

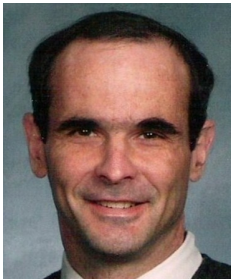
Dental Practice Legal Update

September, 2018

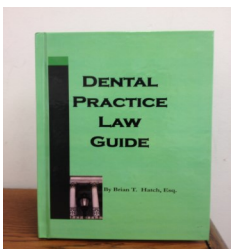
Volume 15 Issue 9

Dental Practice Legal Update is published as a courtesy to the dental practices industry by:

Hatch Legal Group
8 North Main Street
Attleboro, MA 02703
Phone: (508)222-6400
hatchlegalgroup.com
brianhatch
@hatchlawoffices.com



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



Informed Consent Used as a Defense to Over- Aggressive Treatment

A September 5th Connecticut State Dental Commission's disciplinary hearing ruling against a pediatric dentist accused of over-aggressive treatment brought up the limits of informed consent as a defense. In s 7-2 ruling, the Commission ruled that West Hartford, Connecticut dentist Dr. Ammar Idlibi was guilty of overtreatment when he installed eight steel crowns on a 3-year old patient while she was under anesthesia. The patient's mother had brought her daughter into the office in expectation that she would be given one crown. Instead, eight crowns were installed on the child's baby teeth and the mother complained to the Dental Commission. Idlibi said that the mother had given him "blank authorization" to treat whatever decay he found. He argued that, while the treatment was aggressive, his decision to complete and expand the treatment corresponded to two "sacred laws" of dental ethics that he stated was to "treat the patient as fast as you can, to limit exposure to anesthesia" and also to "ensure the patient is not exposed to general anesthesia again." Two commissioners on the tribunal agreed with Idlibi, and one found the treatment was "entirely appropriate" and "the way it had to be done." The Department of Public Health attorney prosecuting the case argued successfully that an overarching principle of informed consent, that the patient-or the parent of a minor- must be given sufficient information to choose a treatment was not present. Idlibi was pleased with the votes in his favor and will appeal.

Restricting Cell Phone Use in the Dental Practice

Nowadays it seems like the use of smart phones constantly is such an important part of people's lives that it would be considered a personal invasion to attempt to limit their availability during work time. Employers are becoming extremely frustrated that employees are using their work time to use their phones to text, call, take photos, or search the internet. Dental practices are no exception, and rules restricting cell phone use are now common in every employee handbook for dental practices. It is important to understand the laws related their use in the dental office workplace.

In dental offices, HIPAA restrictions on potential unauthorized release of protected health information place an additional burden on ensuring that employees don't violate privacy laws by using their cell phones around patients. Using a cell phone to transfer health information to an unauthorized recipient is a HIPAA violation. Talking to a third party on the phone while also dealing with patients could allow for the release of health information unlawfully, even if it is inadvertent. For this reason, cell phone use while dealing with patients by providers or by office staff should be prohibited.

HIPAA has certain rules regarding relaying of patient information to patients via e-mails or texting or other "insecure" methods of communication without patient authorization. Patients must be notified that this may be an insecure way of communicating health information and must authorize it directly. Texting unprotected information that is not health or financially related, like an appointment

(continued on page 2)

Restricting Cell Phone Use in the Dental Practice (cont. from p. 1)

reminder by cell phone is allowed, and staff should be made aware of this.

Dental offices sometimes prohibit cell phone availability or use at any time while at the practice, to the extent of requiring cell phones to be deposited in a specific place at the start of the work day, to be picked up at the end of the day. This kind of rule is likely to be resisted by employees because they feel their phones are almost a part of them and that they feel uncomfortable leaving them anywhere but on their person. Rules allowing use only in emergencies and prohibiting their use during work hours are reasonable and lawful, and are commonplace.

It is surprising to know that until recently, the National Labor Relations Board had issued rules which made unlawful employer rules prohibiting use of cell phones because they could be used to discuss work conditions or coordinate worker actions, which are guaranteed rights under labor laws. Since December of 2017, however, that rule was narrowed so that only if cell phone use is used as a common part of normal workplace interaction amongst employees is it unlawful to restrict their availability or use.

The use of smart phones to relay health information is now starting to be employed increasingly as a diagnostic tool as well, with accessibility to the free flow of patient information and reference materials between providers being a useful tool in treatment. Using encryption in these cases prevents the possibility of HIPAA violations because of hacking or other unauthorized use.

Restricting use of cell phones during break time can also present some legal problems for dental offices. What if an employee uses his or her smart phone to take pictures of OSHA violations or other regulatory violations for use as evidence in making a complaint? Forcing employees to delete such photos might be used as evidence of intent to circumvent regulations if there was an investigation later or if the employee decided to bring a whistleblower action.

The use of phones during work time is also a distraction for practice employees, and when dealing with treatment, negligence can be alleged if cell phone use coincides with dental malpractice.

Most employers are upset by the interference cell phone use has on an efficient uninterrupted workplace. Dental practices are also impacted, and employers should be aware of how to best set office rules regarding cell phone use that are effective, fair, and lawful.

Accusations of Death Threats Result from Complaints by Professors at Pitt Dental

A former dental school professor at the University of Pittsburgh Dental School has now accused administrators at the school of alleging she made death threats against another professor she had previously complained was performing services for fees during clinical and administrative time. Professor Snjezna Bagic alleges in her suit against the school, Assistant Dean Bernard Costello, and Professor Sean Noonan that they committed intentional infliction of emotional distress, negligent retention, trade libel, false light and civil conspiracy. In addition to her allegations against Noonan abusing his privileges to undertake the additional paid services while on school time, Bagic said Noon misappropriated the assistance of her team without her consent. Allegedly, when she complained, nothing was done, and when she informed other faculty members of the accusations the resulting investigation was done in a "negligent, careless and reckless fashion" and took into account Noonan's allegations that Bagic supposedly

threatened to kill him. She said that Noonan's allegations were all part of an attempt by him to discredit her, prevent her from interfering in his activities and to defame her. Bagic was fired on April 27, 2016 as a result of an investigation which she said failed to give her appropriate due process and had a predetermined result. The University and the other defendants have asked the court to dismiss the suit, citing no basis for determining libel or outrageous conduct.

Mobile Dental Clinic Fined \$200,000 for Unlawfully Taking Children's X-Rays

A mobile dental clinic located in New South Wales, Australia has pleaded guilty to taking dental x-rays of thousands of children without employees that had proper radiation licenses. The judge in the case fined the company owning the clinic Smiles On-Site, Sydney Australia based Australia Aged Dental Care Pty Ltd, \$200,000 for the offenses, though he said he would have imposed a higher \$700,000 fine if he had been jurisdictionally allowed to do so. The clinic employed managers who did not hold radiation user licenses and did not have any training in taking x-rays. About 60 children a day had x-rays taken at the clinic, and it received Medicare rebates

if they were sent to a radiologist. The company's headquarters was raided in 2014 and they were prohibited from taking x-rays but continued to operate the mobile units. They sent out a letter to prospective investors in June of this year saying it had expanded to 5 vans, 10 dentists, 40 support staff and were seeing 30,000 patients a year. The Department of Education had only sent out an internal memorandum in April 2016 stating that they were under investigation and that principals should use their discretion. The judge in the case was severe in his criticism of the company having taken advantage of the trust of parents and their children for financial gain.

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.

New Law Requires Dental Exam for 9th Grade Students

A newly passed Illinois law is requiring all students entering the 9th grade, whether they attend a public or private school to show that they have had a dental examination. The new statute, which was sponsored by Illinois State Senator Heather Steans (D-Chicago), was signed into law in August, and supplements an existing Illinois law requiring dental examinations before entering kindergarten, second grade and sixth grade. Steans explained that "Regular dental checkups can help children develop good habits while also addressing potential issues that can disrupt sleep, eating and speaking. I hope that adding an exam before high school will help ensure Illinoisans having good oral hygiene." Other states have similar requirements for dental exams for students entering certain levels of public and private schools, including New York, Kentucky, West Virginia and Oregon. Massachusetts requires a physical but not a dental exam for students. Local governments sometimes have their own

requirements that go beyond state requirements. A report influencing the Illinois legislation stated that "An estimated 51 million school hours are lost because of dental-related illness. Poor oral health has been related to decreased school performance, poor social relationships, and less success later in life. Children experiencing pain are distracted and unable to concentrate on schoolwork. Children should enter school free from dental problems." There have also been justifications for these kinds of laws that they allow states to collect data (anonymously and confidentially) from the exams to keep track of the extent of dental care being provided in the community.

Delta Dental's Big Legal Hassle-Coloring Books?

Dentists in many states have been upset over Delta Dental's changes in reimbursements and corporate structure, with lawsuits and public hearings resulting. But the latest Delta legal hassle doesn't have to do with reimbursements, but instead coloring books. The lawsuit has been filed against in Delta Missouri Federal Dis-

trict Court by Really Big Coloring Books stating that Delta wrongfully copied its illustrated books on the benefits of dental hygiene, word searches and puzzle mazes which were under copyright protection. The book company says that Delta wanted to buy the rights to use the books, but the company did not agree and purchase orders for them ended in December, 2017. The issue was the 2012 agreement that supposedly made the coloring books "joint works" for the purposes of copyright infringement law (Delta supplied the text of the works). Judge Jean Hamilton of the US District Court of Missouri dismissed Delta's Motion to Dismiss on August 24th, but hinted that she would perhaps allow the joint works defense to be raised at a later time during the case.

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.

Dental Group Sues Former Hygienist for Facebook and Instagram Statements

Spodak Dental Group, a Delray, Florida company is now suing a former hygienist, Jessica Cooper, for defamation for comments she made on Facebook and Instagram after her termination, which the Complaint quotes in detail in 29 separate allegations. The statements range from accusations of withholding benefits and pay from her and other employees, to embezzlement, to other illegal financial actions, to taking naked pictures of her in the shower, all of which the Plaintiffs say are untrue, defamatory and maliciously injure their reputation. The statements offer no proof for the allegations that there was financial wrongdoing occurring at the practice. The Plaintiff also alleges tortious interference with business and employment relationships. They seek an undetermined amount of damages and an injunction against Cooper.

Sham Dental Practice Bilks Investors for Multiple Locations

A Texas lawsuit against a multi-site dental practice called FLOSS, and run by Clinton Herzog, who was found not to be a licensed dentist, has claimed hundreds of thousands of dollars in damages allegedly bilked from investors who thought they were funding practice location startups in numerous locations in Texas. Herzog, whose dental license was suspended by the Texas Board of Dental Examiners in 2015, and then voluntarily surrendered his license under a settlement agreement in 2016, opened FLOSS dental in 2007 and started recruiting investors to establish 5 locations in Austin. In one of the locations, Herzog took \$500,000 from investors but never consummated a purchase and sale from the existing dentist. He then tried to run the dental office without having purchased the practice by working through the landlord. In another location, none of the investors have received

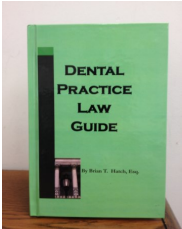
any money from the practice, which opened in December of 2017 but closed several months later. Herzog attempted to sell the practice for \$20,000 in August, and the prospective owners are also defendants to the suit. Herzog has other lawsuits against him, with various allegations of his withdrawal of funds from FLOSS to live an extravagant lifestyle.

Align Technology Sued for Abuse of Monopoly Power in Aligner and Scanner Markets

3Shape, a company centered around the innovation and manufacturing of 3D digital scanners and CAD-CAM software for dental practices and labs, has filed a lawsuit against Align Technology for abusing its power holding patents on aligners by extending their monopoly to intraoral scanners to keep dental professionals buying its products to the detriment of competitors like 3Shape. 3Shape has competed with innovations in their intraoral scanners with Align for several years and the rivalry prompted the suit.

Hatch Legal Group
8 North Main Street
Suite 403
Attleboro, MA 02703

Available Now at
hatchlegalgroup.com



Dental Practice Legal Update



HATCH
LEGAL
GROUP [*A Dental
Practice
Specialty
Law Firm*