

DENTAL LEGAL UPDATE

Texas Sunset Bill Passes: Anesthesia in the Spotlight

by Jeanine Lehman, Attorney

enteral administration)

- (5) Level 4: deep sedation or general anesthesia

Education & Training. Requires the Board to establish the qualifications for obtaining each permit, including education and training. Applicants for level 2, 3, or 4 permits must complete training on:

- (1) pre-procedural patient evaluation, including the evaluation of a patient's airway and physical status as classified by the American Society of Anesthesiologists,
- (2) the continuous monitoring of a patient's level of sedation during the administration of anesthesia, and
- (3) the management of emergency situations.

Examination. Requires development and administration of an online jurisprudence exam to be passed by anesthesia permit holders every 5 years covering anesthesia requirements in the Dental Practice Act, Board rules, and other state law.

Portability. Requires the Board to adopt a rule that a dentist, who provides or will provide permitted anesthesia service in more than one location, will include a statement to that effect in the application for issuance or renewal of the anesthesia permit.

Pediatric & High-Risk Patients. Sets out provisions for the administration of anesthesia to a pediatric or high-risk pa-

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The Texas Legislature completed the Sunset process for the Texas State Board of Dental Examiners (Board). The Board was reauthorized for an additional 12 years. Major changes were made to the Dental Practice Act in the Sunset Bill – Senate Bill 313. Here are some of the changes.

Anesthesia

Dental anesthesia was the main focus of the Sunset Bill. Greater oversight of dental anesthesia is required, including:

Rulemaking. Expands the scope of the Board's rulemaking authority on anesthesia. The Board is working on new anesthesia rules, which will be considered at the September 22, 2017 Board meeting.

All Forms of Anesthesia. Expands the Board's authority to regulate all forms of anesthesia, not just enteral anesthesia.

Tiered Permits. Adopts tiered anesthesia permitting system based on the extent to which the intended procedure will alter the patient's mental status and the method of anesthetic delivery. The classification of permits is substantially similar to that currently in place in the Board's rules. Permit classifications are as follows:

- (1) Nitrous oxide
- (2) Level 1: minimal sedation
- (3) Level 2: moderate sedation (enteral administration)
- (4) Level 3: moderate sedation (par-

The Board will adopt minimum components of a preoperative checklist to be used before administering anesthesia to a patient and such checklist must be retained in the patient's dental record.

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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



Sunset Bill has many changes.

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

American Society of
Anesthesiologists
www.asahq.org

Texas Sunset Bill (cont.) --

tient. A pediatric patient means a patient younger than 13 years of age. A high-risk patient means a patient who has a level 3 or 4 classification according to the American Society of Anesthesiologists Physical Status Classification System. A permit holder may not administer anesthesia under a level 2, 3, or 4 permit to a pediatric or high-risk patient unless the permit holder has:

- (a) demonstrated to the satisfaction of the Board that the permit holder has advanced didactic and clinical training and
- (b) obtained authorization from the Board to administer anesthesia to pediatric or high-risk patients. Additionally, the Board by rule may establish limitations on the administration of anesthesia by a permit holder to pediatric or high-risk patients.

Capnography. Requires a permit holder administering anesthesia at the level 4 permit level to use capnography during anesthesia administration.

Pre-operative Checklist. Requires the Board to adopt the minimum components of a preoperative checklist to be used before administering anesthesia to a patient, and such checklist must be retained in the patient's dental record.

Minimum Emergency Preparedness. Requires the Board to adopt rules for minimum emergency preparedness standards and requires permit holders to have protocols. The rules must require a permit holder to:

- (1) have an adequate and unexpired supply of drugs and anesthetic agents necessary for the safe administration of anesthesia, and an automated external defibrillator,
- (2) conduct periodic inspections of the permit holder's equipment in the manner and on the schedule required by the Board,
- (3) maintain and make available to the Board on request an equipment readi-

ness log, and

- (4) develop and annually update written policies, procedures, and training requirements, specific to the permit holder's equipment and drugs, for responding to emergency situations involving anesthesia.

The policies and procedures for level 2, 3, and 4 permit holders must include:

- (1) advanced cardiac life support rescue protocols,
- (2) advanced airway management techniques, and
- (3) if the permit holder is authorized to administer anesthesia to pediatric patients, pediatric advanced life support rescue protocols.

The emergency preparedness protocols must be specific to the permit holder's practice setting and establish a plan for the management of medical emergencies in each practice setting in which the dentist administers anesthesia.

Prior to the legislative session, effective December 26, 2016, Board rule 108.15 requires dentists to maintain and annually update written policies and procedures for responding to emergency situations.

Inspections. Requires inspections. Such inspections may include inspections of an office site, equipment, a facility, and any document of the dentist. During an inspection, the Board may evaluate dentist competency in the administration of anesthesia. No notice is required to be given before conducting an inspection. The Board is required by rule to adopt a risk-based inspection policy for conducting inspections. The policy must require the Board to take into consideration any previous disciplinary action taken against a permit holder for an anesthesia-related violation when determining

Texas Sunset Bill (cont.) --

whether an inspection is necessary. For a dentist holding a level 2, 3, or 4 anesthesia permit, the inspection must occur no later than the first anniversary of the date the permit is issued. However, if the permit holder was issued the permit prior to September 1, 2017, the Board must conduct the inspection no later than September 1, 2022. There are exceptions to the inspection requirement for administration of anesthesia exclusively in a state-licensed hospital or state-licensed ambulatory surgical center. The Board may by rule create further exceptions to inspections for a dentist who administers anesthesiology exclusively in any other facility that is subject to inspection by the Department of State Health Services, or an accrediting body under state law.

Advisory Committee on Dental Anesthesia. Establishes Board appointed six-person committee to analyze and report on data and trends concerning anesthesia-related deaths and incidents. Members must include a general dentist, a dentist anesthesiologist, an oral and maxillofacial surgeon, a pediatric dentist, a physician anesthesiologist, and a periodontist.

Other Dental Practice Act Changes

Board Composition. The Board's size will be reduced from 15 members to 11, consisting of 6 dentists, 3 dental hygienists, and 2 public members. A majority of the Board members continues to be dentists. In response to antitrust concerns arising from the U.S. Supreme Court case of North Carolina State Board of Dental Examiners v. Federal Trade Commission, involving teeth whitening, Sunset Commission staff had recommended having dentists be in the minority of the Board. That recommendation was not followed. However, the training program for Board members has been expanded to include training on antitrust law.

Dental Review Committee. The Texas Governor will appoint a nine-member Dental Review Committee, consisting of 6 dentists, 2 dental hygienists and 1 registered dental assistant. The committee members will serve with the Board members, on a rotating basis, as panelists on informal settlement conference (ISC) panels. The ISC's are proceedings to address alleged disciplinary infractions by license holders. Since the size of the Board has been de-

creased, the committee members will be able to help with the ISC work. (Note: It is prudent for licensees to be represented by their own attorneys at informal settlement conferences.)

Data Bank. The Board is required to periodically review reports filed with the National Practitioner Data Bank for disciplinary action taken by another state against a Texas license holder that would constitute grounds for disciplinary action under Texas law.

Complaints. The Board is prohibited from accepting "anonymous complaints" – meaning complaints that lack sufficient information to identify the source or the name of the person filing the complaint. A complaint filed by an insurance agent, insurer, pharmaceutical company, or third-party administrator against a license holder must include the name and address of the complaining person – which will then be provided to the license holder, unless it jeopardizes the investigation.

Mental or Physical Examinations. The Board, on probable cause, may request an applicant for a license or a license holder to submit to a mental or physical examination by a physician or other health care professional to enforce the provisions of the Dental Practice Act, concerning insanity, drug/alcohol addiction, intemperance and abuse, and physical or mental incapacity to safely practice dentistry. A process for a hearing is provided to the applicant or license holder.

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

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Texas Sunset Bill (cont.) --

Records Custodian. The Board will adopt rules that specify when the Board may temporarily or permanently appoint a custodian of a dentist's billing or patient records. These rules will consider a dentist's death or mental or physical incapacitation, as well as the abandonment of billing or patient records.

RDA's. Registration as a Registered Dental Assistant is still required to (1) make dental x-rays or (2) monitor the administration of nitrous oxide. The Board also has the authority to adopt rules requiring dental assistant registration to perform other dental acts. The law repeals requirements for pit and fissure sealant certificates and coronal polishing certificates.

Sunset Commission staff had recommended that the regulation of dental assistants be discontinued in Texas. That recommendation was not followed by the Texas Legislature.

Effective Date. Many of the changes to the Dental Practice Act will be effective on September 1, 2017. However, some changes have different effective dates. Be sure that you are in compliance on or before the applicable effective date.

Part 2: Death & Incapacity in your Dental Practice

By Jeanine Lehman, Attorney

In the April 2017 issue of the Dental Legal Update, the first part of "Death & Incapacity in your Dental Practice" was published. It is available at www.jeanine.com. This is Part 2 of that article and starts with the fifth point.

... Fifth, talk with colleagues with similar practices and offer to help each other by providing patient care on a temporary rotating basis until a temporary dentist can be hired, if there is a death or disability in the group.

Sixth, obtain life insurance and disability insurance which serves your overall plan.

Seventh, choose a bank and banker who will work with you and your family. Be aware that many commercial loans, including those with personal guarantees, have provisions that treat death as an event of default, which allows the bank to call the loan due.

Eighth, discuss these plans with your family and, if appropriate, your office manager. If there is a family member whom you trust, such as your spouse, you may want to add that person to the signature card for your practice's bank account, so that person can sign checks in case of emergency.

Ninth, assemble your team – including a business law attorney well-versed in the dental field, a wills and estate planning attorney, an accountant, a dental practice broker for dental practice valuation and sale, and a life and disability insurance agent. Your team can help you implement these steps now and can help you and your family if mental incompetency or death occur. Your team can help you throughout your practice's life, including with bringing in or buying out practice co-owners, selling your practice, and other events. Share your team's contact information with your spouse, family, office manager (if appropriate), and other team members and store your team's contact information with your will.

Act now to implement these steps and have peace of mind for yourself and your family.

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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 contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, 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!