

## On the Radar: Patient Notifications, Specialty Ads & Sleep

By Jeanine Lehman, Attorney

**Patient Notifications.** On January 26 and April 1, 2016, the Texas State Board of Dental Examiners (Board) held stakeholder meetings on changes to Rule 108.5, Patient Abandonment. It is likely that the patient abandonment rule will also morph into a patient notification rule triggered by a dentist leaving a practice. In 2014, the Board abandoned proposed Rule 108.15, Notification of Discontinuance of Practice, after a flood of comments from the dental community. That rule would have generally required certified mail notification to patients when a dentist departed from a practice. The Board is now holding stakeholder meetings to obtain input from the dental community and others, prior to proposing some new rules. In the April 1<sup>st</sup> meeting, there was discussion of imposing a new patient notification requirement for when a dentist leaves a practice, requiring notice of how to obtain dental records.

There were strong concerns about the cost of a patient notification rule and the need for such regulation. The rule could cost dentists thousands of dollars (per practice departure). These seemingly unnecessary costs have a compounding effect on patients, since the costs will need to be passed through. Someone has to pay for this. A dentist seeing a new patient will perform an exam, medical history, records update, and have new x-rays taken as needed, to allow a current assessment of the patient's needs. Participants proposed that there be exceptions to patient notification for military, faculty, charity-care, and group practices. Finally, practices often have noncompete agreements to protect their significant investment and goodwill. It is established law under the Texas Business and Commerce Code that properly written noncompete agreements are allowed. A patient notification rule impacts the efficacy of such noncompete agreements.

The Texas Medical Board has a rule requiring physicians departing a practice to provide mailed or hand delivered notification to patients they have seen in the prior two years, as well as posting a sign in the lobby, and running an ad in at least two newspapers. Physicians bear significant expense to comply with this requirement (each time they depart a practice), typically, amounting to thousands of dollars for postage. Additional expenses to the departing physician and practice are IT, staff, and legal expenses. The possible rule to be imposed on dentists has its genesis in the Medical Board's rule. The Board's proposals, discussed at the stakeholder meeting, include allowing departing dentists' notices to be provided by alternate means, in addition to mail. An alternate means is email. Participants, at the meeting, had concerns about using email to deliver notification to patients, including HIPAA concerns. Also, many practices do not have email addresses for their patients. Even if the practice does have email addresses, staff time and IT resources (which cost money) are needed to provide email notification.

The next stakeholder meeting on this rule will be in May, 2016, at a date to be determined. To receive stakeholder meeting information on this rule and other rule-making topics, email the Dental Board at [cbodden@tsbde.texas.gov](mailto:cbodden@tsbde.texas.gov). Then, a proposed rule could be considered at the Friday, June 3, 2016, or August 12, 2016 Board meeting. You are encouraged to attend and participate in both the stakeholder

meetings and the Board meetings. Public comments may be given at the beginning of the Board meetings, by filling out a card that is provided.

At the stakeholder meetings, there was also discussion on changing the current language in Board Rule 108.5 concerning patient abandonment, to make the requirements less onerous, which would be a positive development. For example, the current rule requires that when a course of treatment has been undertaken for a patient, notification of discontinuance of that treatment must be given by hand-delivery or certified mail and include detailed information on the diagnosis, current treatment plan, and more. Discussion included allowing provision of the notice by alternate means and having a summary statement concerning the need to continue treatment, rather than a detailed dental history. This would significantly reduce the cost of notice in the abandonment context, for postage, staff time, and dentist time. There was discussion about what comprises "active treatment", which would trigger abandonment concerns. For example, if a temporary is in place, and the permanent crown has not been seated, then presumably, the patient would be in active treatment.

**Specialty Advertising.** In response to U.S. District Court Judge Sam Sparks' January 2016 decision against the Board, there was a stakeholder meeting on March 31, 2016, to work on revisions to Board Rule 108.54 on specialty advertising.

**Sleep Dentistry.** In response to the lawsuit by the Texas Medical Association against the Board, amendments to Rule 108.12 on sleep dentistry were proposed on March 18, 2016. The proposed amendments are available in the Texas Register at volume 41, page 2066.

**[www.sos.state.tx.us/texreg/pdf/backview/0318/0318prop.pdf](http://www.sos.state.tx.us/texreg/pdf/backview/0318/0318prop.pdf)**

This proposed rule could be adopted at the June 3, 2016 Board meeting. Public comment may be given at that Board meeting.

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## **Austin Fair Chance Hiring Ordinance: Criminal Background Checks**

**By Jeanine Lehman, Attorney**

On March 24, 2016, the Austin City Council passed the “Fair Chance Hiring” ordinance by a vote of 8 – 2. The ordinance took effect on April 4, 2016. The purpose of the ordinance is to give a fair chance to job applicants and current employees seeking promotion, with a criminal history that is not relevant to the job. This ordinance applies to private employers, including dental practices, staffing agencies, and others, who employ at least 15 individuals whose primary work location is in the City of Austin. This article addresses requirements for employers that are subject to the ordinance.

An employer may not solicit or otherwise inquire about criminal history in a job application. Prior to making a conditional employment offer, an employer may not solicit criminal history information about an individual or consider the individual’s criminal history. A conditional employment offer is an oral or written offer to employ an individual, conditioned on the employer’s evaluation of the individual’s criminal history and may also be conditioned on examinations authorized under the Americans with Disabilities Act.

An employer may not take adverse action against an individual because of the individual’s criminal history, unless the employer has determined that the individual is unsuitable for the job based on an individualized assessment conducted by the employer. Adverse action includes refusing to hire or promote or revoking an offer of employment or promotion.

The individualized assessment is an evaluation of the criminal history of the individual that includes, at a minimum, the following factors: (1) the nature and gravity of any offenses in the individual’s criminal history; (2) the length of time since the offense and completion of the sentence; and (3) the nature and duties of the job for which the individual has applied. If the employer takes adverse action against an individual based on the individual’s criminal history, the employer must notify the individual in writing that the adverse action was based on the criminal history.

The ordinance does not apply to a job for which a federal, state, or local law, or compliance with legally mandated insurance or bond requirement disqualifies an individual based on criminal history.

Complaints may be filed for violations of the ordinance. Retaliation against a person filing a complaint or participating in an administrative proceeding is prohibited. The Austin Equal Employment/Fair Housing Office enforces the ordinance. The director of that Office may subpoena records or testimony relevant to the investigation of a complaint under the ordinance. Failure to comply with the subpoena is a crime punishable as a Class C misdemeanor. Commencing on April 4, 2017, civil penalties of up to \$500 per violation may be imposed on employers who violate the ordinance, with a warning allowed for a first time violation.

Dental practices, which are covered by the ordinance, need to review and revise their job applications and recruiting policies and procedures. Facing risk of embezzlement, drug diversion and identity theft,

many dental practices perform criminal background checks and will need to comply with this new ordinance, as well as other laws.

The ordinance has very technical requirements for the overall recruiting process and is not clearly written. Examples include required counting of the number of employees in a two year period to determine if the employer is covered by the ordinance, and coverage of both employees and contract labor. Therefore, Ordinance No. 20160324-019 should be reviewed in its entirety, by dental practices and others, who may be covered by the ordinance. It is prudent for them to consult with an attorney. Here is the link to the ordinance: **[www.ci.austin.tx.us/edims/document.cfm?id=251818](http://www.ci.austin.tx.us/edims/document.cfm?id=251818)**

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