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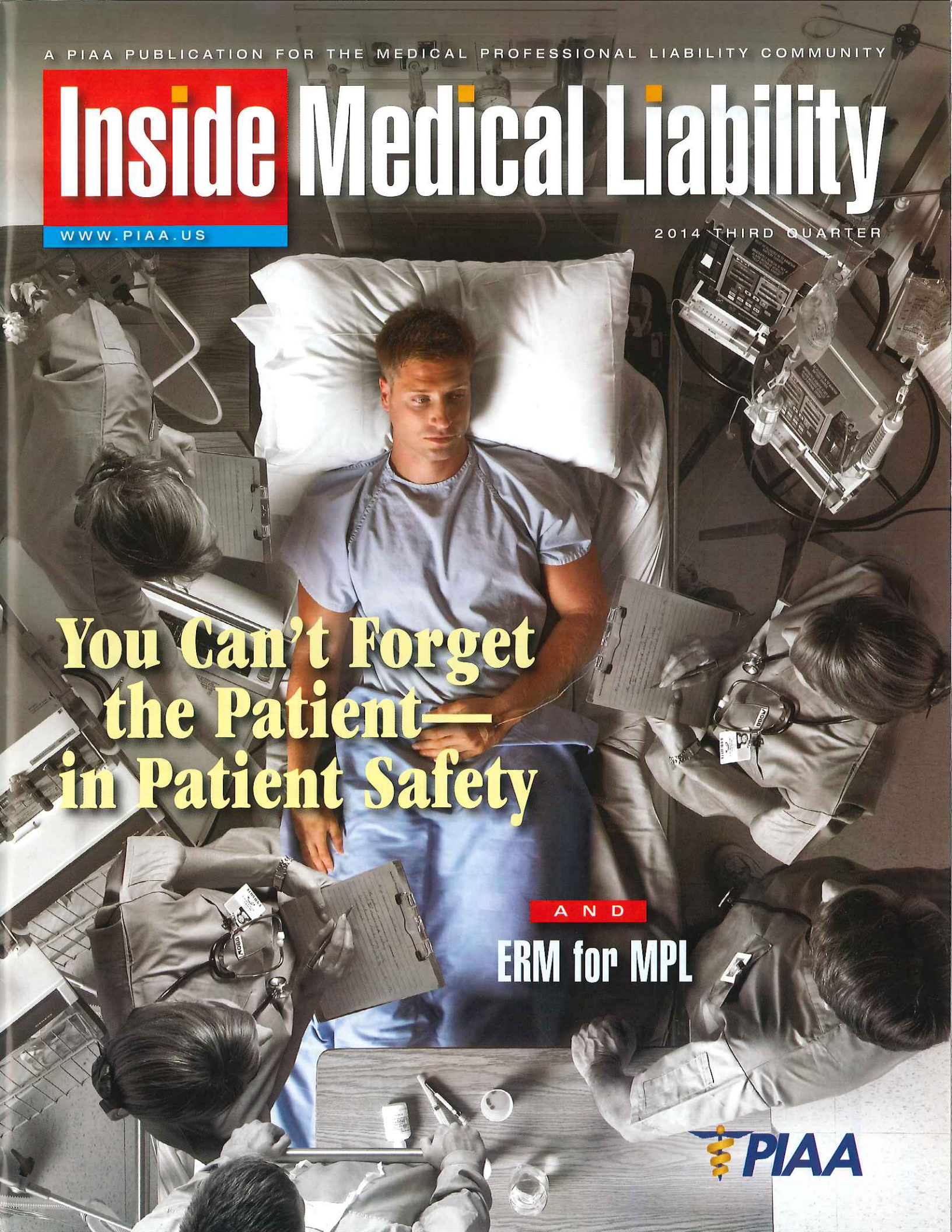

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The Dental Professional Review and Evaluation Program:

Lessons and Implications for Professional License Defense

The Dental Professional Review and Evaluation Program, or D-PREP, was recently developed by the American Association of Dental Boards (AADB) as a tool for evaluating the competency of dental professionals. The program may be good idea in theory, but a recent Massachusetts case highlights the serious legal issues and difficulties that its application poses for dental professionals and insurers alike.

D-PREP presents unique challenges for professional licensing defense. The sanction is so severe—and the results of it so unpredictable—that taking a matter to a hearing will likely prove more desirable than agreeing to D-PREP as a settlement term. Generally, going through a full adjudicatory hearing greatly increases the costs of defending an action. The D-PREP program itself is very expensive, however, and insurers and practitioners should be mindful of who will be stuck with the hefty fees associated with the program, should it be required.

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This case note discusses the issues raised by D-PREP and offers some insights from our experience in successfully defending against it recently in Massachusetts.

What is D-PREP?

D-PREP was created by the AADB and modeled after the Physician Assessment and Clinical Education (PACE) program designed for physicians. D-PREP consists of the following six phases, with fees totaling nearly $20,000[1]:

1. A dentist is referred by a licensing board and applies to the program at one of three host universities.

2. The dentist undergoes a full mental and physical examination, the results of which must be provided to the AADB for their

review.

3. The AADB assembles all the information available about the dentist.

4. The dentist travels to one of the host universities, in Wisconsin, Louisiana, or Maryland. There, they undergo a full evaluation, including written and clinical testing, over the course of four to five days.

5. The reviewers write a comprehensive analysis of the dentist's competency for the referring dental board. The dentist will receive one of three grades: a pass, a pass with recommendations, or fail. A pass with recommendations will include suggested remediation. A fail is a determination that he cannot practice dentistry at a level of minimum patient safety, and in all likelihood will function as a complete revocation of the dentist's license.

6. The dentist completes the remediation recommended in the D-PREP evaluation once it has been approved by the board.

There is no appellate procedure or opportunity to obtain an appellate review at any stage of the program. The evaluation is final, and there is no mechanism for challenging the D-PREP report.

D-PREP is still in its relative infancy. As of January 2014, only approximately ten individuals had enrolled in D-PREP for serious issues that had cast doubt on their competency.

Legal implications of D-PREP

Generally, licensing boards are creatures of statute and must have a statutory grant of authority for any action they take. Due process requires that when a board seeks to revoke a license, the licensee be given a hearing on the allegations against him. These fundamental legal principles are called into question by the very nature of D-PREP.

First, while boards are frequently given wide discretion in fashioning an appropriate sanction, such discretion is not unlimited. In Massachusetts, the action of at least one licensing board has been overturned by a reviewing court, when it attempted to require a licensee to take and pass an industry examination as a condition for maintaining licensure.[2] In Massachusetts, there is nothing in the dental board's enabling statute giving them authority

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to order a dentist to undergo assessment by a third party. Compare this to the Massachusetts Board of Registration in Medicine's statute, which explicitly allows the board to utilize remediation programs like the Physician Assessment and Clinical Education Program (PACE), but even then, only on a voluntary basis.[3]

Second, the D-PREP report is used by the board to determine whether a dentist will be able to retain his license. The evaluation is not limited to the issues that caused the case to be referred to D-PREP in the first place. Thus, a dentist enrolled in the D-PREP program risks losing his license completely for issues on which a hearing was never held and for which no appellate review was available.

This possibility flies directly in the face of traditional notions of due process and essentially outsources the hearing process to an unaccountable third party.

A case study

Our client dealt with a difficult patient population. He had received a series of patient complaints that, we believe, were motivated by a desire for free care, as the patients' insurance program had recently cut benefits substantially. In response to the complaints, the board conducted a thorough investigation, which included an unannounced compliance inspection of our client's office. Ultimately, the board did not move forward on the quality-of-care issues raised in the patient complaints, except for one allegation that involved an overfilled root canal. Instead, the board sought discipline for recordkeeping deficiencies and other issues discovered during the compliance inspection.

The board's proposed sanction, from the beginning, was to require that our client enroll in D-PREP. We viewed this as highly draconian; after all, our client was only being accused of a single clinical deficiency. D-PREP was designed for dentists with serious competency problems, not bad record keepers. Furthermore, if our client were to enroll in D-PREP, he would need to pay nearly $20,000 and spend a week away from his family. He would lose any type of control over the process, and also risked losing his ability to practice entirely, should the D-PREP assessment come back negative.

Keeping in mind that board cases rarely benefit from a full hearing, we sought to address the board's concerns by proposing that our client complete additional continuing education in the areas noted by the board. We also proposed to demonstrate that he had no physical or mental impairments that might impact his ability to practice. The board continued to insist on D-PREP, however, and, consequently, this became one of the rare cases where a hearing appeared the more attractive alternative to a negotiated resolution.

Our primary theory of the case was that D-PREP was not warranted under the facts. Nearly all the violations of which our client was accused were minor or entirely defensible. In particular, our expert was fully supportive of our client's treatment of the single overfilled root canal, which is a known complication of root canal therapy.

We also vigorously disputed the board's authority to order D-PREP as a sanction. There was evidence, developed through discovery, that tended to show that the board was not actually familiar with what D-PREP entailed. We attacked the board's position on both procedural and substantive grounds. Because we believed the board would go forward with its intention to order D-PREP, we thoroughly developed a number of issues for appeal.

In one final push, shortly before the hearing commenced, the case went back to the board for reconsideration. Our message was clear: this was not a case that warranted D-PREP, and we would challenge it. Should we prevail on appeal, the board risked losing D-PREP as an option in the future in cases where a D-PREP assessment might be a far more appropriate remedy. Ultimately, the Board relented and accepted our initial coun-

teroffer. This was only after substantial and intense efforts and expenditures needed to prepare the case and highlight the issues D-PREP raised, however.

Insights and lessons

Like outright revocation of a dental license, when D-PREP is proposed as a settlement term, taking the case through a full adjudicatory hearing may be the preferable option. The defense will be far more costly, but this approach does ensure some limitation in the scope of the issues considered, some level of due-process protection for the licensee, and appellate options not available with D-PREP.

If you are confronted with D-PREP as a settlement option, conduct a thorough evaluation and assessment of your client's case. This is an extreme sanction, with wholly unpredictable, and possibly disastrous, consequences for your client. Your board's enabling act may not authorize third-party assessments; your client may not be willing to sacrifice his substantive and procedural due process rights to the unknown individuals at the D-PREP centers; and you may obtain a more predictable result for your client through the established procedures of an adjudicatory hearing.

Due process requires that when a board seeks to revoke a license, the licensee be given a hearing on the allegations against him.

D-PREP may serve a suitable purpose for those whose clinical competency is in serious doubt, but it is likely not an appropriate option for practitioners facing more routine allegations.

D-PREP can be a useful tool for the boards, and offers an attractive alternative to revocation when the facts warrant it. The boards need to understand, however, that if they order it when it is not warranted and subsequently lose on appeal, they may foreclose the possibility of ever ordering it.

Conclusion

It remains to be seen how D-PREP will be utilized by the boards as the program matures and boards become more familiar with it. If, as in the Massachusetts case, the boards seek to require it for routine violations, it will impede the ability to reach negotiated resolution, and defense of professional licensure may become far more costly. If, however, the boards use it sparingly, and only where serious issues warrant it, the program could be an attractive alternative to the ultimate sanction of revocation. PIAA

For related information, see www.hmdrslaw.com.

References

1. See http://dentalasp.com/D-PREP.htm.
2. *George v. Board of Registration of Home Inspectors,* 27 Mass. L. Rptr. 186, 2010 WL 3038729 (Mass.Super. May 26, 2010).
3. See M.G.L. c. 112, § 5.