

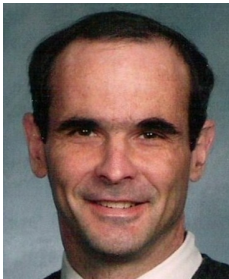
Dental Practice Legal Update

May, 2019

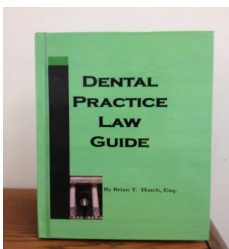
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Maine Bill Would Stop Public Funding for Amalgam

Maine state Senator Michael Carpenter has introduced a bill which would stop public funds from being used to pay for amalgam fillings in any dental work for children on MaineCare or in schools or institutions. Carpenter is promoting his bill with Maine dentist Dr. Mohammed Imam by referring to an environmental treaty called the Minamata Convention on Mercury, which deals with the dangers of mercury and is endorsed by the United States and close to 100 other nations. Carpenter and Imam have written an article in the Bangor, Maine Daily News which states that the rationale for their position is based on four points involving environmental pollution, safety of children exposed to mercury in amalgam at an early age, environmental justice and occupational health hazards to dental industry employees. They say that the use of amalgam is an outdated dental filling treatment method, considering the new composites and other materials which are better at preserving tooth structure. The trend towards mercury free dentistry is gaining momentum, with the European Union's science branch calling it a "secondary poisoning" because of its introduction into the food supply through fish or vegetables and its banning amalgam use for children under 15 and breastfeeding women. The negative effects on dental workers preparing amalgam fillings because of mercury vapor exposure has been cited to support the bill. The sponsors say Maine must keep up with less amalgam use in the dental industry.

Would Your Office Pass a BORID Inspection?

You've received notice that the Board of Registration in Dentistry is going to make an inspection of your practice. It's enough to strike fear in the hearts of any dental practice owner. BORID has an extensive checklist an inspector goes through when making an inspection. What are the most commonly found violations to look for to make sure your office won't get cited?

The top area of concern for most practices is in infection control. That is a key area that BORID often reviews in response to a complaint, and it must be investigated, and sometimes is the basis of any disciplinary actions. Three violations seem to be the subject of many BORID hearings: 1. Compliance with specific infection control requirements such as weekly spore testing and use of internal indicators in sterilization pouches 2. Failure to sterilize handpieces and attachments 3. Proper storage of sterilized handpieces and equipment in sterilization pouches.

Other areas where documented violations are frequently found involve educational requirement documentation, hazardous waste disposal, charting and other treatment documentation, meeting safety requirements, and proper patient communications.

Continuing education requirements must be fulfilled for all dental professionals, including dentists, hygienists and clinical staff, and there must be attested to documentation that these requirements have been met. Signatures that required courses for continuing education have been completed are made

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Would Your Office Pass a BORID Inspection?

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under pains and penalties of perjury, and it is important to retain official records of attendance and completion of all courses taken.

Hazardous waste disposal requirements are specified by federal and state regulations, and Material Safety Data Sheets (MSDS) can be a source of knowledge of these requirements as well as annual OSHA inspection materials. There is an increasing focus on correct disposal of amalgam scrap containing mercury now that many patients are having older amalgam fillings replaced by composites.

Proper charting is a fundamental way to avoid all kinds of legal ramifications of treatment mistakes and malpractice, and can often

counteract conflicting testimony of a complaining patient about what they were told verbally. Periodontal charting and documentation of oral cancer screenings should be carefully maintained. Whiteout should not be used in documentation, since it is better to revise charting made in error openly rather than reveal attempts to conceal mistakes.

Safety equipment and necessary items to administer local anesthesia must be present. An automated external defibrillator (AED) must be available and all staff trained on how to use it.

Consent forms for specific procedures should be maintained, and the Massachusetts Dental Regulations require general consent forms for all restorative and preventive procedures, and for specialized treatment including administration of anesthesia other than local anesthesia, periodontal, endodontic, orthodontic, prosthetic, oral and

maxillofacial procedures and specialized treatment for pediatric patients, including behavioral management techniques.

The Massachusetts Dental Regulations are very detailed on the content of patient records (234 CMR 5.14), including many aspects of both medical and dental history as well as consultations with patients about treatment and changes in medical history and prescriptions.

The detailed checklist that BORID follows should be a part of every dental practice's documents and staff should be aware of what it contains which will be the focus of BORID inspectors. The Massachusetts Dental Society has made this checklist available for use and downloading at www.massdental.org/regulations/BORID, and every practice would be well served by making it a subject of review on a regular basis. This will avoid patient complaints and prevent violations if BORID comes calling.

District Court in Alabama. Last fall, the dental board accused SmileDirectClub of unauthorized practice of dentistry because of its practice of taking digital images of patients' mouths without an onsite dentist. Similar arguments have been posed by the Georgia Dental Board in a lawsuit against SmileDirectClub there. The Alabama board claimed that without an onsite dentist a number of dental problems could not be addressed, such as allergic reactions, infection, and broken teeth or dental work. This interferes with the health and safety of patients it said, and thus its jurisdiction and regulation is appropriate. SmileDirectClub is maintaining that the board is interfering with interstate commerce and has economic interests that are its main concern.

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.

CVS and the Dental Field—Forged RI Opioid Dental Prescriptions and Remote Orthodontics

Rhode Island based pharmacy giant CVS is at the forefront on two controversial issues in the dental industry—opioid prescription abuse and the increase of the remote orthodontics treatments business of Smile Direct.

In April CVS agreed to pay a \$535,000 fine to settle allegations that it filled 39 forged prescriptions for Percocet in 2017. The settlement allows CVS to prevent a trial on the complaints by the Drug Enforcement Administration. CVS has had troubles with painkiller prescriptions in several New England states going back to 2016, when it paid a \$3.5 million fine to settle allegations that 50 pharmacies in Massachusetts and New Hampshire filled forged opioid prescriptions. One forger signed a dentist's name on 131 prescriptions for hydrocodone and had them filled at 8 different CVS stores in those states.

CVS waded into another

controversial issue in the dental industry on April 29, 2019 when it announced that its program to allow SmileDirectClub's Smile Shops to operate out of CVS pharmacy locations will be increasing. SmileDirect has created a bitter battle with orthodontists by its extensive marketing of a low cost remote orthodontics business not using orthodontists for in-office treatment. In 2019 CVS plans to allow Smile Shops to open in hundreds of CVS locations, a large increase from the present 13 locations where the company gives 3D scans and teeth whitening kits to customers. The information obtained from the scans is relayed to another site, where orthodontic equipment designed for self application is manufactured and shipped to patients. CVS also owns Aetna Dental and announced that SmileDirectClub will be included as a part of plans for participants in that service.

Smile Direct's Legal Battles with Dental Boards Continue

The latest in a number of legal battles orthodontists and dental boards have engaged in with SmileDirectClub's growing remote orthodontics business will continue in Alabama, as an antitrust suit filed by the company against the Alabama Board of Dental Examiners will now be heard in U.S.

Federal Court Rules that Before and After Dental Photos May be Allowed Copyright Protection

Do before and after photos taken by a dentist with permission from the patient have copyright protection preventing other companies from using those photos for its own purposes? A U.S. District Court was presented with the issue when Dr. Mitchell Pohl, a Florida dentist who uses photos from specific patients to promote his cosmetic dentistry practice, sued a company called Offcite that was using a photo of a patient of his taken in 2005. The District Court initially said that the photos were not “original” enough to merit copyright protection, since Pohl was not a professional photographer. But the 11th Circuit Court of Appeals disagreed and cited the U.S. Supreme Court’s decisions that state that “originality does signify novelty.” The main point in Pohl’s favor was that he was intentionally taking the photos to showcase his dentistry skills, the appeals court said.

NH Dentist Who Joined Army to Speed Up Citizenship Process Files Suit Over Delay

The American Civil Liberties Union is taking up the case of Dr. Hiren Lorat, an Indian born dentist who enlisted in the U.S. army in 2016 under a program to fast track U.S. citizenship, and whose citizenship application has been delayed. The program was designed to allow non-citizens who have specialized skills to have a faster processing time to gain citizenship status. A change in government policy requiring more stringent background checks for military members resulted in the determination that Lorat was a “moderate security risk.” Lorat joins others affected by the policy in a class action lawsuit, separate from his case, to state their claims. Giles Bissonette, legal director for the New Hampshire ACLU said that “All he’s trying to do is live the American dream by working hard and providing a life for himself, and he’s decided to do that in service to the United States.”

California Governor Seeks to Expand Dental Services for Undocumented Younger Adults

Since 2016, children in California were able to receive dental services through the state Medi-Cal services program regardless of whether they could show legitimate immigration residency status. Governor Gavin Newsom, citing the costs of treating younger adults in emergency rooms for serious conditions caused by poor dental health and savings in the future by better access to preventive dentistry, has proposed expanding that program to adults under 26. The effectiveness of the program would become increasingly apparent, proponents argue, with the access of younger adults to dental care before they develop conditions that would cost the state more money as they age and their health worsens.

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

New Mexico Board’s Authority to Challenge DSO Control Over Dentists Upheld

A New Mexico court has upheld the New Mexico Board of Dental Healthcare’s attempts to prevent the management of Dental Service Organizations from interfering with patient treatment, inhibiting their access to patient records, and using contractual provisions to control referral processes. The New Mexico Board had enacted three regulatory amendments to the New Mexico administrative code to deal with these situations and protect dentists from managerial control which favored profits instead of independence in treatment decision making by dentists. Pacific Dental Services (PDS), doing business as Modern Dental, asked the court to review the amendments developed through public hearings attended by practicing dentists who supported the changes. PDS was

unable to counter arguments that insufficient access to patient records in case of DSO closures or bankruptcies favored a rule requiring maintenance of six years of patient records by non-dentist owners of practices such as DSOs. An amendment specifically proscribing interference with dentists’ decision making processes involving referrals to specialists or use of laboratory services was upheld. The negative impact on patient care by this interference was considered influential to deciding that the amendment was necessary. Additionally, another amendment dealt with restrictions on dentists making referrals because of contractual commitments to the DSO. The court weighed the extensive commentary by professionals in the dental industry as a key factor in its decision.

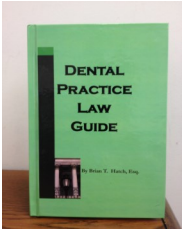
Dentists Among Opioid Prescribers Arrested by DOJ

In a crackdown by the federal government to curb the opioid abuse

epidemic in the United States, the Department of Justice arrested about sixty health care professionals, including doctors, pharmacists, nurse practitioners and dentists charged with illegally prescribing opioids. The states where the charges were brought include states particularly hard hit by opioid related deaths and fraud associated with over prescription of opioids, West Virginia, Virginia, Ohio, Kentucky, Alabama, Tennessee, Pennsylvania and Louisiana. One of the dentists charged allegedly prescribed opioids “that had no legitimate medical purpose” and removed teeth “unnecessarily” in order to allow him to prescribe more painkillers. He was accused of profiting from the system fraudulently by getting his patients addicted to post-procedure opioids. Both Attorney General William Barr and Health Human Services Secretary Alex Azar emphasized that the Appalachia region involved in the crackdown has been hit particularly hard by the opioid crisis, with deadly consequences.

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