

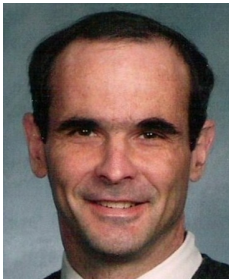
Dental Practice Legal Update

February, 2018

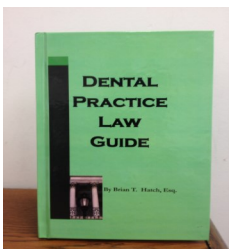
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MetLife Sued for Using Dental Consultants as Independent Contractors

MetLife insurance company has been sued for misclassifying its dental consultants as independent contractors. Dr. Carol McNeely is one of 100 plaintiffs in a suit against the insurance giant for overtime pay and benefits they were due for their work up until November 1, 2017. The dentists were hired as consultants to evaluate claims of policy holders. The lawsuit states that MetLife avoided paying employment taxes and overtime wages and didn't provide pensions and health insurance. A statement in the plaintiffs' complaint highlights the main allegations: "Until November 1, 2017 MetLifecontrolled the means and manner by which Members (dental consultants) performed their job duties. This control, and MetLife's other behavior toward members set forth in the Complaint, makes Ms. McNeely and other Collective Action Members employees rather than independent contractors."

This case, which was filed in the U.S. District Court of NY, could provide some key insight into what are the parameters for using dentists as independent contractors. It is possible to classify a dentist as an independent contractor, but as indicated by the above case, the owner loses nearly all control over the dentist's work, and there must be an independent business relationship not integrated into the practice, without the owner having a say in many aspects of the practice including a scheduling.

Legal Pitfalls in Dealing with Oral Cancer

Failure to diagnose oral cancer is the second most common type of dental malpractice, and results in the biggest damage awards, so an awareness of the legal standards in the field is important to all dentists.

The most important part of the process of preventive dentistry when it comes to diagnosing oral cancer is a review of the patient's medical and family history. A dental screening should be done on high risk groups. In addition, sometimes a biopsy is in order to arrive at a proper diagnosis, since dental screenings can be inaccurate. This is warranted particularly if there are other abnormalities. A thorough head, neck and tongue examination is advised. If clinical abnormalities exist a follow up biopsy is important. Failure to follow up with a second biopsy if abnormalities exist is a definite cause of litigation.

Delays in a diagnosis of oral cancer, especially when there have been repeated visits which indicate some abnormalities can result in a lawsuit. This is the most frequent cause of litigation against a dentist in oral cancer cases. This indicates errors in failure to diagnose and thus possible liability.

The important standard to note is what is the standard of care in oral cancer cases? Is the cancer due to lack of reasonable skill on behalf of the dentist, or due to other causes they are not responsible for? Tobacco use is a main risk factor, with about 80% of people with oral and oropharyngeal cancer use tobacco. Using "chew" tobacco is even more of an indicator. About 70% of people diagnosed with oral cancer are heavy drinkers. The risk of oral cancer may go up to 100% (continued on page 2)

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THE ONLY DENTAL PRACTICE SPECIALTY LAW FIRM IN MASSACHUSETTS

The Legal Pitfalls in Dealing with Oral Cancer (from p.1)

for those using alcohol and tobacco, as opposed to those who do not smoke or drink. A suit against the R. J. Reynolds tobacco company is now asserting that the chief cause of the injury was not dental care, but the intent of that company not to reveal oral cancer as a known contributing factor to oral cancer.

Irritation from poorly fitting dentures has been the subject of litigation involving oral cancer, though with this unproven correlation, some cases have been dismissed due to a lack of an expert witness for the plaintiff. The studies concerning the use of mouthwash as a risk factor are limited, particularly considering the frequent use of mouthwash by people who smoke or drink.

The general risk factors which should be weighed by the dentist who is looking for oral cancer risk factors include gender (men are more than twice as likely to get oral cancer as women due to high alcohol and tobacco use), age (the average age of diagnosis for oral cancer is 62, and two-thirds of oral cancer patients are over 55). Often prolonged exposure to sunlight can lead to cancer of the lip. Also, poor nutrition, such as a diet low in fruits and vegetables, has been linked to oral cancer incidence increase.

There are genetic syndromes which dentists should be aware of which can heighten the risk of oral cancer. These include Fanconi Anemia, a blood condition which may increase the risk of oral cancer up to 500 times, and Dyskeratosis Congenita, which can cause aplastic anemia, is a genetic syndrome which can cause mouth and throat cancer.

Another condition which may increase the risk of oral cancer is Human Papillomavirus (HPV). People who develop oral cancer as a result of this factor usually have a good prognosis and tend not to be heavy drinkers or smokers. Immune system suppression drugs have also been linked to oral cancer.

Remember that to make a diagnosis of oral cancer correctly and to avoid liability, it is important to make a thorough and careful examination, which a patient is entitled to as his or her condition warrants and attending circumstances permit. Documentation of the results of that examination, and follow up if necessary is essential. Litigation of oral cancer cases can result in damages for loss of life, and the estate of the deceased may be the plaintiff, so it wise to take the appropriate precautions to avoid a costly judgment or settlement.

Dentist Provides Video of Patient Eating to Exonerate Her

After placing 11 implants in Javatar Kaur's mouth, Indian dentist, Dr. Jyoti Oberoi was served with a legal notice demanding compensation because she was in pain and could not eat solid food. Kaur had not returned for a follow up follow to place a full set of dentures. However, Dr. Oberoi provided police with a video of Kaur eating bread, vegetables and an Indian food, kheer, without any apparent discomfort. In dismissing the case, police stated that the video not only provided evidence that Kaur could eat, but that she could eat well

:Unlicensed Dentists Arrested; Were Treating Undocumented Immigrants

Two New Jersey men have been arrested and charged with practicing without a license out of two residences in Linden, NJ. Police acted on a tip from a woman who said she paid \$1,000 during the course of several visits and had developed an oral infection after that, Hector Carro, 73, and Jorge Renteria-Paz, 46 were arrested at the apartments, where police

found various dental equipment, including tools, a handheld x-ray machine, sterilization equipment and more than \$20,000 in cash. All of defendants' known patients were undocumented residents without insurance, who officials emphasized can seek out low cost dental care at a local community health clinic. New Jersey law protects undocumented immigrants from further investigation when they are victims of a crime.

Ability to Regrow Teeth Raises Legal Concerns

New research indicates that there may be an experimental drug which was found which may allow dentists to regrow teeth, and eliminate the need for repair of dental decay with fillings. The drug, Tideglusia, which has a low cost and has already shown to have a good safety record, works by having the drug stimulate stem cells with dentin, and it integrates itself completely within the tooth, lessening the chance that the filling will come out. So far the drug has only been studied in rats, but researchers expect human trials to start within the next year.

A second new method for regrowing teeth has been developed using low power laser light to stimulate regrowth of teeth. Researchers have shown that shining the laser directly on pulp can stimulate den-

tin growth. The resulting tooth would have to be capped but is also less likely to fall out.

The legal obstacles in growing entire teeth remain, since in order to regrow entire teeth it is necessary to harvest stem cells from human embryos. This is required to make a tooth primordium, which a tooth in its earliest stage of development, and implant it in the human jaw. Harvesting stem cells from human embryos is currently against U.S. law. Some of the researchers haven't given up yet, saying that they are looking for other ways of regrowing teeth that doesn't involve stem cells. That could take a couple of years.

Provide your employees required HIPAA training and present to them an employee manual customized for the dental industry and your office.
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Attorney Brian Hatch has been practicing law for over 32 years and has focused on the dental industry since 1995.

Kool Smiles to Pay U.S. \$23.9 Million for Medicaid Fraud

The national children's dental chain Kool Smiles has agreed to pay \$23.9 million to the US. Government in response to a suit regarding Medicaid fraud. The basis for the suit was a continuing effort to treat routine cavities in baby teeth with unnecessary extractions, root canals and steel crowns. Kool Smiles then billed Medicaid for the more expensive treatment. Also, facts contributed by whistleblowers showed the Kool Smiles billed for work that was never done. Some anecdotal evidence contributed by an attorney for the whistleblowers alleged child abuse as well. Kool Smiles clinics were encouraged to recommend as many unnecessary treatments as they could, which very often took place in a single visit. The children treated often did not come back for follow up visits, so it was suggested that as many treatments in the only visit be performed.

Dentists working at Kool Smiles were pressured to meet quotas for certain more expensive procedures.

Kool Smiles was adamant that "the companies are disappointed that reasonable disagreement between dentists can become a (false claims act) or FCA case." However, U.S. Attorney John H. Durham of Connecticut, countered, saying that "(t)he allegations in these cases are particularly egregious because they involved medically unnecessary dental services performed on children....Exploiting needy children for financial gain is inexcusable if the goal is toward making money off impoverished children." The \$23.9 million settlement will in part be paid back to individual states for lost Medicaid funds, and \$2 million will be paid to each of the 8 whistleblowers. One of the fallouts from the settlement is that Kool Smiles Chief Dental Officer, Dale G. Mayfield, was forced off the Georgia Dental Board, after a newspaper complained that, after the settlement, he should not have a say in the licensing of dentists in that state.

Whistleblower Dentist Complains about Sterilization

In an action prompted by a dentist's discussion with a patient

about the poor sterilization methods used by the office of Dr. Robert Byrd of Richmond, Virginia, that office is now facing multiple complaints to OSHA about not using sterilizers on instruments after each use and failure to sanitize water lines. The dentist complained that she was not scheduled for further work because of her complaints.

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HI-B1 Changes May Affect Dentists

Although the immigration battles are still going on in Congress over the final draft of a bill, it appears that the granting of work permits for spouses of skilled workers who are near the end of the green card application process is in serious jeopardy. This would mean less dentists who are foreign trained who have spouses that are U.S. citizens. The old employer-based system for sponsorship would no longer exist under the Trump administration and Republican proposals. Dentists from India, which are a significant portion of foreign trained dentists who reside in the U.S., face a quota imposed on new immigrants from that country which sometimes requires up to 15 years to get a green card. Although the new Trump proposal emphasizes the admission of skilled workers who he says would help the country's economy, many foreign trained dentists

who still have to go through dental school in order to improve their skill sets, may not qualify under the new standards. It is still possible that the final legislation would favor dentists as opposed to low-wage workers who Trump sees as taking away American jobs. A bipartisan immigration bill has languished so far in Congress so dentists are holding off on taking out loans to finance an education they might not be able to use.

Court Says Dentist Allowed to Continue to Practice Despite Indecent Exposure

Dr. Ron Rohringer of Brampton, Ontario had his license to practice dentistry suspended by regulators from the Royal College of Dental Surgeons of Ontario after they found he that was facing criminal charges in Florida for indecent exposure. However, Superior Court Judge Nancy Spies overturned the decision, reinstated his license and

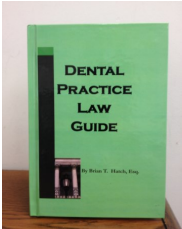
the College to pay court costs. Justice Spiers, in her decision noted that Rohringer had not had any complaints against him in 32 years of dentistry and that there had never been a charge of sexual abuse against him. Rohringer, who has also been a standup comedian, and who also treats children, admitted to police that he masturbated in front of teenage girls in Florida. Psychiatrist Dr. Julian Gojer said Rohringer had a definite problem with exhibitionism, but that he posed no risk to patients.

SmileDirect Suing Dentists

SmileDirect, the on-line braces company which has come under tremendous fire by orthodontists who criticize its lack of procedures for in-office care during orthodontic treatment, has now sued a number of dentists and dental groups for the criticism. It has sued a variety of dentists in different states for posting on-line videos critical of SmileDirect's plastic teeth aligners. The American Association of Orthodontists filed suit in 36 states claiming illegal practice of dentistry.

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