

# DENTAL LEGAL UPDATE

## Texas Dental Board Update: Lots Happening During the Pandemic

by Jeanine Lehman, Attorney

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**The Disciplinary Committee had concerns about a dentist owner's responsibility for the actions of associates in a corporate practice setting.**

**September 11, 2020 Meeting.** On September 11, 2020, the Texas State Board of Dental Examiners held its quarterly board meeting via Zoom, broadcasted to a YouTube channel.

### Corporate Practice Dentist Owners.

The Disciplinary Committee had concerns about a dentist owner's responsibility for the actions of associates in a corporate practice setting. In Informal Settlement Conferences (ISC) involving corporate practice associates, deficiencies were noted concerning:

- Lack of consent forms
- Obtaining records
- Upcoding procedures

Apparently, associates were not aware of needing consents and other matters. The Texas Dental Practice Act §259.004 provides for responsibility of owners, stating: *"A person who practices dentistry and has another dentist practicing with or under the person is responsible for all professional acts performed under the name of the person, regardless of whether the dentist has an ownership interest or an employment or*

*contractual relationship. This section does not affect an individual license holder's responsibilities and rights under this subtitle."* The application of this law is not limited to corporate practice settings. If deficiencies are discovered concerning owner dentists during an ISC, an inquiry can be opened. The Committee Chair requested clarification of owner responsibilities be given to the dental community through newsletters. The Board's Legal Division will continue to review these matters on a case-by-case basis.

**Electronic Prescribing Waivers.** The Dental Practice Committee is continuing to work on rule §111.5 for electronic prescribing waivers for controlled substances to send to the Governor's office. Beginning January 1, 2021, electronic prescriptions must be used by dentists for prescribing controlled substances unless they have a waiver. The terms of the waiver being proposed include coverage of low volume prescribers and those who would suffer hardship.

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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](mailto:jeanine@jeanine.com)

**Website Favorites**

Law Offices of  
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[www.jeanine.com](http://www.jeanine.com)

Capital Area Dental Society  
[www.capitalareadental.org](http://www.capitalareadental.org)

Texas State Board of  
Dental Examiners  
[tsbde.texas.gov](http://tsbde.texas.gov)

Texas Dental Association  
[www.tda.org](http://www.tda.org)

Texas Academy of  
General Dentistry  
[www.tagd.org](http://www.tagd.org)

American Dental  
Association  
[www.ada.org](http://www.ada.org)

Small Business  
Administration  
[www.sba.gov](http://www.sba.gov)

**Texas Dental Board Update (cont.) --**

Once the rule is adopted, to obtain a waiver, eligible dentists will need to complete an application that will be on the Texas Dental Board's website. Eligible dentists will need to reapply every year to keep the waiver.

**COVID-19 Testing.** During the June, 2020 Texas Dental Board meeting, there was discussion of dentists providing COVID-19 testing in their offices. Consideration of that topic was delegated to the Dental Practice Committee. After consideration, the committee reported that such topic is ever-changing and recommended the topic be placed on hold. No further action was taken at the September board meeting.

**Fees.** A new fee schedule was adopted at the September meeting.

**Anesthesia Jurisprudence Exams.** The Board adopted amendments to rules §110.2 and §110.9 concerning anesthesia jurisprudence exams as recommended by the Anesthesia Committee. An anesthesia permit applicant must pass the anesthesia jurisprudence exam within one year immediately prior to application. An anesthesia permit holder must pass the anesthesia jurisprudence exam once every five years. Currently, a score of 100% is required to pass the exam. Retakes of the exam are allowed.

**Continuing Education.** Beginning on September 1, 2020, dentists, dental

hygienists, and dental assistants must take a continuing education course on human trafficking of one hour every license renewal. The course is on the Texas Dental Board's website.

Under Board rules §104.1 and §111.1, continuing education (CE) is required concerning opioids and controlled substances. This CE consists of a 1-time 2 hour CE and CE of 2 hours/year. Discussion was held concerning the 1-time CE being able to be applied to the 2 hours/year CE. This will be addressed on the Board's website. Reference should be made to the Board rules and the Board's website.

**Live Patient Licensure Exams.** The Licensing Committee reported on a requirement for clinical work to be performed on live patients in licensure exams. At the Board meeting, there was extensive discussion concerning this requirement and extensive public comment. The Board voted to propose a rule requiring use of live patients in licensure exams. A proposed rule will be sent to the Governor's office. After the Governor's office approves the publication of the rule, the proposed rule will then be published for public comment.

**Budget Concerns.** Due to the pandemic, the State of Texas has suffered a significant drop in

revenues. Therefore, the Governor issued a directive for most state agencies to cut their budgets by 5%. The Texas Dental Board cut its budget 5% per the Governor's directive. This resulted in the termination of five employees, including the Director of Enforcement and inspector staff. The Texas Dental Board will be requesting some budgetary exceptions, going forward, including due to the Board's Spring 2022 move to the George H.W. Bush State Office Building, an across-the-board 3% pay raise for the 2022-2023 biennium to retain employees (who may otherwise go to other higher paying state agencies), funding for the health professions council, and some funds back from the 5% budget cut for a Director of Enforcement and inspector staff.

**Promotions.** Former General Counsel, attorney Casey Nichols was selected to be Executive Director. In the Legal Division, attorney Laura Studdard was promoted to General Counsel and attorney Cassie Kemp was promoted to Assistant General Counsel.

**August 24, 2020 Emergency Board Meeting.**

On August 24, 2020, the Board held an emergency board meeting to adopt a new emergency rule to keep dental offices open during the pandemic. This rule continued the provisions of the April 30, 2020 emergency rule, which allowed the reopening of dental offices, with three modifications, which were unanimously adopted by the Board, as follows:

- Dental Health Care Personnel (DHCP) may resume the use of ultrasonic devices for hygiene services. The language in the rule requiring DHCP to use only hand instruments and low speed polishing tools for hygiene services was deleted.

- DHCP are no longer required to complete the full treatment of one patient before leaving the treatment area and going on to another patient.
- DHCP are required to remove PPE before returning home, but are no longer required to change from scrubs to personal clothing.

The new emergency rule §108.7(16) became effective on August 25, 2020.

The rule is available on the dental board's website at [tsbde.texas.gov/78i8ljhbj/Emergency-Rule-108.7-Updated-1.pdf](https://tsbde.texas.gov/78i8ljhbj/Emergency-Rule-108.7-Updated-1.pdf) and in the September 4, 2020 issue of the Texas Register. The rule will be in effect for 120 days unless changed by the dental board or unless the COVID-19 emergency disaster declaration of Governor Abbott is terminated.

During the meeting, board members made several observations including that the dental profession is doing a good job, that there have been no dental cluster outbreaks of COVID-19, that dentists must be mindful of what infection control is in place for practices, and that dentists need to look at board rules and set standards for every office.

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**Texas Dental Board Update (cont.) --**

In addition to the specific dental board guidelines for safe practice during the COVID-19 disaster in the emergency rule, the emergency rule incorporates by reference the Centers for Disease Control (CDC) Guidelines. This is a changing area, so dentists will want to review the emergency rule as amended and the CDC guidelines and to look frequently for new developments in board rules and CDC guidelines.

**SBA Throws Monkey Wrench into PPP Loan Forgiveness for Rent to Related Landlord**

On August 24, 2020, the Small Business Administration (SBA) issued a rule on the Paycheck Protection Program (PPP) for "Treatment of Owners and Forgiveness of Certain Non-Payroll Costs".

**Rent Paid to Related Party**

A major change concerns the forgiveness of rent paid to a related party. In the new SBA rule if there is any common ownership between the owner of the real estate (the landlord) and the tenant, who is the PPP borrower, the rent that the tenant may

claim for loan forgiveness cannot be more than the amount of the mortgage interest owed on the property during the PPP Covered Period. The new rule also states that mortgage interest payments to a related party are not eligible for forgiveness.

**There are also additional provisions concerning owners and forgiveness of non-payroll costs.**

*This is very late in the game to change the rules for PPP loan forgiveness*, especially because many borrowers, including dental practices, have already spent the money and may be surprised by the change in rules.

The rule became effective on August 25, 2020. The rule has been published in the Federal Register at 85 FR 52881 (August 27, 2020). Reference should be made to the entire rule. Here is a link to the rule:

<https://home.treasury.gov/system/files/136/PPP--IFR--Treatment-Owners-Forgiveness-Certain-Nonpayroll-Costs.pdf>

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