Mobile Dentistry in Texas – An Overview of Regulatory Risk Areas to be Considered

(December 7, 2018): Each state sets their own licensure requirements, rules and regulations regarding the practice of dentistry, all of which are subject to change. While there are differences from state to state, the approach taken by most states with respect to the practice of dentistry is fairly consistent. After conducting a review of several other states' regulations, it appears that the requirements imposed by the *State Board of Dental Examiners* (SBDE) on dentists in Texas is generally in line with that of other states. Having said that, the degree of regulatory oversight that has been placed on mobile dental practices may vary widely from state to state. This article examines the status of mobile dentistry in Texas and outlines a number of compliance concerns that should be addressed by mobile dental providers operating in both Texas and other states.

I. Background of Mobile Dentistry in Texas:

The regulations[1] covering mobile dentistry went into effect on September 1, 2001 and require that *"every mobile dental facility, and except as provided herein, every portable dental unit* [2] *operated in Texas by any entity must have a permit as provided by this title (relating to Mobile Dentistry Facilities***[3]***)."***[4]** There are only a limited number of circumstance in which a licensee without a permit for a portable dental unit may provide dental services through the use of dental instruments and equipment taken out of a dental office.[5]

Notably, the SBDE implemented the mobile dentistry permit requirements despite the fact that the Texas *Dental Practice Act* **[6]** does not expressly authorize the Board to issue permits or regulate these facilities.[7] In the absence of clear authority to do so, why did the Board issue these mobile dentistry regulations? As discussed in the *Texas Register*,[8] the SBDE imposed these permit requirements in order to be able to answer:

> *"inquiries from legislators, local officials, and other states agencies or the public regarding any mobile or portable dental operations. . . Of great concern to the Board is whether the services are provided in a manner to meet standard of care requirements, whether*

> *arrangements have been made for follow-up care, especially in emergency situations, and whether records of treatment provided will be available to the patients*."

II. State and National Concerns Driving the Regulation of Mobile Dentistry:

The need for mobile dentistry oversight has been echoed by regulators across the country. In numerous articles, the benefits (and concerns) of mobile dentistry have been discussed. One such article mentioned a study published in the July 2009 Journal of the American Dental Association (*JADA*, Vol. 140:7). In that study, researchers from the University of Michigan found that programs providing only preventive services may actually result in fewer children getting comprehensive dental care. One reason for this, is that:

> *"[O]nce someone has billed for examining or x-raying a patient, Medicaid generally won't reimburse another dentist for doing these services for at least another six months . . . As a result, some patients may be getting fluoride or sealants at the expense of having cavities filled*."

While this study focused on Medicaid patients only, the same fears can be mirrored for all patients. State regulators across the country have expressed concern that mobile dental units will be used to collect as much money as possible while leaving dangerous conditions untreated. If a mobile dental unit discovers an issue they cannot or will not treat, it could be difficult for another provider to perform the care the patient requires without the potential duplication of diagnostic dental procedures. This is especially true if the patient does not receive a copy of their dental record. The new provider may have to repeat x-rays or conduct their own clinical exam to determine the necessary treatments, which may or may not be covered by the patient's insurance. If the patient does not have insurance, or their insurance refuses to pay, the patient may be required to pay for the repeated service. If the patient is unable or unwilling to pay for these services, the patient could suffer devastating consequences. The patient may also be exposed to higher levels of radiation due to the need to perform more x-rays. These fears, among others, have led to many states to regulate mobile dentistry.

III. Differences Between Texas' Regulation of Mobile Dentistry Versus How the State Regulates Bricks and Mortar Based Dentists:

Mobile dentist providers will be the first to argue that the regulations Texas has placed on their business model are more strict than those imposed on traditional brick and mortar based dental practices. While brick and mortar dental practices must comply with a number of regulatory requirements, mobile dentist providers must comply with all of those primary requirements AND the extra regulatory mandates specifically laid out for mobile dentists in the Texas Administrative Code.[9]

A. Specific Requirements Imposed on Mobile Dental Practices.

A licensed Texas dentist, organization authorized by the Dental Practice Act, or other organization as defined by rule 108.41(3) and approved by the SBDE that wishes to operate a mobile dental practice ***must*** apply to the Board for a permit and pay the application fee. If all requirements are met, then a mobile dental practice permit can be issued. A list of the requirements can be found at §108.42. A few of the specific requirements that all applicants that are not a governmental or higher education entity must provide include:

- The name and address, and when applicable, the license number of each dentist, dental hygienist, laboratory technician, and dental assistant associated with the facility or unit for which a permit is sought;
- A copy of a written agreement for the emergency follow-up care for patients treated in the mobile dental facility, or through a portable dental unit, and such agreement must include identification of and arrangements for treatment in a dental office which is permanently established within a reasonable geographic area;
- A statement that the mobile dental facility or portable dental unit has access to communication facilities which will enable dental personnel to contact assistance as needed in the event of an emergency;
- A statement that the mobile dental facility or portable dental unit conforms to all applicable federal, state, and local laws, regulations, and ordinances dealing with radiographic equipment, flammability, construction standards, including required or suitable access for disabled individuals, sanitation, and zoning;
- A statement that the applicant posses all applicable county and city licenses or permits to operate the facility or unit;
- Either a statement that the unit will only be used in dental offices of the applicant or other licensed dentists, or a list of all equipment to be contained and used in the mobile dental facility or portable dental unit, which must include:

(A) A dental treatment chair;
(B) A dental treatment light;
(C) When radiographs are to be made by the mobile dental facility or portable dental unit, a stable portable radiographic unit that is properly monitored by the authorized agency;
(D) When radiographs are to be made by the mobile dental facility or portable dental unit, a lead apron which includes a thyroid collar;
(E) A portable delivery system, or an integrated system if used in a mobile dental facility;
(F) An evacuation unit suitable for dental surgical use; and
(G) A list of appropriate and sufficient dental instruments including explorers and mouth mirrors, and infection control supplies, such as gloves, face masks, etc., that are on hand.[10]

The rules also lay out operating requirements for a mobile dental facility or portable dental unit. These rules require among other things, that before beginning a session a mobile dental practice operator must arrange for:

> *"(A) access to a properly functioning sterilization system;*
> *(B) ready access to an adequate supply of potable water; and*
> *(C) ready access to toilet facilities.*"

All permit holders except government or higher education entities, also must submit to the SBDE on the 10th work day of September each year a written report for the preceding year ending August 31*, "detailing the location, including a street address, the dates of each session, and the number of patients served and the types of dental procedures and quantity of each service provided; except that such written reports may exclude information concerning dental services provided to less than three individuals at a private residence."* The dental permits expire one year after the issuance date or whenever the permit holder is no longer associated with the Mobile Dental Facility or Portable Dental Unit, whichever is sooner. The permit is not transferable and can be canceled by the Board after an investigation and opportunity for a hearing is given. These are only a few of the myriad of operating requirements covering mobile dentists.[11]

III. Different Regulations Apply to Mobile Dentists Who Serve Office Buildings than Mobile Dentists Who Serve Elderly Residents of Nursing Homes and / or Patients in Rural Areas:

All mobile dental facilities and portable dental units operated in Texas by any entity must hold a permit issued by the SBDE. However, the following exceptions have been made for licensees treating residents of nursing homes or convalescent facilities:

> *"Licensees who do not have a permit for a portable dental unit or who are employed by a dental organization not having a portable dental unit permit may provide dental services through the use of dental instruments and equipment taken out of a dental office without a permit if . . . the treatment is provided to residents of nursing homes or convalescent facilities."*

This exception therefore allows for a dentist to more easily provide care to the elderly who live in nursing homes or convalescent facilities since the permit is not necessarily required. There is no such exception for rural areas.[12] Otherwise, the requirements for mobile dentists who serve office buildings, the elderly, or rural areas are the same.

IV. How is Mobile Dentistry Treated in Other States?

Many states now have mobile dentists who serve office buildings and commercial customers (including, but not limited to, Maryland, Virginia, Washington D.C., New York, Tennessee, and California). Many of these mobile dentists offer their services to a wide range of customers (corporate environments, private homes, and/or nursing homes / assisted living facilities) rather than just specializing in providing services to office buildings or commercial customers. However, there are other providers who specifically focus on commercial customers as well.

V. How Does the Extent of Regulations Applicable to Texas Mobile Dental Practice Compare with that of Other States?

Each state is unique in how they approach mobile dentistry. Many states, such as Missouri, have not laid out any specific requirements for mobile dentists. All dentists in Missouri must abide by the same regulations as issued by the Missouri Dental Board. Other states, such as West Virginia, appear to have a bit more extensive regulation of mobile clinics than Texas. West Virginia requires for-profit organizations to pay $1,500 for a mobile clinic permit, the permit must be renewed annually, must provide handicap access via ramp or lift, have ready access to toilet facilities, have a covered, non-corrosive container for deposit of waste materials including biohazardous materials, have a Carbon Monoxide Detector and Smoke Detector installed, an AED on board, among other requirements. A few states such as California and Mississippi also require on-site inspections of the mobile dental facilities, which Texas does not require.

VI. Mobile Dentistry Fraud Cases:

In recent years, both federal and state enforcement authorities have ramped up the investigation and prosecution of individuals and entities alleged to have submitted fraudulent dental claims to Medicaid for reimbursement. While only a handful of cases have been brought against mobile dentistry facilities, the cases that have been prosecuted are instructional. The following two cases are reflective of the types of wrong-doing typically identified in mobile dentistry fraud cases:

- **New Jersey.** The owner of a mobile dental company was prosecuted, found guilty and ordered to pay $7 million in restitution and serve 8 years in prison. In this case, state prosecutors alleged that the dentist-owner and his staff overbilled or submitted false Medicaid claims for elderly patients in nursing homes, assisted living facilities, adult day care facilities and private homes. More specifically, the government claimed that:

    1. The defendants overbilled Medicaid for more services than the mobile dentists could have rendered in one day.
    2. The defendants billed for specific dental services that were not actually performed by the dentists.
    3. The mobile dentistry company billed Medicaid for a "behavior management" charge on almost every pediatric patient, even if it was not needed.
    4. The mobile dentistry company charged Medicaid for a "trip charge" to almost every

Medicaid patient, even though the dentists were only entitled to one trip to a facility, regardless of how many patients were examined or treated.

- **Indiana.** Federal prosecutors pursued Medicaid fraud charges against the owner of a mobile dentistry company that was alleged to have applied sealants (a non-covered services under Ohio and Indiana Medicaid rules) to the teeth of low income children in Ohio and Indiana, but billed the dental procedures as fillings (a covered serviced under Ohio and Indiana Medicaid rules) when submitting the claims to Medicaid for reimbursement. A U.S. District Court judge sentenced the defendant to 3 ½ years in prison for his role in the fraudulent conduct.

VII. Additional Risk Areas to Consider:

As you may recall, the *Affordable Care Act (ACA)* passed in 2010 includes a provision which authorizes the Secretary, HHS to mandate that health care providers and suppliers establish a compliance program as a condition of their enrollment in Medicare, Medicaid, or the Children's Health Insurance Program (CHIP). A number of states have also mandated that Medicaid providers implement an effective Compliance Program. Does your mobile dentistry company have an effective compliance program in place?

As part of your compliance obligations, mobile dentistry companies billing Medicaid have an affirmative obligation to regularly audit and monitor their documentation to ensure that claims submitted to Medicaid properly qualify for coverage and payment. Problem areas we have noted include:

- **Failure to comply with state Medicaid and / or private payor documentation requirements.** ***The most common deficiency we have seen in internal audits conducted has been a recurring failure of dentists to comply with state regulatory documentation requirements*****.** In cases where the state requirements were met, it was quite common to find the documentation requirements cited by Medicaid, Medicaid Advantage and private payor dental payor plans were not met.
- **Failure to record a complete medical history for each pediatric patient**. ***A detailed medical history should be provided for each pediatric patient and should be updated at each visit.*** The American Academy of Pediatric Dentistry (AAPD) recommends that a patient's medical history includes the following elements or "pieces of information" along with an elaboration of positive findings: medical conditions and / or illness; name and telephone number of primary and specialty care providers; hospitalizations / surgeries; anesthetic experiences; current medications; allergies / reactions to medications; other allergies / sensitivities; immunizations status; review of systems; family history; and social history.

- **Failure to record observations from x-rays.** The dental notes did indicate, for most patients, when x-rays were taken. The radiographs typically accompanied the file but were *not* of diagnostic quality. Additionally, ***dentists failed to include any observations or interpretations from their review of the radiographs.*** AAPD notes that patient progress notes should include details on radiographic exposures and the dentist's interpretations.
- **Failure to properly document support for medical necessity.** Pediatric dental records reviewed did not contain the name of the minor patient's parent and many times the records contained identical narratives. ***Progress notes for each visit should contain the date of service, chief complaint or reason for the visit, radiographic exposures and interpretations, treatment rendered, and post-operative instructions and prescriptions.*** Additionally, our reviews have found that there was often little detail provided to support medical necessity of pediatric dental treatments provided. ***For example, prophylaxis was typically provided because it was medically required. Although dental notes often indicated that plaque was visible, the notes often failed to specify any areas of build-up. Also, the level of decay was typically not included to support services such as fillings and crowns.***
- **Failure to sign dental treatment notes.** Rendering dentists have often failed to sign or initial each entry on the patient's record pertaining to the treatment he or she rendered. ***Treating dentists and hygienists or assistants should sign or initial each entry on the patient's record that pertains to a treatment he or she rendered.*** This is often a state regulatory requirement and is typically required by both governmental and private payor agreements.
- **Missing dental treatment plans / consent forms.** ***Completed dental treatment plans and consent forms have frequently been found to be missing from patient dental records. The dental treatment plans that were included were typically signed by the pediatric dental patient's parent, but the signatures were often not dated.*** Signatures should be dated and these dates should correspond to the date listed as the date of authorization noted on the claim form. Many of the dates of authorization for the "signatures on file" on the claim form were after the date of service, which is an error cited in recent audits.
- **Failure to document reasons supporting the inhalation of nitrous oxide.** Nitrous oxide is frequently utilized to ease pediatric dental anxiety. ***However, auditors have routinely found that the patient's behavior was frequently recorded as cooperative or no details about the patient's behavior were included that would justify the use of nitrous oxide.*** According to the AAPD, nitrous oxide may be appropriate for patients who have the following indications:
    - Are fearful, anxious, or obstreperous;
    - Have special health care needs;
    - Have a gag reflex that interferes with dental care;
    - Cannot utilize local anesthesia; or

- Are undergoing a lengthy dental procedure.

Additionally, prior to administering nitrous oxide, informed consent should be obtained from the patient's parent and documented in the patient's record. Also, be sure and properly document the nitrous oxide dosage, duration, and post-treatment oxygenation procedure.

- **Excessive number of treatments administered to a pediatric patient in a single visit.** ***Medical dental claims with a high number of treatments are frequently identified in data mining runs for audit and will likely be subject to close scrutiny in an audit.*** Dentists should include more detail regarding the level of decay present in each tooth to support the services provided.
- **Failure to properly credential each treating dentist with Medicaid.** Are your dentists properly credentialed with Medicaid and other payors? ***The billing of dental procedures under another dentists number (typically due to the fact that the rendering dentists has yet to be credentialed) may constitute an overpayment or even fraud.*** We are seeing a huge rise in the number of enforcement cases based on this type of improper conduct.

VIII. Conclusion:

Medicaid claims for dental services and procedures are under the regulatory microscope by federal and state enforcement agencies around the country. Now more than ever, it is essential that you fully understand your obligations under the law with respect to medical necessity, signature, consent, documentation, coding and billing requirements when billing dental claims.

Is your mobile dentistry company being audited? Start out on the right path when responding to a request for dental records and claims information – give us a call. We can help.

Robert W. Liles serves as Managing Partner at the health law firm, Liles

Parker, Attorneys and Counselors at Law. Liles Parker attorneys represent dentists and dental care practice around the country in connection with UPIC and state audits of Medicaid dental claims, private payor audits of dental claims and OIG / DOJ investigations. Are you currently being audited or under investigation? We can help. For a free initial consultation regarding your situation, call Robert at: 1 (800) 475-1906.

[1] **22 Tex. Admin Code §108.40**

[2] As set out under Tex. Admin Code §108.41(2), a "Portable Dental Unit" is defined as:

"[A]ny non-facility in which dental equipment, utilized in the practice of dentistry, is transported to and utilized on a temporary basis at an out-of-office location including, but not limited to, patients' homes, schools, nursing homes, or other institutions."

[3] As set out under Tex. Admin Code §108.41(1), a "Mobile Dental Facility" is defined as:

"[A]ny self-contained facility in which dentistry will be practiced which may be moved, towed, or transported from one location to another."

[4] 22 Tex. Admin Code §108.40(a).

[5] 22 Tex. Admin Code §108.40(b)(1)-(6).

[6] A copy of the Texas Dental Practice Act can be found at: **http://www.tsbde.texas.gov/documents/laws%20%26%20rules/2017-18DPA.pdf**

[7] This point was most recently reiterated in the SBDE's *Self-Evaluation Report* from September 2015State Board of Dental Examiners, *Self-Evaluation Report*, Sept. 2015. **https://www.sunset.texas.gov/public/uploads/files/reports/Dental%20Examiners%20Self-Evaluation%20Report.pdf**

[8] February 16, 2001 issue of the *Texas Register* (26 Tex. Reg. 1498),

[9] 22 Tex. Admin. Code §§108.40 - 108.43.

[10] 22 Tex. Admin. Code § 108.42.

[11] 22 Tex. Admin. Code § 108.43.

[12] 22 Tex. Admin Code §108.40(b).