



BOTOX & DENTISTRY: ARE YOU COVERED?

Case Study

A dentist is applying for professional liability coverage. Currently, the dentist uses Botox in the oral and maxillofacial area only but wants to expand the use of Botox to the forehead and eye area and has received training to do so. The dentist speaks to a representative from a professional liability carrier about their desire to expand his use of Botox beyond the oral and maxillofacial area to ensure that there would be coverage for such Botox treatment.

The representative of the professional liability carrier provides verbal assurances that there would be coverage for the dentist's expanded use of Botox including, *"our carrier does not deny coverage or enforce a Botox related Exclusion in their policy."* When the dentist asks for confirmation that there would be coverage, the representative provides the following endorsement language from the policy,

"Exclusion: any claim arising from, or in connection with, the administration of any and all types of botulinum toxins or dermal fillers, unless administered by an oral surgeon or by an insured dentist authorized to perform the procedure under the laws of the State(s) in which they practice and are listed on the Schedule of Botulinum Toxin."

The dentist procures professional liability insurance based upon the verbal representations, the policy language and their personal knowledge of other dentists in the community expanding the use of Botox outside of the oral and maxillofacial area. He soon begins using Botox outside the oral and maxillofacial area. An unhappy patient brings a claim for malpractice related to the use of Botox for a cosmetic brow lift. Simultaneously, she makes a complaint to the NYS Office of Professional Discipline for professional misconduct and the NYS Attorney General for false advertising. When the dentist reports the claims to their professional liability carrier, they promptly deny coverage for the malpractice claim based on the above cited Exclusion as well as for the false advertising claim.

What Happened Here?

A few long-standing proverbs come to mind: (1) *"A verbal promise isn't worth the paper it's written on"* (2) *"If it sounds too good to be true, it probably is"* and (3) *"Just because everyone else is doing it doesn't make it OK."* Although the language in the insurance policy above seemingly provides an exception to the Exclusion for the use of Botox, its application is conditioned on the procedure being performed being *under the laws of the state* in which the dentist practices.



Can a Dentist in New York use Botox?

Short answer: Yes, with limitations. The New York State Education Department (“NYSED”) issued a Practice Alert for the Administration of Botox and Dermal Fillers to the NYS dental community.¹ That Practice Alert provides guidance and an example,

“NYS Education Law does not specify modalities of practice and does not limit the practice of dentistry to any specific methods of treatment. As a result, Education Law does not prohibit a NY State licensed dentist from using botulinum toxin type A or dermal fillers in the oral and maxillofacial area consistent with Section 6601, as long as it is related to restoring and maintaining dental health.

For example: A dentist who is completing orthognathic surgery to correct a jaw discrepancy, and wishes to do an allograft of the chin, or to administer filling materials such as Botox or Restylane would be considered to be within the scope, if trained. However, to administer these regimens as stand-alone procedures for esthetics or facial recontouring without parallel dental reconstructive work on either the teeth themselves or jaws is not within scope.”

NYSDA has republished the NYSED’s guidance on its website² No dentist can claim ignorance of the law, nor would it be a defense. In addition to compliance with NYS Education Law §6601, the dentist must have competence in the use of Botox and its use solely for cosmetic purposes can constitute professional misconduct.

NYS Education Law §6601 defines the practice of the profession of dentistry as diagnosing, treating, operating or prescribing for any disease, pain, injury, deformity or physical condition of the oral and maxillofacial area related to restoring and maintaining dental health.

Presently, the use of Botox by a dentist licensed in NY that is unrelated to restoring and maintaining dental health is likely outside the scope of practice. Some examples of Botox use by dentists that are unrelated to restoring and maintaining dental health include,

- Forehead wrinkles
- Crow’s feet
- Pure aesthetic facial rejuvenation
- Cosmetic brow lift

This means that a dentist using Botox solely for cosmetic purposes which is unrelated to restoring and maintaining dental health is at a high risk of having claims that fall outside of professional liability coverage, as well as exposure for professional misconduct.

¹ <https://www.op.nysed.gov/professions/dentists/professional-practice>

² <https://www.nysdental.org/news-publications/news/2024/04/29/nysed-issues-guidance-on-botox-and-dermal-fillers>



The mere fact that other dentists in the community are using Botox outside the oral and maxillofacial area in a way that is unrelated to restoring and maintaining dental health does not change this analysis. Put another way, widespread use by other dentists does not expand the legal scope of practice.

However, a cosmetic application that is directly tied to a dental diagnosis and treatment (e.g., correcting asymmetric smile caused by muscle dysfunction related to dental treatment) is within the scope of practice. Some other examples of Botox use by dentists that are within the scope of practice include,

- TMJ disorders
- Bruxism
- Orofacial pain
- Masseter hypertrophy
- Myofascial pain
- Trigeminal-related muscular issues
- Therapeutic management of facial muscles related to occlusion or mastication

While this list is not exhaustive, anytime Botox is used by a dentist they should carefully document the indications for use and how it relates to restoring and maintaining dental health. Such documentation helps show practice within the scope and mitigate the risk of having a claim related to Botox that falls outside of coverage.

Additional Risk Related to Botox Use

Dentists who use Botox in their practices should be aware of additional risks related to its use. Botox is not FDA approved for use in dentistry. The FDA allows any licensed prescriber to use an approved drug within scope of practice. Many Botox uses in dentistry (e.g., TMJ, bruxism) are technically off-label, but off-label use can still be acceptable and legally compliant if:

- They are licensed under state law
- The use falls within state scope of practice (NYS Education Law §6601)
- They comply with standard of care

Dentists can also face advertising liability for marketing and advertising for Botox services.³ Marketing before and after photos, claims of success, and patient testimonials can be perceived as assurances of specific cosmetic results. This could violate General Business Law §349 and §350 and potentially constitute professional misconduct if found to be misleading

and deceptive.⁴ Advertising frequently becomes the primary evidence used by OPD to initiate investigations.

³ New York General Business Law §349 and §350

⁴ 8 NYCRR §29.1



The greatest advertising risk in New York is implying that a dentist operates a cosmetic facial aesthetics practice, which regulators may view as outside the statutory scope of dentistry.

Final Thoughts

A verbal assurance that you have professional liability coverage for the use of Botox unrelated to restoring and maintaining dental health is insufficient to create coverage. Presently, such use is beyond the scope of practice. The fact that other dentists in the community are using Botox in such a way does not bring it within the scope of practice or provide a defense. Until NYS Education Law §6601 is amended to include appearance enhancement or remove *“related to restoring and maintaining dental health”* NYS dentists must comply or face the risks of liability claims, professional misconduct and advertising claims.

Questions about legal compliance can be directed to the law firm of Feldman Kieffer LLP at amercado@FK.law and questions about professional liability coverage can be directed to Christine Garvelli at Walsh Insurance at cgarvelli@walshins.com



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