

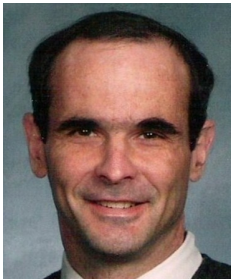
# Dental Practice Legal Update

**March, 2020**

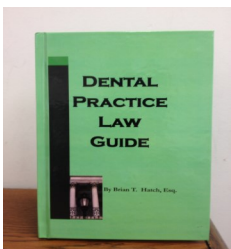
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**Attorney Brian Hatch, publisher of Dental Practice Legal Update, has represented dental practices in business, employment, complex litigation and other legal matters. His latest book is "Dental Practice Law Guide" hatchlegalgroup.com**



## **BORID Hears Complaints About SmileDirectClub**

Direct to consumer teeth straightening company SmileDirectClub, already under fire by 36 state boards of dentistry and Attorneys General, as well as US House Lawmakers and , are now facing the Massachusetts Board of Registration in Dentistry (BORID) for charges of unregulated practice of dentistry. Dr. Janis Moriarty of the Massachusetts Dental Society said that BORID was contacted because the direct to consumer model, without a licensed dentist or orthodontist in charge of treatment, is not allowed under Massachusetts state regulations. Other Massachusetts dentists or orthodontists in key positions have also complained that BORID regulations prevent SmileDirectClub from operating the way it now does, by not providing for in office x-rays and office visits. President of the Medicaid Orthodontists of Massachusetts Association, Dr. Mouhab Rizkallah, said that not only would company practices not hold up to scrutiny under the Massachusetts Dental Regulations, but that he sees many patients from SmileDirectClub developing dental fremitus, a form of biting trauma, which requires repairs by an orthodontist. News organizations have gone on the offensive to try to reveal contradictions in how SmileDirectClub says its procedures are handled by employees at site locations, and what employees actually tell patients. Hidden cameras posted by NBC News at sites in Ohio, New Jersey and Alabama revealed that employees were telling customers "It's not mandatory" to visit a dentist, while SmileDirectClub insists that its employees cannot provide such advice.

## **Non Solicitation- the New Non- Competition Agreement**

Massachusetts has a new law which has significant restrictions on non-competition agreements in employment contracts, and many associate agreements currently used by owners don't meet the law's requirements. But there are ways allowed by the law to protect the main asset dental practice owners need to protect-the patient base.

The new law limits all non-competition agreements to one year in duration and has some unusual requirements for any provisions in new employment or associate agreements or independent contractor agreements (which also fall under the law). Requiring any employee, associate or contractor to agree to such a provision in a contract requires that "consideration" or value be given to the employee in exchange for giving up the right not to complete for one year if they leave the practice. That may be up to one-half of the employee's salary, or some other consideration, sometimes monetary, to include the provision.

The law allows a less burdensome option which is particularly appropriate for the dental industry, however. The biggest value in a dental practice, often 80%, is the intangible value of goodwill generated by a loyal and returning patient base. Thus, if an employment contract provides that a departing employee cannot solicit the practice patients in a new practice nearby, perhaps with patients he or she has treated regularly and remain comfortable moving with the dentist to a new location, it achieves the primary goals a practice

(continued on page 2)

## **Non-Solicitation-The New Non-Competition Agreement** (from p. 1)

would use a non-competition provision for. There are no restrictions on non-solicitation agreements being put in employment contracts.

Interestingly, the new law was designed mainly for the IT industry, where legislators sought to prevent companies from restricting their employees from starting up new companies using the knowledge they gained as an employee. The value is in knowledge in that business model, but in the dental industry it is the patient base and not the ideas which are of the most value to a practice.

Employees in the dental industry may still request that they be allowed to leave the practice and be employed in another practice

and be employed in another practice nearby because of a variety of reasons which are not necessarily to raid the patient base. In that case there is still room for the owner to protect their interest, for the dentist-employee to move on to a new opportunity, and still obey the law with a non-competition agreement which obeys the law, but still gives the employee value for signing on to the provision. An attorney can design a non-competition agreement so that the employer allows the employee to move to new employment freely, which is valuable to them, as long as they don't contact patients for a year, or communicate patient names to their new employer to allow them to recruit former patients. The departing dentist may not be able to start a new competing practice for a year or so, but if they move to a new employer which already has a patient base, that wouldn't be a primary objective anyway.

The loophole in the law which allows for consideration being given for non-competition provisions is often abused by lawyers who create token minimum monetary value, or even just wording making it appear to constitute consideration. But the courts in Massachusetts may very well rule that these maneuvers actually go completely against the intent of the law and may void them or restrict them at some point.

In the meantime, though, it is not necessary to try to evade the new law as it is to protect the real value non-competition agreements have for dental practices. Losing patients through a departing dentist immediately setting up a practice right nearby can be significantly harmful to a practice. Contracts can still protect against that, as long as the old associate or employment or independent contractor agreements owners have been using formerly are revised by an attorney familiar with the law and the industry.

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### **\$4M Civil Judgment, Criminal Charges Against Sex Abuser Dentist**

A North Carolina dentist, Michael Lee Hasson, 56, still faces a number of criminal charges after losing a \$4 Million civil judgment against him for sexual assaults on sedated patients. Hasson was arrested on at least 30 charges of misdemeanor sexual battery, felony second-degree forcible sex offenses, felony indecent liberties with a child and a statutory sexual offense with a person who is 15 years or younger. Hasson's dental license was suspended in February, 2019. In the civil action, a woman, identified as "Jane Doe" was being treated at Wilmington Oral Surgery by Hasson when she was sedated while having her wisdom teeth extracted when she realized, just before losing consciousness that he was saying to her "You're going to feel good in a few seconds" as he grabbed her hand and rubbed it against his groin area. He was fondling her when she awoke from sedation. Three other charges around the same time involved female patients between 17 and 21 years old, and other charges involved younger patients and dated further back in time.

### **Dental Office Calls Police After Seeing Child Playing with Toy Handcuffs**

At a Cape Coral, Florida dental office, a six year old girl was playing with toy handcuffs her mother had bought her at the Dollar Store when police officers showed up and said they were responding to a call from the office staff. Main Street Children's Dentistry and Orthodontics in Fort Myers was where the deputies challenged the mother, Yaritza Fernandez, to explain the situation. The dental office personnel didn't give a reason why they decided to call the police, and referred questions by a journalist about the situation to their legal department. Fernandez said that her daughter was quite scared by the visit from the police and thought her mother might be in trouble. She commented that "We are just sitting there. They could have just come to us and asked us. Maybe just find out for yourself and then if there's something wrong then call the police."

### **Patients in Washington, Philadelphia Dental Clinics Exposed to Hepatitis, HIV**

A dental clinic which operates school based dental clinics in Washington state failed to use proper sterilization of

instruments practices and exposed approximately 1,250 children to Hepatitis B and C and HIV. Neighborcare Health failed to use the appropriate heat in the sterilization process necessary to disinfect completely handpieces using for fillings and cleanings. Similar problems were indicated in Philadelphia, where three dental clinics were closed after it was revealed that hygienists may have been using unsterilized instruments while performing dental cleanings. The Philadelphia Department of Public Health shut down the Trieu Family Dental Clinics and notified the families of all the patients that they may have been exposed to Hepatitis B, Hepatitis C, and HIV. All the families were encouraged to have patients that were treated at the clinics tested for the viruses. There was no indication that any infections had resulted from the possible exposure.

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

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***508-222-6400***

## **Dental Practices Not Likely to Face Problems Legally with Corona Virus Outbreak**

It would seem to the ordinary person that a dental practice would be a prime area for possibilities of becoming infected by the corona virus, considering all the exposure to body fluids that dental treatment entails. But since the dental industry has always been highly regulated with regards to infection control, a dental office is likely a place where a patient is actually safer than most places from catching the virus. Dental offices have heard complaints from anxious patients who have the wrong perception that dental personnel are not well prepared to prevent transmission of communicable diseases. Some are even willing to threaten legal action because of their mostly unfounded fears that their risks of having the virus transmitted during a dental visit is high. Unless there is a provable connection between a visit to a dental office and a patient who has contracted a virus, chances are slim that a lawyer would attempt to draw that connection in an industry where prevention of disease transmission is always mandated with required training and

availability of Personal Protective Equipment (PPE) and checked on an annual basis. Dr. Lisa Kane, President of Dental Office Compliance of New England says that while it is a good time now to make sure infection control office policies, procedures and equipment are up to date, dental offices are most likely in good shape when confronted with the corona virus crisis. The America Dental Association has available for download (at ada.org) a dedicated page for handling corona virus, with a particular focus on how to deal with patients who may be experiencing the virus or virus symptoms. If there are shortages of any Personal Protective Equipment supplies, that may be a problem, but dental suppliers hopefully will be able to keep up with an increased demand for PPE for health care workers in general. Legally, however, with normal precautions and training, most offices should be able to take on confrontational patients without serious difficulties.

### **Dentist Using Cash Records Guilty of Tax Evasion**

A 70 year old dentist with a long history of complaining about the

legality of taxing wages was found guilty of tax evasion. He was ordered to pay back taxes dating back to a 2007 federal order which he had ignored. Dr. Frederick Kriemelmeyer of La Crosse, Wisconsin was accused to have conducted many transactions with patients and business with cash so that there would not be an electronic or paper record. Additional penalties by the IRS may amount to over \$400,000. A federal jury in Madison, Wisconsin found Kriemelmeyer guilty of the four counts of tax evasion in about two hours. He has frequently been open about his objections to paying taxes, and has been arrested a number of times in the past few years on charges related to those protests. There is no indication of what the sentence Kriemelmeyer will face when he faces the judge for a decision on the conviction.

***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.***

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### **Dentist Wins \$240K in Defamation Suit Against Ex-Employees**

Most on-line reviews of dentists are considered protected speech and dentists usually lose defamation suits against negative reviewers, but a dentist in Saskatoon, Saskatchewan successfully obtained a \$240,000 verdict in a defamation action against two ex-employees who complained about him. Dr. Gary Housman won the award, which included punitive damages and required that the negative posts be taken down, against Paige Harrison and Nia Harrison, who were terminated separately from the practice in 2017. They began writing anonymous posts between March 2017 and April 2018 on RateMD and Google Reviews that featured unsubstantiated allegations of poor and unethical practices at Housman's office. One of the posts

in November 2017 stated: "Hands down worst dentist. Only see Gary if you want to pay an arm and a leg for a filling to have it fall out numerous times." Housman and his attorney had to find out the IP addresses from RateMD and then contact their internet service providers to obtain their identities. The reviews contained information which only employees of the practice would know, which bolstered the base, as well as the fact that neither woman were represented by counsel.

### **MA Dentist Pays \$135K to Settle Patient Rewards Kickback Scheme**

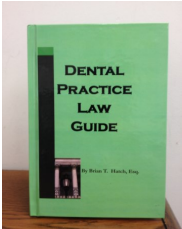
Dr. Nathaniel Chan of Canton, Massachusetts, the owner of three locations of Advanced Dental Arts dental practice, has agreed to pay a \$135,000 settlement with the Massachusetts Attorney General's Office after the investi-

gation of a rewards program connected with MassHealth appointments. The practice offered a customer rewards program which rewarded patients who attended more appointments and referred others to the practice with money and expensive prizes. The Attorney General's office charged that this was a kickback scheme which gave incentives to schedule medically unnecessary appointments paid for by MassHealth. The Attorney General alleged that this was a campaign to boost the practice's own profits at the expense of the MassHealth program. Some of the prizes given out included Apple TVs, Kindl Fires, pro sports tickets, and gift cards.

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

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