

New Changes to Dental Practice Act Help Level Playing Field for Dentists



By: Paul-Michael La Fayette

Ohio Revised Code Chapter 4715 and Ohio Administrative Code Chapter 4715 are the statutory and regulatory provisions that govern the practice of dentistry in the State of Ohio. These Chapters also govern the authority of the Ohio State Dental Board to investigate and enforce standards concerning the practice of dentistry. On June 2, 2010, the Ohio General Assembly passed House Bill 215 which proposed significant amendments to the Dental Practice Act regarding Board investigations, procedures and administrative hearings. On June 13, 2010, the Governor signed this Bill into law and it becomes effective on September 13, 2010.

Prior to the enactment of House Bill 215, dental board investigations were conducted under the sole authority of the Secretary of the Board. Furthermore, R.C. §4715.03(D) provided that all investigations conducted by the Board are confidential and not discoverable. Ultimately, upon conclusion of the confidential investigation, the Secretary of the Board would make a determination as to whether or not the results of the investigation yielded a conclusion that a violation of the Dental Practice Act had occurred. Upon such determination, it was within the Secretary of the Board's sole authority, subject to ratification by the Board, to pursue formal charges against the dentist. These investigations were dependent upon the issuance of subpoenas by Board investigators, under the signature of the Secretary of the Board, to obtain documentation, patient records and, in some cases, statements by witnesses. This information was then evaluated by administrative staff and the Secretary of the Board to determine whether or not a formal action against the dentist was appropriate.

Proponent testimony of House Bill 215 revealed numerous concerns regarding the conduct of such investigations. Specifically, testimony reflected that Board investigators had, on many occasions, issued "blank" subpoenas that were signed by the Secretary of the Board but did not identify what documents were being subpoenaed. The investigators would then appear at the practice under investigation, review documentation and fill in the subpoenas as to the documents that were being sought. Accordingly, proponents of the statutory changes argued that the Board essentially conducted "fishing expeditions" and suggested that the Board simply investigated individuals until they eventually found something to support a formal action. Furthermore, due to the cloak of confidentiality, Board investigators and the Board Secretary were not accountable to address the reasons as to why an investigation was initiated in the first place or to disclose how the investigation was conducted, even if the investigation did not seek, or ultimately disclose, exculpatory evidence. For these reasons, and many others, the General Assembly agreed that amendments to the Dental Practice Act were necessary.

The following is a brief outline of the most significant amendments to the Dental Practice Act that will become effective on September 13, 2010:

- **Investigations** - All investigations are conducted by the Board Secretary and Vice-Secretary who serve as the "investigative panel." Upon the conclusion of an investigation, the panel must recommend to the full Board 1) disciplinary action against the dentist, 2) seek an injunction for unauthorized practice, 3) enter into a consent agreement with the dentist, 4) refer the individual being investigated to the Board's quality intervention program, or 5) terminate the investigation. After making the recommendation, the panel shall not participate in deliberations with the full Board;
- **Statute of Limitations** - The investigative panel is required to make its recommendation as to further action not later than one (1) year after the date the panel begins to supervise the investigation or, not later than two (2) years after the panel begins to supervise the investigation in instances where the allegations being investigated involve non-delegable duties;
- **Subpoenas** - All subpoenas issued by the State Dental Board for the purposes of an investigation must be authorized by the Attorney General's Office for a determination of probable cause to believe that the complaint filed alleges a violation of the Dental Practice Act. An individual who has been subpoenaed has a reasonable period of time, not less than three (3) calendar days, to comply with the subpoena;
- **Discovery** - If a determination that formal action is appropriate and a notice of opportunity served upon a licensee, the licensee shall be advised that he or she is entitled to receive, at least sixty (60) days before the hearing, one (1) copy of each item the Board procures or creates in the course of its investigation. These documents include: complaint or complaints, correspondence, reports, statements, deposition transcripts, and patient dental records. Accordingly, the Board is now required to produce those records which were previously not produced under the cloak of confidentiality; and

- **Hearing Subpoenas** - Under prior law, subpoenas for the purposes of administrative hearings, could be issued to mandate the attendance of witnesses and the production of documents at the time of a hearing. The new law now provides that the subpoenas may require the production of books, records, papers or other tangible items at least thirty (30) days prior to the hearing. This permits the dentist the opportunity to investigate, prepare a defense and otherwise obtain documentation which may be exculpatory to the charges.

There were a number of other changes to the Dental Practice Act which are of varying degrees of significance. However, the changes that will be in effect in September 2010 will provide a level playing field for dentists in both the defense of investigations and formal administrative actions. Most significant of these provisions is the ability now of the dentists to obtain investigative documents to determine the nature of the initial complaint, the scope of the investigation to include whether or not investigators sought exculpatory evidence, witness statements and investigative reports prepared by Board investigators outlining what efforts were taken in the course of the investigation. Defendants in Board actions will now have an opportunity to determine whether or not Board investigators fully investigated a matter and pursue exculpatory evidence if the investigation performed by the Board was incomplete. While the administrative process remains imperfect, the new amendments to the Dental Practice Act provide a more level playing field in the defense of administrative actions.

Should you desire further information regarding these changes to the Dental Practice Act or have any other questions regarding the investigative or administrative hearing processes, please contact one of our Dental Practice Group leaders.

Columbus

Paul-Michael La Fayette
plafayette@reminger.com
 65 East State Street, 4th Fl.
 Capitol Square
 Columbus, OH 43215
 Phone: 614-232-2423
 Fax: 614-232-2410

Akron

D. Cheryl Atwell
catwell@reminger.com
 200 Courtyard Square
 80 South Summit St.
 Akron, OH 44308
 Phone: 330-434-6002
 Fax: 330-375-9075

Cleveland

Richard J. Rymond
rrymond@reminger.com
 1400 Midland Building
 101 W. Prospect Avenue
 Cleveland, OH 43215
 Phone: 216-430-2137
 Fax: 216-687-1841

Toledo

Philip S. Heebsh
pheebsh@reminger.com
 One SeaGate,
 Suite 1600
 Toledo, OH 43604
 Phone: 419-254-1311
 Fax: 419-243-7830

Cincinnati

Brian D. Goldwasser
bgoldwasser@reminger.com
 525 Vine Street,
 Suite 1700
 Cincinnati, OH 45202
 Phone: 513-455-4005
 Fax: 513-721-2553

Youngstown

Thomas A. Prislipsky
tpislipsky@reminger.com
 11 Federal Plaza Central,
 Suite 300
 Youngstown, OH 44503
 Phone: 330-744-1311
 Fax: 330-744-7500