

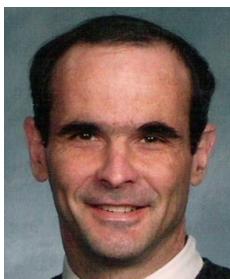
Dental Practice Legal Update

December, 2019

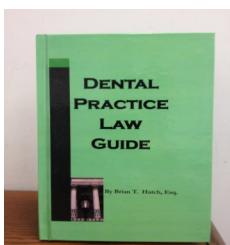
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MA Bill Would Eliminate Live Patient Component of Licensing Exams

As a result of an effort promoted by the American Dental Association, American Student Dental Association (ASDA) and Massachusetts Dental Society (MDS), a Massachusetts bill to eliminate the live patient component of dental licensing examinations in Massachusetts is moving forward steadily. MDS President Dr. Janis Moriarty testified on November 19, 2019 before the Joint Committee on Public Health in favor of H. 1992, An Act Relative to Dental Licensing Exams, which would eliminate such exams as a part of dental licensing exam requirements. Referring to a research analysis of the validity, reliability and ethical considerations of the clinical exam by the ASDA, Moriarty testified that the live exam is outdated and does not provide a useful assessment of skills necessary to complete licensure requirements. She stated that the clinical exam directs attention to only a limited number of procedures and thus does not represent the complexity of the variety of treatments a dentist must provide on a daily basis. The ASDA paper highlights this concern in its critique of the viability of the testing of actual performance skills of licensure candidates.

The requirement of students to obtain patients to perform as subjects for the exam sometimes is actually detrimental to the dental health of those patients, according to Moriarty. The delays in treatment from the time the patient is initially recruited to the time of the exam sometimes results in treatment that at the time of the exam is no longer within a valid treatment plan.

(continued on page 2)

ADA Files Suit Against Delta Dental

On November 26, 2019 the American Dental Association, a NY dental practice and Dr. Janis Moriarity, President of the Massachusetts Dental Society, filed a federal anti-trust lawsuit against Delta Dental's national entities and 39 state Delta Dental organizations in the United States District Court for the Northern District of Illinois. The Complaint alleges a conspiracy by all the individual state Delta entities to confine their activities to specific geographic regions, and in combination allowing them to suppress compensation of dentists, restrict competition in areas where Delta Dental provider networks exist, and lower the value and choices of dental care available to subscribers of Delta Dental insurance plans. Allegations in the complaints include that agreements among these state networks are illegal horizontal agreements which restrict activities of the individual state organizations from expanding into other states and underserved areas. Delta Dental often refers to itself, in a quote cited in the Complaint, as the "nation's leading provider of dental insurance," with over 80 million American subscribers.

The lawsuit cites a number of different state Delta organizations as examples of the anti-competitive and harmful actions of Delta, including Delta Dental of Massachusetts (DDMA). Janis Moriarty, DMD is named as the only individual plaintiff, and a dental practice from Jamestown, New York and the ADA are the other plaintiffs which filed the suit. The recent fee reimbursement reductions imposed on dentists in Massachusetts due to its adjustment to its Delta Dental Premier Plan and Preferred Provider

(continued on page 2)

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ADA Files Suit Against Delta Dental (from p. 1)

Organizations are described in detail in the Complaint. Massachusetts dentists' testimony in hearings at the Division of Insurance before those reductions were approved was cited as evidence of the severe constraints of the actions on dentists' compensation and their abilities to treat patients effectively, including taking underserved MassHealth patients in addition to Delta subscribers without losing money. As support the Complaint refers to a quote from the hearing transcript that "(W)e see the patients as people, and we do not want this level of care, compassion and trust to be eroded by the greed of insurance companies."

The elimination of the annual tracking of fee reimbursements in Massachusetts to the Consumer .

Price Index was cited as an example of the attempt by Delta Dental of Massachusetts to impose variable fee adjustments it may set out on an annual basis without sufficient underlying rationales. The process by which the changes were forced upon Massachusetts dentists was through a non-negotiable revision in a contract that required either renewal on Delta's new and restrictive terms, or an exit from the dominant network provider system in the state. The short notice allowed dentists during this changeover was part of the allegations.

The intentionally misleading letter that was sent out by Delta of Massachusetts implying that dentists were to blame if patient costs went up because of exiting dentists was cited as an example of what the MDS called the "punitive aim" of Delta of Massachusetts against Massachusetts dentists.

The disregard of Delta Dental for "quality of care" issues is likely to be a factor in any outcome of the antitrust action, even if a direct legal relationship to antitrust law is not drawn. Disallowance of procedures to allow for larger profits on behalf of the corporation is an allegation incorporated into the filing. There are numerous examples highlighted of the disparity between the increasingly high compensation of Delta executives and reductions in compensation for dentists. Delta of Massachusetts has recently dropped its nonprofit status in transitioning to profit making corporation at the state level.

The American Dental Association has long been critical of Delta Dental's actions in a variety of areas that are detrimental to the dental provider community as a whole, and the new suit will bring those issues to a head in what will be a closely watched case in the dental industry.

MA Bill to Eliminate Live Patient Component of Licensing Exam(cont. from p.1)

Moriarty said that this may conflict with ADA ethical principles for all dentists to provide quality and timely care to patients. The process of seeking out patients can be not only expensive if paying for patient costs for travel and lodging, but sometimes even results in a failing grade for licensure candidates, thus giving leverage to patients to try to gain further financial compensation to show up.

A number of other states have already enacted regulations eliminating the live patient part of a dental licensing exam, including New York, Connecticut and California. The ADA has been advocating for taking the live exam out of licensure requirements for more than a decade. With the MDS support, it seems likely that the bill will be reported favorably out of committee and be enacted this current session.

Trial of the "Hoverboard Dentist"

Not only did dentist Seth Lookhart make the ridiculous decision to ride a hoverboard while

making an extraction on his patient Veronica Wilhelm, he filmed himself doing the procedure and texted the video to friends. He announced that performing oral surgery while riding on a hoverboard was a "new standard of care." The video, which was introduced as evidence in his trial on the "unlawful acts" he was then charged with along with 39 other charges, showed him zooming down the hall after the procedure with both hands in the air. Lookhart's license was suspended in July 2017, and now his trial is nearly complete on charges including the hoverboard dentistry, billing Medicaid for procedures either not necessary or not performed, diverting funds from Alaska Dental Arts, other violations. His patient, Veronica Wilhelm testified that she never would have consented if Lookhart had told her that he was going to ride a hoverboard during the procedure, saying that "Hell no! ...That's crazy!" Lookhart's lawyer continued to insist that what he did was not a crime, but that it was just an idiotic action that should not result in a criminal charge.

Dental Consultants Win Settlement in Independent Contractor Misclassification Suit

Dental consultants working for Metropolitan Life Insurance Company have won a \$3.4 million settlement in a lawsuit

based on allegations that they should have been classified as employees and not independent contractors. The consultants evaluated claims for MetLife to determine whether employees' dental procedures done under the employee benefit program were dentally necessary. Key determinants of whether MetLife exercised enough direction and control over them to require them to be employees included assessment of their work by supervisors, requiring them to work at MetLife's offices, set a maximum number of hours they could work, and a number of other factors. A part of the settlement, however, included a non-admission provision on the part of the company, and no requirement for it to change its business practices was therefore set in place as a result of the lawsuit filed in federal district court. The parties still have to have the settlement approved by the U.S. District Court in the Southern District of NY.

Employment Manuals, customized for the dental industry and your office, are available from Hatch Legal Group. brianhatch@hatchlawoffices.com

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Maine Dentists and Board Accused of Flouting Mercury Legislation

The State of Maine has legislation which prescribes how dentists can use amalgam fillings containing mercury in their practices, including a significant amount of informed consent that must be provided to patients. Dentists must provide an informed consent form listing the “benefits or disadvantages” of using amalgam fillings instead of other materials because of the known toxicity of mercury which has been used in amalgam fillings for years. Now a group of non-profit groups focusing on dental patient safety is filing a petition with the Federal Trade Commission alleging that the widespread flouting of these regulations by dentists, with tacit approval of the Maine Dental Board, constitutes an antitrust violation. The Customers for Dental Selection, Natural Customers Affiliation and Mercury Coverage Venture allege that only 11% of Maine dentists inform their patients that amalgam contains mercury, and many still refer to amalgam fillings as “silver fillings,” which they claim is

extremely deceptive. The petition alleges that the Maine Dental Board informs dentists only that compliance with the regulation is non-compulsory, and that the Board held a secret vote to ally with the Maine Dental Affiliation to lobby against state legislation that would require MaineCare, the low income dental plan associated with Medicaid, to allow only mercury-free dental treatment. The head of Customers for Dental Selection, Charlie Brown, decried the Board’s defense of pro-mercury dentists and their revenues as opposed to dental patient safety. He said that these actions amount to anti-trust violations, and the petition asks the FTC to look into possible breaches of those laws. The safety groups claim that these practices affect low income patients significantly because of some of the cost differences of using cheaper amalgam rather than other materials.

Palestinian Dentist Defends Israeli Patient Who Was Attacked With Knife

In the West Bank many Israelis come to Palestinian dentist

Ameen Mansour for dentistry because it is less expensive than treatment in the Israeli community. He welcomes them and they account for almost 20% of his patients. However, the animosity of Palestinians towards Jewish Israelis, and the violence that often results, came to head just outside his practice when one of his Jewish patients, 60 year old Josef Peretz, was knifed by a young Palestinian man who asked if he and his son were Jewish. Mansour leapt into action in defense of his patient, jumped on the stabber, took his knife away, and forced him to run away. Mansour bandaged up the wounded man and arranged for some soldiers to take him to the hospital. The attacker’s family eventually turned him into Palestinian authorities. Mansour said that, unfortunately, in spite of his bravery news of the attack spread enough so that he has had only a few Israeli patients since then.

**Attorney Brian T. Hatch
has practiced law in
Massachusetts since 1985
and has concentrated on
the dental industry for 24
years.**

After Stop for DUI, Dentist to Face Trial for Prescribing Himself and His Sister Opioids

Dr. Nicholas Harker, 36, of Spokane, Washington was arrested recently for driving under the influence when he drove over a concrete barrier with his BMW and knocked over a yield sign. The half empty bottle of hydrocodone acetaminophen in his car next to him, which he had prescribed for his sister, resulted in an investigation for illegally writing prescriptions for opioids. He had picked up the pills earlier in the day. Harker had prescribed hydrocodone and carisoprodol, a muscle relaxer to his sister 21 times since December of 2016. Harker had also been subject to a disciplinary proceeding regarding treatment allegedly below the standard of care. The charges at that time were dismissed, but the new charges against him for abusing his prescribing authority may result in actions up to suspension or revocation of his license. His license remains active

while the disciplinary proceedings and other court actions take place.

UK Regulator Accused of Entrapment of Dentists

The United Kingdom regulatory agency for dentists, the General Dental Council (GDC) has been accused of hiring a private detective agency to investigate complaints about dentists’ fitness to practice. Groups representing dentists have accused the GDC of “Stasi Tactics” in paying Invicta, a detective agency, monies obtained through dental licensing fees to conduct “unfair and invasive” investigations. The chairman of the British Dental Association, Mick Armstrong, said that although there is a reason to investigate practices such as illegal tooth whitening or braces obtained through websites, these actions reach the point of entrapment. Some of the undercover “patients” have uncovered evidence which was later thrown out by courts adjudicating charges against suspected dentists. Dentists complain that an agency should not be targeting its own

registrants with the use of a “contrived scenario” that goes beyond the scope of its duties and powers as a regulator.

Dentist Failing to Take Out Baby Teeth to Pay Award

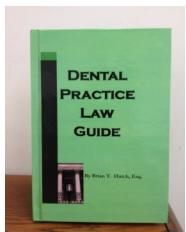
Dr. Richard Fox of Corsham, England, failed to recognize for 12 years of his treatment to Rhiannon Cooper, now 24, that her baby teeth had not been taken out. Cooper began a legal action against Fox when she realized she had to pay £10K for orthodontic treatment to correct the problems and was awarded £45K.

**Attorney Brian Hatch
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