

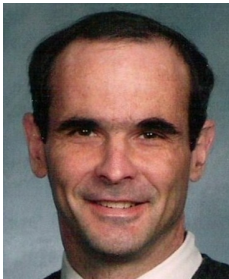
Dental Practice Legal Update

November, 2018

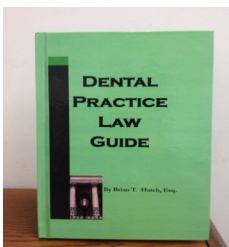
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Attorney Brian Hatch, publisher of Dental Practice Legal Update, has represented dental practices in business, employment, complex litigation and other legal matters. His latest book is "Dental Practice Law Guide" hatchlegalgroup.com



What are the Legal Risks of Teledentistry?

Teledentistry is here to stay in Massachusetts, considering that the American Teledentistry Association (ATDA), founded in May, 2018, is now located in Wellesley Hills and its Executive Director is Mark Ackerman, DMD, MBA, director of orthodontics at Boston Children's Hospital and assistant professor of developmental biology at the Harvard School of Dental Medicine. The American Dental Association introduced new CDT codes, 9995 and 9996 for teledentistry in 2018 which deal with real-time teledentistry services and information stored by teledentistry for forward a dentist for subsequent review, respectively. What are the legal risks of practicing teledentistry? The laws are state-specific and for the most part haven't been formulated or tested in court, but there is a standard of care that is higher than with localized dentistry. A patient must establish a specific doctor patient relationship via e-mail or formal consultation and give informed consent to the use of teledentistry and any risks associated with it. HIPAA requires that the patient be informed that the transmission of patient information electronically may not be secure. There are licensure issues that have come up, with most states requiring a state dental license where the patient resides. It is likely that dentists using teledentistry will be able to diagnose a problem and then require a followup in person to treat it. If a patient is not required to make two trips to the office which may be far away, but critical problems are dealt with face to face, then liability is lessened but costs still go down.

Avoiding Partnership Pitfalls

Sharing ownership of a dental practice is often a great way to combine the capital financing of multiple parties while saving on expenses to have a larger more profitable practice. Once you've met someone you are convinced you like and will get along with fabulously the rest of your career, you still have to plan for possible points of contention neither party has even thought but which often result in bitter disputes. Here are some of the issues which should be resolved in a partnership agreement and tips to handle the details.

Setting up the entity form is important to creating a structure which protects both partners from liability and preserves their individual investments while yielding tax benefits. When there is more than one dentist in a practice, a Professional Limited Liability Company (PLLC) has benefits in these areas because of state and federal corporations and tax laws. A PLLC Operating Agreement protects each partner as a member from any liability beyond their investment share or capital account. Otherwise creditors of one partner can sue the partnership as a whole to reach other partners' individual investments.

The proportion of ownership interest of each partner depends on the capital they want to invest and the present value of the practice, as determined by an independent appraiser. It is strongly recommended that they agree on one partner with a majority interest, such as 50.5%, who can make major decisions of the practice as a manager. If the partnership is exactly a 50-50 split, there

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Avoiding Partnership Perils

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should be a great deal of language devoted to the decision making process, so that it is understood which partner has the final say in which type of decision, such as capital investments, hiring, equipment purchases, renovations, marketing decisions, real estate decisions, etc. Decision making for a partnership is not always easy, even if the partners have a very amicable relationship, so a written decision making process is essential.

In the day to day operation of the practice as well as during its growth periods, assignment of patients is an important issue to deal with. If there is a younger dentist who anticipates taking over eventually for a retiring partner, it is possible to have a provision for assigning

a bigger proportion of new patients to the dentist who has the most interest in long term growth. Allocation of types of procedures, whether it be lucrative procedures or hygiene related, is a good thing to be mentioned in the agreement, because it is a major determinant of revenue for the provider.

Distribution of revenue must be handled fairly and in detail. Revenue from direct treatment should go to the treatment provider, while general net income from other treatment or services of the practice (like hygiene or x-rays) should be allocated according to the percentage of ownership. There can be a provision for additional compensation for performing management duties as well.

Termination of the partnership is perhaps one of most important issues to deal with in depth, with questions having to do with the withdrawal of one

partner only, the disability, retirement or death of a partner, who gets the premises or practice name, waiver of a right to partition, how patient lists are to be spit up, or a complete dissolution of the partnership being just some of the situations to be covered.

A non-competition agreement is key of course, and since the new Massachusetts law restricting non-competition agreements does not apply to ownership transfers, the standard of "reasonableness" is the only limit to a non-competition provision. This prevents one owner from leaving and practicing nearby the partnership location and taking patients and employees with them. Depending on location and other factors, 3-15 miles distance limits or about 3 years length of duration of the restriction is considered reasonable.

Partners often think they have resolved all potential issues, but only with experienced legal drafting can known and unknown scenarios be dealt with adequately.

Multi State Dental Fraud Crackdown Results in Raids

Federal authorities raided dental offices on October 18th in Florida, Iowa, Michigan, Pennsylvania, Ohio and South Carolina in a Medicaid fraud crackdown that followed an investigation into billing practices. The investigations are now relying on automated review of billing data by the U.S. Department of Justice, audits conducted by "fee for service" contractors working with the Centers for Medicaid and Medicare Services, and other federal agencies and task forces including the U.S. Department of Health and Human Services and the Office of the Inspector General. Other highly publicized investigations into dental practices have resulted in advertisements by federal health care fraud defense law firms which provide services representing dentists who are accused of Medicaid fraud to avoid criminal charges and fines.

Illegal Corporate Practice of Dentistry and Fraud Results in \$5.1M Settlement

A whistleblower dentist, Dr. Jihaad Abdul-Majid, will receive

\$925,000 plus attorneys fees and costs for his role in filing a suit through the Medicaid Fraud Control Unit of the Indiana Attorney General and the U.S. Department of Justice alleging that Samson Dental Partners, LLC and ImmediaDent of Indiana, LLC committed illegal corporate practice of dentistry and other fraudulent practices. The \$5.1 million settlement awarded to the public entities and the whistleblower dentist came from a qui tam complaint which stated that the defendants committed fraudulent billing, excessive and unnecessary treatment of multiple patients, and a "sustained pressure by non-dentists in management positions to place corporate profits over patient care by exerting undue influence on dental care decisions." The defendants were accused of rewarding providers and staff for production and disciplining them for not meeting production goals. The fraudulent billing claims had to do with upcoding simple tooth extractions and improperly billing them as surgical extractions. Also, the complaint stated that the defendants billed for scale and root planing when the treatment was either not performed or not medically necessary. ImmediaDent operates nine dental offices in Indiana. Samson Dental Partners, LLC provides administrative and support services for Immediadent. The false claims actions were based on submissions for payment to Medicaid from January 1, 2009 to September 30, 2013.

AZ Attorney General Sues Benco

After recently settling a lawsuit in federal court on antitrust charges, Benco Dental is now being sued by the Arizona Attorney General's office for antitrust violations and consumer fraud claims affecting the residents of Arizona and going back to 2014. The suit, which also involves Henry Schein Co. and Patterson Companies, alleges that Benco conspired with the other two dental supply companies to stifle competition by forcing newer and cheaper dental suppliers out of business and participating in a "coordinated boycott" of the Arizona Dental Association so that consumers would buy products from Benco. Attorney General Mark Brnovich said that Benco may be forced to give back monies to consumers misled by the company.

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.

MetLife Faces Lawsuit by Dentists Over Reimbursements

MetLife is the latest insurer to be sued by dentists disenchanted with the way they are treated, either through low reimbursements, unfair contracts, or interference with patient care. A group of Brooklyn, New York dentists, who are out-of-network providers under MetLife dental plans, have filed a federal court lawsuit against the insurer, claiming that it had been “unjustifiably targeting them for heightened scrutiny” through “oppressive demands.” The dentists, from Pediatric Dental, Beam A Smile Dental, Bayridge Management Plus Corp., and LBD Management Corp., are suing for more than \$2 million in unpaid claims. They say that MetLife demanded radiographs which were irrelevant to treatment, and then withheld payments for claims, which disrupted their cash flow and required them to take more upfront payments. Patients questioned them about why MetLife was not approving or authorizing their treatments. The difficulty dentists have in confronting large insurers is that small practices

often are powerless to challenge the large and expensive legal teams these companies can defend themselves with. Overall, lawsuits against insurers continues, however, with a recent California suit against Delta Dental resulting in a \$65 million settlement with dentists there. The declines in reimbursements are being felt most severely by small practices, with a projected 8.7% decrease in rates for solo practitioners, 2.67% for dentists and 4.9% for orthodontists, and actually an increase of 1.6% for group practices, according to a study in May by Morgan Stanley Research. Dr. Dave Preble, senior vice president of the American Dental Association Practice Institute, said that dentists’ complaints over insurance claims are increasing, particularly because of how claims are processed or insurers’ interference with the doctor-patient relationship and patient care.

\$350K Awarded by Jury for Bridge Failure

A Florida schoolteacher, Jean Hanna, was recently awarded over \$350,000 by a jury in a lawsuit

brought against her dentist, Dr. Justin Martone of Apple Tree Dental Care, for failure to remove dental decay before cementing a three tooth bridge and crown, failure to do crown lengthening, failure to do pre- and post-cementation films, failure to do study models, and failure to consider occlusion issues. Hanna’s attorney, Lisa Levine, said she had to have three implants done as a result. Levine has been a medical malpractice attorney for 30 years, and has gained national recognition for obtaining large judgments in the field.

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.

Ontario Dental Association Warns of Risks of Pot After Legalization

Soon after Canada became one of the first countries to legalize recreational marijuana use, the Ontario Dental Association came out with a press release warning about what it can do to oral health. The Association cautioned that oral cancer can result from the drug itself as well as the carcinogens in the smoke, that THC in marijuana can weaken the immune system, that dry mouth is a serious side effect of smoking marijuana, and that marijuana smoke stains the teeth and causes demineralization. Less serious to one’s health but important nonetheless is the tendency to eat high amounts of sugar usually contained in marijuana edible snacks, and the ODA says that patients should be urged to rinse and brush after snacking to avoid cavities. ODA President Dr. David Stevenson, urged new users to consult with their dentist so problems can be prevented.

Permanently Glued “Zombie Teeth” Requires Dental Work and Prompts Legal Claim

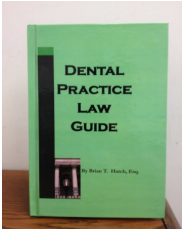
A dentist had to bring a woman who had dressed up for Halloween with costume zombie teeth back from the dead when the \$3 device became glued to her teeth and could not be removed. Anna Tew of Mobile Alabama tried to take the fake teeth out herself and even tried to use wire clippers but couldn’t get them to move, leaving her in such pain she thought she would have to visit an emergency room. Enter Dr. John Murphy of Alabama Family Dental, who said it was even difficult for him to get the teeth off her natural teeth without damaging them. Eventually he picked out all the remains of the artificial teeth and the glue which was obviously more than temporary adhesive. Tew is now looking at her legal options to take care of the costs of the nightmare she will never forget. She will obviously pick a different costume next year,

Dental Technician Convicted of Performing Invasive Dental Work Without License

Majid Rahebi was a dental technician in Iran before he moved to Australia and started employing Australian licensed dentists, but when they quit working for him, he decided to perform, without any health care or dental license, treatments such as root canals, crowns and tooth extractions at his business in Western Sydney. He was charged last month by Australian authorities with 44 counts of falsely representing that he was a registered dentist and 31 counts of performing a restricted dental act, all from actions taken from November of 2017 to February of 2018. He was also convicted of administering prescription medications and anesthesia without a license. He pleaded guilty to all charges and was fined \$30,000. Rahebi’s company, MJ Dental Care, Pty Ltd, was also subject to the suit and was ordered to pay \$11,250 for falsely representing that Rahebi was a licensed dentist.

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