The Wager-Smith Law Firm

DENTAL LAW ADVISOR

NEWSLETTER Fall 2014

What the Passage of Proposition 46 Would Mean to Dentists

This November, California voters will have a chance to significantly change California health care law. Although aimed primarily at physicians, Proposition 46 would impact the dental profession in the following ways:

Prop. 46 requires hospitals to perform random alcohol and drug testing on all physicians in their employ or to whom they have granted admitting privileges. Oral surgeons who have hospital privileges and are licensed by the Medical Board would be subject to this random drug and alcohol testing requirement.

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5 WAYS TO GUARD AGAINST SUITS BY EMPLOYEES

Few human endeavors are fraught with more potential for litigation than the employer-employee relationship. And few areas of litigation provide a greater risk of disproportionate or "runaway" jury verdicts. Therefore, employers should take care to ensure that policies have been adopted to minimize the risk of such claims. Although no "silver bullet" exits to ward off all employee lawsuits, there are 5 simple steps employers can take to help protect against these costly suits by their employees.

- **Use Employee Manuals:** An employee manual establishes the "culture" of the office and provides employees with written notice of conduct that is prohibited and will result in disciplinary action. The employee manual also provides a detailed reporting scheme that will trigger the employer's duty to take corrective action. A well-crafted manual can prove invaluable in defending against employee claims, while the absence of a manual can be a deathnail to the effective defense of the employer.

- **Document Rest and Meal Breaks:** One of the most prolific areas of employment litigation involves alleged failures to provide rest and meal breaks. In the typical busy health care practice, the timing of these breaks is often dictated by patient flow. The employee is frequently left to take breaks at their discretion. Under such circumstances, it is absolutely paramount that employers document when these breaks are taken. Every disgruntled employee will claim they worked through rest and meal breaks and the absence of documentation to the contrary can result in significant monetary penalties and overtime liability.

- **Document Poor Performance:** Creating a detailed paper trail of employee poor performance and instances of insubordination can effectively undermine claims of wrongful employment practices. Put simply, a good paper trail will provide valuable evidence to prove disciplinary action, including termination, was justified.

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Employment Law Update

Paid Sick Leave: (AB 1522) Effective 7/1/15, employers must provide all employees with one hour of paid sick leave for every 30 hours worked, up to 3 full days per year. This law also requires new posting requirements and provides penalties for failing to provide employees with written notice of the availability of these new paid sick leave benefits.

Anti-Bullying: (AB 2053) Requires employers with 50 or more employees to include information about the detection, prevention, and available remedies relating to workplace "abusive conduct" or bullying in mandated sexual harassment supervisory training programs. Abusive conduct is defined as: "conduct of an employer or employee . . . with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person's work performance." •

HIPAA Pitfalls:
When Do HIPAA Restrictions Not Apply?

Most practitioners understand the prohibitions of the Health Insurance Portability and Accountability Act (HIPAA) regarding the disclosure of a patient's health information. However, there are exceptions to HIPAA that, if carefully followed, can provide immunity to the health care provider who communicates a patient's most private medical information to a third party.

We were recently retained by a dentist who received a $575,000 demand from an attorney who alleged that his client's HIPAA rights had been violated. When we rejected the demand, the patient filed a complaint with The Department of Health and Human Services (DHHS) demanding that fines be imposed against the dentist.

Disclose only information that is directly relevant to the patient's diagnosis, treatment and prognosis.

In this case, the patient had been referred to the dentist for a workers' compensation evaluation of a work-related injury to his TMJ. Prior to being evaluated by the dentist, the patient had obtained an order from the Workers' Compensation Appeals Board requiring that he be identified by an assigned number only, and that his name not be used in the workers' compensation action.

During his examination, the patient disclosed to the dentist a history of HIV and Post-Traumatic Stress Disorder. After completing his evaluation the dentist prepared a report to the workers' compensation insurer that included the patient's reported history of HIV and PTSD. Unfortunately, the dentist's report inadvertently identified the patient by full name and date of birth.

We argued to the DHHS that the disclosure was absolutely justified pursuant to an exception contained in the HIPAA statutes. Specifically, we demonstrated that the dentist's disclosure of the otherwise protected private health information was directly relevant to the patient's eligibility for workers' compensation benefits and the evaluation of the patient's existing complaints, diagnosis, treatment recommendations, and prognosis.

As such, the disclosure complied with 45 Code of Federal Regulations, Section 164.512(b)(v)(A)(2), which permits the disclosure of protected health information to an employer about an employee for the purposes of evaluating whether the employee has a work related injury. In addition, Section 164.512(l), provides that "[a] covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault."

The DHHS ultimately agreed with our analysis and held that the dentist had not impermissibly disclosed protected health information in violation of HIPAA as the patient had alleged.

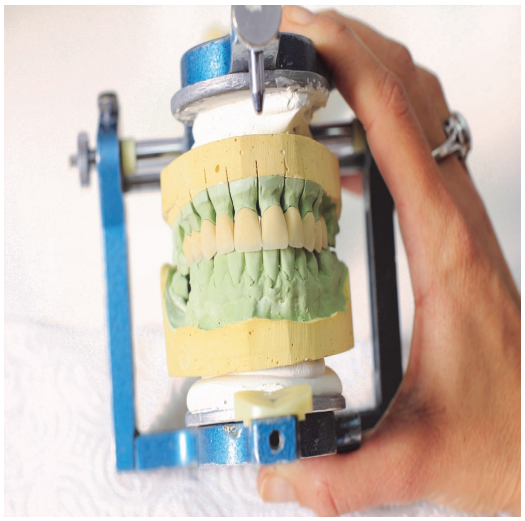
The moral of this story: If ever required to report private health information to a workers' compensation insurer, disclose only information that is directly relevant to the patient's diagnosis, treatment and prognosis. •

Recent Results:

VDO Woes: Patient sued general dentist and alleged the performance of a full mouth rehabilitation involving the placement of multiple implants and crowns altered her VDO and caused chronic, debilitating, TMJ pain. The patient's claims were supported by a treating prosthodontist who "confirmed" that her VDO had been increased as a result of the general dentist's treatment. We were able to show that the prosthodontist had misdiagnosed a change in VDO and that, in fact, the patient's VDO had not been altered. After initially demanding $200,000, the case was dismissed on the day before it was set to go to a jury trial.

These results are illustrative only and are not intended to constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter.

No Harm; No Foul: Patient sued longtime general dentist for the failure to diagnose and treat chronic periodontal disease, resulting in the loss of all of the patient's upper teeth. Our client had not performed any periodontal pocket probing in nearly fifteen years of treatment. We admitted negligence in the case, but argued that the patient had extensive pre-existing bone loss which had not worsened over the course of our client's treatment. In short, we argued that the patient would have likely lost all of her upper teeth even if our client had referred her to a periodontist at the time of her first visit. The court agreed, finding that the patient had not suffered any harm from the admitted failure to diagnose periodontal disease and judgment was entered in favor of our client. •



Prop. 46:

Both the failure to submit to mandatory testing and "positive" test results are required to be reported to the Medical Board, which is required to take investigative and disciplinary action. If a physician fails to submit to the mandatory testing, professional negligence "shall be" presumed in any action by a patient.

In addition, the 39 year old "cap" on non-economic damages in dental malpractice cases will be lifted. Since 1975, patients could recover a maximum of $250,000 for "pain and suffering" in any action against a dentist. Prop. 46 adjusts this limit for inflation, increasing it from $250,000 to **$1,107,109.67** in 2014 dollars. This "limit" is required to be adjusted for inflation annually thereafter.

Finally, dentists will be required to confirm the absence of any current prescriptions for Schedule II or III controlled substances before prescribing any new such medication to a patient. Although Prop. 46 makes the failure to comply with this requirement a basis for professional discipline, patients will surely use evidence of a violation of this requirement to support claims of negligence. •

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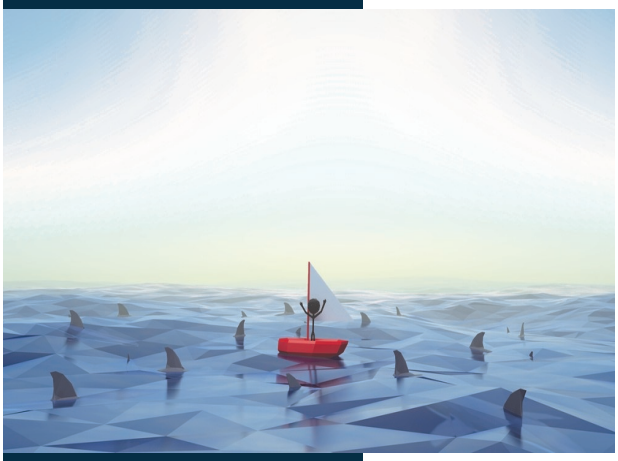
5 Ways:



All instances of employee tardiness, absences, failures to follow instructions, inappropriate behavior, along with warnings, should be thoroughly documented in writing and acknowledged by the employee's signature. This written history of the employee's performance should be maintained as part of the employee's personnel file.

- **Investigate Claims:** It is imperative that employee reports of harassment are taken seriously and thoroughly investigated. The failure to do so can create a nearly impossible to overcome presumption of wrongful employment practices. The employee manual should set out a detailed reporting hierarchy which must be adhered to in the event an employee claims they have been the subject of harassing conduct. In many cases, the outcome of an employee claim of harassment or discrimination will hinge on whether the claims were adequately investigated by the employer when reported.

- **Use An Arbitration Clause:** An arbitration clause can serve as a powerful disincentive to litigation as it provides a less emotionally charged forum within which to adjudicate an employee's claims of wrongful employment practices. In addition, arbitration arguably provides for more predictable outcomes. In short, an arbitration clause incorporated into a comprehensive employee manual can reduce the threat of excessively expensive litigation, and with it the bargaining power of disgruntled employees and their prospective attorneys.