HATCH LEGAL GROUP
A Dental Practice Specialty Law Firm

# Dental Practice Legal Update

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## COVID-19 DENTAL LEGAL UPDATE

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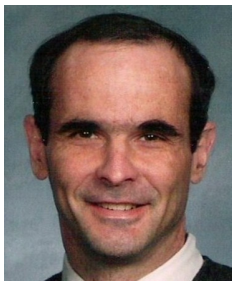

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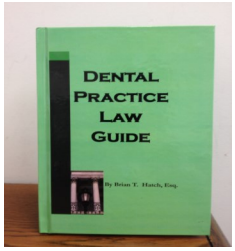


## The Standards for Liability During the COVID-19 Crisis

During a respiratory disease pandemic like COVID-19, dental practices which come into contact with respiratory fluids as a matter of course during treatment should take care that no one who visits the practice who eventually tests COVID-19 positive blames the practice as a the source of their infection. Since dentistry is highly regulated for infection control anyway by CDC guidelines, OSHA regulations, and state regulations, elevating the protections for patients and employees enough so that no aggressive attorney decides to accuse a practice of liability is not as hard as it may appear to the general public. It is a matter of advertising to patients that not only do normal infection practices make it safe to have treatment, but that the practice is being even more cautious than is required to keep its patients and employees safe.

What is the standard that must be overcome to create a minimal case for liability that goes beyond a frivolous lawsuit? Lawyers risk sanctions by a court if they bring a suit which has no chance of being a valid claim. Because it is such a new area, with the elevated risk of a highly infectious disease sometimes caused unknowingly, no one knows what the courts will decide is enough to bring a minimum standard to state a claim. The connection of the dental practice or its employees to an infection must go beyond guesswork or "mere conjecture." It seems that COVID-19 is an

(continued on page 2)

## MDS Recommends Practice Reopenings by May 18th

While the COVID-19 crisis continues, the Massachusetts Dental Society is now recommending that practices stay closed except for urgent procedures (see below) until May 18th, extending an earlier timeline that had set a May 4th return date. The MDS leadership made the decision on April 24th and continued to emphasize that it will assist dentists with resources to reopen their practices. The MDS urges dentists to check with Centers for Disease Control and American Dental Association guidelines for updated information. As an essential health care provider, the Commonwealth of Massachusetts has placed no legal restrictions on dental practices providing treatment.

### Urgent Non-Elective Procedures

- **Toothaches-Fractured teeth with associated pain, severe decay**
- **Symptomatic endodontics**
- **Completion of cases that are in temporary stage (at the doctor's discretion)**
- **Periodontal & endodontic abscesses**
- **Suture Removal**
- **Orthondontics limited to trauma from orthodontic appliance (wire/bracket)**
- **Fractured prosthesis and limited adjustments**
- **Extractions of symptomatic teeth that likely do not require surgical intervention**

## How Contact Tracing Will Affect Dental Practices

The new contact tracing program initiated by Massachusetts Governor Charlie Baker in collaboration with the non-profit Partners in Health Care is recruiting thousands of employees to make phone calls to ask people who have tested positive for COVID-19 to give out information on all their recent contacts. Those contacts will be notified that they should quarantine and be aware that they may have had a chance of being infected.

How will "contact tracing" affect dental practices with both employees and patients who may have come into contact with COVID -19 positive persons and who may be either asymptomatic or symptomatic and capable of infecting others? Employers can require present or prospective employees to give out their contacts who may have been infected or tested positive. It is a part of their duty under OSHA to keep the workplace safe and free from hazards in the workplace which may be dangerous to their employees' health. Whether they take the next step of communicating this information to a public health agency or government contact tracer is a move they might do also voluntarily. Public health emergencies often by statute trump common law principles such as invasion of privacy, and under the HIPAA health information privacy law health care employees such as dental practice employees are allowed to contact a patient who may be infected after consultation with a public health authority or if authorized by law. Executive orders by state officials or legislative action to control infectious disease in such circumstances will likely overcome any legal obstacles other federal, state or local laws or regulations might impose.

Asking patients to state their positive COVID-19 contacts before doing business with them is a little trickier, but as long as it makes business sense as far as patient relations is concerned, it isn't something a business owner cannot lawfully do. This isn't discrimination against a protected class which might run afoul of some discrimination laws. Signage asking the patients to volunteer that information isn't unreasonably or illegally coercive. Can you turn in patients to a public health authority or even infected contacts of customers legally? Sure, since it would be considered to be like a police report, which would always be perfectly legal unless it were false. Under HIPAA, it is directly permitted, and with dentists it might be actually unethical not to do so if they feel their patients might be at risk.

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## The Standards for Liability During the COVID-19 Crisis (continued from p. 1)

infectious disease that is so widespread and hard to detect that it would be very difficult to draw a connection between actions of a dental practice and a person who was infected.

There has to be more than just a hypothetical transmission from a visit to a dental office because it was one of the places a patient has gone to recently. A litigant might at first show that the office was one of the few contacts that they had when they could have contracted the virus, and thus the connection goes beyond mere conjecture that that was where there was transmission. In that case a further burden that must be overcome before a winnable case is presented is that there was something a practice did, or didn't do, that was negligent.

It should be noted that because a practice is an employer, it is responsible by the principle of agency for the actions of its employees. That can be limited, however, if they employer took precautions that were sufficient to minimize the possibility that one of its employees transmitted an infectious disease. Many of the employees in the practice are required through their licensure requirements to have infectious disease training every year. Everyone in the practice, including the non-clinicians, should be knowledgeable of the standards required in that training. If the practice is rigorous in requiring all employees, including front office staff for instance, have this training, it will be evidence that protects the practice as well as individual employees from liability. The CDC and ADA has issued particular guidelines during the COVID-19 crisis that employees should be thoroughly versed in as well. Employees who refuse to go through the practice protocol for training risk going "beyond the scope of their employment" and thus may be individually liable more than their employer.

If a practice can show that they met both the required and recommended guidelines, and educated their employees about them also, and even went further to find additional authorities that they respect who have advice during this crisis and obey their advice, then they can show that they took enough safety precautions to avoid liability. When tests become readily available, since health care workers are already a top priority to have access to tests, employees should perhaps be tested even when they are asymptomatic. Employees should also be required to be able to provide a list of contacts if they have exhibited symptoms or test positive. Any positive results or possibilities of infections among connections may be a cause to report to the Department of Public Health or the new "contact tracers" that the Commonwealth of Massachusetts is now employing through Partners in Health Care.

The standard for liability through negligence is often whether the defendant knows or should have known about a risk, and then did nothing about it. "Carelessness" is a keyword often used in litigation. "Recklessness" is also a keyword which is often used to go beyond mere negligence to state a claim for "gross negligence."

An attorney considering litigation may quiz potential clients about what they were aware of in a setting where they could have been infected. Informing patients through extensive signage about all the precautions the practice is taking may actually dissuade a patient or an attorney from even considering litigation. And of course, making patients aware of all the extra precautions the practice is taking during this pandemic makes them feel safer, makes them feel better about coming into the office for treatment in the first place, and is thus good for business as well. Going above and beyond shows a caring attitude that will benefit them in the long run as well as in this crisis.

## Can Dental Employers Be Liable for Employees Who Are Fearful Of Returning to Work?

Employees of dental offices have always been subject to protections them from contagious illness in the workplace. Bloodborne pathogens training and standards are a required part of training in all dental offices. What is different about COVID-19? Can employees who express fear of returning to work because of COVID-19 be dismissed?

The answers to both those questions are somewhat unique in a dental office setting. The OSHA statute is a major guideline to the rights of employees when they are fearful of returning to their employment at a practice because of possible exposure to COVID-19. The Bloodborne Pathogen Standards in the OSHA regulations at 29 CFR 1910.1030 are what the Occupational Health and Safety Administration "Guidance for Preparing Workplaces for COVID-19" refers to when discussing the standards for protecting workers from COVID-19. OSHA explains that this is the case even though coronavirus is a respiratory secretion spread illness and not technically under the standards for bloodborne pathogens. Since dental practice employees follow those guidelines anyway, then there is limited exposure to liability if normal-precautions, extended to respiratory spread situations are followed.

Additionally, however, OSHA also has a General Duty Clause, 29 USC 654(a)(1) Section 5(a)(1) which requires employers to provide each employee "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Since COVID-19 is so highly contagious, this would require extra precautions with the possibility of patients or employees coming into the office space even outside the operatory and spreading the virus knowingly or unknowingly if they have the disease asymptomatically. Questionnaires to patients and employees about their recent contacts with anyone who tested positive for COVID-19 are thus very appropriate to protect the office from liability from employees working in this employment situation. Signage warning employees and patients of the dangers of spread of COVID-19 and about the necessity of taking precautions like wearing facemasks, keeping social distancing of 6 feet from one another, and coughing or sneezing into an elbow rather than one's hands is important.

So what is the "standard of "fear" that would make an employee justified in not coming into the workplace or attempting to sue the practice if eventually he or she were found to have been infected by working at the practice when they were hesitant to do so. This is a difficult standard to judge, since just about everyone has a different sense of when they would be fearful enough to avoid coming into a particular workplace environment. We can turn to two employment law standards that can be used, both in unemployment law situations and unlawful termination cases. An employee can leave a job voluntarily and collect unemployment if they face working conditions that "cause or exacerbate a health problem." The cause and effect standard of proof that the workplace conditions caused an infection thus would apply. Also, there is a "constructive discharge," which can be cause for unfair termination in certain cases, if there is a "hostile work environment" that "no reasonable person should be expected to endure." The standard there would be if the fear were reasonable simply irrational considering the chances of infection just by being employed. To meet this "reasonable man" standard the practice must take the obvious additional precautions to prevent COVID-19 spread by patients or other employees, in addition to the normal required safety requirements.

Following what OSHA or state regulations require, the CDC guidelines for COVID-19 that have been issued previously and recently, and any state law guidelines now being issued. The first thing that any lawsuit uses for proof is not the subjective fears of the employee-plaintiff but the violation of regulations or guidelines that can be objectively proven.

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***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.***

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

## MDS Recommendations for Procedures to Start May 18th

- **Routine fillings that do not address or prevent pain or restore normal oral functioning**
- **New crown and bridge cases that do not involve severe decay or pain**
- **Recall exams/cleaning**
- **Dentures**
- **All orthodontic procedures (including aligner therapy) that do not address infection, restore oral function, are related to trauma, or relieve pain**
- **Cosmetic/aesthetic dentistry, teeth whitening.**

***All dentists and their dental practice staffs are encouraged to call Attorney Brian Hatch with their questions on how the COVID-19 affects your practice and your employees. Call 508-222-6400 or e-mail brianhatch@hatchlawoffices.com.***

***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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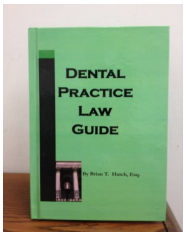


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