

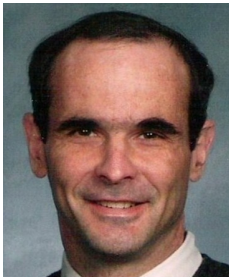
Dental Practice Legal Update

January, 2019

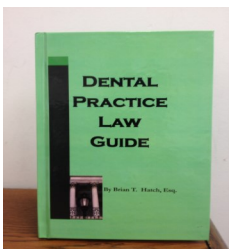
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DOI's Partial Ruling on Delta: Fees for 2019 to Remain the Same

The Massachusetts Division of Insurance has issued a partial ruling on Delta Dental's proposed new fee reimbursement methodology which requires its fee structure to remain the same after January 1, 2019, at least until its ruling on the entire proposal is issued. Delta of Massachusetts appeared before the Division of Insurance last May to propose new reimbursement calculation methods which would decrease by 10% fees paid to dentists now under the Premier or PPO plans in 2019. Delta's plan was to eliminate increases in fees that have corresponded to changes in the National Dental CPI since 2010, and instead "rebase" its fees based on data collected during 2019. It then proposed to decrease fees during that 2019 period as an "initial rebasing" without the collected data. Delta asked the DOI to issue a partial ruling to allow them both to implement the decrease in 2019 and eliminate the Dental CPI increase requirement. The DOI ruled that the 2019 decrease in fees would not be allowed but allowed the request that CPI not be used going forward. As a result fees would remain the same in 2019 as in 2019. At a later date this year, the DOI will rule on the entire Delta proposal, which it said was complex enough so that it required extensive review and analysis to see if the statutory requirement that they "fall within the range of reasonableness and the method of determining such fees is reasonable considering the costs of running a dental practice." So, in essence, stay tuned!

The Legalities of Dental Discount Plans

With the economics of dental insurance provider participation becoming more uncertain these days, the alternative of using a dental discount plan can be attractive. There are networks of dental discount plans providers, which charge patients a fee for yearly participation in exchange for discounts on dental treatments. Some providers are setting up their own dental discount plans for their patient base to eliminate the network plan or insurance provider middleman. Whether it will be profitable is a business decision, but the legalities the state sets out for dental discount plans must be followed.

Dental discount plans are *not insurance*, and as such are not regulated by the Division of Insurance. The Massachusetts legislature has set out a whole section of regulations, 940 CMR 26 to cover discount health (and dental) plans, and much of it focuses on publicizing to the public and patients that that they are not insurance. Specifically written into the opening Purpose section of the regulations it states that the entire section is designed to prevent "sham discount health plans." It then goes on to state that the regulations will require certain disclosures and prohibit certain misrepresentations, as well as require specific types of provider agreements if the plan is business network of providers.

The regulations are clear that violations of the sections can constitute an unfair or deceptive trade practice under M.G.L. c. 93A, the consumer protection statute that allows for triple damages in some circumstances. It requires particular disclosures of material information in any advertisements, brochures or

(continued on p. 2)

The Legalities of Discount Dental Plans (cont. from p. 1)

marketing materials or in any initial contact with prospective patients.

In all materials describing the plan, the provider must disclose clearly that the plan is not insurance, and thus does not qualify for any minimum insurance coverage requirements that exist. The materials must specify the range of discounts for specific services or treatments. The materials must note that payments are made directly to the provider and not to a third party (or if it is a network plan, that the plan does not pay the provider). Patients and those receiving advertising must be made aware that plan members must pay for all services to the provider at the discounted rate.

At the time of enrollment, the patient must be fully informed in

writing of the terms and conditions of the plan, including limitations, periodic fees, refund information, waiting periods for discounts, termination and renewal information, and the procedures for filing complaints.

There is a detailed list of what are considered misrepresentations which are considered false and deceptive trade practices. In advertisements, marketing materials or brochures, the word "discount" must precede the words "dental plan," "coverage," "copay," "copayments," "deductible," "preexisting conditions," "guaranteed issue," "premium," "PPO," "preferred provider organization," "open enrollment," or any other terms which might mislead someone into believing the plan was a form of health insurance. Additionally, if there is use of the term "license" or "licensed" it should not imply that there is any form of licensure of

the plan with the Division of Insurance.

The requirement of provider agreements with networks or plans comes up only when the provider is not the exclusive plan provider, but when there are multiple providers participating in the discount dental plan.

There are possibilities of offering insurance plan reimbursement as well as identified discount plans, but there are many insurance plan contracts that restrict fee amounts. Looking at the detailed language of those contracts is a good idea before initiating a discount plan.

The numerous varieties of dental and health discount plans that turn out to be shams caused the legislature to enact these detailed regulations, but if done correctly a discount dental plan can have benefits that should be reviewed for feasibility. It is just one of the payment methods, including insurance plans, that dentists can use to assist and attract patients.

Lawsuit Filed for Emotional Distress Because of Notices of Sterilization Failures

The mother of a girl who had orthodontic treatment at Southeastern University in Davie, Florida is filing suit against the university for emotional distress allegedly caused by notices of the risk of disease because of lack of proper sterilization practices. 1152 notices were sent out by the university clinic when it was discovered that the dentists there used surface disinfectant instead of heat sterilization of dental handpieces between uses on patients. The notices stated that patients treated by 14 orthodontic residents between July, 2015 and February, 2018 may have been exposed to infectious diseases, including HIV and hepatitis, because of the failure to use appropriate sterilization procedures. Jay Cohen, a Fort Lauderdale attorney, is seeking to represent other patients in a class action for damages for emotional distress by the notices being sent to them. No incidents of the diseases caused by the procedures have been reported, but patients have been advised they should be tested.

Should Prisoners be Provided Dentures? Texas Now Says Yes

Prisoners filing suits against prison officials for not providing adequate dental care are very commonplace, and usually don't succeed, but some states have started to weigh the standards that must be met for prisoners to be free of "deliberate indifference" to "serious medical needs." That is the minimum requirement set by the Supreme Court in 1976 to avoid a violation of the 8th Amendment's prohibition of cruel and unusual punishment. A California court has forced prison reforms to meet this standard. In Texas, which is not usually receptive to reforming laws to improve treatment of prisoners, the Texas Department of Criminal Justice (TDCJ) is now responding to publicity, not prompted by a lawsuit, about its usual policy of giving prisoners pureed food without treatment using dentures. The TDCJ announced it would create a new dental clinic, hire a prosthodontist and create a review board to look at prisoner complaints requesting dentures as part of treatment. Previously just 71 sets of dentures had been provided to prisoners in 2016 out of a prison population of 149,000. Now, the definition of "medical necessity" may increasingly include provision of dentures, which may cost hundreds of dollars to about \$1,000 per prisoner.

Breast Feeding Mom "Shamed" in Dental Office

Tiffany Elliott of Irondequoit, New York complained to her dentist, Dr. Robin Craig, that she was being "shamed" for attempting to breast feed her 9 month old daughter "discreetly" in the dental office while she was discussing the dental history of her 9 year old daughter. When she explained that a 1994 New York law allowed her to breast feed in any public place, it was suggested that she see another dentist. Elliott voiced her frustration on Facebook and attracted over 3,600 comments on the situation. The dental office apologized in a Facebook post for the "unfortunate comment" but Elliott found the apology insincere and said women like Dr Craig as well as others should be educated in the law.

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.

After Support of Corporate Dentistry Law, Dental Association Files Complaint Against Corporation

The Washington State Dental Association (WSDA) supported a 2017 law in that state which eased the rules against corporate dentistry without dentist ownership of practices. A recent lawsuit it filed against a Colorado corporation with over 50 clinics in 12 states, Lone Peak Management, alleges kickback schemes and profit oriented policies that impact negatively the quality of patient care. The complaint, prompted by a whistleblower employee of the company, detailed kickback schemes disguised as "facility use fees" which rewarded Lone Peak Management \$170 for each anesthesia referral, required referrals to other Lone Peak specialists, and required dentists to cold sterilize and reuse single use devices. Examples of e-mails emphasizing the profit motive behind dental decisions were provided with statements such as: "Patients in your office should NOT be given options as to where they would like to go for their wisdom teeth

extractions. Regardless of how near/far the office...referring patients anywhere else is to send OUR business and money away and therefore is unacceptable."

The possible change in viewpoints of the WSDA on corporate dentistry and possible abuses was illustrated in President Dr. Chris Delecki's comments: "The concerns brought forward by the whistleblower and uncovered by our team are deeply troubling and represent a dangerous corporate intrusion in the doctor-patient relationship....In this environment, corporations can direct, question and over-rule the decisions dentists make in how to best treat their patients."

A Washington newspaper, the HeraldNet, also has revised its support of the new law, after reporting on the WSDA action, and advocated for more enforcement of rules and more transparency in how corporations use new authority to influence care. It also called for increasing reimbursement rates for Medicaid dental patients, which it stated might be a cause of the cost-cutting of Lone Peak which resulted in the complaint.

Claim of Intimidation Follows Dentist's Suit for Yelp Defamation

Iram Arvesen of Matteson, Illinois is accusing dentist Christopher J. Neal of Chicago Kidds Pediatric Dentistry of threatening to use doctor-patient information to "blackmail" her into taking down a negative Yelp post. Neal had alleged in a suit for defamation against Arvesen that she falsely claimed he performed unnecessary work for profit and not being a "real dentist." Arvesen claims Neal made threats to reveal confidential doctor-patient information if she didn't delete the post. She alleges violations of the Illinois Medical Patient Rights Act and requests damages for emotional distress.

Attorney Hatch will speak at "3 Pillars of Dental Practice Transitions: Valuations, Legal Issues and Financing" in February, 2019 in Worcester, MA. Further details will be announced.

Business Dispute Results in HIPAA Information Being Held Hostage

An Electronic Medical Records vendor, MOGO, is now refusing to return the patient base records it used as a HIPAA Business Associate to a Florida based dental practice, Key Dental Group, because it was shown a preliminary purchase and sale agreement which transferred the records to a new dental practice provider. The contract originally transferred the patient base records, but the final executed contract excluded patient records from the sale. Key Dental Group terminated the Business Associate contract with MOGO and demanded the records back, as a vendor is required to do under HIPAA. But because it was operating under the understanding of the original contract when it transferred the records to the new owner, MOGO refuses to return the records, and Key Dental Group has asked a federal court to require the transfer.

Warnings of False Credentials Ignored by AZ Dental Board With Patient Suit Resulting

A criminal complaint and a civil suit have been filed against an Arizona dentist who falsified his anesthesiologist's credentials, and a patient involved alleges that his "negligent sedation" caused her breathing problems and resulted in her periodontist abandoning a procedure. A few days after going through oral surgery, Kris Peterson saw an investigative TV report about the fake credentials of Dr. Pankaj Goyal. That report showed that Goyal had used a number of fake degrees, forged signatures and false documents to obtain a general anesthesia permit from the Arizona Dental Board. One of those degrees was created using a basic template on Microsoft Word. Peterson alleges physical and emotional injuries.

The actions of the Arizona Dental Board were brought into question by the case, and not only because of its

failure to recognize the fake credentials. Apparently, Goyal had received multiple warnings and complaints about his fake credentials for a number of years, and the Board ignored them, and even went so far as to silence staff from pursuing the case and allowing him to continue practicing.

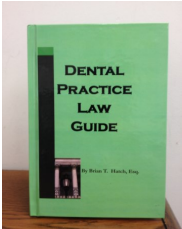
Dental Insurer Fined \$500,000 for Numerous Policy Failures

A Washington dental insurer, Dental Health Services of Seattle has been fined \$500,000 by the Washington State Insurance Commissioner's Office for a number of violations, including failing to process appeals and complaints, double charging 492 policy holders a total of \$56,351 and failing to deliver enrollment materials. This company had previously been fined in 2017 and 2018 for mishandling consumer complaints.

Brian T. Hatch Esq. is an experienced provider of legal services for dental practice purchasers and sellers.

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