

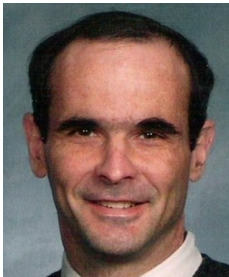
Dental Practice Legal Update

February, 2020

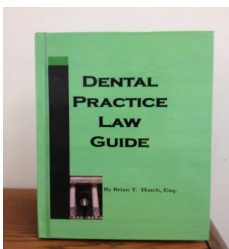
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SmileDirect's Unhappy Customers Must Sign Non-Disclosure Deals

The direct to consumer teeth straightening device company SmileDirectClub has taken litigious path towards beating down every objection state dental boards, orthodontists and state legislatures have to it becoming a dominant player in the market for those seeking teeth straightening alternatives to in person orthodonture. Lawsuits in multiple states are in process with both SmileDirectClub as a plaintiff trying to gain access to markets and overcome dental regulations, and as a defendant against dental boards, orthodontists associations and state entities which are trying to restrict its growth based on patient safety concerns. It has even sued for defamation over articles outlining risks of using its products. It claims that most customers are completely satisfied with the results of their direct to consumer product, which uses remotely taken and observed x-rays to prescribe and complete teeth alignment without face to face orthodontist's visits. The company is now trying to silence any dissatisfied customers by refunding their money in exchange for them signing a non-disclosure agreement to not disparage SmileDirectClub. The form prohibits customers from making any statements or opinions which "would create a negative impression" of the company. Nine U.S. Representatives have formally expressed concerns with the company's tactics and California has a bill pending to require teledentistry companies inform customers about the risk of not using licensed providers.

Have you Had a Dispute Regarding Dental Necessity?

Nearly every insurer, as well as Medicaid, has a definition of "dental necessity" which it uses to approve or deny insurance claims. It is a constant tug of war that dentists and patients have with insurers both before treatment is approved and afterwards when it comes time for claims payments to be made, or audits after the fact. A licensed dentist should be the one who decides what kind of treatment is dentally necessary, right? Here are some pointers that are worth noting through the claims submission process.

Medically necessary care (MNC) is the foundation of decision making when it comes to what insurers will cover for all health services, including dental care. It is useful to refer to the standard for MNC when it comes to dental care too. Medicare defines medically necessary care as "services or supplies that are needed for the diagnosis or treatment or your medical condition and meet accepted standards of medical practice."

The American Medical Association also has definitions for MNC that are equally applicable to dentistry. Just substitute the words "dental practice" "dentist" for "medical practice" and "physician" and you will find a good general indicator of what is necessary for a physician or dentist. It is often worded this way: "Services or procedures that a prudent physician (dentist) would provide to a patient in order to prevent, diagnose, or treat an illness, injury or disease or the associated symptoms in a manner that is: 1) in accordance with the generally accepted standard of

(continued on page 2)

Have You Had a Dispute Regarding Dental Necessity? (from p. 1)

medical (dental) practice. 2) clinically appropriate in terms of frequency, type, extent, site and duration 3) not intended for the economic benefit of the health plan or purchaser or the convenience of the patient, physician (dentist) or other health care provider.”

Third party payers, including private insurers, have their own definitions of dental necessity which are often used in pre-approvals for treatment, claims payments or audits (sometimes long after the treatment has been approved but conflicting with that approval). Some examples of what third party payers use when deciding what treatments they will pay for in part or in full include: (1) treatment that is consistent with the

symptoms or diagnosis of the illness, injury, or symptoms; (2) treatment that is necessary and consistent with generally accepted professional medical (dental) standards (i.e. not experimental or investigational); (3) treatment that is furnished at the most appropriate level that can be provided safely and effectively to the patient, and is neither more or less than what the patient is requiring at that specific time; and (4) documentation of all medical (dental) care should accurately reflect the need for and outcome of the treatment.

That last example, documentation, is the key to success in getting the insurer to agree that a diagnosis and procedure is being made because of dental necessity. This requires coordination between the dentist and claims submitter and coder, and is often complex enough so that the dentist should educate the

person in charge of coding with some key factors. Don't assume the level of knowledge at the claim review level. Most claims are not reviewed by dentists but by non-licensed insurance employees (often earning their pay by saving their employer money with denials of claims). Don't rely on diagnosis documentation alone. Use such useful tools, such as labs, radiographs and other diagnostic studies, which can provide authoritative back up for a diagnosis.

Finally, the dentist and the coder should be familiar with the payer policies, and document claims in their terms. Knowing the payer's terminology and being able to fit within their definitions with authoritative dental diagnostic terms will often prevent a non-licensed insurance reviewer from challenging a dentist's in-person diagnosis and treatment. Only dentists have the education and experience to be able to back up their dental decision making for what is in the best interests of their patients.

Does a Dental Office Message “We are Open Today” Violate the Robo Call Statute?

A Florida dental practice is now being sued by a plaintiff who says that unsolicited text messages were sent to her phone and others' phones stating that the practice was open and that they should “take advantage as there are only a few openings left.” Plaintiff Adriana Hill said in the Complaint that the practice, TLC Dental-Hollywood violated the Telephone Consumer Protection Act (TCPA), which does not allow certain types of messages to be sent unsolicited and without consent of the recipient. Marketing calls which do not identify protected health information would not be subject to the restrictions for that kind of information under HIPAA, but if the company making the solicitations has not established or followed procedures for handling “do-not-call” lists it may violate the TCPA. The Plaintiff contends that the practice sent out thousands of messages to cell phones causing “injuries, including invasion of their privacy, aggravation, annoyance, intrusion on seclusion, trespass and conversion.” The American Dental

Association has taken this case seriously enough to inform its members specifically about this suit and direct them to a web page the ADA Center for Professional Services maintains entitled “Follow the Rules When Phoning Patients.” It advises its members to review a consent form available through that website.

Lawsuit Filed Over Charcoal Toothpaste's Effect on Enamel

An Oklahoma woman, Destinee Setzler, has filed suit against Hello Products, LLC because of the damage she alleges the tooth paste it manufactures, which contains activated charcoal, caused to the enamel on her teeth. She began using the company's charcoal toothpaste when when she became a vegan and stopped when her dentist told her that she was having more cavities than usual and that the enamel was being removed from her teeth. The product is not regulated by the FDA because it considers it a cosmetic rather than a drug, which covers some toothpastes which contain fluoride. The FDA has issued information, though, regarding some adverse effects that charcoal toothpaste may have. Hello Products, LLC is relying on a statement regarding the American Dental Association's Relative Dental Abrasivity scale, which it says sets parameters for toothpaste

that its charcoal toothpaste falls within and is therefore safe. They say that it has been verified to meet these standards by an independent third party laboratory and thus would not be a contributor to removal of enamel from teeth of users.

Kansas Dental Instructor of Women Inmates Convicted

A former prison dental instructor was charged with having unlawful sexual relations with six female inmates he was teaching to make dentures, and has now been convicted of that conduct with one of those women. Complaints about inappropriate conduct of 73 year old Thomas Co had been made from 2011-2018 from female inmates, and there were recommendations by state and federal auditors that he be fired. He remained in his position until November of 2018, when the Kansas Department of Corrections acted on new allegations.

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

Hatchlegallgroup.com

Girl's Mouth Set on Fire During Dental Procedure

A Las Vegas, Nevada dentist allegedly allowed a fire to be started in a 5 year old girl's mouth while he was treating her under general anesthesia, resulting in a four day hospital visit with injuries and burns to her epiglottis, throat, lips and other areas in or around the mouth. A lawsuit filed on her behalf says that the injuries "may be permanent and disabling" and asks for more than \$15,000 in damages. Dr. Deep Karan Dillon of Just for Kids Dentistry and Orthodontics was placing multiple crowns on her teeth when the diamond bur he was using produced a spark that caused a cotton throat pack in the girl's mouth to catch fire for one to two seconds. The procedure is done on pediatric patients frequently and without any similar problems, and a spokesman for the American Dental Association, and professor at Boston University School of Dentistry, Dr. Jonathan Shenkin, said it was a "freak accident" which he had never known to happen before. He said that the standard procedure for a dentist to follow in this situation involves using a coolant and moistening the cotton

pack. Dr. Kevin Donly, president of the American Academy of Pediatric Dentistry, said that an incident such as this is "unheard of" and has never been experienced in his 33 years of practice. Nonetheless, Donly did note that he sent a report to the organization's safety committee. He said that he would be an example to look at in future and warn dentists that there is a possibility that this kind of situation could occur under certain circumstances.

Dentist's Accusation of Document Theft Prompts Employee Complaints

Dr. Sam Wise made a report to the Longview, Texas police department that an employee of his practice, Lower Columbia Oral Health, Austin Covington had stolen lists of names of patients. Wise said he had terminated Covington on November 18th and realized the documents had been taken on December 11th. Longview police investigated but could not determine that any documents had been stolen. Covington called the accusation "a joke" and said that there were a number of employees going in and out of the area, which was unsecured, after he

was dismissed. Wise claimed he had fired multiple employees since he took over the office in August of last year, but when interviewed many of those employees defended Covington and said they had left on their own accord because of Wise's actions. Two of those employees said they left because of new policies instituted by Wise. Covington said he is considering filing a class action lawsuit against Wise for his treatment of employees and the workplace conditions at the practice.

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.

Ex State Senator, Business Partner Sues Practice Owner for Defamation

A South Carolina dentist, Dr. Ray Cleary, who had served as a South Carolina state senator for three terms, has filed a suit for defamation, breach of contract and fraud against a former business partner at Glens Bay Dental Associates, Dr. Joseph "Hal" Capps and his wife Sherri Capps. According to Cleary, who has practiced dentistry for 40 years, Capps had promised him he could practice dentistry at the practice for as long as he wanted. The two men had worked together since 2003 when they agreed to have Capps purchase the practice in two parts. Capps talked to Cleary about buying the real estate where the practice was located in 2018, but no agreement was ever reached, according to the Complaint. Cleary claims that he was called into

Capps' office in September of last year and asked to resign. When he refused Cleary fired him, and allegedly had him led out of the building by a security guard. Cleary said that Capps has been falsely telling former patients that he has retired or resigned and that he is evicting Capps. Cleary also claims an invasion of privacy by Capps, saying he made copies of a personal book he had containing bank account and personal family information. Cleary had filed a defamation suit, which was dropped eventually, against a prior business partner in 2011.

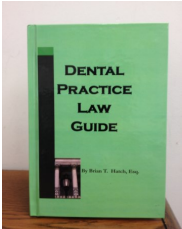
Patients and Employees Blow the Whistle on Fraudulent Practices

Signature Smiles of Garden Oaks, Texas closed suddenly on January 20th, and apparently left a trail of

abandoned patients, unpaid employees, defaulted debts on medical equipment, fraudulent practices to withhold patient payments and the record of a bankruptcy by the practice owner. Dr. Terry Lee owned two practices and filed for bankruptcy in November but continued operating at the second location into December, continuing to take payments from patients for services it most likely would never perform. Last year, a dentist employee sued the practice for making fraudulent claims using her professional identification numbers to take payments from insurance payers for services never provided. Patient records were not handled in accordance with state laws, and patients were apparently abandoned without notice. One patient recently formed a Facebook group entitled "Screwed by Signature Smiles" and claimed that she needed to pay twice for treatment because payments at one location were not credited to the other site.

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