

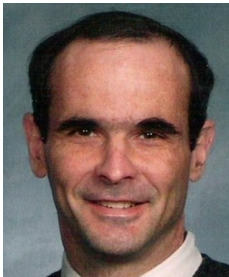
Dental Practice Legal Update

December, 2018

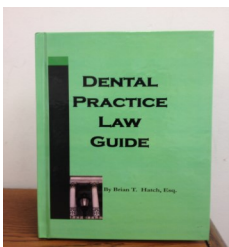
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RI Dentist To Provide Free Services, Pay \$75k Fine to Avoid Jail for \$1.2M Tax Scheme

A North Providence, Rhode Island dentist who had pleaded guilty to failing to pay taxes on as much as \$1.2 million in payments to his office was given a sentence involving paying a \$75,000 fine and doing 280 hours of community service which included providing free dental services. Dr. Lawrence Stephenson, 72, had been accused of transferring payments for his North Providence dental practice, including insurance payments, to his personal bank account. From there the monies were put into other banks and investment accounts as well as for payments for personal expenses. The scheme aided Stephenson in avoiding paying taxes on the money, and he has since been required to pay more than \$900,000 in back taxes and penalties. The actions resulting in the fraud conviction dated back to 2011. Prosecutors had requested an 18 month prison sentence for the crimes. Investigators recognized the scheme when Stephenson withdrew \$350,000 from his personal bank account in 2013 and 2014. In 2013, he admitted that he had underreported earnings in 2013 by more than \$320,000. The investigation was conducted by U.S. Attorney Stephen G. Dambruch and Kristina O'Connell, a special agent in charge of Internal Revenue Service Criminal Investigations. Stephenson, who resides in Lincoln, Rhode Island, practices out of an office at 1826 Mineral Spring Avenue, North Providence. His sentence included three years of probation.

How to Deal with the MA "Garden Leave" Non-Comp. Law

As of October 1, 2018, all new non-competition agreements for employees in Massachusetts must now conform to the new Massachusetts Non-Competition statute passed this past July. Non-competition provisions have always been an important part of agreements involving dentist-owners and employees to prevent the most important part of a practice value, the patient base, from being taken away from the practice by a departing dentist. While the statute was mostly designed to allow for better transition of high-tech employees in a free and competitive market, the dental industry must learn how to deal with the law's intricacies and loopholes. The courts will undoubtedly fine-tune the answers to the many ambiguities in the law, but there are some possible ways to deal with its language in dental agreements.

The most important feature of how the law was finally negotiated was not the restriction on non-competition agreements in general, which is already present in many states and in the medical field, but the many exceptions to the rules. First, dental practice transitions involving ownership are not affected at all, and thus dental practice purchasers need not fear that the practices they purchase will soon lose the valuable goodwill of a solid patient base. Through non-competition provisions, departing owners will not be able to take part of that base with them or set up shop nearby.

A key exception to the statute which

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How to Deal with the MA “Garden Leave” Non-Comp Law (cont. from p. 1)

protects dental practice owners from employee dentists who leave the practice and take patients with them are non-solicitation agreements. Those agreements prevent departing dentists from soliciting existing patients of the practice. Protecting the patient base is thus still possible with non-solicitation clauses, and that was a major concern of the dental industry when the law was being formulated.

A major part of the law restricting non-competition agreements, and its namesake, is the “garden leave” requirement. The strange term “garden leave” was coined to describe the required payments under those provisions by employers to employees for a cer-

tain length of time after separation, possibly to not even work, but to tend their “gardens.” If this sounds silly, it is until faced with the fact that the new law requires employers to pay employees 50% of their annualized salary on a pro-rata basis for one year after separation. The one year time limit on the duration of non-competition agreements also cuts down on the restrictive nature of non-competition agreements.

But there are ways around having to shell out “garden leave” payments to dentists and employees leaving the practice. For example, the law’s restrictions on non-competition provisions do not apply to workers who are terminated for cause. Commentators have envisioned broad definitions of what is a “cause” for termination written into contracts, and until courts start limiting that language, it certainly will be used. Non-competition agreements are not enforce-

able against employees who are “terminated without cause or laid off.”

Finally, the biggest and most publicized loophole in the new law is the requirement that each non-competition agreement includes a “garden leave” provision *or* “other mutually-agreed upon consideration.” This is not even limited, at least for now, by a standard of “reasonable” consideration, so technically it could be next to nothing, as long as it was “mutually agreed upon.” This interpretation likely won’t pass court muster, though. Inventive attorneys will find a way to define the consideration so that it isn’t as burdensome to the employer as garden leave payments.

Since the dental industry isn’t focused on the main objective of the statute, to allow free flow of ideas and inventions, the statute’s restrictions, even if they definitely apply to dentistry, can be lessened if experienced attorneys draft new agreements.

Some Soda Tax Measures Pass, Some Fail, and CA Dentists Push Forward

The election results for soda tax measures in 2018 were mixed, with state-wide votes to ban municipalities from taxing sugar-sweetened beverages taking place in Oregon and Washington state. In Oregon, the vote was decidedly in favor of not banning local governments from enacting taxes on sugary beverages. Just next door in Washington state, voters voiced a different opinion, and approved a state-wide ban on taxes on sugary drinks. PepsiCo and Coca-Cola were among the beverage companies putting significant amounts of money into the ballot initiatives in each state, and both campaigns were marketed as “affordable grocery” votes. State-wide bans on soda taxes by municipalities had previously been passed in Arizona and Michigan. The California Dental Association, however, has filed for putting a state-wide soda tax on the ballot in 2020. California now bans new local soda taxes through 2030, from legislation passed earlier this year.

Five Dentists Win U.S. House Seats

Five dentists were elected or re-elected to seats as U.S. Congressmen in the November, 2018 mid-term elections, including three incumbents. Drew Ferguson, DMD (R-GA) won an election for his first term to represent Georgia’s 3rd District. Rep. Mike Simpson, DMD (R-ID), who was chairman of the House subcommittee on energy and water development, Rep. Paul Gosar, DDS (R-AZ), who serves on the House subcommittee on natural resources, water, power and oceans, and Brian Babin, DDS (R-TX), who serves on the House subcommittee on Space, all won reelection. These four candidates are all members of the American Dental Association, and were funded by more than \$2 million in monies contributed by the American Dental Political Action Committee. Jeff Drew, DMD (D-NJ) upset incumbent opponent Seth Grossman by over 13,000 votes in New Jersey’s 2nd District.

Dental Group Withholds Refunds to Try to Have Negative Internet Comments Removed

A dental group called Grandpa’s Dental threatened to withhold refunds

patients said were due because of either poor dental work or dental work never performed. The refunds, which were mandated by state law in Utah to be given by the Salt Lake City based dental group within 30 days, were withheld until the patients signed an agreement to remove negative reviews from social media and with a consumer advocacy group, Get Gephardt. When that advocacy group publicized the situation and went to talk to employees from Grandpa’s Dental, they were told that the stories were “fake news” and that the complaints should not have been broadcast in the media before other resolutions were offered. Grandpa’s Dental, which has a number of offices in the Salt Lake City area, has been given an “F” rating by the Better Business Bureau, which said that they had received seven complaints about the company, none of which were responded to.

Provide your employees required HIPAA training with an on-site presentation and manuals for employees and Privacy Officers. 508-222-6400

Attorney Brian Hatch has been practicing law for over 33 years and has focused on the dental industry since 1995.

Dentist Who Over Prescribed Opioids Has License Revoked

A Tennessee dentist has had his dental license revoked after he admitted to over prescribing opioids for amounts and durations that were not medically or dentally necessary. For one patient, Dr. Michael Tittle, 64, of Erwin, Tennessee, wrote 71 opioid prescriptions, averaging ten hydrocodone pills each time, over a period of six months. Another patient was given 49 prescriptions of hydrocodone and 14 prescriptions for oxycodone from October 2016 to September 2017. He wrote 41 prescriptions for oxycodone, totaling 365 tablets, to another patient over four months from February to May of 2018. There were no records of one patient who was prescribed 110 tablets of opioids having been seen by Tittle at his clinic. A method he used to allow patients to not have him physically sign off on each prescription was to have a pre-signed blank prescription in his office that was copied onto security paper to generate additional pre-signed slips for the patients to use to obtain the drugs.

Dentist Directing Employees to Commit Fraud Faces Charges

A Tennessee dentist and his employee are now facing federal health care fraud charges in connection with allegations made by employees of the dentist's practice, Dental Excellence of Murfreesboro Tennessee. Dr. Nate Schott and his employee Kendra Davis directed employees to make future appointments for patients for services, then bill insurance companies, push back appointments without the patients knowing, and then in many cases the office would receive the benefits without performing the work. Debra Clark, a receptionist at the practice who served as the whistleblower in the investigation said that she was hired because she didn't have much experience in the health care field and thus wouldn't realize that the actions were fraudulent. Clark confronted Schott about the practices, but was told that "So long as they're on the schedule, I'm playing the insurance game" and that it was entirely "legal." She said she was "groomed" to perform the fraudulent actions, which included going

through patient billing statements to throw out those which would notify patients of the services they had received. If patients actually got a bill, they were supposed to tell them that there had been a mistake on behalf of the insurance company. The investigators for the case said that Schott and Glenn deposited some of the insurance monies into personal accounts and Glenn received bonuses based on the number of insurance referrals her work resulted in.

Looking to Buy or Sell a Dental Practice? Hatch Legal Group can provide legal work and also match up prospective buyers and sellers.

Attorney Hatch will speak at "3 Pillars of Dental Practice Transitions: Valuations, Legal Issues and Financing" in February, 2019 in Worcester, MA. Further details will be announced.

North Carolina Law for Opioid Misuse by Practitioners Leaves Out Dentists

A North Carolina statute called the Strengthen Opioid Misuse Prevention Act (STOP) of 2017 requires supervision of physician's assistants and nurse practitioners who prescribe long term use opioids with high abuse potential and lower medicinal value, and requires veterinarians to use the Controlled Substances Reporting System to allow officials to track opioid prescribing practices. However, dentists are not included in the law, and there have been calls for an amendment to the STOP act to include dentists in the supervision process. The North Carolina State Board of Dental Examiners interprets the law to include dentists because of the use of the words "prescriber" or "practitioner" but dentists are not referred to specifically in the Act's language. Differing Board and state requirements resulted in the calls for amendments to clarify STOP

Investors and Operators of Mobile Dental Clinics Sued After Shutdown

The owners and operators of a mobile dental clinic in Australia, Smiles on Site, have been sued by the majority owner who purchased it earlier this year, which says that the Smiles on Site clinic did not disclose the a legal action against it because of x-rays being taken by unqualified staff. The former owners of Smiles on Site, led by investor Jeremias Olivier, reinvested \$2.8 million of the \$7 million they received in the sale to Smiles Inclusive in April, 2018 to get a 40% stake in the new business. They stayed on as operators, which Smiles Inclusive usually requires if it purchases a business. Smiles on Site representative and part-owner Jeremias Olivier said that there had been "extensive due diligence" before the final closing on the purchase on April 23, 2018. The relationship between the two sets of owners went downhill several months afterwards when revenues started to go down.

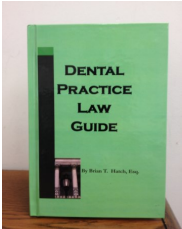
On October 26, 2018 the CEO of Smiles Inclusive, Mike Timoney, Chairman David Herlihy and chief commercial officer Keith Nichols arrived at the Smiles on Site headquarters to announce Olivier and the rest of his family had been terminated and that their mobile dental clinic vans would be seized. Truck drivers then seized the vans at that site and other sites. In mid-November the Olivier family was sent notices stating their equipment leases had been terminated. The parties will appear in court in February, but Smiles Inclusive says it will be accepting patients by then after resolution of the dispute.

89% of Dentists Are Afraid of a Lawsuit by Their Patients

The paranoia of dentists about malpractice suits has been made clear by new surveys taken by Dental Protection indicating that 89% of dentists think there is a real chance their patients might sue them. 74% of them feel that this impacts their dentistry, 77% of them say the fear of litigation causes them stress or anxiety, and 64% make more referrals as a result.

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Dental Practice Legal Update



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