

# DENTAL LEGAL UPDATE

## Sleep Dentistry & Anesthesia: Finger on the Pulse

by Jeanine Lehman, Attorney

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Anesthesia-related complaints received midway through fiscal year 2016 were on pace to equal the previous high.

### Sleep Dentistry

On August 7, 2016, a new rule on sleep dentistry, Rule 108.12 “Dental Treatment of Obstructive Sleep Apnea” replaced the prior rule that was the subject of a lawsuit filed by the Texas Medical Association (TMA) in November 2014 against the Texas State Board of Dental Examiners (Board). That lawsuit alleged that the prior rule authorized dentists to diagnose and evaluate sleep disorders, thus expanding the practice of dentistry beyond its statutory limits into the practice of medicine.

The new rule provides that a dentist shall not independently diagnose obstructive sleep apnea (OSA). It further requires that a dentist may fabricate an oral appliance for treatment of OSA only in collaboration with a licensed physician. The dentist then has the responsibility for monitoring and maintaining the oral appliance to ensure the patient's dental health, while the physician is responsible for monitoring the patient's medical condition.

The requirement for education continues in the new rule. A dentist who treats OSA must complete during the first year of treating OSA, 12 hours of minimum basic education in sleep-disordered breathing from an educational venue (a combination of didactic and clinical education). For each sub-

sequent year that a dentist treats OSA, the dentist must complete 3 hours of education in sleep-disordered breathing.

The requirements of other Board rules are incorporated into the new rule. A dentist treating a patient for OSA must comply with the Dental Practice Act and Board rules, including but not limited to, provisions related to fair dealing, standard of care, records, and business promotion. Further, a dentist must maintain records as required by the Dental Practice Act and Board rules, including but not limited to, records related to treatment planning, recommendations and options, informed consent, consultations and recommended referrals, and post treatment recommendations.

The 2014 TMA lawsuit against the Board was put on hold on August 13, 2015 to allow the parties to work out their differences. At the time this article is written, the status of the lawsuit has not changed. However, the status of the TMA lawsuit should be monitored for changes and impact, if any, on the new rule.

For reference: The new rule was published in the March 18, 2016 Texas Register at 41 TexReg 2066. Discussion of the comments on and adoption of the new rule were published in the July 29, 2016 Texas Register at 41 TexReg 5547.

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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**

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

Texas State Board of Dental  
Examiners  
[www.tsbde.state.tx.us](http://www.tsbde.state.tx.us)

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  
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Texas Sunset Advisory  
Commission  
[www.sunset.texas.gov](http://www.sunset.texas.gov)

American Society of Dentist  
Anesthesiologists  
[www.asdahq.org](http://www.asdahq.org)

**Sleep Dentistry & Anesthesia (cont.) --****Anesthesia**

With patient deaths and injuries related to dental anesthesia increasing, major changes are in progress.

**Dental Board.** At the August 12, 2016 meeting of the Texas State Board of Dental Examiners (Board), the Board asked the Anesthesia Committee to explore a possible pediatric designation or separate pediatric permit; to develop written emergency plan requirements for permit holders; to analyze and determine appropriate data to track concerning anesthesia complaints; and to evaluate the current levels of anesthesia permitting, including but not limited to, educational requirements and training courses. The Board also voted to propose a rule requiring all dentists to maintain and annually update written policies and procedures for responding to emergency situations. Expect more on these initiatives at the November 18, 2016 Board meeting.

**Sunset.** Both the Board and the Texas Sunset Advisory Commission (Sunset) have identified dental anesthesia as a major priority. The Sunset staff report found that anesthesia can be high risk to patients, and related complaints to the Board have increased. The Sunset staff noted that "Anesthesia related complaints received midway through fiscal year 2016 were on pace to equal the previous high." The Sunset staff performed a manual review of standard of care complaints to the Board from fiscal year 2011 to mid-fiscal year 2016. "Of the 100 anesthesia-related complaints compiled in the review, 41 involve a patient death during or

shortly after a dental procedure involving anesthesia. Board reviewers ultimately determine that most of these deaths were unrelated to the supervising dentist performance, but at least 13 of the 41 death cases were found to include violations of the dental standard of care, including inappropriate preparation for or response to anesthesia-related emergencies." The Sunset staff recommended (i) changing the Dental Practice Act to authorize the Board to conduct inspections of dentists administering parenteral anesthesia in office settings and (ii) directing the Board to revise rules to ensure dentists with anesthesia permit(s) maintain related written emergency management plans.

On August 22, 2016, Sunset held a Decision Meeting and addressed dental anesthesia. In the Decision Meeting Material, Sunset noted "Dental anesthesia, regulated by the State Board of Dental Examiners, poses one of the greatest risks to the health and safety of a dental patient, and is related to at least 51 deaths in the past five years." Sunset recommended requiring the Board to appoint a 5 to 10 member blue ribbon panel comprised of an independent group of dental anesthesia experts, to investigate dental anesthesia deaths and mishaps over the last five years, and make recommendations to the legislature, prior to the meeting of the 85th Texas Legislature in 2017. This panel will also make recommendations to the Board. In response, a special Board meeting is scheduled for August 31, 2016 to address the

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**Sleep Dentistry & Anesthesia (cont.) --**

establishment of the blue ribbon panel.

Sunset recommended amending the Dental Practice Act (DPA) to create a standing Advisory Committee on Dental Anesthesia to advise the Board on the development and revision of rules related to dental sedation and anesthesia – appointed by the Board chair and consisting of nine members to include, but not be limited to: dentists, dentist anesthesiologists, oral and maxillofacial surgeons, pediatric dentists and physician anesthesiologists.

Proposed changes to the DPA include clarifying that the Board has authority to regulate and inspect all methods of anesthesia when performed in a dental office, defining “pediatric” and “high risk” patients based on age and American Society of Anesthesia Association (ASA) ratings; requiring an annual permit for each of the 4 different levels of anesthesia; requiring the Board to develop rules on minimum standards for training, education, and other standards for different permit levels (with level 2-4 permit holders providing proof of additional training for the treatment of pediatric and/or high risk patients); allowing the Board to establish additional limitations on administration of anesthesia on pediatric and/or high risk patients; allowing the Board to conduct pre-permit, random, and compliance inspections and requiring the Board to establish a risk-based inspection schedule for on-site inspections of dental offices of dentists with a level 2, 3 or 4 permit – the goals being that all relevant offices are inspected at least once every five years; requiring all dentists holding anesthesia permits to have adequate supplies and maintained and inspected equipment (including automated external defibrillator); and to have written emergency action plans – with level 2-4 permit holders’ plans including specified rescue protocols and advanced airway management techniques.

Sunset recommended requiring the Board to provide detailed tracking and reporting of complaints and investigations related to anesthesia/sedation.

Additional recommended changes to the DPA include establishing a “portability permit” for portable anesthesia services, and requiring the Board to establish rules and training requirements for the portability permit.

The **Prescription Monitoring Program** (Program) allows prescribers to track their prescribing history, as well as the prescription history of their patients. The Program helps prevent “doctor shopping” by patients, who have multiple prescriptions filled without informing the multiple doctors, and helps detect drug diversion by unauthorized persons using a doctor's prescription ability. The Program is being transferred from the Texas Department of Public Safety to the Texas Pharmacy Board. Sunset made three major recommendations for the interaction of dentists and the Board with the Program:

- Require dentists to register in the Program.
- Require the Board to query the Program on a periodic basis for potentially harmful prescribing patterns among its licensees. Based on the information obtained from the Program, the Board would be authorized to open a complaint for possible non-therapeutic prescribing.
- Beginning September 1, 2018, require dentists to search the Program and review a patient's prescription history before prescribing opioids, benzodiazepines, barbiturates or carisoprodol. A

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**Sleep Dentistry & Anesthesia (cont.) --**

dentist who does not check the Program before prescribing these drugs would be subject to disciplinary action by the Board.

Sunset noted that the overprescribing of pain medication by dentists can be the start of opioid addiction. (Note: A dentist can also check his own prescribing history to check if drug diversion has been occurring.)

**Medicaid.** The June 2016 quarterly report of the Office of Inspector General (IG) of the Texas Department of Health and Human Services noted that in response to a series of recent incidents involving the sedation or anesthetization of Medicaid pediatric dental patients, the IG launched the Pediatric Dentistry Action Team (PDAT), which welcomes collaboration with the Board.

Consistent with the IG's mission to detect and deter fraud, waste, and abuse in the delivery of health-care services by Medicaid providers, the PDAT is examining the following two critical issues:

- Are Medicaid dental providers meeting the required medical necessity criteria for performing procedures that use anesthetization and sedation?
- Do the anesthetization/sedation services performed on children meet Medicaid standards?

The report indicates that the PDAT will finalize its survey work in July, conduct field work in August and September, and issue a final report with recommendations and lessons learned in October.

**Specialty Advertising.** The Board's specialty advertising Rule 108.54 did not allow the advertising of certain specialties not recognized by the American Dental Association, including anesthesiology and three others. This was the case, even for dental anesthesiologists who completed residency programs in anesthesiology. A federal lawsuit was brought challenging Rule 108.54 on U.S. Constitution commercial free speech grounds. Under the January 21, 2016 judgment by U.S. District Court Judge Sam Sparks, anesthesia specialization may be advertised in Texas, if the dentist anesthesiologist is board certified by the American Dental Board of Anesthesiology and satisfies the provisions of the judgment in that lawsuit. For a detailed discussion of the lawsuit, see the March 2016 and May 2014 issues of the [Dental Legal Update](#) at my website, [www.jeanine.com](http://www.jeanine.com). The Board has appealed the judgment to the U.S. Fifth Circuit Court of Appeals, in cause no. 16-50157. Oral arguments on the appeal are scheduled for the last week of September 2016. Interested persons need to follow carefully the outcome of the appeal, and Board action concerning specialty advertising.

**Practice Tip: Preparing to Sell Your Dental Practice**

When you pay off a loan, be sure that your bank files a UCC termination or, for real estate, a release of lien. Then, when selling your dental practice, you reduce risk of delaying your closing due to old liens. An attorney can assist you with these matters.

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