

May 6, 2020

North Dakota Board of Dental Examiners
Ms. Rita Sommers
PO Box 7246
Bismarck, ND 58507

Ms. Sommers,

I am writing to you as Executive Director of the NDDA representing over 400 dentists in the state of North Dakota. I have a few serious questions regarding your most recent 4/28/2020 COVID-19 Statement. I have sincere concerns surrounding the legal interpretations, clinical implications, legality of the statement and enforcement power of NDBODE regarding the statement. I would respectfully request you distribute this communication with my questions to your board members as well as your legal counsel for their interpretation and response at a special meeting.

“The North Dakota Dental Board (“Board”) has received numerous requests for guidelines for the reopening of dental offices. At this time, the Board is unable to provide such guidelines. However, in order to limit the spread of COVID-19 the Board recommends practitioners review information provided by the Centers for Disease Control and Prevention and American Dental Association for the duration of the COVID-19 pandemic. Practitioners are responsible for the safety of their patients and staff and must operate in a manner consistent with protecting their safety. Practitioners with specific questions regarding liability should consult their legal counsel and insurance providers. The Board has the authority to discipline practitioners for willful or negligent disregard for safety.”

My first question pertains to the duration of this statement. In your statement you reference that “practitioners review information... for the duration of the COVID-19 pandemic.” What does “duration of the COVID-19 pandemic” mean? Will NDBODE be issuing a statement when the COVID-19 pandemic is over? What metric or guideline will be used, or should we follow to know when the COVID-19 pandemic is over? Some studies have stated that COVID-19 will persist perpetually so should dental practitioners assume that this statement is adopted by NDBODE permanently?

My second set of questions revolve around the phrasing:

“Practitioners are responsible for the safety of their patients and staff and **must** operate in a manner consistent with protecting their safety... **The Board has the authority to discipline practitioners for willful or negligent disregard for safety.**”

Yes, dental practitioners can and will communicate with the NDDA, consultants and legal counsel regarding legal and insurance questions, but this phrasing raises many implications from NDBODE. Does this phrasing imply that dentists “must” follow CDC and ADA recommendations? Other outside recommendations? What if they conflict? And since they do conflict, can dentists be penalized by NDBODE for following one over the other? More importantly, does NDBODE have the power/authority to “enforce” heightened health and safety standards? Can NDBODE take punitive action against dentists not following a set of “recommendations?” Could punitive action taken by NDBODE enforcing other standards create other liabilities and legal circumstances?

To make such a statement could potentially give standing/grounds to any dental professional to assert it is NDBODE's position that these "recommendations" "must" be followed. Most standards/requirements set a floor that all practitioners/sites need to reach with the intention of going above and beyond, but I do not believe NDBODE has the authority to enforce any heightened standards/requirements. At least not without going through the formal rulemaking process. The implications of this phrasing could create liability not only for providers, but also NDBODE for "changing" the standard/requirement of care in the state of North Dakota without any scientific evidence or formal rulemaking process. Should situations arise where there are allegations of offices/clinics not following CDC/ADA or any other set of "recommendations" would NDBODE be weighing in on the matter (enforcing/taking punitive action) as the regulatory body with "the authority to discipline practitioners for willful or negligent disregard for safety." There are many uncertainties during this COVID-19 pandemic, and I would ask that this statement, and the ramifications of NDBODE adopting it not add to the crisis being navigated by our dental providers. The current statement is vague, threatening and extremely problematic. We would ask that the statement be addressed and clarified for the providers in our state.

I would respectfully request that these concerns be distributed to your board members and legal counsel for their public comment to all dental providers. Clarification is needed on this statement for the entire dental community as this statement seems to create more confusion than clarification.

Respectfully,



William Sherwin
Executive Director