subject to the rule is in operation, or until ownership is transferred, the Dental Discharger or its agent or representative must maintain the One-Time Compliance Report and make it available for inspection in either physical or electronic form.

Dental Dischargers are also required to have compliant amalgam separators or other amalgam removal devices, to timely maintain, inspect, and replace amalgam separators or other amalgam removal devices, and to properly dispose of amalgam in accordance with the rule. Records of such compliance are required to be kept and made available for inspection by the government.

For more information, see 82 Federal Register 27176 and Title 40 of the Code of Federal Regulations Part 441. See the EPA website:

www.epa.gov/eg/dental-effluent-guidelines

See the City of Austin – Austin Water website:

www.austintexas.gov/sites/default/files/files/Water/SSD/Pretreatment/NewDentalOfficeRulesAndDeadlines.pdf

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

The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally, nor is it applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2017 Jeanine Lehman.

Specialty Advertising Lawsuit: Dental Board Loses Appeal

On June 19, 2017, the U.S. Court of Appeals for the Fifth Circuit ruled against the Texas State Board of Dental Examiners (Board) in the federal lawsuit involving specialty advertising under Board Rule 108.54. The appellate Court upheld the district court's decision that Board Rule Section 108.54 "is an unconstitutional restriction on Plaintiffs' First Amendment right to free commercial speech". The appellate court held that the Rule is unconstitutional only as it applies to the plaintiffs in the lawsuit. The organizational plaintiffs include the American Academy of Implant Dentistry, the American Society of Dental Anesthesiologists, the American Academy of Oral Medicine, and the American Academy of Orofacial Pain. The individual plaintiffs are five dentists, three of whom are in private practice and two of whom are professors at the University of Texas Health Science Center School of Dentistry. The individual plaintiffs limit their practice to one of the following practice areas: implant dentistry, dental anesthesiology, oral medicine, and orofacial pain. Each of the individual plaintiffs has been certified as a "diplomat" by one of the organizational plaintiffs' credentialing boards, indicating that the plaintiff has achieved that board's highest honor by meeting certain requirements set by the board "including training and experience beyond dental school".

The appellate court noted that "Section 108.54 completely

prohibits the plaintiffs from advertising as specialists in their fields solely because the ADA has not recognized their practice areas as specialties. The Board has not justified 108.54 with argument or evidence. Without more in the record, we find an improper fit between the means and the objective."

The appellate court's decision leaves in place the injunction against the Board enjoining enforcement of Rule 108.54 against the plaintiffs.

For further background on this lawsuit, see the May 2014, March 2016, and December 2016 issues of the Dental Legal Update at my website: www.jeanine.com

DSO Report

On May 31, 2017, the Texas Department of Health and Human Services Inspector General issued its Dental Services Organizations Informational Report. The Report states: "In order to gain an understanding of DSOs and how they support the delivery of dental services provided to Medicaid and CHIP-eligible individuals, the IG Audit Division compiled a broad array of information pertaining to DSO (a) practice structures, (b) operations in Texas, (c) alleged influence on Medicaid and CHIP participation, (d) state payments, and (e) oversight efforts and investigations." The report is available at:

<https://oig.hhsc.texas.gov/sites/oig/files/reports/IG-DSO-Informational-Report.pdf>

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About Our Firm ... Call us at (512) 918-3435

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, and build-to-suits, 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 been in private practice as the owner of her firm for over 25 years and has over 30 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. Suggestions for future newsletter topics and invitations to speak to professional groups are appreciated!