

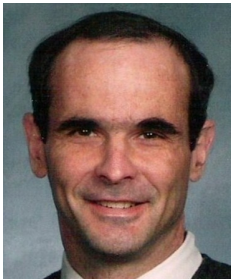
Dental Practice Legal Update

January, 2017

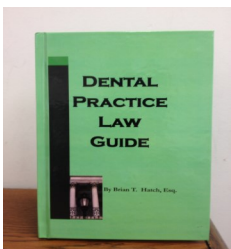
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EPA Issues Ruling Requiring Amalgam Separators

The Environmental Protection Agency has released its finalized rules requiring the use of amalgam separators by dental offices to prevent the discharge of mercury into municipal wastewater systems. The EPA stated that more than 100,000 practices in the United States use or remove amalgam, resulting in the release of about 5.1 tons of mercury into municipal water treatment plants. The regulations require that practices handling or disposing of amalgam collect and recycle used amalgam, and clean chairside traps with non-chlorine or non-bleach cleansers to prevent mercury from reaching the wastewater systems. In addition there will be a requirement, with reasonable exemptions, that practices have an amalgam separator to achieve a 95% removal efficiency. The ADA, while confirming its position that "dental amalgam is a safe and effective cavity-filling option," stated through its president, Dr. Gary L. Roberts, that the new rule is a "fair and reasonable approach to the management of dental amalgam." The ADA had previously opposed any rule requiring amalgam separators while the EPA was in the process of discussing the possibility of the amalgam separator requirement. A phase in period means that many practices do not have to achieve compliance until late 2019. The EPA said that it believes that the requirement will not place an undue burden on dental practices, since amalgam separators are readily available and would have an annual cost to practices of about \$800.

What to Do With Receivables in a Sale

In every dental practice sale there is always a question of how to handle the accounts receivable. They were earned by the seller, but would be collected after closing when the parties have exchanged the money for the purchase. There are a few ways of dealing with this question, but in general they are either sold as part of the assets of the practice, or collected by the buyer for the benefit of the seller after closing.

The problem is minimized when the practice takes all monies up front before the procedure takes place, taking into account the insurance that is estimated to be collected. But there are always some instances where either positive or negative balances result, such as when the insurance payment estimate is off. If a credit balance exists because of prepayments for treatment, then is the buyer responsible for refunding the credit to the patient or to the seller? Or is the balance left to be used for future treatment, with the paid amount to be split between the buyer and the seller according to how much work each does for the patient? The purchase and sale agreement needs to address these situations.

It may become too difficult to ascribe a particular value to the accounts receivable as well to allow it to be included in the sale as part of the price. Allowing the accounts receivable to become part of the sale artificially inflates the price of the practice, since there is no certainty that there will be 100% collection. The accounts receivable can be discounted based on the age of the account, but the complications

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What to Do With Receivables in a Sale

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of the formulas used can be difficult to come up with. And quick turnaround accounts receivables, such as those with insurance payments pending, shouldn't be discounted either.

Often, it is decided that the buyer will collect the receivables owed the seller, and reimburse him or her for a certain period of time following the closing. The buyer's staff can collect for the seller for six months or so, and then the receivables go to the buyer. There is the problem here that the seller may accuse the buyer of holding off on collecting on those receivables until the time the period expires in order for them to be collectible by the buyer.

The receivables can be collected by the buyer's staff for a certain period and then they revert back to the seller for his or her collection. In this case the buyer may be concerned that the seller will be overzealous in his or her collection efforts by taking current patients to court prematurely and alienating them from the practice. There is usually a clause in the purchase agreement either preventing this kind of collection, or providing enough notice to the buyer to preserve the patient relationship.

In either circumstance where the buyer's staff is responsible for collecting on behalf of the seller, there should be a collections incentive fee in order to urge the buyer's staff to make reasonable efforts at collections. This fee is usually set at about 3-5%. If there is no fee, and it is just stipulated that the effort must be "reasonable,"

then the definition of "reasonable" collection efforts is bound to be interpreted differently by the parties. After all, collection efforts are never the most enjoyable part of the staff's job. When large amounts of receivables are at stake and they are left completely dormant, then a lawsuit can often result regarding the negligence of the staff in not making any attempt to collect.

Many times the question of receivables doesn't come up in initial discussions about the price of the practice for a sale. A percentage of gross income is often the simplistic way the parties come to an initial agreement about the price. But the buyer must do his or her due diligence about how good the practice owner has been about collecting, for it matters in a good appraisal of the value of the practice. Only then can the buyer and the seller instruct the attorneys drafting the purchase agreement on how best to word the section on handling of the transfer of accounts receivable.

Dental Practice Tries to Avoid Bad Reviews Using Trademark Infringement

Abbey Dental of Las Vegas, Nevada was confronted by negative reviews on a particular consumer feedback website called Pissed Consumer. Many other suits against individual reviewers and consumer websites have failed consistently on first amendment or other legal grounds, but Abbey Dental was determined to get back at Pissed Consumer using an entirely new legal cause of action. When the defendant tried to use the state anti-SLAPP law (Strategic Lawsuit Against Public Participation) to get Abbey Dental's lawsuit dismissed, the dental practice tried to take the case to federal court using a trademark infringement legal theory. Its attorneys alleged that using the words "Abbey Dental" on a website leads consumers googling "abbey dental" directly to the reviewing company's website, thus possibly creating confusion in the searcher's mind that the site is affiliated with Abbey Dental. The Ninth Circuit Court of Appeals stated that the argument was too weak to hold up, saying "Outside the special case of... domains that actively claim affiliation

with the trademark holder, consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page-if then." Pissed Consumer is asking under the anti-SLAPP statute for attorney's fees and a fee award, as well as sanctions against Abbey Dental for filing a frivolous complaint.

8 Year Old Who Lost Part of Jaw Sues Water Contaminating Practice

Children's Dental Group of Anaheim, California was required to replace its water system after contamination by mycobacterium was found and 70 children were treated for possible infections. An 8 year old girl, Ericka Lorena Mendez, underwent a pulpotomy at the practice in June and then came back two times because of pain and inflammation. She was hospitalized for a week in August and then in September an oral surgeon had to take out an infected jaw bone. The suit says that the final result was disfigurement and notes that some of her permanent teeth were also removed and intravenous antibiotic treatment was required upon her discharge. The complaint states that Ericka now suffers from paranoia of all medical providers and "episodic bed-wetting." The suit says that the dental procedure that was performed was medically unnecessary to begin with.

Partner Who Was Forced Out of His Practice Awarded \$3.15 Million

Dr. Marshall Kurtz, who had been a partner with Dr. Dorrance Kelly in Danbury Oral and Maxillofacial Surgery Associates was ordered to pay \$3.15 million in a breach of contract action in which Kelly claimed Kurtz forced him out of his practice prematurely. Kelly had sold the practice to Kurtz in 2009 for \$1.6 million and had agreed to keep Kelly on as a dentist until he was 80 years old. But at 74, Kelly said he was locked out of the practice's computer system so he could not schedule future appointments with patients. During the lawsuit it was revealed that Kurtz had failed to tell Kelly about a 2013 investigation by the Connecticut Department of Social Services into fraudulent Medicaid billing practices at the location which resulted in a \$212,000 settlement by Kurtz with the state. During testimony Kelly described Kurtz' "insatiable greed and hunger for power" which induced him to force him out of the practice, which he had developed over 40 years before the sale. The complaint stated that Kurtz "resented being in the shadow of Dr. Kelly and Dr. Kelly's legacy" which had grown from the longstanding relationships with his patients. He says he will continue to seek punitive damages and attorney fees in an extension of the case.

National Black Legislative Group Endorses DSOs

The National Black Caucus of State Legislators (NBCSL) has voted in favor of a 2017 policy resolution approving of the benefits of Dental Service Organizations. The NBCSL resolution noted several positive attributes of DSOs, including that they provide treatment in typically underserved areas of the population. The resolution went on to say that dentists who participate in DSOs which are located in low-income and underserved areas should be allowed more student loan forgiveness, that anticompetitive policies that prevent the growth of access to DSOs should be limited, and that the efficiencies and capabilities of DSOs that allow them to provide better access to treatment and preventive treatment policies should be encouraged.

Dentist Critical of DentaQuest Awarded \$22M

A Tennessee dentist who was critical of DentaQuest's administration of the TennCare Medicaid network was awarded \$22 million by a jury because

the entity restricted his first amendment rights. DentaQuest's connection to TennCare made it liable as a state actor which dropped Dr. David Snodgrass as a TennCare provider to more than 1000 children a month in 2003. Evidence was presented that officials at DentaQuest considered Snodgrass a "problem provider" and that they should "figure out a way to justify excluding (him)" from their network. DentaQuest never officially revealed why they dropped Snodgrass, though he feels that it was because he used stainless steel crowns instead of fillings to get more payments. The decision by the jury still does not require that Snodgrass be allowed to treat TennCare patients, though he is applying to be reinstated. Meanwhile DentaQuest is appealing the verdict, which included \$14.8 million in punitive damages.

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Dentist Says He Was Not Competent to Sign Agreement Not to Practice

A former Abbotsford, British Columbia dentist who signed an agreement with the College of Dental Surgeons not to practice again in 2011 is now suing the College and stating he was not competent to sign the agreement in the first place. Clarence (Clark) Stelmaschuk had his license to practice dentistry suspended in 2011 after the investigation of complaints against him relating to negligent treatment and other mismanagement of his practice. He appealed the decision, but before the hearing, he instead signed a settlement agreement to not practice dentistry "anywhere in the world." He claims he suffers from bipolar disorder, does not recall the signing of the agreement and was suffering from an "acute period of mental illness" as a result of the investigation and proceedings. His lawyers will be questioned as to Stelmaschuk's alleged mental competence

in 2011 and whether he realized what he was signing at the time.

Woman Treated by Unlicensed Dentist Now Can Barely Speak

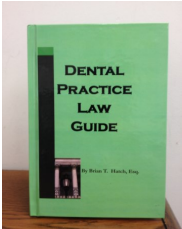
Rosie Pitelli went to Natural Smiles Dentistry in Palm Gardens, Florida to have Invisalign treatment to straighten her teeth. The dentist, Dr. Jose Alvarez, permitted an employee of the practice, dental assistant Luis Quintero, to fit Pitelli with braces in 2015. Now the muscle inflammation and degeneration which followed wearing the poorly fitting braces prevents her from speaking properly, and she is continuing to have constant muscle spasms on her face. Alvarez and Quintero were both arrested, and the police report states that Pitelli was told by Alvarez that Quintero was licensed only in Columbia but was not licensed to practice dentistry in the United States.

Dentists' Licenses Suspended, Patients Urged to Get Tested for HIV, Hepatitis

A Pennsylvania dental practice which is being investigated for poor infection control procedures is now being closed temporarily while patients are contacted with recommendations that they be tested for HIV, hepatitis B and hepatitis C. Health Secretary Dr. Karen Murphy issued a press release stating that dentists Dr. Stephen Sulzbach, Dr. Jana Osmolinski, and Dr. Eric Osmolinski have had their licenses suspended because they pose a immediate and clear danger to the public health and safety. Murphy noted that "While we haven't received reports of hepatitis B, hepatitis C or HIV from patients, infection control procedures at the practice were inadequate and created the potential for harm, so we're recommending patients get tested." The temporary suspensions remain in effect until further action by the Board.

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