

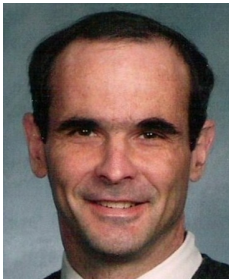
# Dental Practice Legal Update

**August, 2018**

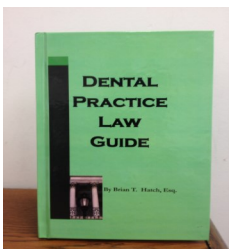
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**Attorney Brian Hatch, publisher of Dental Practice Legal Update, has represented dental practices in business, employment, complex litigation and other legal matters. His latest book is "Dental Practice Law Guide" hatchlegalgroup.com**



## **New Non-Compete Law Will Affect Associate Dentists**

For years, the Massachusetts legislature has attempted to pass a law restricting non-competition agreements between employers and employees. On July 31st, a bill was passed which will now limit non-competition agreements to one year in length for all exempt employees such as dentists. Non-exempt, hourly employees cannot be subject to non-competition agreements. Non-competition agreements are defined in the new law, to go into effect October 1, 2018, as agreements which require that an "employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended" Agreements not to solicit employees of an employer or not to transact business with clients, customers or vendors of an employer are not included in the restrictions, and it does not apply in the case of a sale of a business. The law requires a "garden leave" clause in every agreement which requires the employer to pay 50% of the employee's salary for the duration of the agreement, or "other mutually agreed upon consideration"(which is considered a loophole in the garden leave requirement). Many dental associates are now covered by non-competition clauses to prevent them from practicing elsewhere within a certain radius of their employer. Any associate agreements with non-competition provisions signed after October 1, 2018 must not exceed the new law's one year limit, and a compensation provision must be included.

## **Complaint About Treatment? Legal and Business Tips**

No matter how good the dental treatment is there are still patients who complain about it-and there are negative legal and business ramifications depending on how the issue is handled. There are ways to minimize the damage, however, and keep patient goodwill, both of the complaining patient, and others who might become aware of those who view the practice in a negative light.

Keeping thorough written notes of any patient treatment can prove valuable if a patient complains in the future. If a patient complains about treatment while still in the chair it is worthwhile to note that in the clinical record, and what the resolution was. It is good to ask the patient if there have been any changes in their dental health, or if they have had any changes in medication. Failure of a patient to note accurately the medications they take or other health conditions which may be related to dental treatment can sometimes be considered contributory negligence, a widely used affirmative defense in lawsuits of all types.

Dentists should be aware of the standards for negligence that are applied in malpractice cases. "Mere error" will very often be a key reason for dismissal by a medical tribunal of a case, and a decision at the tribunal level is required for any lawsuit to proceed in a civil court of law. There are ways for a plaintiff to still take a case to court even when a medical tribunal (composed of peers as well as a judge and an attorney) rules that the facts of the case indicate "mere error"

(continued on page 2)

## **Complaint About Treatment? Legal and Business Tips** (cont. from p. 1)

and the evidence is important to a court. Although dentists should not usually admit fault to patients when they complain about treatment, they should explain that they always like to satisfy their patients, and that they are sorry the result wasn't exactly what the patient wanted. Being overly defensive when it comes to stating the perfection of one's dental methods can aggravate a patient who sees fault in the treatment into taking their complaint to the next level.

It may be a good idea to let a third person, such as the manager of the practice or another dentist, emphasize the usual high quality of a dentist's work for patients.

Dentists can inadvertently say something wrong or inaccurate in the initial response to the complaint, and those statements can be used against them if any further legal action is taken.

What if the complaint is taken to a higher level and results in a negative review on-line? Contacting the patient to try to resolve the complaint can sometimes convince them to take the complaint down. If it is mostly an opinion, though, even if it is somewhat inaccurate, it is protected against a suit for defamation. To reach the level of defamation, the statement has to be proven not to be opinion, such as saying the treatment was "poor," but must be a false statement such as the patient's condition was misdiagnosed. Defamation suits are very reviewing sites jealously guard their customer's right to free speech, however negative or unjustified it is.

difficult to win, however and reviewing sites jealously guard their customer's right to free speech, however negative or unjustified it is.

Offering corrective treatment or refunds are always a possibilities to prevent a patient from filing a costly lawsuit, but of course, making it a practice can be unfeasible economically for that particular patient or for other patients in the future who hear of that policy. But if a condition is likely to get worse without further treatment it is wise to recommend it even if no discount is given.

Complaints are a natural part of dentistry in a profession which is not always perfect, so it is good to be aware of how to deal with them to prevent further legal or business problems for the practice. If it gets beyond that and goes to a lawsuit, it can impair a dentist's reputation, and win or lose, it becomes part of public record. Don't let it get that far!

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## **Criminal Charges Filed Against Dentist for Sexual Abuse of Inmates**

A thirty seven year old dentist who treated female inmates at a county jail in Sioux Falls, South Dakota has been charged with inappropriate sexual contact and attempted sexual contact without consent of a person not capable of consent in cases involving at least six woman inmates. Dr. Andrew Heimish turned himself in and posted a \$10,000 bond after an investigation following a single complaint resulted in interviews with a number of victims. Heimish was contracted by the jail to perform dental treatment through a company called Armor Correctional Health Facilities and still works as a dentist at Apple White Dental in Worthington, South Dakota.

## **Swedish Hygienist Fired After Revealing His Immigrant Child Patients Were Actually Adults**

A Swedish hygienist was accused of violating confidentiality laws and was fired after he revealed

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that about 80% of the "children" who were designated after arriving from other countries as "unaccompanied" minors were actually adults. Bernt Herlitz realized this when analyzing the wisdom teeth of the "children" and found they were fully grown and the individuals were most likely adults. He relayed his findings to an immigration-official and was advised to file a report. His employer subsequently fired him because he had violated confidentiality laws. In a lawsuit against his employer, Herlitz appealed the firing and won damages, but the county he worked in appealed to a higher court and the decision was reversed. Bernt was fined \$54,000 after that court's decision. After the case became public and he was able to reach out for financial help because of impending bankruptcy, he raised nearly half that amount in a matter of days. Bernt insists that he did the right thing in telling authorities about people who lie about their age when coming into the country.

## **Suit by NY Patients Claims that Medicaid Must Pay for Implants, Replacement Dentures**

A Staten Island, New York man has filed a lawsuit, accompanied by a number of other Medicaid patients, stating that Medicaid must pay for implants which would allow him to eat a diet prescribed for

his end stage renal disease. Because of bone erosion dentures were always ill-fitting and he had a set of dentures fall out recently and run over by a car. Medicaid would not cover implants as an alternative and would not allow replacement dentures until 2024. Frank Ciaramella, 57, initiated a suit in Federal District in Manhattan against the New York Department of Health, saying that the ban by Medicaid on paying for implants and replacement dentures denied him medically necessary treatment. He has been joined in the suit by a number of other patients who have a law firm representing them that is claiming that as a result of this rule thousands of low income residents of New York are being prevented from receiving medically necessary treatment.

***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.***

## Handling A Third Party Payer Audit

When a private insurance company sends you a notice that you are going to have an "audit" of your third party insurance company reimbursements, it conjures up fears of an IRS-like audit with detailed analysis of all the financial details of how your practice is paid by an insurance carrier. But after you turn over the clinical records they request-and HIPAA allows them to receive as an insurer-it is necessary to know how to review and appeal the subsequent letter demanding back thousands of dollars of reimbursements based on not following the insurance company's guidelines. It may easily be assumed because of profit making incentives of the insurance company that you are boxed in to paying a large amount back based on an unreasonable analysis within 30 days, or risk legal action or being dropped as a provider.

But wait! Careful review of the demand letter can significantly reduce or eliminate the necessity of having to make that big payout because of

technicalities indicating unintentional deviations from "policy" that is often hidden in unknown language of the provider contract. First, it is a good idea to go through the fine details of the analysis with both the providing dentist and an attorney to weed out the untrue and perhaps legally shaky accusations of possible insurance fraud. Investigators are often not dentists, and the dentists are very often legally given the presumption of accuracy as to their clinical records as opposed to non-dentist examiners. The accusation that a non-dentist such as a hygienist is actually named as the submitter can easily be rectified by showing that the dentist actually had legally appropriate supervision of a procedure to make him or her the actual provider, with the naming of a non-dentist on the submission forms just a mistake that can be rectified by revising the submissions to correct the error. Maybe office personnel just incorrectly coded the procedure, and it is also an error that can be rectified in an appeal. Even ignorance of recent updating of reporting codes can be used as a defense if it is not an unreasonable excuse. An attorney can also expose the legal flaws in the de-

demand letter as not being contractually allowed or deceptively termed as an unjustified and unfair demand for immediate payment or legal action or a report for criminal fraud will result. Good initial responses to the demand letter can prevent the appeal process from getting too involved if the insurance company makes obvious errors which are more consequential than those of the dentist or dentist's staff. Fraud is an intentional act resulting from a pattern of behavior designed to purposely gain higher reimbursements which are not justified by actual treatment. A good analysis of the demand by professionals, both dental and legal, can prevent an unfair accusation from turning into an business and legal nightmare.

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***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***

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## Will Dated Settlements Be Revised to Allow More MassHealth Providers?

The difficulty of recruiting enough MassHealth Dental providers is now entering the political arena with creative proposals by the Baker administration and some legislators to reduce the tremendous burden of generous MassHealth benefits and still provide quality medical care for all residents. Much dental care is being provided without cost to residents, and very few dentists can afford to accept MassHealth patients. Some alternative MassHealth providers such as dental therapists are now being used who will accept lower reimbursement rates. There may be a base of good dentists willing to perform MassHealth which has been overlooked, however. In the past, MassHealth fraud by dentists was met at times with lifetime prohibitions against accepting MassHealth/Medicaid patients in settlements with dentists

who paid out settlement sums to avoid criminal prosecution, perhaps even for defensible cases involving unintentional errors in insurance submissions. More audits in MassHealth have occurred after the 2013 program by state auditors to combat insurance fraud. Since that time, however, many of the settlements, while for large sums for intentional and pervasive fraud were not lifetime prohibitions, resulting in educational instruction for staff on avoiding fraud in the future, and not exclusion of quality dental providers from the MassHealth dental program. For older settlements the Attorney General's office and MassHealth often rely on deferring to strict settlement language instead of using discretionary revision to such settlements to allow for many experienced dentists who want to accept MassHealth again, perhaps during their retirement years, but are still prohibited from doing so. The political pressures to correct the lack of MassHealth dentists is now leaning towards more creative solutions towards revising these kinds of policies,

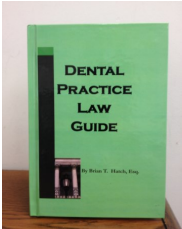
and the current Attorney General's office often seen as willing to employ its powers to force innovative and progressive change. As a result some legislators and political players may be discussing this type of change as part of a reform of the MassHealth Dental, and MassHealth programs in general.

## Illegal Tongue Splitting Causes Alarm Among UK Dentists, Oral Surgeons

A recent court case in the United Kingdom has cracked down on "body modification practitioners" who are performed an extreme cosmetic treatment called "tongue splitting" or a procedure to split the tongue to create a forked appearance. The court decided there that the procedure caused serious bodily harm, and could not be performed by unregulated non-licensed personnel. The Faculty of Dental Surgery is one of the professional organizations condemning the procedure, which may cause a number of serious and harmful conditions.

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