

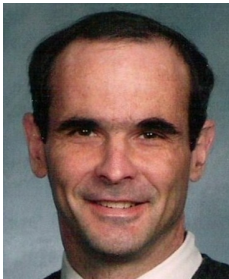
Dental Practice Legal Update

October, 2018

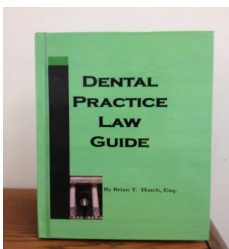
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Dentists to Share in \$80M Dental Supplier Price Fixing Settlement

Up to 142,000 dentists, orthodontists and dental labs will be sharing in monies received from a settlement for \$80 million with the top three dental suppliers in the country, Henry Schein Inc., Patterson Co.s and Benco Dental, who were sued for price fixing in the \$10 billion dental supplies industry. Schein will pay \$38.5 million in accordance with its 41% share of the dental supply market, Patterson will pay \$28.5 million for its 34% share, and Benco Dental will pay \$13.2 million as the third largest supplier at 10% of the market. The suit stems from price fixing activities going back to 2008, and takes into account that its profit margins have increased steadily since 2005 to approximately 35%. The settlement covers 35 individual suits pending in the federal district court in New York, and most of the plaintiffs or those receiving parts of the settlement are sole proprietors. Some of the evidence indicating a conspiracy among the three suppliers to fix prices and punish groups not complying with its strategies includes e-mails by a Schein regional representative quoted in the complaints as saying that dentists paid the same amount "no matter who they buy it from" and therefore "we all get paid." The three companies also allegedly agreed not to "poach" one another's customers, as well as conspired to prevent the entry into the market of lower-priced distributors. Multiple other legal actions against the companies are still pending, including an FTC complaint and a suit from lower-cost distributors.

OSHA is at the Door! What do We do Now?

With the expansive OSHA regulation of an environment with hazardous materials and the risk of transfer of bloodborne pathogens like a dental office, it's important to know how your employees should react if an OSHA inspector comes unannounced. Luckily, unannounced visits are not common, and OSHA conducts many of its investigations by phone or fax, and then allows 5 days to respond to determine that an inspection will not be necessary. However, OSHA does list specific criteria where it can do an on-site inspection.

Quickly summarizing the preliminary criteria related to dental practices which must be met to conduct an on-site investigation, there has to be an employee complaint or other report of a violation posing imminent danger, an inadequate response from the phone/fax notification, prior complaints, a scheduled inspection, or a referral from a whistle blower investigator.

A practice should train employees to not panic and deal with the inspector in a calm and courteous manner. Although technically a practice can require the inspector to get a warrant, it is obvious that this route raises undue suspicion, and isn't recommended. It is good to have one employee assigned to manage OSHA training who can guide the inspector through the practice to help him or her focus on the violation which is specifically the subject of the investigation. The inspector must keep the complaining employee's name confidential if requested.

It is important to narrow the scope of

(continued on page 2)

OSHA is at the Door! What do We Do Now?

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from p. 1)

the investigation at the outset, by asking about the specific complaint, and talking about it to the inspector in a conference room or before a general walk through. While the inspector is normally limited to the complaint subject, he or she can look at anything in "plain view." This can expose the practice to more violations than initially within the complaint. Leading the inspector right to where the violation could have occurred is a good idea and may satisfy the visit's objectives without more investigation.

Volunteering to let the inspector see your OSHA records is a good idea if you are confident they are accurately maintained. Having an updated OSHA compliance manual, which contains all written re-

quired plans and records, which is easily accessible and known to employees is important.

Infection control and blood-borne pathogens standards are a common area for violations complaints, and so directing the inspector to show these standards are being met is appropriate.

MSDS sheets are often requested too, so that is another area to show the inspector if an additional walk through is necessary.

The inspector may ask for employee interviews, and the practice should make employees aware that they may be questioned, and to be both calm about the questions and clear about their answers. Often the inspector will question employees about Personal Protective Equipment and if it are both being used in the right manner and that employees are trained adequately in its use. Employees may also be asked about training ses-

sions in other areas, so make sure that these sessions are held regularly and that employees remember them.

The inspector always gives the practice an exit interview to summarize initial findings and follows up with written reports shortly. The sooner any corrective measures can be taken the better, so show that they are in progress or will be immediately put into effect before the inspector leaves.

Fines can be severe when resulting from an OSHA investigation, especially when injuries have resulted, patients put in danger, or there have been previous violations. But remember that penalties can be negotiated or reduced, so work toward that goal if a penalty is announced or is imminent.

It is wise to get educated legal counsel involved soon if the investigation has a potential for serious penalties as well as an OSHA specialist consultant to avoid an adverse result.

Forensic Dental Examinations to Determine Age of Immigrants Challenged

A new case of a 17 year old Guatemalan immigrant who was held in an adult detention center for nearly a year on the basis of a forensic dental exam is now prompting examination of the practice of the Immigration and Customs Enforcement (ICE) agency of using forensic dentistry to calculate ages of the immigrants it processes who unlawfully enter the U.S. The minor, who jumped over a fence on the California border and turned himself in to claim that he was a refugee in danger for his safety in Guatemala, was examined by a forensic dentist who determined that there was an 85.6% chance that he was eighteen. A birth certificate from Guatemala, which took a year to produce, eventually identified his age as seventeen. Unaccompanied minors are given more rights than adults entering the company illegally and are given the right to have their cases heard by an asylum officer, as well as access to legal services in a youth shelter which would allow them to apply for a special immigrant juvenile visa and asylum. Criticism of the practice of using

forensic dentistry to determine age in immigration cases goes back to 2007, when a U.S. House Appropriations Committee report directed the Department of Homeland Security to "cease its use of and reliance on unreliable forensic testing of children's bones and teeth to determine their age." A year after that the Committee repeated its concerns, saying that the practice "has led to the erroneous placement of children in facilities commingled with adults who may seek to prey upon" them. At that point the Office of the Inspector General issued a report stating that "Using radiographs of a person's bones or teeth...cannot produce a specific age due to a range of factors affecting an individual's growth." The age related use of forensic dentistry continued, however, and now is being challenged again by attorneys from the Immigrant Defenders Law Center, which now is representing the Guatemalan minor. A dentist in the field of forensic odontology, Dr. Mike Bowers, is working with attorneys to oppose the use of third molar estimates, and stated that "dental aging should be considered an *indicator* of the biological maturity of a growing child. It was not developed to be used for *individual* age identification." It is not clear how many individuals have been processed in this way, but federal laws on trafficking victims authorize the government to take into account evidence which includes "non-exclusive use of radiographs."

New Legislation to Clarify Orthodontics Treatment Benefits Confusion in California

An unclear policy on whether children's orthodontic treatment will be reimbursed under Medi-Cal, the California Medicaid program, has left providers and parents unsure about whether Medi-Cal will provide benefits. Under the state dental program, dentists have been informed that children's orthodontic treatment is not covered, but lawyers have generally said the federal Medicaid coverage includes children's treatments. As a result, the National Health Law Program and the Western Center on Law and Poverty developed legislation which reconciles the state and federal programs and ensures the reimbursements. The new law was overwhelmingly approved by the legislature.

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.

DIY Orthodontics Company Using Chinese Orthodontists and Labs

An Australian company, EZ Smiles, modeling itself after the U.S. based Smiles Direct do it yourself orthodontic treatment has been accused by a media outlet of using Chinese orthodontists and labs to perform minimal treatment and provide aligners while advertising that it used local orthodontists and labs. After going through a simple dental history questionnaire, the customers buy impression kits, make molds themselves and send them off to labs for aligners similar to Invisalign. Fairfax Media discovered that the orthodontists and labs used during the process are located in Shiyang, China. The founder of EZ Smile, Ed Ambrosius, admitted that as far as legal recourse if treatment centered around overseas products and providers caused damages to patients, saying, "No, I guess not, but the fact is they can get it from other businesses based overseas, so at least with us, we're here and they can deal with us through normal legal channels."

EZ Smile insists it is offering a service that is needed by patients who could not otherwise afford orthodontic treatment, and that it welcomes more legislation to protect patients. Dr. Neal Peppitt, president of the Australian Dental Association NSW, is not in favor of DIY orthodonture, saying that "If treatment relies on imprints and records without the patient being personally examined, there's a much greater risk that the treatment will not be successful." The Dental Board of Australia which supervises all dentists and dental codes, is working with the Australian Health Practitioner Regulation Agency to ensure that laws regarding this area keep up with technology and still protect consumers.

NJ Dental X-Ray Technician Practiced Dentistry Without License or Training

A New Jersey dental x-ray technician was arrested for unlawfully performing dental treatment at the dental practice his wife owned, including installing braces on children who required further treatment for errors made and treating one child who needed to visit the hospital after

treatment. Oscar Guevara was arrested along with his wife, Dr. Amy Rojas, who is a licensed dentist and owned Allure Dental, which has several locations in New Jersey. Prosecutors arrested Rojas as well on charges of health care fraud, after allowing Guevara to bill insurance companies under her name for treatments he performed. The mother of the minor who required hospitalization after Guevara's treatment said that her daughter developed an infection after the procedure. Guevara was listed as one of the dental staff on the practice's website, although he was qualified only as a dental x-ray technician.

Looking to Buy or Sell a Dental Practice? Hatch Legal Group can provide legal work and also match up prospective buyers and sellers. Practices are now available for purchase in Massachusetts. Attend seminar "3 Pillars of Dental Practice Transitions: Valuations, Legal Issues and Financing" on December 6.

University of Kentucky Dental Professor Claims Opposition to Governor's Changes to Dental Benefits Cost Him His Job

The legal issues surrounding Kentucky Governor Matt Bevin's decision to eliminate basic dental and vision benefits under the state run Medicaid program have gone beyond suits to prevent it from being implemented. University of Kentucky College of Dentistry Professor Dr. Raynor Mullins claims in an employment lawsuit that he lost his job after making public comments along with other dental professors in 2016 criticizing the proposals before the law was formally enacted earlier this year. Bevin was angry over the remarks, and through Dean of the College of Dentistry Dr. Stephanos Kyrkanides made his thoughts known to Mullins. The lawsuit says that the Dean fired Mullins from his position after talking with other faculty members about how to "get rid of him."

U.S. District Court Judge Robert Weir called the case an "epic story of academic intrigue" before ruling that the complaint stated evidence of a potential violation of Bevin's First Amendment right to free speech. Bevin's policy decisions are designed to eliminate basic dental and vision benefits until Medicaid recipients purchase the coverage through a "My Rewards" program requiring getting employment, taking classes, or volunteering. The benefits were restored temporarily last month after an initial uproar over an abrupt termination of dental reimbursements, but federal approval could reinstitute the state plan. Mullins' case will go to trial before a jury on November 6th, according to Judge Weir's decision.

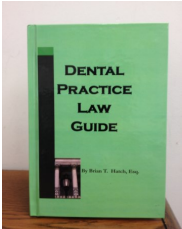
GA Dental Board Allows Non-Dentist to Keep Practice Open During Criminal Prosecution

The Georgia Board of Dentistry found out in 2014 that Krista Szewczyk may have been running a dental clinic

without a license, but it took until a grand jury indicted Szewczyk on four dozen counts of illegal dentistry, fraud and forgery to have deputies raid her office. The Board had originally referred the complaint about Szewczyk to the Paulding County District Attorney's Office, which had to transfer the case to another investigator because of a conflict of interest. While a prosecutor did put her into a pretrial diversion program in 2014, Szewczyk continued to operate a practice, transferring its location and opening a new site. None of her patients or employees at the clinic doubted that she was a licensed dentist and she trained a number of employees there in dental treatment. She received many of her referrals from the sheriff's department, where her husband worked. The Dental Board is restricted from revealing information about its proceedings until a ruling is made, but it does have the power to close a practice down. Over 40 victims of the clinic's shoddy dental treatments came forward after news of the arrest.

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