

PATIENT COMPLAINTS - WHEN THE DENTAL BOARD CALLS

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It is not the type of letter, telephone call or even a knock on the door that any dentist would welcome. A patient has filed a complaint with the Board of Dental Examiners (“Dental Board”). An investigation is initiated and one that which can lead not only to stress, but also costly legal fees, fines and in some cases, the loss of your license. Fortunately, most dentists enjoy a practice away from such experiences. When a complaint is filed and an investigation begins, however, the consequences are real. Every dentist needs to understand their rights and how to respond. Every dentist should consider the following nine points:

1. Respond.

A complaint may be filed for any reason. No matter how frivolous, a response must be made in a timely and appropriate fashion. To ignore an inquiry by the Dental Board, is simply to invite more problems. Often, a patient’s complaint is filed without the dentist’s knowledge, or without the dentist receiving a copy of the complaint prior to the request from the Dental Board for information. The first notice may even be an unannounced face-to-face meeting with the Dental Board representative at your office. While dentists should be mindful and respectful of the Dental Board’s authority, due process provides you with certain rights. The requirements of due process include adequate notice and a reasonable opportunity to prepare a defense with the assistance of counsel. Practically speaking, this means you should first ask for a copy of any written complaint or finding. Second, you should be allowed a reasonable opportunity to respond to the Dental Board’s inquiry. This may mean consulting a lawyer even where the

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request is for immediate information or production of documents. In communicating with the Board representatives, it is important to convey that your decision to seek a lawyer's advice is not a refusal to respond, but only an effort to protect your rights. You should be mindful that seeking such legal counsel does not allow an open-ended time to respond. Thus, if the Dental Board requests information by a date certain, you should reply. Further, in certain circumstances such as suspected drug or alcohol abuse or where the dentist may be viewed as a threat to themselves or the public, there may be a need for an immediate response. The failure to comply may lead to the Dental Board exercising its right to obtain an emergency court order in its favor. It is therefore imperative to understand that the complaint is not going to be dismissed based upon your inaction.

2. Consult a Lawyer.

By no means is every investigation intended as a disruption of the dentist's practice. Nevertheless, it is prudent to contact an attorney regarding the Dental Board's investigation, even if contact is nothing more than a brief telephone call. Because the Dental Board has its own counsel and will be guided by sound legal advice, you too should proceed with advice of counsel. In consulting with your attorney, the focus of the investigation can be confirmed. An attorney can assist in formulating a response to the Board that is limited to the proper inquiry. If there is a concern with the scope of the investigation, your attorney is in a better position to understand and explain your rights. A clear example of why it is important to consult an attorney exists where the Dental Board requests a dentist to submit to a behavior examination or rehabilitation when the validity of the complaint remains disputed. Further, an attorney will oversee the production of documents and any interviews given to the Dental Board by you and your staff to ensure they are conducted in a reasonable fashion. As needed, your attorney may

also converse with the Dental Board's counsel or the Administrative Law Judge to address any legal issues. Should there be resolution prior to a hearing on the merits, you will most certainly want an attorney's advice before entering into any Consent Order.

3. Do Not Underestimate the Dental Board's Authority.

The Board is created by statute by the Alabama Legislature and has enormous power. In addition to its statutory authority, the Dental Board has the power to create its own rules as set forth in the Alabama Dental Practice Act. On its own initiative, the Dental Board can commence an investigation, request records, and issue subpoenas. At its discretion, the Dental Board can temporarily suspend the license of a dentist even before a hearing is held on the merits of the complaint. The Dental Board can "recommend" certain courses of action that often involve time and expense such as attendance at a one-week behavioral examination. These "recommendations" can be made even before you ever have the opportunity to fully respond to the complaint. The Dental Board may issue a monetary fine, suspend or permanently revoke your license. The Alabama Legislature even provides that a willful violation of the Alabama Dental Practice Act may subject the violator to a fine not to exceed One Thousand Dollars (\$1,000) and sentenced to hard labor for a period not to exceed twelve (12) months. (ALA. CODE § 34-9-5.) The implications of such power is that you should not underestimate the Board's authority. At the same time, however, each dentist must recognize they are entitled to due process in responding to and defending a patient's complaint.

4. Know the Rules.

The rules that govern the practice of dentistry are codified in the Alabama Code, § 34-9-1 and following, as well as the Alabama Dental Practice Act. The Dental Board is required to publish the provisions of these rules on an annual basis. A dentist is presumed to know, such

that a lack of knowledge is not a valid excuse for any violation. The rules and statutory provisions are detailed, and a requirement may be overlooked absent careful study. As an example, there are specific provisions that govern advertising, referral services, maintenance of control of substances, records and inventory, and documentation of a patient's chart. The duty to know the rules is continuous. The proposed changes are publicized via the *Alabama Administrative News Monthly*, the *Dental Board Newsletters*, or on its web site, www.dentalboard.org. Moreover, a public hearing is required before a rule is adopted, amended, or rescinded. Given the obligation of the dentist to know the rules, and availability of various resource to access the rules defending a violation on the grounds of ignorance is unconvincing.

5. Integrity of the Patient's Chart.

Paramount to defending any complaint, whether it is a complaint to the Dental Board or one for malpractice, is the obligation to maintain the integrity of the patient's chart. The patient's chart will serve as the basis for your defense. As described by Alabama Dental Practice Act, the chart should contain specific information. If well maintained, the chart should constitute the strength of your case, not the weakness. Under no circumstances should the chart be altered in response to a patient's complaint, or any reason for that matter. The temptation to add some lengthy self-serving narrative must be avoided. Instead, the chart should be maintained and produced to the Dental Board in its original form. Altering the chart simply creates more problems. Further, should a civil suit be filed, an altered chart may be grounds for your professional liability carrier to deny coverage.

Apart from the patient's chart, a separate file folder should be maintained regarding any and all correspondence to or from you, the Dental Board, and your lawyer. Any notes or written observations by you about the Dental Board's investigation should likewise be segregated from

the original chart. Moreover, any notes should be made only at the direction of your attorney so that the notes remain privileged. Privileged documents such as correspondence and notes should not be subject to production.

Beyond the written chart, it is important to ensure that x-rays and models relating to a particular patient are safeguarded. Even if such x-rays and models are not specifically requested for production, they should be identified to the Board.

6. Notify Your Professional Liability Carrier.

Policies issued for professional liability may carry an endorsement that provides coverage for responding to a patient's complaint. The coverage may be limited to the cost of defense and not include payment for any fines or examinations. Even if the policy does not provide coverage, however, notification to your insurance carrier is essential for several reasons. To begin, a patient's complaint can evolve into a civil suit for dental malpractice. If so, your insurance carrier needs to understand at the earliest date when and what complaint has been made. Your carrier may need to take immediate steps to protect your interest in anticipation that a civil action will follow. More so, the failure to provide timely notice may be a ground for the insurance carrier to later deny coverage should a civil action follow. Second, even if there is no coverage, the insurance carrier may often have risk management services available. This would include education to the dentist and staff about the particular matters made the subject of the complaint. These programs are generally provided at no cost. Third, the insurance carrier can provide a reference of attorneys who are experienced in handling complaints made by the patient to Dental Board, and dental malpractice matters.

7. Expect an investment of time and money.

Responding to a patient's complaint is often stressful and expensive -- both in terms of time, money, and even the loss of your license. Given the serious nature and consequences of a Dental Board inquiry, you should expect to prepare for any meetings with the Dental Board and its investigators as if you are preparing for a deposition. If you retain an attorney, you should anticipate a number of meetings as necessary to properly respond. Under certain circumstances, you may follow the Dental Board's recommendation by participating in a course of action, such as a behavioral examination. As these examinations are often conducted out-of-state and may last an entire week, the cost could exceed several thousand dollars plus the lost income from your practice. This cost is incurred by the dentist under investigation. Should there be a hearing, you will need time to prepare as if it were a trial. You should understand that your attorney's approach to defending the patient's complaint, is the same as defending a civil action. Given the consequences, there is simply no reason not to prepare.

8. Consider All Options.

Not every patient's complaint will lead to a full hearing before the Dental Board, much less an appeal to a Circuit Court, or Alabama Supreme Court. Such a course of action is unusual both in terms of time and expense. If, however, an appeal were to occur, the defense cost could run into thousands of dollars, and take months if not a year or more to conclude. At the same time, your practice may be subject to some temporary suspension or limitation imposed by the Dental Board. A careful review of all options including a negotiated agreement with the Dental Board should always be considered. This may mean taking affirmative steps such as changing your practice routine, limiting the scope of your treatment, supervision from other practitioners, or participation in some ongoing practice management program. If a reasonable resolution can

not be reached, you should be prepared to defend yourself, knowing the potential cost, risk of an adverse finding, and punishment.

9. Be Proactive.

The best way to avoid a patient's complaint is to establish a good relationship with the patient and to provide reasonable care. It is understood that every dentist is going to have patients who have unfortunate results. A patient's complaint, however, is often the product of unrealistic expectations by the patient, and a lack of good communication between the patient and the dentist. The patient needs to understand that dental problems may be the result of longstanding conditions including neglect. The patient who expects the perfect smile in 24 hours to correct a longstanding problem needs to be educated regarding realistic expectations. Likewise, a dentist should consider whether this is the type of patient he or she should treat. Close attention by you and your staff is necessary to those patients who express or show dissatisfaction while in your office. If a problem is recognized, address the issue with the patient in a thoughtful manner. It is much easier to resolve any problem face-to-face with the patient at the time the complaint is first recognized. Otherwise, the patient's frustration may grow and lead to a complaint to the Dental Board and a follow-up investigation.

Dentists are encouraged to use the Dental Board resources if there is a question about patient or compliance with the rules. As the introduction to the rules of the Board of Dental Examiners states, "The Board believes that disciplinary actions can be reduced if you seek guidance before acting. Reliance upon forgiveness rather than permission is an unwise course of action when it involves your license."

In summary, the practice of dentistry is self-governed. The state of Alabama has prescribed certain rules that must be followed in connection with the privilege of the profession.

Dentists like all professions are not perfect and patients will complain despite the dentist's best efforts. The Dental Board has an absolute obligation to investigate those complaints. It is the dentist's duty and, in their best interest, to properly respond to any investigation. By careful and thoughtful deliberation, a patient's complaint can be addressed and resolved. Understanding these nine basic rules will hopefully assist in that process.