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Dental Licensing Board Actions: Countering the Risks

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Licensing board actions pose a significant risk to dentists, potentially disrupting or even ending practices and careers. According to the CNA *Dental Professional Liability 2016 Claim Report*, during the five-year period between 2011 and 2015, CNA-insured dental professionals experienced 1,626 board actions that resulted in a defense expense payment of at least one dollar.*

Approximately 60 percent of the board actions in the claim report dataset are linked to a specific dental procedure. As noted in the chart, *Dental Procedures Most Frequently Associated with Board Actions*, the five most frequent procedures are crown placements, root canal therapy, simple extractions, implant placements and composite restorations.

In terms of severity, crowns and composite restorations occupy the lower end of the average paid expense range. Although crowns represent the most frequent board action-related procedure, only one of the ten most costly board investigations involve crown procedures. On average, complaints associated with dental implants are considerably more expensive, with three of the ten most costly dental board actions involving implant placement.

This issue of the NSDP newsletter examines licensing board-related exposures and offers risk control strategies addressing the dental procedure most frequently associated with licensing board actions–crown restorations–as well as measures to address the three most costly board allegations: overtreatment, failure to obtain informed consent and treatment failure/failed dental implants.

DENTAL RISK CONTROL MEASURES

Crown restorations

Because crown restorations are a common source of complaints and investigations, the procedure calls for a targeted risk control approach, including the following measures, among others:

- Prior to crown and bridge preparation, take a preoperative radiograph showing the entire root structure and periapical area, and carefully assess the pulpal, periodontal and periapical status of the tooth or teeth.
- Before performing a crown or bridge restoration, discuss the possible need for future endodontic treatment, which is a common and potentially unavoidable consequence of the procedure. As such, the risk should be included in the documented informed consent discussion.
- Discuss fees and payment expectations before beginning treatment and document this discussion.
- Have patients approve aesthetics before crown cementation and ask them to sign an approval. If they remain uncertain, make a provisional placement, using a temporary cement.
- Encourage patients to invite a family member or friend to accompany them to the office and help them with shade selection and aesthetic approval.
- Critically evaluate restorations before cementation. When necessary, take a bitewing radiograph to help determine the integrity of interproximal margins. Inform the patient of any problems with the completed restoration and promise to redo the procedure at no additional charge if the standard of care has not been met.

Overtreatment

As always, dentists are expected to serve as a reliable source of oral healthcare information, recommendations and treatment. However, as a result of the plethora of information available on the Internet, patients tend to be more skeptical and questioning than in the past. It is, therefore, more important than ever for dentists to carefully communicate and document diagnoses and the rationale supporting treatment recommendations.

Ideally, the dentist should take personal responsibility for patient education and discussion of treatment costs. If this task is delegated to staff members, they should be well trained in patient relations and documentation skills. All verbal and written communication about dental conditions and treatment, irrespective of who delivers it, should reflect the health literacy of the patient and the complexity of the case.

Failure to obtain informed consent

Dentistry is a highly technical profession, and patients often have a limited understanding of the procedure to be performed and the reasons for it. The informed consent process should thus be treated not merely as an administrative formality, but rather as an opportunity to educate patients and manage their treatment expectations and the possibility of failure.

The informed consent process has two major components:

- Discussion of the procedure's benefits and risks, as well as a description of alternative treatments and the potential consequences of inaction.
- Documentation that the patient understands the information presented and consents to the recommended treatment, typically through use of a signed informed consent form.

Regardless of whether a written consent form is used, the dentist's progress note should indicate that informed consent was obtained, not that "a form was signed." Remember that healthcare providers have a duty to obtain informed consent and that failure to do so, may constitute battery.

Treatment failure/failed implants

Many licensing board complaints are precipitated by a patient's disappointment with treatment results. Dentists can minimize this risk by:

- Explaining the prognosis within the informed consent discussion, thus fostering realistic expectations.

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- Honestly acknowledging the possibility of failure, to help patients understand and accept the fact that while some treatment choices are better or safer than others, no option is risk-free.
- Informing patients of their own responsibility to maintain good oral health, comply with self-care instructions and to return for ongoing professional care. Every aspect of such discussions and patient behavior should be documented, including written/spoken instructions given and patient responses, as well as instances of noncompliance. These records can be of pivotal importance for defense attorneys in the event of a claim or board investigation.

LEGAL AND COVERAGE ISSUES

Dentist's Advantage professional liability policies issued through CNA provide defense coverage for state licensing board investigations, including attorney fees and related expenses. The insured dentist is typically responsible for fines, restitution, continuing education costs or other expenses arising from board-imposed disciplinary actions. However, dentists should check and understand the details of their policy to determine the actual scope of coverage, as well as applicable exclusions and conditions.

By understanding the major causes of board actions and lawsuits, dentists can better identify their exposures and implement effective preventive measures. If, despite taking precautions, one becomes aware of the possibility of a board investigation, the first step is to inform the insurer. A claim professional will describe the process, determine the need for legal counsel, and explain how to respond to licensing board inquiries and record requests.

Dental Procedures Most Frequently Associated with Board Actions*

** Based on 988 closed claims for which dental procedure coding is available.*

Procedure	Percentage of board actions with coded procedures	Average paid expense	Total paid expense
Crowns	17%	$3,467	$603,296
Root canal therapy	9%	$4,354	$378,777
Extractions, simple	7%	$4,868	$326,182
Implant surgery - placement	6%	$6,819	$422,786
Composite restorations	6%	$3,520	$197,093
Grand total	**45%**	**$4,323**	**$1,928,134**

Source: CNA. (2016). Dental Professional Liability: 2016 Claim Report. (Table 39, page 49).

Summary of Board Actions, 2011 to 2015

- Licensing board investigations average $4,100 in legal and related expenses.
- Board actions in the Midwest average about $1,000 less than the nation as a whole.*
- Expenses for individual board actions range from $1 up to the mid-six figures during the five-year period.
- Eleven percent of the board actions incur expenses ranging from $5,000 to $10,000, while 7 percent of the actions represent expenses of more than $10,000.
- Ninety-two percent of board investigations involved general dentists, who comprised 83 percent of all CNA-insured dentists during the report period.

This newsletter is prepared by the staff of the National Society of Dental Practitioners, Inc.

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Dental Expressions® – From the CNA Claim Files

Licensing Board Action: Periodontal Treatment and Patient Dissatisfaction

Facts:

The patient was a middle-aged female with a history of periodontal disease, cigarette smoking, and bruxing, who had been a patient of the general practitioner dentist for over 20 years. The dentist had referred the patient to a periodontist in the past and did so again after reassessing the patient's periodontal status. The patient underwent periodontal surgery, which resulted in exposed crown margins: the patient was not pleased with this outcome. Her dissatisfaction led to a complaint to the state board of dentistry. Shortly thereafter, the dentist received notice from the board regarding the patient's complaint, which included a request for records. The same day, he reported the board

complaint to his insurer. The CNA claim professional assigned a defense attorney to advise and represent the insured dentist.

The dentist and the attorney met and began preparing for the board's investigatory hearing. Counsel's opinion was that sanctions were likely, based upon his experience that the dental board often sanctioned dentists whom they believed failed to appreciate a patient's declining periodontal condition.

The attorney accompanied the dentist to the investigative interview and nearly 3 months later, the dentist received the board's determination. The board found fault with the dentist's care and proposed a consent order in which he would admit his wrongdoing. In retrospect, the dentist believed his record keeping had been inadequate, and he should have been more aggressive in his periodontal treatment approach and patient recommendations. As a result, the dentist chose to forego a full hearing and signed the consent order.

Within one month of signing the board consent order, the dentist and defense counsel received a call from the patient's husband. He demanded $20,000 in settlement of all claims on behalf of his spouse. Further, he stated that failure to meet this demand would result in malpractice lawsuit against the dentist. The attorney believed any civil claim would have a strong statute of limitations defense: more than two years had elapsed since the patient learned of her alleged injury, and the state statute of limitations was two years. The demands were denied, and no lawsuit was filed.

Key Allegations:

Patient alleged failure to diagnose and inform her of her ongoing periodontal disease and deteriorating periodontal health.

Claimed Injury/Damages:

The patient's complaint to the state dental board stated that she lost a number of teeth due to the dentist's inattention to her periodontal problems, resulting in a less than aesthetic smile.

Analysis:

The primary treatment issue before the dental board focused upon the dentist's diagnosis and treatment of the patient's periodontal disease. In his view, the patient had not been dependable about keeping her recall appointments. Therefore, her disease progression was due to her own neglect. The dentist recalled numerous discussions with the patient about periodontal disease risk factors, emphasizing the impact of cigarette smoking and poor oral hygiene. In his view, the patient had ignored his recommendations until she began to see the visual evidence of her gum disease. By then, her condition was advanced. Although he regretted that his long-time patient developed periodontal disease, he initially believed it was not due to the lack of a diagnosis, referral, or treatment on his part.

The patient's dental record was scrutinized by the board during its review of the complaint. The Board acknowledged that the patient was noncompliant and that there was a total of six calendar years during which she did not return for dental care. Notwithstanding the patient's conduct, the dental board found fault with the dentist's treatment in the following areas:

- The records demonstrated that although he had treated the patient for twenty-two years, the only full mouth series of radiographs were from her initial visit over 20 years ago.
- The dentist referred the patient to a periodontist three times over a period of approximately 8 years. In view of the patient's long history of periodontal disease, the board determined that the "referrals to a periodontist were not timely made."
- The patient records documented only three periodontal examinations recorded in the record, and that there were "no records of periodontal charting" over the twenty-two years of treatment.

The board reprimanded the dentist about documentation during the investigative interview and noted in the final consent order that his infrequency of periodontal examination and radiograph assessment, and absence of exam appropriate documentation breached the standard of care.

Dental licensing boards have broad authority to investigate the dental professionals named in complaints. As a result, reprimands for an action, error, or omission not related to the specific issue cited by the complainant are common. In the course of investigating the periodontal complaint against the insured dentist, the dental board also found that he failed to take a diagnostic preoperative radiograph of tooth #14 prior to preparing it for a crown. This deficiency also cited in the consent order.

The timeline for resolution of a dental licensing board complaint is highly variable among the states and even within a given state. Important factors include the processes required under state law or administrative rule, the nature of the complaint, the quality and accuracy of the dental record, and the cooperation of the parties involved. The dentist's case required seventeen months to resolve, even in the absence of a full board hearing.

The dentist exercised prudence in immediately reporting the dental board complaint to his professional liability insurer. (Note that not all professional liability policies include this type of coverage.) The attorney was experienced and conversant with the state dental board's procedures, as well as actions taken against other dentists, giving him pertinent insight into the situation. Through his efforts to negotiate with the board, the dentist's original fine was reduced substantially.

Following the resolution of the dental board complaint, the patient's husband threatened to use the findings of the board as evidence in a professional negligence civil liability lawsuit against the dentist. Initial filing of a board complaint represents a common method for patients to have their case investigated without incurring litigation costs and to determine its strengths and weaknesses. Any negative findings by the board often become the basis for a negligence claim.

Outcome:

The state dental board placed the dentist's license on probation for three years and levied a fine of $1,000. The board also mandated that, within one year from the date of the consent order, completion of eight hours of risk management continuing education, eight hours of periodontal diagnosis continuing education, and eight hours of diagnosis and treatment planning continuing education, in addition to the continuing education hours required for license renewal.

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DENTIST'S ADVANTAGE
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DENTIST'S ADVANTAGE

Did you know...

...that there is a full library of Risk Management information available to NSDP members on the Dentist's Advantage website?

As a member, you have access to a full range of helpful information that you can use everyday in your practice. They include:

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