

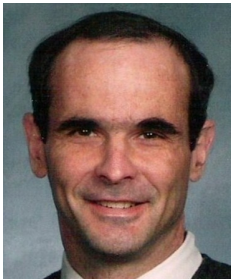
Dental Practice Legal Update

April, 2018

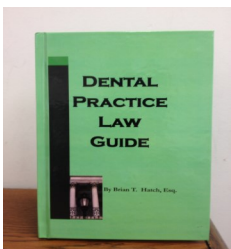
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Attorney Brian Hatch, publisher of Dental Practice Legal Update, has represented dental practices in business, employment, complex litigation and other legal matters. His latest book is "Dental Practice Law Guide" hatchlegalgroup.com



The Effects of Dental Product Tariffs on Dentistry

The \$50 billion dollars in import tariffs on Chinese products announced by the Trump administration will affect a number of key dental products and materials of the 1,300 items listed by the United States Trade Representative. These include dental cements, dental fillings, diagnostic equipment, dental burs, artificial teeth, mirrors and reflectors, anesthetic instruments and appliances, dental fittings, and other equipment, materials and instruments. The import tariff is due to raise the price of Chinese goods by 25%. The question for the dental industry is how this will affect costs of performing dentistry, if the tariffs being negotiated take effect. The answer is complex, given that parts of the dental industry have relied to a great extent on lower priced products from China to lower costs manufacturers and dental labs charge individual practices for necessary materials and products.

There has been a outcry in recent years, however, over the inferiority of the quality of Chinese dental products that are not held to the standards required by U.S. regulations. Some critics of large practices have said that the reason they keep treatment prices low is that they buy these items in bulk from outside the country at lower prices. U.S. manufacturers and local dental labs which deal with many dentists may benefit from a better competitive edge over Chinese companies. A cost benefit analysis will have to take place to see if it is a good thing or not for dentistry in the U.S.

Dental Practice Owners' Liability for Employees' Actions

As employers, dental practice owners are legally responsible for the actions of their employees under a principal-agent relationship where the employee is under the control of the employer and the employer profits from the work of the employee. However, in the dental office, there are some unique aspects which must be weighed in order to prevent this owner liability, and other considerations should be looked at as well.

Individual dentists who are employees of a dental practice carry their own malpractice insurance, and to the extent their malpractice insurance covers their own actions as a dentist, the employer is protected from malpractice actions taken against their associates. However, if that insurance is insufficient to cover liability, then a dental practice owner as employer can be held responsible also for the dentist's malpractice. Most often a contract with the associate requires malpractice liability insurance to avoid this situation, although dental practice liability insurance is available to cover practice owners.

Sexual harassment and discriminatory harassment of employees with protected class status (gender, disability, race, sexual orientation, etc.) can subject an employer to liability, even if employees who are not supervisors are harassing other employees. Courts will look at whether there is a written no harassment policy that all employees are aware of and have signed off on. Secondly, it is the action of the employer after the harassment

(continued on page 2)

Dental Practice Owners' Liability for Employees' Actions (continued from p. 1)

by an employee of another employee is reported to a supervisor that subjects an employer to liability. If there is knowledge of the harassment and immediate action is not taken such as discipline or termination of the harasser, and there is separation in the workplace to the extent possible of the harasser and the employee being harassed, then the employer may be liable. Interestingly, if the harasser is a supervisor both owner and supervisor are strictly liable, but not the employee.

In dentistry, one of the most significant possibilities for liability for a dental practice owner is upcoding or wrongful coding to an insurance company or Medicaid/

Dentists' Union Says Don't Treat Morbidly Obese Patients

A union representing dentists in the United Kingdom has warned that they may face a problem of liability when treating morbidly obese patients who might break dental chairs if the weight put on the chairs exceeds the maximum amounts specified by manufacturers. The Dental Defence Union, which indemnifies dentists, said that patients who are above a certain weight should be referred to specialty clinics for treatment to avoid liability because of the voiding of their insurance policies by going beyond the manufacturer's recommendations for the chairs. The Union recognized that there are possibilities of dentists facing charges of discrimination if they inquire as to the weight of each obese patient they treat, so that this way of dealing with the situation is not necessarily recommended either. The Union had been receiving inquiries from numerous dental professionals as to how to deal with the situation. Specialty dental clinics often have dental chairs that are designed to support additional weight.

MassHealth agency which is determined to be insurance fraud. If an owner or dentist benefits from these practices by their employee, then they may be subject to action by the Attorney General, fines, and possible elimination from the MassHealth program. The state false claims act sets detailed instructions for whistleblower employees who recognize these actions by an employer and file a complaint, preventing them from adverse actions by the employer and awarding them portions of the settlement or judgment against the employer. The award to the whistleblowing employee is proportional according to the employee's participation in the wrongdoing and the type of action the Attorney General takes.

What if only the employee benefits monetarily from his or her wrongdoing, and the employer doesn't know about the fraud? Only then the employer

Implant Abutment Reuse by Dental School Becomes a Legal Issue

A University of Nevada Las Vegas (UNLV) dentist working at a faculty clinic is coming under fire because of a cost-saving practice he had been using regarding implant healing abutments placed temporarily in the gums before final crowns and abutments can be placed. Dr. Philip Devore, who had been UNLV's director of the faculty group practice until resigning in December, had been using single use abutments, which are usually placed in a patient's mouth for up to six months, multiple times on different patients before discarding them. The products, which manufacturers designed and specified to be for single use only, were used in this manner on 184 patients who were going through the implant process at the school until a review revealed the practice. Officials at the school were concerned that this deviation from standard practice would result in dental implant failure, including swelling, severe pain, discomfort, gum inflammation or loosening or movement of the implant. Devore insisted that because he sterilized the abutments after each use, this method of reuse was completely safe. He said that dentists and physicians and others in health care reuse instruments all the time, and that it was not cost-prohibitive, since an abutment costs

cape liability for individual fraudulent actions by the employee. Also, there are cases which define how much knowledge the employer had of the possibility of matters such as assaults by employees against each other in order to make them liable. If an employer could have foreseen that domestic abuse or fights between employees might spill over into a workplace confrontation, then employer liability could be claimed.

The most important thing an employer can do to prevent liability for employee actions is obvious and stated rules to prevent the actions from taking place in the first place and immediate corrective action once the incidents become known. Letting employees know that certain actions will not be tolerated and the consequences of breaking the rules is essential. Only then can the principal-agency relationship that generally allows for employer owner liability be avoided.

between \$20-\$150, but it did cut down on costs. Devore taught students at the clinic but did not have students witness his treatment procedures. UNLV said they notified patients by mail and notified all students and faculty at the clinic that this kind of reuse practice was not acceptable. Chancellor Thom Reilly said that he directed his legal staff to contact the state health officer to help conduct an investigation of the situation. Devore, who has since transferred to private practice, said that he had never had a problem with infection caused by this procedure in his forty years of practice as a dentist.

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.

Schein Sued in Class Action by Shareholders

Shareholders of dental supply giant Henry Schein, Inc. have been notified of a class action suit filed on behalf of shareholders who acquired shares of the company between 2013 and 2018, during the period in which Schein was alleged to have participated in anti-competitive behavior in an investigation and lawsuit by the Federal Trade Commission. The complaint alleges that Schein made materially false and misleading statements or failed to disclose that it was engaging in anti-competitive behavior with Benco Dental Supply Company and Patterson Companies, Inc. and that it would invite scrutiny by the FTC. These companies were accused of conspiring to prevent smaller dental supply companies from interacting with dentists at trade shows and other venues, and during the lawsuit, the value of the equities held by Schein shareholders declined significantly. The anti-trust suit was settled recently by the company, and Benco and Patterson also settled with the FTC separately.

ADA Issues Policy Statement to Combat Opioid Abuse

On March 26th The American Dental Association issued a policy statement outlining specific recommendations to its members and other dentists to deal with and target opioid abuse that can harm their patients and their families. The Interim Board Policy on Opioid Prescribing has specific items addressing continuing education, dosage and duration, and prescription and drug monitoring. The ADA stated support for “mandatory continuing education in prescribing opioids and other controlled substances; statutory limits on opioid dosage and duration of no more than seven days for the treatment of acute pain, consistent with the Centers for Disease Control and Prevention’s evidence-based guidelines; and dentists’ registration and use of prescription drug monitoring programs to promote the appropriate use of opioid and deter misuse and abuse.” While the number of opioid prescriptions written by dentists in the U.S. has decreased since 1998, the ADA notes that “there is “more work to be done.” Studies

have shown that dentists write 11-12% of opioid prescriptions annually in the U.S., and the prescriptions given to minors are particularly important to control. The ADA offers a number of on-line courses in opioid prescribing, and most dental schools now include the subject in their curriculum.

Attorney Brian Hatch is presenting a seminar with other dental practice professionals in banking, accounting and practice transitions on practice purchases to take place in September 2018. Further details will be available soon.

Looking to Buy or Sell a Dental Practice? Hatch Legal Group can provide legal work and also match up prospective buyers and sellers. 508-222-6400 brianhatch@hatchlawoffices.com

Dental Practice Accusing Mother of Unlawful Neglect Draws Criticism

A Pennsylvania dental practice which threatened in a letter to report a mother of two children who had been diagnosed with a total of seven fillings began drawing criticism on social media for its actions when the mother posted negative statements on her Facebook page. She said: “Smile4keeps bullies the parents, controls the care behind closed doors, and turns parents into villains...and I will not stand for it anymore!!!” The post received 228 comments, almost 800 shares and more than 400 likes. The practice, located in Stroudsburg, Pennsylvania sent Trey Hoyumpa, the mother of 12 year old and 9 year old patients of the practice, a letter stating that “According to law, failure to bring your child for dental care is considered neglect. Pennsylvania Act 31 (Child Abuse Reporting and Recognition Requirements) states that health care providers must report

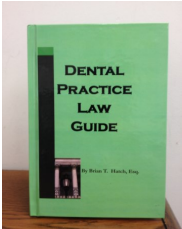
your failure to bring your child to the dentist for evaluation and care...To keep your child as healthy as possible and to avoid a report to state authorities, please call Smiles4Keeps immediately to schedule a treatment appointment within the next 30 days.” The comments on the Facebook page were mixed with some parents saying she “hated” her experience with the practice and had a similar problem with her child, and others defending the practice and criticizing Hoyumpa. John Rutkauskas, the CEO of the American Academy of Pediatric Dentistry noted in a statement to the media source highlighting the story that dentists are mandated reporters for child neglect and abuse. He said the AAPD defines dental neglect as “willful failure of parent or guardian, despite adequate access to care, to seek and follow through with treatment necessary to ensure a level of oral health essential for adequate function and freedom from pain and infection.” Smiles4Keeps defended its actions, saying its letter was “grossly misinterpreted” and that its dentists were threatened during the dispute.

Dental Practice Which Extracted All Teeth Without Consent Must Pay \$275K Jury Award

An Arizona man was awarded \$275K by a jury after he sued California based dental chain Western Dental for extracting all of his teeth during an emergency visit. DeWayne Smith went to a Western Dental office because of extreme tooth pain in a wisdom tooth in 2015 and was told by dentists there that he had serious dental issues and would eventually need implants or dentures for all of his teeth. Smith said that he agreed under pressure to a long-term treatment plan, but “made it clear” that he only wanted one tooth pulled that day. After he was sedated with nitrous oxide Western Dental dentists extracted all his teeth and filled his mouth with gauze. Only when he left did he realize all of his teeth had been extracted. Although Western Dental submitted in evidence signed consent forms, Smith claimed they were falsified after the procedure, and a Western Dental employee testified to support him.

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