

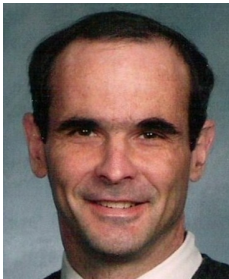
# Dental Practice Legal Update

September, 2019

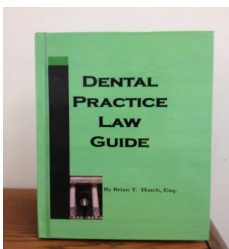
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## **VP Creating Reimbursement Reductions Leaves Delta**

The Vice President of Network Development for Delta Dental of Massachusetts, Erick Paul, who created the methodology that led to 10% fee reimbursement reductions for Massachusetts, has left the position. From the start of his work at Delta Dental Massachusetts, Paul led the effort to negotiate the new fee structure at Delta which was approved by the Massachusetts Division of Insurance during its transition process away from non-profit status in Massachusetts. The 10% reduction in reimbursements to dentists from the Premier Dental Insurance was opposed by many dentists in Massachusetts who appeared at the hearings at the Division of Insurance. They spoke about negative effects on revenue to dental offices from the biggest private dental insurance plan in the state. Paul's involvement with Delta of Massachusetts came at the same time as other aspects of Delta's relations with its dental provider members, including its increased auditing of dental claims resulting in demands to retroactive recoupment of reimbursements already paid out to dentists. Dental practices have questioned whether the increased auditing enforcement at the same time as Delta of Massachusetts was transitioned to a profit making company was harming not only dentists but also the quality of care of patients that may result from Delta's demands for changes in treatment methods. Quality of care issues involving non-dentists are often key points in any legal disputes with insurers.

## **Retirement Using a Practice Transition Process, Legally Speaking**

You've decided you want to retire in five to ten years and start enjoying the life after dentistry that you've worked long and hard for. What are the legal issues you should consider during the five to ten years before retirement when you either transfer the practice over to another dentist or close out the practice?

Perhaps the most important decision to be made is whether or not to hire an associate to continue the practice or sell the practice. Hiring an associate with a good associate's agreement can allow the practice to continue, set aside some income flow for partial ownership during retirement, and give an associate an opportunity to gain experience and develop his or her own patient base. When looking for an associate you can work with to transition to retirement, it is good to put enticing options to buy into the practice into associate agreements with younger dentists you like. Even if it is entirely voluntary language on the part of both parties (like language stating the future goals of the owner and associate to have discussions about buying in to the practice), it creates future possibilities for ownership that are attractive for any associate looking at their long term career goals.

When the owner and associate become more certain that the associate is a good fit to eventually buy out the owner, there are a variety of ways the two parties can set up that framework. If an associate is not willing or cannot finance an entire purchase sale at the

(continued on page 2)

## Retirement Using a Practice Transition Process, Legally Speaking (cont. from p. 1)

outset he or she can put some money aside from present earnings into an escrow account to pay for a deposit for eventual purchase. The terms should allow for the return of those monies should the deal never be consummated. There are numerous other ways to structure long term buyouts as well.

Marketing the practice during this period is important to continue to make the practice more valuable to a new owner or to helping build a new associate's patient base. Continuing to market the practice with modern methods (using social media for example), increases the value of the practice both in the short and long term. Growing the practice and increasing the patient

base also makes it easier to afford the newer associate as well without easing into retirement mode if the owner still wants to remain involved on a full-time basis. If the practice is known to the public only under the owner's name, it may be useful to reserve a more generic name at some point, even if it is not used to a great extent immediately, to make a transition to a new owner easier.

Getting a good valuation done at some point is important to allow both prospective owners to judge both the present value of the practice, the growth of the practice in the last three years or so, and the potential for future growth. Too many dentists fail to realize that a downward trend in income towards the end of a career may jeopardize the value of the practice good will, the most important part of practice worth.

The time frame of the transition

period and hours to be worked by the owner during that period must be worked out. The personal budget of the dentist wanting to transfer the practice affects these decisions, as well as the hours a dentist and associate want to work during the transition.

Estate planning enters into the transitioning period plan in various ways. You can protect assets from creditors and often gain tax benefits by transferring the ownership of stock in a P.C. to a trust. There are a variety of methods of setting up a proper retirement plan and save on taxes at the same time. Setting up ownership with a limited liability company can protect the owner from malpractice of other dentists as well create capital accounts which can change according to the share of ownership.

Retiring through transitioning requires planning, and with advice from professionals a dentist can reap the benefits of a long career of practicing dentistry.

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## Smile Direct Opposes Dentists in More Legal Actions

Smile Direct Club, the provider of remote orthodontic services which has fought to increase its market share in opposition to licensed on-site orthodontists has expanded its legal fights to Canada as it is now pursuing a lawsuit against Canadian dentists. Smile Direct has accused the Manitoba Dental Association of making false and misleading statements about the company and misleading and intimidating dentists into not doing business with SmileDirect Club. The complaint states that two e-mail alerts to association members warned dentists that in light of the popularity of direct services now provided by companies which do not involve on-site visits they must provide in-person exams to patients and that taking impressions of teeth for aligners is covered by dental regulations that requires on site licensed dentists. Smile Direct claims that these activities prior to treatment are not covered by dental regulations and that the dental board has no regulatory authority over them.

Dental Association denied wrongdoing and said it will provide an aggressive defense against the claim.

Smile Direct Club has ongoing disputes in the United States as well with dental associations, dental boards, and the orthodontists they represent. In Georgia, there is a federal lawsuit by the company against the Georgia Board of Dentistry, backed by the Georgia Dental Association, for "conspiracy in restraint of trade." The Georgia Board has insisted that it is acting in the interest of the public's health and welfare. One direct issue is the Board ruling that 3-D scans before treatment can only be done by licensed dental assistants under the supervision of an on-site licensed dentist or orthodontist. Smile Direct allows the scans to be done by non-dentists and forwarded remotely to its offices, where it employs dentists to review them without seeing the patient. Other suits involving Smile Direct Club are ongoing in other states, including dentists and orthodontists attempting to appeal a case with Smile Direct Club to the 11th Circuit Court of Appeals, one step above the Federal District Court.

## American Bar Association Supports Dental Benefits in Medicare

The American Bar Association

House of Delegates has approved two resolutions supporting the repeal of the statutory exclusion of dental care and dentures from Medicare benefits, and supporting the inclusion of dental and oral health services in those benefits. The Social Security Act currently does not allow those benefits, but the Medicare Dental Benefit Act of 2019, introduced in the U.S. Senate, repeals that exclusion and would allow dental and oral benefit. The ABA also supports the Dental, Vision and Hearing Benefit Act of 2019 that was introduced in the U.S. House of Representatives and would increase Medicare dental benefits. The ABA chairman of the Commission on Law and Aging, Louraine Arkfeld, spoke out in favor of the resolutions, questioning why 70% of seniors have no dental coverage. She said that most seniors cannot afford the extra burden of private dental insurance.

## 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,

## **Ransomware Attack on IT Company Impacts Dental Offices Nationwide**

On August 26, 2019 it was reported that a ransomware attack on an IT company operating out of West Allis, Wisconsin, PerCSoft, had occurred which affected 400 dental practice customers in Wisconsin and nationwide. The remote management software DDS was the target of the ransomware attack, and the Wisconsin Dental Association (WDA) took action to assure dental practices that recovery efforts were being pursued. Dentists were notified so that they could be proactive about the situation, although it could not assure that either patients' confidential information had been compromised or that that it was entirely safe and that there was no further threat. Normally, in ransomware attacks, data is encrypted and locked, but not necessarily taken. Access to electronic records was interrupted after the situation became known. There hadn't been any ransom paid as of the date of the communication of August 30, 2019 of the WDA to its members, and it said

that PerCSoft was working with the FBI Cyber Crimes Task Force to help resolve the situation. The WDA said that the recovery process was complicated enough to take time to be complete, but was ongoing as quickly as possible.

## **Dispute Over Yelp Reviews Results in Dentist Revealing Patient Info on Social Media**

A patient in Dr. Gus Khalifa's office posted some particularly negative reviews about the practice on Yelp, including that "I'm in pain all the time after the root canal" and "(the procedure) just makes \$\$\$ for him." The reviewer told others to "STAY AWAY" from the office, Canyon Ridge Endodontics. Khalifa objected strenuously to the negative impact the posts had on his reputation and responded that "I attempted multiple times to contact you so we could handle our concerns in private. You chose to air your grievances on an open forum which means now by law you have forfeited your right to doctor/patient confidentiality act. I regret that I must proceed with this openly."

Khalifa then detailed the patient's dental history and why he was not at fault in the situation. A complaint was filed against Khalifa with the Arizona Board of Dental Examiners. The Executive Director of that Board, Dr. Ryan Edmonson said that he couldn't comment on the case specifically, but that the comments were probably a violation of professional standards. He called it a "knee-jerk" reaction which may have resulted from what Khalifa thought was an attack on his character. Khalifa posted that he thought the posts were slanderous and provided false claims to the public. The Board's investigation of the complaint may result in probation, suspension or even license revocation. The doctor/patient confidentiality privilege is not forfeited by public criticism of a dentist, and details of treatment cannot be revealed under HIPAA federal confidentiality regulations. Khalifa may still file suit on his slander claims, but the HIPAA violations will not help his case.

***Attorney Brian T. Hatch has concentrated on the dental industry for 24 years.***

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## **Woman Sues Dental Office After Being Escorted Out for Breast Feeding**

Kalee Kellough, a 31 year old mother from La Pine, Oregon, is suing the dental office in Bend, Oregon because she was escorted out of the office by an office manager who told her she could not breast feed her sixteen month old son while watching her daughter receiving a tooth extraction. Kellough said that she was told by a female office manager that the male dentist who was treating her daughter, Dr. Matthew Haelen, was not comfortable treating her daughter while Kellough breast fed her son Bryce. When she was told she could continue breast feeding in the waiting room, she said that was not an alternative since her 5 year old daughter wanted her in the room. Williamette Dental Group, the practice providing the treatment, offered to schedule her at another dental office. Kellough had

breast fed her son at the same office earlier this year without objection. The lawsuit states that the practice's actions amounted to sex discrimination and is suing under an anti discrimination statute in Oregon. The lawsuit does not ask for damages, but Kellough's lawyer may ask to amend the lawsuit to add a specified sum. Matthew Haelen, the male dentist involved, was not named in the suit.

## **Man Arrested Who Twice Pointed Gun, Made Threats at Dental Offices**

A man who had been arrested two years ago for threatening another man with a rifle was arrested for threatening dental office employees on two separate occasions with a gun. Christopher King, 28, of Estero, Florida, was arrested in July for threatening and pointing a pellet gun at dental office employees. While he was on pre-trial release after posting \$100,000 bond he went to another dental office and deman-

ded that they fix a temporary crown that had come loose after a procedure earlier in the day. He told them if they refused he would do the same thing that happened at the last dental office. An employee knew that he was referring to going to get a gun and called police. King was arrested after employees said they thought he had pointed a gun at them from his car. Though the object turned to be a black flashlight, it was determined he had violated a no-contact order from his previous arrest, and was taken into custody again.

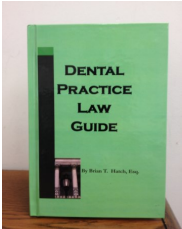
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