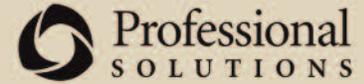




DENTAL Insights



PROFESSIONAL SOLUTIONS INSURANCE COMPANY BRINGS YOU PRACTICAL TIPS FOR AVOIDING A MALPRACTICE ALLEGATION

SUMMER 2010

State Licensing Board Actions... Matters Requiring a Dentist's Prompt Attention

Though a licensing board disciplinary action can be quite serious, the ease in which a complaint can be made is astounding. What's more, the powers of a state disciplinary agency are all encompassing, and sanctions can be as severe as permanent license revocation.

While each state has its own regulatory body overseeing substantive and administrative procedures, the following scenarios are fairly common:

The Surprise Visit

Dr. Nelson, a general dental practitioner, was treating a patient when his office manager pulled him out of the room and said privately, "The receptionist just told me that there is a man at the front desk who says he is with the state disciplinary agency. He said he needs to see you because he needs to review certain patient records and wants to inspect our office. He flashed a badge. What should we do?"

"Insurance Was Supposed to Pay" Part I

Dr. Markham, an oral surgeon, received notice of a complaint filed by a former patient. The patient said both her physician and her referring dentist gave her the impression that the extraction procedure Dr. Markham



performed would be covered by her dental insurance.

The patient had reviewed and signed papers at Dr. Markham's office stating the dentist's office would not guarantee coverage, and she agreed to full responsibility for any fees. However, after the procedure was performed, the patient learned there was no coverage. She complained that Dr. Markham was seeking payment from her for charges she believed were covered by insurance.

"Insurance Was Supposed to Pay" Part II

Dr. Datar, a general dentist, treated a patient and billed the primary insurance

carrier, as was the office's standard practice. The patient was told to submit claims to any secondary carriers on their own. The lengthy treatment involved many submissions to the carriers, much paperwork and a lot of confusion. When certain benefits were denied, the patient complained to the state disciplinary agency, which instigated an investigation.

Dentist Blindsided

Dr. Jonesborough, a general dentist, received a notice of an investigation and hearing that requested treatment and billing records from five different patients for "questionable treatment." The doctor had no idea what the complaint was based on.

Patient Died

Dr. Mikaela, a general dentist, treated a young female patient for a problem with one of her teeth that necessitated a prescription for antibiotics, which ended uneventfully. Dr. Mikaela followed up with observations of the area every other week for the next four weeks. All follow ups showed the problem resolved, with no care administered.

Dr. Mikaela learned that three days after the last dental visit, the young woman went to the emergency room of the local hospital and died the next day. Dr. Mikaela did not know if she was

Continued on page 2

required to report this matter to the state disciplinary agency.

Suspicion of Substance Abuse

Dr. Tossa received a notice of an investigation requesting multiple patient records for “questionable treatment.” The investigator also subpoenaed records of Dr. Tossa’s mother, brother and sister. The investigator also asked for any arrest and police reports.

Dr. Tossa retained his personal counsel, began to gather sparse record information and was also provided an attorney retained through his malpractice policy. Dr. Tossa had no knowledge of what the complaint was about, or who made it. However, he’d heard rumors that someone made an allegation that he had a substance abuse problem.

How Do Disciplinary Agencies Work?

State disciplinary agencies are often comprised of similarly licensed practitioners who are retained by the agency, as well as investigators and attorneys who prosecute cases before the agency. The process for each state will vary, but they are fairly similar. The following reflects how it works in Illinois.

Anyone can make a complaint—a patient, an employee or former employee, another practitioner, or even an insurance carrier. A complaint can be filed in writing or electronically.

Once a complaint is filed, the agency has a duty to investigate it. At the early stages, the agency’s investigative personnel will attempt to learn more about the complaint. That investigation and its results are not required to be disclosed to the practitioner.

Investigators may obtain other dental or medical records, conduct inspections of the dental offices, question witnesses (your staff, other practitioners, family members of the complainant, etc.), and interview others such as insurance company representatives and

former employees. These investigations may occur by phone or in person.

The investigator may or may not have dental expertise or background. For example, some investigators have a purely investigative background, such as police training or experience, or private investigative expertise. Investigators can be friendly and disarming, or they can be aggressive and sly.

The agency can then set an investigative hearing or ask the practitioner to send them more information. During the hearing, the practitioner often will be presented with some type of information that they did not know about prior to the hearing. For example, in a case of improper prescription of narcotics, the investigator may have already obtained pharmacy and patient prescription information to learn the amount and dosages of medications. Because the agency typically is not required to disclose the results of its investigation in the early

phases, the practitioner may be surprised by what the agency has discovered.

For example, in the scenario where Dr. Tossa received a notice of investigation requesting multiple patient records for “questionable treatment,” the dentist was shown copies of all of the prescriptions he had written for his mother, brother and sister. He was also presented at the hearing with a three-inch thick sheaf of documentation of every prescription he had called in to the pharmacy for the past year.

Caution Is the Word

Every potential disciplinary matter must be taken seriously by the practitioner. A decision by a disciplinary agency has the potential to apply severe sanctions on a dental practice—including restrictions or limitations on a dentist’s practice and, in worst-case scenarios, revocation of the practitioner’s license to practice dentistry. 

This case study was derived from the files of Linda Hay, J.D. All names used in *Dental Insights* case studies are fictitious to protect patient privacy.

Legal Defense Coverage for State Disciplinary Proceedings

The Professional Solutions’ policy was designed to provide limited coverage for the defense costs of state disciplinary proceedings in addition to:

- Federal professional review organization sanctions
- HIPAA and privacy related proceedings

If you receive notice of an investigation (or think one may be forthcoming), contact the Professional Solutions’ claims staff at 1-800-640-6504. They will discuss the issues with you, offer advice, confirm your specific available coverage and take action where appropriate.



Linda J. Hay is a member of Alholm, Monahan, Klauke, Hay & Oldenburg, L.L.C., a law firm that is certified as a

Women’s Business Enterprise, located in Chicago, Illinois. Ms. Hay focuses her practice on the defense of professional liability cases, including dental malpractice. In addition to trial work, Ms. Hay frequently lectures and regularly publishes on risk management issues for professionals. Ms. Hay can be contacted at lhay@illinois-law.com.

What Can We Learn?

- **Contact Professional Solutions immediately, 1-800-640-6504**, upon notice of a board investigation. Your policy may provide defense coverage for such matters. Cooperate with any investigation, but involve the Professional Solutions' claims professionals who will verify your policy's coverage and obtain counsel for you as needed.
- **Never defend yourself in any disciplinary matter.** Cooperate with the investigation to the extent possible. However, advise the investigator that you will be involving your malpractice insurance carrier and retaining counsel to assist you. Be frank with your defense team about any potential issues.
- **Be aware that quality/fraud/abuse investigations are exempted from HIPAA regulations**, and patient consent is not required for an inspection or audit of patient records by a state investigator.
- **Review your your state's requirements** for the renewal and update of licenses to assure proper compliance with educational requirements, fees, recordkeeping and disciplinary matters. It is helpful to provide the agency with a copy of your curriculum vitae and continuing education courses completed over the past five years.
- **Be ready to discuss your office procedures and protocols** without relying on your office staff. Your staff will not be present with you at the hearing. That includes matters such as scheduling, billing, insurance submissions, care, treatment, marketing and paperwork.
- **Understand that billing and financial issues are often at the heart of patient complaints.** Ensure your office maintains comprehensive records relating to billing, payment and insurance processes.
- **Know your state's regulations governing the practice of dentistry.** For example, most states have specific reporting requirements when a patient is hospitalized or dies after dental treatment. In the state of Illinois, for instance, Dr. Mikaela (the doctor who learned the patient died three days after a dental visit) could have been sanctioned for failure to make a report.
- **Realize that findings are easily accessible.** With the advent of the Internet and the power of technology, disciplinary results may be easily accessed by the public. 

Why Practice Confidentiality Is Even More Critical Today

Years ago, employees had to be cautioned not to discuss patients where they could be overheard. Today, exercising caution in staff discussions about patients is just as important, but ever-changing technology has opened up additional ways confidentiality can be breached.

These days, the ramifications of breaching patient confidentiality are more serious for practices and employees due to HIPAA. Consider the following situations and ask yourself whether they could occur in your practice.

Scenario #1

After a dental practice underwent a complete change in its computer system

and moved to a paperless Electronic Health Record (EHR) system, all inactive patient records were moved off-site for storage. After being scanned into the new system, the "active" hard-copy charts were stacked on the floor of an unused office, awaiting the final okay to move them off-site, as well.

The office manager got approval to move the "active" charts after two weeks on the new system. When the record transport van arrived for the pickup, the records were not where they had been left. The entire office was searched, and the records were not found.

Further investigation discovered that sometime during the two-week period, an after-hours janitor had seen the piles of charts in the unused, open office, mis-

takenly assumed they were trash and had disposed of them in the building dumpster. By the time this was discovered, the dumpsters had long been emptied by the trash service, and the contents had been taken to the local landfill.

Scenario #2

A member of a small town group's front office staff was fired after repeated disciplinary problems. Several patients had complained about her rudeness and reluctance to help them through insurance problems. In addition, there were documented problems with attendance and punctuality. The staff member's employment was terminated.

Within a few days, the office began

Continued on page 4

getting calls from unhappy, angry patients who reported that sensitive information from their health records was being “passed around town.” A few threatened litigation. The practice believed that the fired office staff worker was at fault, that she had downloaded patient info from her PC while cleaning out her workstation. However, they could not prove her involvement.

Commonly Faced by Dentists

While the two scenarios are fictitious, they are not far-fetched. And, they demonstrate how easily your patients’ personal health information can be breached—whether accidentally or on purpose—opening up your practice to a HIPAA violation and litigation.

Scenario #1 brings up the issue of security measures that should have been put in place to protect the active patient charts. They were in an unlocked, unused office with an open door. Yet, they were so “invisible” to staff no one noticed that they were gone. All patient records should be maintained safely—whether stored electronically, in traditional hard copy files, or in off-site storage. A staff well-trained in HIPAA requirements would have noticed and called attention to the lack of security with these records.

What happened in Scenario #2 is more difficult to control. However, no employee should be left alone after employment is terminated. The employee’s access to the practice computers should be blocked immediately upon termination. In addition, a supervisor or other employee should be at employees’ sides while cleaning out their work areas. Re-



mind employees about the confidentiality agreement is also important at termination, although doing so may not have changed the events in this scenario.

Practice Tips for Protecting Privacy

A dentist has a duty to protect patient information—anything that’s acquired during the course of the doctor/patient relationship. That duty extends to each of the dentist’s employees. In addition, under the HIPAA Privacy Rule, a dental practice must, among other things, show compliance in the following areas related to staff’s duty of confidentiality:

- **Develop and implement written privacy policies and procedures** that are consistent with the Privacy Rule. These should be communicated to all new employees upon hiring and periodically thereafter. Confidentiality agreements should be required annually of all practice staff.
- **Train all workforce members on privacy policies and procedures.** A dental practice that makes a strong, visible and well-communicated commitment to protecting patient confidentiality will be much more likely to have a staff that respects the privacy of its patients as well. All new employees should receive training when hired, with reinforcement through in-service programs and regularly updated training.
- **Have and apply appropriate sanctions** against workforce members who violate privacy policies, procedures or the privacy rule. Many practices have instituted a tiered disciplinary process for breaches in patient confidentiality. However, because of HIPAA and increased public awareness and expectations, many dental practices are adopting a “zero-tolerance” policy for breaching patient confidentiality.
- **Detail your policies and procedures** in the practice office manual, communicate it to all employees and enforce it without exception. Even when terminating an employee, the topic of patient confidentiality should be reiterated. The discussion should emphasize the employee will be held to the confidentiality agreement signed upon hiring and will face HIPAA penalties and prosecution if a patient’s confidentiality is violated.
- **Maintain appropriate administrative, technical and physical safeguards** to prevent disclosure of protected health information. Limit the use and disclosure of this information to what is permitted or required. 🔄



Professional
SOLUTIONS

INSURANCE
COMPANY

Send all inquiries, address changes and correspondence to:
Dental Insights, P.O. Box 9118, Des Moines, IA 50306
Toll-Free 1-800-718-1007, ext. 9250
Internet – www.profsolutions.com
Email – dentists@profsolutions.com

Dental Insights is published quarterly for policyholders of Professional Solutions Insurance Company. Articles may not be reprinted, in part or in whole, without the prior, express consent of Professional Solutions.

Information provided in *Dental Insights* is offered solely for general information and educational purposes. It is not offered as, nor does it constitute, legal advice or opinion. You should not act or rely upon this information without seeking the advice of an attorney.