

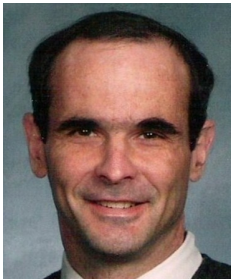
# Dental Practice Legal Update

August, 2020

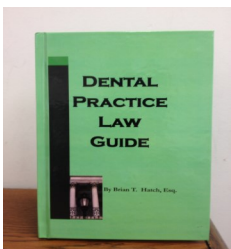
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## COVID-19 Restrictions Continue But Dental Practices Unaffected

With a recent uptick in COVID-19 cases in Massachusetts, Governor Charlie Baker has postponed moving into the latter part of a Phase 3 reopening of businesses in Massachusetts, but dental practices are still among the businesses which are allowed to remain fully functioning at pre-pandemic levels. The public had been holding off on elective dental procedures for several months during shutdowns but scheduling of all dental procedures is now surging at a brisk pace. Dental offices have been resourceful and conscientious about reforming their office layouts and procedures to include more physical barriers, and more separation of possible patients unknowingly bringing in virus contamination from others in the practice, including employees. CDC guidelines and advice from the Massachusetts Dental Society to be extra careful to follow those rules and other suggestions to increase patient safety have been a good road map for practices to emphasize that visiting the dentist is probably one of the safest places the public can be during a crisis involving a contagious disease. Interestingly even the financial community has taken note of the positive indications that the dental industry will be strong economically since advisors for investors are bullish on dental related companies growth during the coming year. If coronavirus fears ease in the northeastern part of the country and are mainly focused on large gatherings and mask wearing in southern and western regions, the dentistry will most likely benefit.

## Does HIPAA Protect Those Who Don't Like Contact Tracing Questions or Maskless Rights Proponents? No!

Attorneys are cringing during the COVID-19 pandemic at claims of people insisting that it is their "right" under HIPAA to not be questioned about their recent contacts or COVID-19 symptoms. HIPAA only prevents health providers from *releasing* protect health information to unauthorized persons. HIPAA even has a special section *allowing* health care providers to disclose protected health information to public health authorities for the purpose of controlling disease. Sec. 164.512(b). Ethics rules for doctors and dentists may require that disclosure regarding contagious disease. HIPAA goes further and allows an authorized covered entity or public health authority to allow disclosure of PHI to those who may have been exposed to a communicable disease. Health care providers, or anyone else for that matter as a private business or as a government official can ask any questions about a person's health when it is necessary and related to a pandemic or infectious disease.

Does that person who is asked contact tracing questions have a "right" not to respond? Powers granted to executive officials or the legislature in public health emergencies are extremely broad, and mandating answers to those questions may be .

(continued on page 2)

## Does HIPAA Protect Those Who Don't Like Contact Tracing Questions and Maskless Rights Proponents?No!(cont.from p.1)

within that power. Of course, there is the right not to incriminate oneself under the 5<sup>th</sup> Amendment. In a pandemic one would wish that it were made a crime not to infect someone with a deadly disease, but this pandemic is so new that laws like this haven't been written yet about COVID-19. Forcing someone to talk isn't within the powers of most people, except for perhaps the police or judges. Public health officials could be given those powers by specific laws or executive orders relating to public health emergencies, and it remains to be seen if that kind of power would be abused enough not to be lawful.

What about the rights of someone with a disability not to reveal information about their health, or be asked probing questions about their disability? As long

as it is related to a verifiable disability, and it is directly related to that disability, it might be discriminatory. But many people who consider themselves "disabled" because they might have a minor asthma condition, for example, aren't necessarily considered disabled unless it interferes with a "major life activity." But asking questions about contacts a disabled person may have had does not amount to discrimination based on their disability. Again, an infectious disease emergency usually creates an exception to most rules, including those preventing discrimination based on disability, depending on its effect on the safety of other non-disabled people.

Going beyond contact tracing, where there is at least a reasonable concern about invasion of someone's privacy, how about those people who go around insisting that it is their "right" not to wear a mask? There are some viral videos of patients who have stated that they have "talked to their attorney about this" and that it is unlawful for a dental practice to force them to wear a mask while in the dental office. This is a

ridiculous argument, considering that it is not a right to infect others with a deadly disease just because someone is too vain not to wear a mask or feels it is uncomfortable. Do people have a right to be drunk and use their drunken body to perhaps kill someone else when they use a car like a deadly weapon? Businesses, and definitely health care providers, have the right to deny entrance or service to anyone they wish, as long as they are not a member of a protected class. Are those who want to bare their face a protected class? Of course not. And executives or the government have enough powers during a health emergency to mandate that businesses do someone for the safety of others (like OSHA requirements or municipal public health laws for example). There may be court battles over which government entities orders prevail (state v. municipality), but it most likely will be the entity protecting public safety that will prevail over the entity claiming it is protecting a "freedom" that it will be hard-pressed to define in a legal sense. It is certainly not a "right" to infect others with a deadly disease.

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## SmileDirect Club's Suit Against California Dental Board Dismissed

SmileDirect Club, the direct to consumer orthodontic service being marketed as a substitute for in-office orthodontist care, has suffered a defeat in one federal court in California, where it had sued the California Dental Board for antitrust violations. On July 17, 2020 Judge George H. Wu of a U.S. federal district court denied SmileDirect Club's Motion to Amend its Complaint action against members of the California state Dental Board for anti-competitive harassment, saying the regulators were only doing their job. The Court maintained that SmileDirect Club would have to appeal to the 9th District Court of Appeals for any further ruling. The Tennessee company has been very aggressive about filing legal challenges to any obstacles that the dental industry has put in its way to protect its conclusions that in-office orthodontist visits are necessary for satisfactory and successful patient treatment. The Califor-

nia state legislature has also been at the forefront of enacting regulations that restrict teledentistry done without sufficient professionally authorized treatment safeguards. SmileDirect has not been deterred yet, and its investors remain bullish on the prospects for its success in the coming year. The decision may be a setback other dental boards will look to for a strategy to control the company's push forward to take over a remaining treatment alternative requiring in-office orthodontists.

## Dentist Sues Dental Board for \$10M After Discipline

A Mississippi dentist, Dr. Joe Germany, has filed a lawsuit against the Mississippi Board of Dental Examiners after being disciplined for what he says were minor violations. Germany claims that the allegations against him stemmed entirely

from a complaint from an 84 year old patient who was upset with him when he wouldn't accept his recommended treatment plan. He said the treatment in question was regarding one crown, one patient and two treatment dates. Germany has stated that the main reason the Board is disciplining him is their position against his widespread television advertising. The Board has countered by stating that there were charges of negligence, unprofessional conduct, and allowing an unauthorized person, a dental assistant, to perform dental treatment.

***Policies and Procedures Manuals, customized for the dental industry and your office, are available from Hatch Legal Group. New COVID-19 Supplements are available to ensure practice protocols for meeting the pandemic are acknowledged by all employees. brianhatch@hatchlawoffices.com***

## Protected Health Data Breach Damages “Pure Applesauce”

Dental practice breaches of the confidentiality of Protected Health Information (PHI) are often considered HIPAA violations and can result in hefty government fines. But the courts have ruled on many occasions that HIPAA breaches are not actionable as such in private lawsuits. Creative attorneys have often tried to get around that restriction by fashioning private causes of action around the same release of confidential health information fact situations. One federal court has made it clear that, even when a different cause of action besides HIPAA is used an action for damages against a dental practice can amount to “pure applesauce.” In July of 2019, the Sarrell Regional Dental Clinic in Alabama became aware of a ransomware attack on its computers. It immediately took measures to shut down its system, contract with an independent forensic data security firm to investigate the breach, and update its security and virus protection before reopening. The investigation revealed that no patient files had been downloaded or misused. One of Sarrell’s patients filed a class action lawsuit against the dental clinic in October, 2019 on behalf of herself and other patients whose files Sarrell had in their system claiming that they suffered “increased risk” of suffering harm from identity theft, were required to monitor their credit, and overpaid for dental

services because of the assumption that personal information would be protected. The federal District Court Judge for the Middle District of Alabama dismissed the claims, stating that there had to be at least a “credible threat” for the plaintiff’s information to be misused and that this threat had to be imminent or likely in order to present allegations that were actionable in court. As for the damages for monies the plaintiffs allegedly overpaid for their dental services because they expected better protection, the judge dismissed that theory as “pure applesauce.”

Sarrell immediately notified about 390,000 patients of the breach when they found out, and this, as well as their corrective measures and thorough investigation of the effects of the breach seemed to have prevented any further action from being a cause for a legitimate private lawsuit. A HIPAA violation could definitely be stated, but the damages would have been in the “unknowing” or “should have known” categories which can mitigate violation penalties as long as they are corrected. The Alabama case shows that a breach which may be a HIPAA breach must cause significant other damages in order for a private lawsuit to get by initial scrutiny as an invasion of privacy lawsuit. Mitigation by correction will also be an important factor in any court’s decision on whether to allow a private party to proceed.

## Dentist Faces Penalty for Treating Patients While Under COVID-19 Isolation

An Australian dentist, Dr. Natalia Nairn, was brought into court to face charges that she treated patients while under a COVID-19 order of isolation. After flying from Western Australia to the eastern coast, she was required to undergo 14 days of pandemic-related isolation. She decided not to obtain legal representation even though the magistrate in the case told her that the charges were “significant” and that the penalties may be up to \$50,000 or 12 months in prison. Nairn, a powerlifter in her spare time, treated several patients at her dental clinic in June of this year while requiring to be in isolation because of travel restrictions, and thus violated the Emergency Management Act in effect in Australia at that time. She pleaded guilty in the Joondalup Magistrates Court on July 25th on the failure-to-comply action. Nairn has not tested positive for COVID-19 and there was no evidence any of her patients had suffered ill effects for her treatments. “I understand you’re anxious for this to be over and done with, but these are significant charges,” Magistrate Sandra DeMaio told her. She was also warned that she should take some time to prepare better for the court appearance and make sure to get an attorney now that she knew the implications. Otherwise, “you might wind up in jail,” the magistrate said. Nairn was released on bail and ordered to appear on August 7th for sentencing.

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## Former Staff Members File Complaints Against Buyer of Practice

Dr. Sam Wise, a Longview, North Carolina dentist who recently purchased a dental practice from Dr. Daniel Haghighi, has been facing numerous complaints from various former employees of the practice and patients for mishandled dental procedures, inappropriate billing procedures, poor or unethical workplace practices and improper prescribing of medications. Four of the fifteen complaints have been closed by State Health Department, which found no cause to discipline Wise. Improper medical treat-

ment, advertising violations and privacy issues are among other complaints. Wise says that many of the complaints were retaliation because of a breach of contract suit brought by Wise against Haghighi for referring patients from the practice to personal friends.

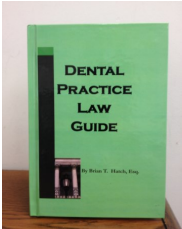
**Attorney Brian Hatch Assists Clients in the Dental Practice Purchase and Sale Process from Valuations to Letters of Intent to Drafting and Review of Documents Necessary to Complete the Sale.**

**Attorney Brian T. Hatch has practiced law in Massachusetts since 1985 and has concentrated on the dental industry for 25 years.**

**HIPAA and OSHA Infection Control Training by Zoom is now available through Hatch Legal Group in conjunction with Dental Compliance of New England.**

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