



Douglas A. Ducey,
Governor

Arizona State Board of Dental Examiners

“Caring for the Public’s Dental
Health and Professional
Standards”

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OPEN SESSION MINUTES

November 26, 2019

Records Management Committee

Committee Members of the Arizona State Board of Dental Examiners (“Board”) Records Management Committee held a meeting at 9:16 a.m. on Tuesday November 26, 2019 at the Board’s office in Boardroom B, 1740 West Adams Street, Phoenix, Arizona 85007.

COMMITTEE MEMBERS:

- Aditya Dynar, Esq..... Chairperson and Board Member
- Nick Goodman Board Member
- Marilyn J. McClain, RDH Board Member
- Susan I. McLellan, Esq. Public Member
- Russell J. Morrow, DDS Board Member
- Rebecca Schaffer, DDS Licensed Dentist Member

- Participated telephonically
- Absent

STAFF AND ASSISTANT ATTORNEY(S) GENERAL PRESENT:

- Ryan P. Edmonson..... Executive Director
- Kristina Gomez Deputy Director
- Mary DeLaat-Williams, Esq Assistant Attorney General
- Sherrie Biggs..... Licensing Manager
- Miriam Thompson Chief Compliance Officer
- Selena Acuna Legal Administrator
- Lisa Schmelling Administrative Assistant
- Nancy Elia..... Licensing Administrator

GUEST(S) PARTICIPATING AND/OR PRESENT:

- Dina Anagnopolous, Esq. Attorney

CALL TO ORDER AND ROLL CALL

The meeting was called to order at 9:00 a.m. by Mr. Aditya Dynar. The following Committee Members were present: Mr. Aditya Dynar (telephonic), Mr. Nick Goodman, Ms. Susan McLellan, Dr. Russell Morrow (telephonic) and Dr. Rebecca Schaffer. Member(s) absent: Ms. Marilyn McClain. With a quorum achieved, the Committee considered the following agenda items:

CALL TO THE PUBLIC

The Americans with Disabilities Act: Persons with disabilities may request reasonable accommodations, such as sign language interpreters. Requests should be made as early as possible to allow time to arrange the accommodation. This document is available in alternative format upon request.

No statements from the public.

SCOPE OF WORK

Mr. Dynar led the discussion by inviting the Committee Members to share their thoughts on proposed items for consideration as the scope of work for the Committee. Ms. McLellan stated that at a previous Board Meeting she identified issues with the requirements for licensed dentists to respond to a Board subpoena for records when he or she is no longer employed at a facility and the Board's expectation in this regard. Mr. Dynar noted that this could be discussed on the next agenda item. For the record, Mr. Dynar wished to clarify that comments should be confined to the preparation of a final report which could be presented to the Dental Board. Dr. Morrow stated that the Committee should not be limited in scope because of the variety of issues related to records especially in statute which can be discussed and presented to the Board.

CURRENT STATUTE(S) AND/OR RULE (S) REGARDING THE MANAGEMENT OF CLIENT RECORDS

Mr. Dynar proposed that the first step in the discussion would be to identify a list of issues related to records and record-keeping for consideration. While engaging in this discussion, Committee Members would refrain from discussing specific cases which have been brought before the Board. Generic comments about cases was advised. The second step would be to discuss solutions in furtherance of preparing a report for the Board. At this point, Mr. Dynar opened the floor to the Committee Members for discussion.

Ms. McLellan stated that there was a concern with the handling of subpoenas issued by the Board to the licensees and the manner in which the interpretation of the statutes is being used to try to enforce those subpoenas on licensees who are not in possession of records. Another issue Ms. McLellan observed that was raised at a prior Board meeting related to how to proceed with cases when the records were no longer in existence and still within the legislative timeframe for records retention.

Dr. Morrow stated that the Committee should explore issues related to business entities which are not affiliated with dentists as it relates to the extent of the Committee's scope. In addition, Dr. Morrow shared the concern about business entities that are no longer in operation and the impact on patient records. The statute should be re-evaluated in order to address the process and procedure involved in the disposal of patient records.

Mr. Goodman sought to understand based on past experience with the Board how the responsibility of the healthcare professional at times been interpreted as being the responsibility of the business entity. After reviewing the applicable laws, Mr. Goodman stated that he observed the responsibilities placed on business entities for records. According to him, that appeared to be an industry standard that the business entity holds the records therefore the healthcare professional is not responsible. It was Mr. Goodman's view that the law does not support this perspective. The law states that the healthcare professional holds responsibility with or without a business entity. Mr. Goodman stated that this was a question that he hoped the Committee could answer and clarify for the Board.

Mr. Dynar steered the Committee to a discussion on the requirements for responding to subpoenas by noting past tension regarding the custodian of records and the appropriate respondent to

subpoenas. Ms. McLellan stated that she had raised this concern in the past. A subpoena is issued to a specific licensee and the current expectation is that the licensee has to track down and obtain the records if they are not in possession of them.

According to Ms. McLellan, this presents some legal complications because if the subpoena is issued to a specific licensee, he or she has no legal authority to transfer that subpoena to a third party to mandate a response. There are statutes that state that if a licensee has retired or sold their practice and transferred records to a new provider, the transaction is acceptable. The new provider becomes the custodian of records. Therefore, the subpoena should be issued to the new custodian. Ms. McLellan referenced A.R.S. §12-2297 and §32-3211.

Ms. McLellan identified another issue that there are many associate or employee dentists who, based on their employment status do not retain records. Statutes which address this issue state that if the healthcare professional is an employee, he or she is not responsible for retaining records. Subpoenas should be sent to the prior employer for a response. Ms. McLellan noted that A.R.S. §12-2297 and §32-3211 supports this view. Part of the issue is the mixed interpretation of the words “retain” and “maintain” under the Dental Practice Act.

Mr. Dynar stated that in terms of the current practice of the Board perspective, when a licensee is issued a subpoena, the onus is on the licensee to inform the Board of any custodial issues. Ms. McLellan was in agreement with the Board issuing a second subpoena to the custodian of records in cases where the licensee was not in possession of the records. She further stated that the current Board practice has been to encourage licensees to get the records in spite not being in the custodian.

It was her belief that the problem lies in the current Board practice. Mr. Dynar stated that in evaluating the reason for a licensee not being able to produce the records, there should be a determination as to whether statute allows for such a response to be excused. Examples include a records retention issue or the sale of a practice. He further stated that the middle of the road approach where the licensee was cooperative with the subpoena by providing an explanation for not being able to respond to the subpoena, the Board could make an evaluation and issue a subpoena to the custodian of records.

Dr. Schaffer inquired as to the extent of the Board’s jurisdiction over business entities and whether there is a statute which addresses situations where a person opens a dental practice and the requirement for recordkeeping and custodianship in the business charter. She further inquired as to any guidance that can be given to non-dental business owners regarding records. Mr. Dynar added that this could be another issue for consideration.

Dr. Schaffer stated that she is a dentist who owns a practice and teaches dental students who are later employed by corporate entities. The dental students share concerns about such matters. Dr. Schaffer resonated with Mr. Dynar’s middle of the road approach in that the licensee should provide the address of the business where the patient received treatment and a branch office certificate as proof of employment at that time. The onus should be on the business entity to provide the records. Dr. Schaffer stated that the onus should not be removed from dentists to provide records, however, this is the reality of corporate dentistry. Dentists are not always in physical possession of records for patients treated.

In referencing A.R.S. 12-2291, Mr. Dynar pointed out the definitions of healthcare providers and stated that he was not sure that these definitions carry into the Dental Practice Act. This appears

to be the source of the disconnect. Mr. Goodman stated that he was concerned with the law on this issue. Referring to A.R.S. 32-3211(c), Mr. Goodman stated that the employed licensee can respond to the subpoena stating that records were kept in a proper manner and deny responsibility. He suggested that a change in the law may be necessary as the law seems to remove the responsibility on the dentists.

Dr. Morrow, in support of Mr. Goodman's view, stated that being from the corporate world, he provided a corporate perspective on records. Dr. Morrow questioned whether any possible action could fall within the Board's jurisdiction. Ms. McLellan stated that she was not sure that she agreed with the interpretation presented previously because the business entity law was enacted to give the Board jurisdiction over non-dentist owners. Under the business entity statute, the Board has jurisdiction over business entities which are owned by non-dentists. Licensees should be able to provide an explanation for not being able to produce patient records. Dr. Schaffer agreed with Ms. McLellan's view by stating that a licensee should provide proof of being employed at the facility where the patient received treatment.

Mr. Dynar offered one solution to the Committee: the Committee could attempt to present a reasonable standard. It would not be reasonable for a licensee to avoid providing an explanation but it would be reasonable if the licensee pointed to a specific place or entity or person who in his or her belief is the custodian of records. Mr. Goodman was concerned about a possible definition of the reasonable standard. According to him, the bar must be set higher than the one set at present. Mr. Dynar stated that the reasonable standard would not be for a layman but for a licensed dentist which would be a higher bar of reasonableness.

Having engaged in discussion of issues, Mr. Dynar stated that he would like to steer the Committee towards the preparation of solutions to the Board in the form of a report or suggestions which may necessitate advice from the Attorney General's Office. The Committee considered the following list of issues (1) Requests for requirements to responding to subpoenas, (2) Licensees who are not in possession of records, (3) Records that are no longer in existence, (4) Business entities that are not owned by dentists, (5) Businesses or Dentists that go out of business, (6) Proper disposal of records, (7) The responsibility of the healthcare professional versus the responsibility of the business entity and (8) Jurisdiction of the Board over business entities.

Mr. Goodman stated the Board could use assistance with item number three (3) especially in cases where all reasonable measures were taken. He noted that if the records no longer exist, this would impact Board investigations. Mr. Dynar was of the view that situations where records were no longer in existence could be treated as an adverse inference case.

Mr. Edmonson stated that from the Board Staff's perspective and the Governor's Executive Order from approximately four (4) years ago, the number one responsibility of a healthcare board is to protect the public. He added that not doing anything and to put that ownership of getting records back on Board Staff is a dereliction of the Governor's Executive Order. Regarding the notion of an adverse inference, the burden may shift to the complainant to provide as much truth to the complaint. It is the responsibility of the licensee to prevent the discipline.

Mr. Goodman inquired as to whether the Board could proceed with the investigation even in the absence of patient records as a defined standard. Mr. Dynar responded that the standard is whomever presents the issue has the burden of producing proof. The factfinder would take the

facts as they exist. Dr. Morrow added that the Board sources evidence from the Dental Consultants who review cases. Ms. McLellan presented another aspect of this issue in that the dentist can refer to custom and practice in various situations especially when he or she does not have a specific recollection of patient treatment. Mr. Goodman stated that proceeding with the investigation once the subpoena expires would be a notable shift for the dental community and should be recommended to the Board.

Ms. McLellan presented a two-step process: (1) If the records do not exist, why is this the case? and (2) Who is responsible for the records not existing and continuing with the investigation? The law allows for sales of practices and transference to a new custodian. If the new custodian has not properly maintained records, the concern would be placing an adverse inference on the original dentist instead of the new custodian.

Dr. Schaffer stated that in the absence of records, the investigation should proceed. However, the difficulty would be to prove what occurred in the patient's mouth at the time of treatment. Dr. Schaffer further added that care should be taken when invoking the law because a person is innocent until proven guilty because nothing can be proven without the records. Dr. Morrow stated the case must progress and if records cannot be produced the licensee should not be absolved of responsibility. Mr. Goodman added that an appeal process exists if there is an adverse result for the licensee.

Mr. Dynar inquired of the Committee as to whether there should be internal deadlines for Board Staff where there are no responses and a possible waiting period. Mr. Goodman responded that the deadline should remain and submit it to the Board with or without records. The Board can make the choice to subpoena the business entity. Mr. Dynar stated that the standard would incentivize the licensees to cooperate with the Board.

Mr. Goodman stated that the investigation is not about the records and this must remain at the center of the discussion. Mr. Dynar stated that the Committee should seek solutions within the existing structures which would not require changes to rules and statute. Mr. Dynar asked the Committee to think of solutions which can be explored at a subsequent meeting.

Dr. Schaffer asked whether it would be possible to create statute stating that when dentists with independent contractor status leave a practice, the owner would produce documentation addressing retrieval of records in answer to subpoenas. Mr. Dynar responded that the Committee should provide suggestions which are actionable by the Board. Ms. McLellan stated that these provisions already exist in statute.

Mr. Edmonson noted that one of the biggest hurdles the Board faces is that business entities can be owned by non-dentists. The law change in terms of ownership should be fifty-one percent (51%) or greater by a licensed dentist. Mr. Goodman disagreed stating that standards can be upheld without this ownership change.

Mr. Dynar offered closing comments on the discussion and suggested that the Committee meet at a subsequent time to discuss solutions.

DISCUSSION AND POSSIBLE ACTION ITEMS FOR FUTURE MEETING AGENDAS

No action items presented.

ADJOURNMENT

Mr. Dynar moved for an adjournment, Dr. Morrow seconded, motion carried. Meeting adjourned at 10:40 a.m.

NEXT COMMITTEE MEETING DATE

Thursday, January 30, 2020.