

NEVADA STATE BOARD  
of  
DENTAL EXAMINERS



REGULATION WORKSHOP

WEDNESDAY, APRIL 20, 2022

6:00 P.M.

**PUBLIC COMMENT BOOK**

**Public Comment:**

**Ed De Andrade, DDS  
President, Nevada Dental Association**



April 19, 2022

Nevada Board of Dental Examiners  
Attention: Director Hardeep Sull and NSBDE Board Members  
2651 N. Green Valley Pkwy, Ste. 104  
Henderson, NV 89014

Sent via Email

Re: Public Comment for April 20, 2022 Workshop, NSBE Agenda, Item 3

Dear Director Sull and NSDE Board Members,

The NDA appreciates time and effort the Board is taking to review and make proposed changes to the Nevada Administrative Code Chapter 631 regulations regarding unprofessional conduct and administration of Board disciplinary proceedings pursuant to NRS 631.350- NRS 631.368.

We have reviewed the draft regulations posted on the Board's website and would like to offer the following comments derived from our review of your proposed changes to the above noted regulations for your consideration and to be included in the administrative record:

*Proposed Changes to Unprofessional Conduct Regulation*

1. NAC 631.230(1)(c): It appears that the proposed change significantly narrows when consistent acts that depart from prevailing standards of acceptable practice will constitute unprofessional conduct. We draw your attention to NRS 631.3475(1)&(4) where the Legislature has determined that malpractice, and more than one act constituting substandard care are each separate and distinct acts of unprofessional conduct, and the potential conflict between the proposed regulatory change and statute.
2. NAC 631.230(1)(t): The change as proposed does not make sense and appears to perhaps be an error: "The failure of the dentist, dental therapist, or dental hygienist who provided the services in the records of a patient each time the services are rendered." We assume you are suggesting to make it unprofessional conduct for a dentist, dental therapist or dental hygienist to fail to record their name in the patient record each time services are provided.
3. NAC 631.230(1)(v): This new sub-section states that if the Board takes disciplinary action by requiring patient reimbursement per NRS 631.350(l), it is the licensee subject to the action who would be responsible to reimburse.
  - a. The reference should be corrected to NRS 631.350(1)(l).
  - b. NDA questions whether this addition is necessary. NRS 631.350(1) sets forth the various forms of disciplinary action against "persons," including patient reimbursement – the Board may only take disciplinary action against persons it licenses. Thus, if the Board decided to order patient reimbursement as part of its disciplinary action, it is clear under existing law that it would be the licensee subject to the disciplinary action who would have to pay.



4. NAC 631.230(1)(s)&(t): The NDA has some concerns that the suggested changes seem to shift responsibility away from the owner of the dental practice to individual dentist, dental therapist, and dental hygienist licensees and whether this is a good policy decision.
5. NAC 631.230(2): Does deleting this regulation, which currently administratively defines when a dental insurance plan does not provide a reasonable opportunity for a patient to select a dentist of their choice, make for a good policy decision? See NRS 361.347.

*Proposed Changes to Disciplinary Process Regulations and Creation of Additional Disciplinary Process Regulations*

6. NAC 631.240(1)(b): The change requires the complaint to set forth each violation of unprofessional conduct under NRS 631. On this point, NDA suggests that it would be better to require the complaint to set forth facts supporting violations of any statutory or regulator grounds to discipline a licensee, and if one of those is unprofessional conduct, what specific type of act constituting unprofessional conduct, tied to a specific NRS or NAC section, is alleged.
  - a. In relation to the above, we draw your attention to NRS 631.349, which is a catch-all provision that allows the Board to consider conduct as unprofessional or dishonorable, even if it falls outside a specific type of unprofessional conduct under statute. The Board should be careful not to circumscribe the ability to make a complaint for conduct that does not squarely fall in the statutes or regulations delineating certain acts that constitute unprofessional conduct.
  - b. Additionally, relative to financial disputes and a potential challenge, over-billing or not billing insurance companies could arguably be unprofessional conduct under the catch-all provision of NRS 631.349.
  - c. NDA is concerned about requiring a third-party to include "sufficient evidence" to show jurisdiction and support the allegations of a violation for several reasons: (1) could conflict with NRS 631.360(1) that states a verified complaint need only set forth facts, which if proven, would constitute grounds for initiating disciplinary action, and (2) may be unduly burdensome for a lay-person.
7. NAC 631.240(1)(d):
  - a. The NDA is curious why the Board specifies a review by legal counsel, rather than simply stating staff review as it could subject Board counsel to being a witness in the licensee's due process hearing; in any event, if the Board seeks to proceed with a legal counsel review, it should specify that it is Board General Counsel to protect against the Board retaining outside legal counsel to conduct the initial clearinghouse review of complaints received, keep the review in-house and minimize costs.
  - b. Reiterating the comment above on NAC 631.240(1)(b) regarding requiring sufficient evidence be submitted with the complaint.
8. NAC 631.240(1)(h): This section refers to a Dental Board Expert. The Board should define what qualifies as a dental board expert in this section for clarity.



9. NEW NAC RE: INVESTIGATION INITIATED BY BOARD - This new section aligns with statutory authority for the Board to pursue investigation outside of a third-party complaint. As with private party complaints, NDA recommends amending to make clear this is Board General Counsel.
  - a. (2)(b), which requires listing of specific violations of unprofessional conduct, please see prior comments to NAC 631.240(1)(b) above.
10. NAC 631.250(1): NDA supports the change of limiting the Board's investigation to only matters raised in the complaint.
11. NAC 631.250(2): NDA supports making a change to make clear that if the complaint is dismissed, it cannot be used against the licensee ever. It should be kept in mind, that dismissal at this stage is prior to any due process hearing. Moreover, NDA would support a change that makes clear that licensees should not have previously dismissed complaints (whether dismissed at investigation stage or after a full due process hearing) used against them in any future proceedings.
12. NAC 631.250(5): This section should be clarified to make clear that (1) if the complaint deals with a patient, that the licensee will be required to provide all records in the licensee's control and possession relating to the patient within the past 5 years, and (2) that the notice of complaint sent to the licensee must include the pertinent and records request and patient reference. Please note that if the licensee has changed practices, they may no longer have access to patient records at their prior place of business.
13. NAC 631.250(7): This section states that the failure to provide requested records is deemed to be unprofessional conduct and could subject licensee to additional discipline.
  - a. NDA suggests, in line with the comment above, that the scope of any records requested is confined to those within control and possession of the licensee.
  - b. If the investigator makes a request for records that is outside the scope of the complaint or otherwise deemed confidential and privileged, there should be a process for licensee to object and not provide the record (and escape discipline for that exercise of rights).
14. NEW NAC – ASSIGNMENT OF MATTER TO BOARD DENTAL EXPERT – The NDA would like clarification on the cost associated with these expert(s) and who pays for them.
  - a. (1)-(3): Investigator sends to Board Dental Expert retained by the Board that meets certain qualifications. There should be a process to inform the licensee of the appointment of a Board Dental Expert and for the licensee to object to the expert on grounds of bias, etc.
  - b. (9): The licensee being subjected to discipline should have more than 30 days to respond to the Board Dental Expert's opinion, particularly if going to use retain their own experts to rebut the Board Dental Expert's opinion.



#### 15. NEW NAC – ASSIGNMENT OF MATTER TO REVIEW PANEL

- a. (2): This should be clarified that the Review Panel should also be required to consider any responses or documents produced by the licensee being investigated.
- b. (4): The licensee being investigated should receive Review Panel recommendations/findings at the same time they are sent to the Board.

#### 16. NEW NAC – BOARD DELEGATION TO A HEARING PANEL

- a. (2): Retaining Hearing Advisor—presumably, this would be legal counsel. To confine expenses, is there any reason this would not be the Deputy Attorney General assigned to the Board to limit costs of retaining a private attorney to serve in this capacity? Also, please note that if Board General Counsel was part of investigation, that person could not serve as the Hearing Advisor as that would be a violation of due process due to the conflation of investigation and adjudication functions in one person.
- b. (3): Hearing panel will be the 3 members of the Board Disciplinary Committee. Are there any other members on the Hearing Panel? NDA would support appointment/retention of an independent peer who is not a member of the Board. Further, has the Board considered having a dedicated hearing officer that is employed or contracted by the Board, rather than a panel?
- c. (5): There is a typographical error - should be NRS 631.3635, not 631.365. Also, NDA recommends that a change be made to make clear that the record before the hearing panel consists of all documents considered in the investigation, not just the Review Panel findings, including all investigator findings and conclusions, results of any informal hearing, the Board Expert opinion, and any responses/rebuttals and documents offered/produced by the licensee during the investigation.
- d. The Board may also want to consider setting forth the hearing process in a new regulation, including addressing requirements for pre-hearing briefs, pre-hearing conferences, and the presentation of evidence and witnesses at the hearing. Although NRS 622A.380 sets forth the order of the hearing, the Board may enact specific procedures per NRS 622A.130. In particular, a mandatory pre-hearing conference could be very helpful to identify issues, determine if the parties can stipulate to narrow the issues in dispute and certain facts, identify witnesses for the hearing and require the parties to estimate the time needed for their cases, including rebuttal. Such pre-hearing conferences are common in administrative cases and can be helpful to streamline the hearing.



- e. (7): NDA does not find this provision necessarily objectionable, but does suggest there should be an outside timeframe in which the hearing panel must render a decision, such as six months, unless a stipulated extension is received. If no decision rendered within that 6-month period, the charges are dismissed.

We understand the length and breadth of our comments provided and we appreciate your thoughtful consideration of same. We reserve the right to further supplement our comments and present public comment at the April 20<sup>th</sup> workshop or subsequent meetings scheduled on the proposed regulations.

The NDA stands ready to offer any further explanation on the above.

Most sincerely,

A handwritten signature in black ink, appearing to read "Ed De Andrade".

Ed De Andrade, DDS  
President, Nevada Dental Association