

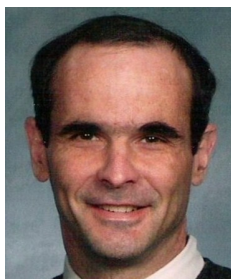
Dental Practice Legal Update

December, 2017

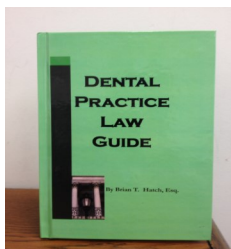
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Is Your Office Compliant with the Prescription Drug Monitoring Program?

Since October 15, 2016, when it became required to participate in the Massachusetts Prescription Drug Monitoring Program, most prescribers of Schedule II-VI drugs have registered to use the program. But the Department of Public Health reported last month that 34% of prescribers are still non-compliant with the regulations. How does the program affect dental offices on a day to day basis?

Due to widespread support among state and federal governments to combat the opioid abuse epidemic in the United States, almost all state governments now have a prescription drug monitoring program, with at least 26 states requiring prescribers to check the interstate network before issuing prescriptions. Massachusetts has tried to become a model for a state program, and the DPH has recently received \$58.8 million to continue running its system. If a participating prescriber in the program enters a patient's name and birthdate into the database they can receive a year's worth of clinical information, including drugs prescribed and the pharmacies issuing the prescriptions. As a result, in the second quarter of 2017, 250 people were tagged as "individuals with activity of concern" regarding Schedule II opioids. Some positive indications of the lowering of overdose related deaths in Massachusetts have been reported, and whether this will continue remains to be seen, but with dentists flagged as a main source of the

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How to Deal With Sexual Harassment in the Dental Office

Now that there are daily headlines in the media these days about more allegations of sexual harassment by public figures, what is considered sexual harassment in the dental office, and how should it be dealt with? It is interesting to note that while the harasser in the public spotlight may suffer a devastating blow to a career, in a private workplace such as a dental office often it is the practice or its supervisors that can be held accountable legally. Unless there is a crime committed it is unusual for a harassing employee who is not a supervisor to suffer legal backlash except for termination or workplace discipline.

Criminal conduct resulting from sexual harassment is a line which cannot be crossed by anyone, and can result from particular actions by an individual who is either harassing a fellow employee or a patient. An unwanted physical touching is considered an assault or battery and an arrest of the perpetrator can be made by the proper authority. Dentists and other dental providers have been found guilty of assault because of unwanted sexual touching while a patient is under anesthesia or otherwise unable to consent.

Sexual harassment, on the other hand, is a cause of action for a civil complaint, and often occurs in the employment context such as in a dental office. Not only unwanted physical sexually oriented contact, but sexually suggestive verbal conduct or anything that could be considered a sexual advance can

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Dealing with Sexual Harassment in the Dental Office (from p.1)

constitute sexual harassment. Unnecessary touching such as regularly brushing against another person's body, pinching, hugging, or patting are examples, and actions without touching such as written notes containing sexual innuendoes, using objects to portray sexual messages or sexually oriented jokes can be considered harassment.

It is important to note that the legal standard for whether conduct is inappropriate is not whether it is "voluntary" but whether it is "welcome." A willing participant or contributor to sexually oriented conduct cannot file charges for sexual harassment, while for instance a showing that an employee submitted to conduct merely to keep his or her

job would be actionable. "Joking around" is often used as a defense to harassment, but then the victim can overcome that defense by showing that the other party was aware that it was not welcome.

There is a very important role that a supervisor has in making harassment an actionable offense against a dental practice, since an employers' actions are keys in harassment litigation. If a supervisor, manager, or owner is made aware directly or indirectly of the harassment, and does nothing to correct the situation, then both the supervisor and the practice can be held liable for an employee's sexual harassment. If it is a supervisor, manager or owner that is the harasser, there is strict liability without any further communication by the victim.

So, what can be done to ensure that the practice prevents the harassment in the first place, and makes sure the harassment doesn't escalate to liability by

the practice? There must be a good sexual harassment policy and training in place, detailed in an employment manual, to make sure employees are aware of examples of sexual harassment, and that there will be consequences if such conduct is recognized. Employees should be required to report harassment either by others or against themselves with a complaint procedure that allows private and discrete communications to those in charge. Also, it is important to require that there is a swift and thorough response to any complaints by owners or supervisors by disciplining the harasser or making sure the two parties do not work in proximity to each other if the harasser is allowed to continue to be employed. Written warnings are preferred so that there is a record should problems continue to arise, and litigation ensues.

Now that there is more public awareness of sexual harassment, victims aren't afraid of speaking out, and so dental practices should adhere to proper standards when it is recognized.

Is Your Office Compliant with the Prescription Monitoring Program?

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the opioids which wind up contributing to starting abuse problems, either through patients' overuse or release of drugs on the black market, dental offices should have a clear policy for adhering to the regulations.

The regulations in 105 CMR 700.012(G) are clear: it is required to use the "prescription awareness tool" (PAT) set up by the DPH each time a dentist prescribes a Schedule II or III drug, and when prescribing to a patient for the first time benzodiazepine or a Schedule IV or V drug as noted in DPH guidelines. There aren't many exceptions which apply to dentists, most of which have to do with hospitals, hospices, emergency responders, when patients are children under 96 months of age, or when specific waivers are given due to emergencies or technological limitations.

Prescribers can request the DPH to create "subaccounts" for staff to use the PAT, as long as they have a

written set of procedures regarding management and security of prescription monitoring and reports. The prescribers are then responsible for ensuring that the staff are competent to use the PAT, and requiring that they not have access once they no longer work for the office. The staff have their own legal responsibilities under HIPAA and the monitoring statute to keep the data obtained from the PAT confidential. The data can be used can to prescribe safely, taking into account the possibility of drug abuse or diversion, but it doesn't require a prescriber to take any action which in their opinion would be contrary to the best interests of the patient. Enforcement by the DPH of violations of the regulations can result in warnings or suspensions, Board discipline, non-renewals or revocation from the ability to use the program.

Since the requirements are specifically geared towards the process of writing up a prescription for the controlled drugs, use of the PAT would probably be considered an unnecessary use of protected health information unless it is used only for that purpose. Providers would probably have more leeway about when they can use the PAT for treatment purposes, but it would be beyond the scope of the legitimate use of protected health information under

HIPAA if it is used otherwise by non-provider staff. The prescription drug monitoring program was enacted by the legislature for the purpose of responding to the opioid and prescription drug abuse crisis, and as long as office procedures are devised and followed with that specific goal in mind, dental offices will be assured that they are compliant with the new statute.

Provide your employees required HIPAA training and present to them an employee manual customized for the dental industry and your office. brianhatch@hatchlawoffices.com 508-222-6400

Attorney Brian Hatch has been practicing law for over 32 years and has focused on the dental industry since 1995.

Husband Denied Part Ownership in Wife's Dental Practice

A dentist's husband who claimed he had contributed nearly all the investment capital towards building up his wife's thriving multi-site dental practice was denied an interest in the ownership of the practice based on a number of legal flaws and violations. Scott Savel claimed in his divorce proceeding complaint that he should be entitled to half an ownership interest in KIDDSmiles, PLLC in Nassau County, New York because of the \$500,000 and time he invested in the start-up of the practice, including construction, management, and operation. KIDDSmiles has a gross revenue of \$8 million and a profit of \$2 million annually. His complaint stated that his wife only contributed "garden-variety dental services" working "at most two days per week" and only was responsible for 5% of total practice revenues.

The decision by Justice Robert Bruno referred to the New York statute prohibiting non-dentists from owning dental practices, stating that there could

not be a legal partnership which would allow him 50% of the interest in the practice. Contributing to the decision were legal violations of the husband, whose separate consulting company allegedly received kickbacks for referrals which were termed falsely as "rental payments." In post decision motions, the wife, Dr. Michele Savel claimed that her husband was using the action as leverage in their divorce proceeding and for delaying the divorce proceeding to allow continuation of support payments by her to the husband.

Dentist Wants Charges for Unlawful Prescriptions Dismissed

A Pennsylvania dentist who was arrested in August and charged with seven counts of prohibited delivery of a controlled substance and five counts of criminal use of a communications facility wants all charges dismissed against him because a drug involved was not a controlled drug under state law when the prescriptions were filled. Dr. Christopher Berezna allegedly wrote prescriptions for carisoprodol, a muscle relaxer, oxycodone

and diazepam for a woman who he did not have a doctor-patient relationship with and with whom he was romantically involved. Carisoprodol was not on the list of controlled substances under Pennsylvania law until August of 2016, although it has been a federally controlled drug since 2012.

Hatch Legal Group works with South Shore Dental Advisors to provide dental practices with services within a variety of areas, including law, IT, banking, accounting, and practice management. See SSDentaladvisors.com

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Dentists Rebel Against Dental Association and Set Up Own Organization

Alberta, Canada dentists were so upset about what they called "bullying" of individual dentists by the government sponsored Alberta Dental Association and College that they decided to form their own organization and website called the Alberta Dentists Association, which they hope will assist them in countering the special interests and attorneys who influence the ADA & C. In November the President of the ADA & C and Health Minister Sarah Hoffman announced their decision to reduce the Alberta Dentist Fee Guide by 8.5%, while no mention of the 21% increase in membership fees was made. The dentists feel that the ADA & C no longer attempted to act in the best interests of dentists by asking for concessions to reduce overhead in government oversight. They are pushing for more separation of the government from the ADA & C and cite other examples of

how this has been achieved in other Canadian provinces. They cite problems with the disciplinary system, cronyism, conflicts of interest, and excessive policing of dentists' advertising as a situation which must be rectified.

Dentist Who Sued Son for Slander Acquitted of Child Indecency

Allen Pearson, 49, a Wylie, Texas pediatric dentist, has been acquitted of charges of indecency with a child by contact involving an underage relative. His son, now 20 years old, had posted information on line about the criminal charges brought against his father, saying that he believed them. The facts introduced at trial did not support the allegations, according to jurors, and they confirmed that the investigation of the case was poor. The Texas Board of Dental Examiners lifted a suspension on Pearson's license in February because they did not find probable cause. Pearson had sued his son for slander and

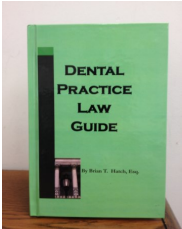
libel, and that case is scheduled to be dismissed soon.

Board Says Attorney General Didn't Prove Case Against Maine Oral Surgeon

The Maine Attorney General did not prove its case against a Maine oral surgeon it accused of lack of competence and professionalism, according to the Maine Dental Board, which heard the case after multiple complaints by patients alleging that he had pulled the wrong teeth, not given necessary pain killers after patient pleas, and did not provide proper post-operative care. Dr. Jan Kippax had been ordered to pay \$300,000 in damages this past summer to a patient accusing him of malpractice. His case was controversial because it involved a dispute because the Dental Board said the Attorney General's office failed to investigate the case sufficiently. The Board heard patients' testimony but eventually found that a lack of expert testimony was a flaw in the case.

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