

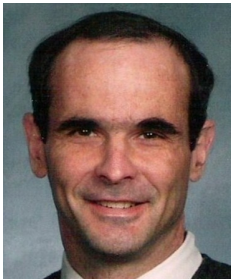
Dental Practice Legal Update

October, 2019

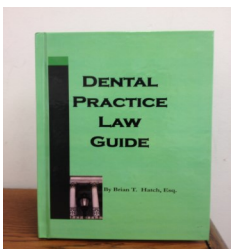
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Hatch Legal Group
8 North Main Street
Attleboro, MA 02703
Phone: (508)222-6400
hatchlegalgroup.com
brianhatch
@hatchlawoffices.com



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



Lawsuits with SmileDirectClub

Now Involve FTC, DOJ, an IPO, Consumers, and Dental Boards

The lawsuits involving the remote orthodontics treatment company SmileDirectClub are almost more numerous than can be kept track of, and the company seems to be relishing in its role in litigating the issue of remote orthodontic treatment nationwide. The business model of the company is to provide the possibility of consumers creating their own models of their mouth for potential orthodonture, mailing or e-mailing them in, and not being treated by an orthodontist in person for any part of the process of completing their orthodontic treatment. Orthodontists and dental boards are, needless to say, not pleased with the enormous growth of the company and its impact on their profession and quality treatment. The company is growing so fast that it even went public perhaps prematurely and saw its stock drop 28% the day it was introduced as a public stock IPO offering. But that hasn't stopped owners Jordan Katzman and Alex Fenkell, who at 30 years old have become two of the youngest billionaires in the United States. In the process of their rapid climb, they have leaped over numerous litigation hurdles and bulldozed over multiple players in the dental industry, including the maker of Invisalign, Align Technologies, numerous dental boards, orthodontists, and state entities. In its federal

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The Devil is in The Details of DSO Agreements

The growth of Dental Service Organizations (DSOs) within the dental industry and their control over individual dentist owned practices has been exponential in the past few years. DSOs are attractive to dentists who do not desire to be burdened with the administrative costs or managerial duties of running a dental practice. Consumers seem to flock to the discount dental services provided by DSOs that can afford to lower prices because of economies of scale and other factors. So how does an individual dentist protect themselves when a DSO makes an attractive proposal to manage their practice?

There are a variety of state dental regulations restricting ownership of dental practices to licensed dentists. Massachusetts is still among the states which have explicit regulations preventing dental practices from being owned totally or in part by non-dentists. Enter the DSO model which places legal ownership of the practice in the hands of a licensed dentist, with the DSO managing the practice and taking revenue from it through a separate contract with the dentist. The abuse of this model has been challenged by regulatory bodies in states like New York, where "sham" dental practice owners of chains like Aspen Dental were exposed to the extent that they were creating non-dentist control over treatment. The harm to patients resulting from this absence of control by dentists over their treatment was an important factor in these decisions.

But the model of DSOs managing the practice for a dentist while he or she focuses on treatment is still beneficial, as long as practice management agreements between dentists

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The Devil is in the Details of DSO Agreements (from p. 1)

and the DSO are constructed to preserve dentists' control over clinical aspects of the practice. Almost every part of the practice management agreement must emphasize that a licensed dentist controls clinical decisions. References to dentists' control over patient evaluation, diagnosis and treatment, treatment records, protocols and quality assurance, and hiring and supervision of dental professionals must be included. Decisions like referrals out to specialty practices of more complex treatments, even if they are more profitable for the practice if done in-house, must be made by the dentist and not the non-dentist looking at the economic bottom line instead of the welfare of the patient.

Dentists must realize that, as owners, they should have some

Multifaceted Litigation Involving SmileDirectClub (continued from p. 1)

antitrust lawsuit in the Eleventh Circuit against the Georgia Dental Board, the Federal Trade Commission and the Department of Justice weighed in with briefs stating that the Alabama Dental Board was not protected by the "state action" doctrine against anti-trust actions. In a lawsuit in the Middle Tennessee U.S. District Court, close to its Nashville, Tennessee home, SmileDirectClub faces off against a group representing consumers and orthodontists who say that the company has damaged the orthodontists' businesses by illegally practicing dentistry. The Plaintiffs say it misled consumers about its product's effectiveness and level of consumer satisfaction to amount to "fraudulent and deceptive practices."

SmileDirectClub's litigation extends to the journalism field too, having started a lawsuit in 2017 against the Michigan Dental Association for false light and trade libel published in its trade journal, and a 2018 action against a reporter for a provocatively headlined article. In

say in the exit portions of the agreements, including sale of the practice. After all, the dentist owner technically and practically still owns the patient goodwill of the practice, since the patient base most likely associates the dentist more closely with their treatment than the DSO. Goodwill is nearly 80% of the value of most practices, and the dentist should reap financial rewards for building up that value. In addition to good salary or collections percentages while still employed at the practice there should be financial incentives for the dentist available in exit or sale provisions.

Dentists should watch for abilities retained by DSOs to establish things like quotas or the types of treatment which management can decide to concentrate on. Dentistry is not an assembly line concentrating on profitability of what kind of treatments are provided and

February of this year, the company settled a lawsuit against New York and New Jersey dentists who made a YouTube video critical of its product.

A former attorney general in Louisiana, Charles C. Foti, Jr. Esq. is spearheading an investigation into violations of federal securities laws which may have occurred because of covering up negative information while in the process of going through the public stock offering and fund raising actions. Among other players in the litigation whirlwind SmileDirectClub is whipping up is the American Dental Association, which was denied an injunction against the company earlier this year by the FDA. The Alabama Dental Board and other state regulatory boards have been involved in lawsuits with the company. So it appears that some of the billions of dollars the company, which was founded in 2014, is making is enriching not only the owners but an army of lawyers prosecuting and defending its multiple court actions.

Dental Assistant Charged with Selling Fake Braces and Retainers

A former Thai dental assistant is now facing charges of practicing dentistry without a license, opening a medical business without permission and distribution of unregistered orthodontic appliances after

and how fast they can be produced.

While DSO management can make sure the practice conforms to dental regulations in compliance areas like infection control, the Board of Registration in Dentistry has control over the disciplinary process for dentists who are associated with violations in these areas. A dentist cannot get caught up in violations existing because of non-dentist negligence, since their license is on the line. Often a position such as a dental director allows the official designation of a licensed dentist with supervisory authority over these subjects.

With DSOs, the intricacies of the contractual relationship set up by the DSO in language they provide must be reviewed carefully by an attorney dealing specifically with the dental industry. Otherwise, the beneficial parts of the relationship can be negated if the "devil is in the details."

the discovery of her business selling fake braces and fake retainers appeared on a Facebook page. The business, was advertised as "Retainer Chiang Mai Braces BM" and took advantage of the popularity of braces and retainers among young people as a sign of wealth and the fact that to them they look "cute." The fake appliances are often of such low quality that they are made of heavy metals, including wires from coat hangers, are dangerous to health, particular when supplied by a non-licensed individual. A significant number of cases of bad teeth among youth in Thailand has been attributed to the practice, and the charged woman had been selling the appliances for discount rates. She had accumulated over 10,000 followers on her Facebook page before being arrested.

**Employment Manuals,
customized for the dental
industry and your office, are
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hatchlawoffices.com](mailto:brianhatch@hatchlawoffices.com)
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508-222-6400

Free Dental Care for \$70K or Less Income Earners to be an Issue in Canadian Election

Canadian New Democratic Party (NDP) Leader Jagmeet Singh announced that part of his party's platform in the upcoming elections would be to provide free universal dental coverage for uninsured Canadians with a household income under \$70,000 a year. Costs for dental care would be partially covered on a sliding scale for households with \$70,000 to \$90,000 income annually. The NDP is in third place among the leading political parties in polls leading up to the upcoming parliamentary elections, behind the Liberal Party of Prime Minister Justin Trudeau and the Conservative Party. The program, called Denticare, will cover examinations, cleanings and fluoride treatments, teeth fillings, crowns, root canals, treatments for gum disease, and braces for non-cosmetic purposes. The Canadian Dental Association stated, through its director for public affairs that it is for including the proposal in discussions about ensuring increased access to oral health care for all

Canadians, but that the "devil is in the details." At this time 55% of private dental care expenditures come from private insurance and 45% are paid for out of pocket. A fourth party, the Green Party has proposed that all dental care should be paid for under a single payer health care system.

Denturists Say Dentists Need Not Be Present

Denturists are a specialty dental care provider who exclusively treat patients for placement and maintenance of dentures, and are certified separately from dentists in seven states, Montana, Arizona, Colorado, Idaho, Maine, Oregon, and Washington. In Montana, the 1985 voter passed Freedom of Choice in Denture Services Act allowed denturists to set out a specialty of making and maintaining dentures without a licensed dentist present. Since that time, the rule has been restricted slowly, and recently mandatory on location supervision of licensed dentist requirements were announced by the Montana Board of Dentistry. The main issue was placement of dentures over implants and

and the rod stabilizing the implants. Denturists objected that their experience was narrow and specialized enough so that they actually had more expertise in this type of procedure than most younger dentists. They say that for patients to have to travel several hundred miles in a state where there are great distances between any towns with populations large enough to support a dentist prevents them from having adequate care at a reasonable cost. The older denturists, some of whom have practiced since 1985, resent the requirement that dentists just out of dental school would be looking over their shoulder while they were performing work they had done for years. The Dental Board rejected a denturist suggested "referral rule" which would allow dentists to make a referral to denturists, where a patient would go for treatment, and then a follow up could be scheduled with the dentist.

Attorney Brian T. Hatch has practiced law in Massachusetts since 1985 and has concentrated on the dental industry for 24 years.

Hygienist's License Revoked for "Sexual Abuse" After Treating Wife

An Ontario dental hygienist performed dental treatment for his wife, after which she was determined to be his "patient," thus prompting the discipline committee of the College of Dental Hygienists (CDHO) to revoke his license for having "sexually abused a patient" under the Ontario Regulated Health Professions Act. Alexandru Tanase said that his wife had a fear of dental treatment and fully consented to the care. In September the Ontario Divisional Court upheld the discipline committee's decision. In Ontario it is considered sexual abuse of patient, which includes spouses, if the provider has any sexual intercourse or any other sexual relations with that patient. There is an exemption to that restriction if the provider is a dentist, but not for hygienists. The CDHO council approved such an exemption, but the

legislature in Ontario hasn't passed it into law. After Tanase's wife posted her gratitude for her husband's treatment of her on Facebook a complaint was issued against him, which the discipline committee was required to investigate. A supposedly mandatory revocation rule required the CDHO to revoke Tanase's license for 5 years, after which time he can reapply to get his license back. The Divisional Court said its hands were tied by prior precedent. His appeal fees to the next level of a court ruling are expected to be \$35,000, and Tanase started a GoFundMe page to help with those expenses. The Canadian Dental Hygienists Association is supporting Tanase's case. The parties are now waiting to see if the Ontario government will approve the exemption, and if it will be applied retroactively to assist Tanase.

Vaping Bans Coincide with Dental Association Concerns

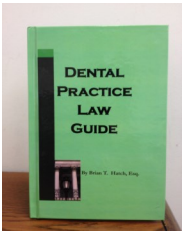
Vaping products, sometimes known as e-cigarettes, which deliver

nicotine or other substances through a liquid heated to a vapor which is inhaled, are not banned from sale in a number of states at least temporarily or partially. What about effects on teeth and gums? In India, where the government has now banned the sale of e-cigarettes, the Secretary of the Indian Dental Association stated the potential harms of the products to oral health. He said that continuous inhalation and exhalation of nicotine in vapor form leads to dryness of mouth, and germs in the mouth have more effect, leading to faster caries development. As these products are examined the dental community in the U.S. may weigh in also.

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.

Hatch Legal Group
8 North Main Street
Suite 403
Attleboro, MA 02703

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