

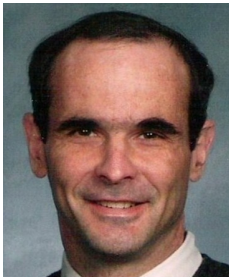
Dental Practice Legal Update

September, 2020

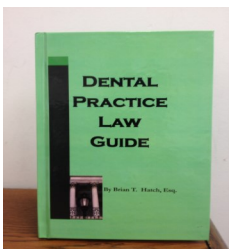
Volume 17 Issue 9

Dental Practice Legal Update is published as a courtesy to the dental practices industry by:

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MA Dentist Files Class Action Suits Against Business Interruption Insurers

A Hyannis dentist has filed a federal class action lawsuit against Safety Insurance because it will not cover losses his practice suffered as a result of Governor Charlie Baker's closure of dental practices from March 13, 2020 to June 8, 2020 due to the COVID-19 pandemic crisis. Paul Marshall, DMD filed the suit on August 17th, claiming that his "all risk policy," which covered all risks unless specifically excluded should have paid for loss of income suffered because the mandated closure prevented him from having income from procedures, except for emergency treatment, during the period his practice was not treating patients for elective procedures. Marshall's complaint accuses Safety Insurance of breach of contract. The policy provided for any "extra expense" required, which he says should cover the extra safety equipment he had to purchase to keep his practice closing. The Safety policy also had "civil authority" coverage, which was supposed to pay for business losses as a result of a civil authority like the governor requiring business closure. Marshall's attorney, Patrick Sheehan said he was seeing similar suits started across the country against other insurers, and that his class action allows for other dentists similarly situated to join Marshall's action against Safety. In another case in Florida, a dentist's suit was dismissed in federal court because the judge said that the coverage because the policy included just "direct physical loss or damage to covered property." Other suits are continuing in other situations in a number states.

Effective Lease Negotiation Strategies

Negotiating good lease language is one of the most important parts of buying a practice and negotiating new terms at the end of a term when options to extend can give a lessee leverage to change the details of the lease. After all, the expense of rent can easily be 5-10% of the overall budget of a practice. Dental practices have specific needs when looking at lease terms so be aware of them when discussing this aspect of a purchase or reviewing the current lease to exercise an option.

Rental rates vary widely according to the location, so it is good to get an estimate from a realtor or look at commercial rents paid for professional office spaces in other parts of the community of the practice site. Annual rent increase rates based on inflation are often written into the lease, and often the rates can be 3%, so it is good to get a reasonable fixed rate, and not accept language allowing a fixed rate or the market rate, depending on which is greater.

Dental practices are normally good tenants, since practices don't go out of business as often as other commercial tenants, and once the space is built out as a dental practice, practices are usually sold and a new tenant occupies the space without interruption in rental payments. Therefore, use this as leverage in convincing the landlord that the value of a good tenant is worth giving the lessee good terms.

Is there room to expand the practice outside of the existing space? And is that possibility considered in the lease? This is valuable to a prospective buyer who is looking at long-term growth of the

(continued on page 2)

Effective Lease Negotiation Strategies (cont. from p.1)

practice. And if there are other professional spaces available in the building, try have an exclusivity clause included so another competitive dental practice can't locate in the same building.

There may be a personal guaranty required of the lessee, particularly if there is a new practice or a practice corporation which hasn't been in existence for long. Try to either not have a personal guarantee, or have it limited to the first few years of the lease while the practice is building up a stable patient base.

The provision on assignment and subletting is crucial to prospective selling of the practice, since if there isn't clause requiring at most a landlord consent "not to be unreasonably withheld" it may hold up a sale. A clause allowing more tenant freedom to assign the lease if it is to another dental practice can add value to the lease and also be agreeable to a landlord looking to continue to have solid continuation of tenants when the time comes for

a practice to be sold. Sometimes an unreasonable landlord may demand an exit payment to obtain consent for an assignment.

Lease extension options are important, and for long periods into the future, such as a number of five year options, with the opportunity to renegotiate some of the terms at the end of each option period. Banks often require these kinds of lease extensions before financing long-term loans for practice purchases.

The triple net lease, or tenant payment of a share of taxes, insurance and maintenance is often offered, instead of a gross lease, in which the landlord pays these expenses, so it is important to require information on what the average increases in these figures have been, and may be in the future. A good term is to require that major or exterior maintenance be taken care of by the landlord, except for perhaps the cost of snow plowing or regular landscaping. Avoid language which may allow for costs which should be borne by other tenants to be included in the maintenance expenses. There should be language regarding the allocation of the potential

future costs such as repair or replacement of the HVAC system. It must be laid out what is considered a repair to the structure of the building, which generally should be covered by the landlord, what is the tenant's responsibility, particularly if it affects the interior premises and functioning of the practice, such as the provision of utilities. The owner of the premises should be required to have a general liability insurance policy, with the tenant required to have personal property insurance to cover individual items such as dental equipment.

For dental practices the provisions on allotted parking spaces and signage are important to insert to ensure that enough convenient parking is available for patients, and that marketing the practice through good signage is allowed by the landlord up to the extent of local ordinances.

A good lease is of value to a practice seeking to develop a long-term transition plan, since it is one of the factors prospective buyers look at first when weighing where to locate. So don't accept blindly what the landlord is offering before negotiating something better!

CT Hygienists Sue After Release Regarding CDC Guideline Dispute

A group of Connecticut dental hygienists is suing their employer after they complained about the owner not following CDC and Governor Ned Lamont's safety guidelines for dental practice openings, and then were released. The periodontist practice they worked in, which has offices in New Britain and Middletown, Connecticut, stopped providing dental hygiene services after their complaints that the office as not following safety guidelines for dental offices issued by the CDC and the state. Katarzyna Rolinski and Izbela Cwalina had worked at the practice for 15 years before being furloughed from the practice during business closures mandated by executive order. They complained about the practice not following the guidelines issued for reopening, and after the practice resume teeth cleanings, new hygienists were hired to replace them. Their attorney, Matthew Paradisi, said that "Instead of following the governor's and the CDC guidelines, he preferred

to get rid of the squeaky wheels."

The Issue of Dental Practices as Health Care Providers Under the FFCRA

One of the two exemptions under the Emergency Paid Sick Leave Act and Family and Medical Leave Expansion Act (under the Families First Coronavirus Relief Act (FFCRA)) is for "health care providers" and their employees. Although the other exemption for practices with under 50 employees, the "health care provider" exemption was recently designated as not applicable to dentists and their employees by the Department of Labor, since they most likely were not directly treating COVID-19 patients. The FFCRA, which provides credits to employers who are required to give paid leave to employees who cannot work because of a COVID-19 related reason, has an exemption for health care providers. A federal Court in New York has added to the confusion by stating that

the exemption was too broad and may not cover employees that don't actually treat COVID-19 patients such as support staff. Even within the DOL inconsistent interpretations have been given verbally that makes dental practices leery about applying for the exemption. The federal court's decision may only apply to workers in the state of New York. Regardless of when and how the actual clarification is made, this issue is becoming a subject that dentists need to be aware of updates on as funds are applied for.

Policies and Procedures Manuals, customized for the dental industry and your office, are available from Hatch Legal Group. New COVID-19 Supplements are available to ensure practice protocols for meeting the pandemic are acknowledged by all employees. brianhatch@hatchlawoffices.com

ADA Supports Bill to Assist Workforce Shortages and Address Student Loan Debt

The American Dental Association has formally endorsed a bipartisan bill introduced in the United States Senate which would address workforce shortages, health disparities and student loan debt, all of which were adversely affected by the COVID-19 pandemic. S. 4055, introduced by Sens. Dick Durbin (D-IL) and Marco Rubio (R-FL) would invest in the U.S. National Health Service Corps (NHSC) and the National Disaster Medical System. ADA President Chad Cehani, DDS and Executive Director Kathleen O'Loughlin, DMD said that the "Expansion of the NHSC programs would not only address existing health workforce shortages through the country, but would also tackle the issue of student loan indebtedness...associated with graduate dental education..." The loan indebtedness could be repaid through exchanges for service in underserved urban and rural communities. Students from low-income urban and rural areas would benefit from funds to reduce inequalities and barriers to entry in the dental profession, according to the ADA. Graduate school education debt remains a significant part of difficulties in addressing the nation's oral health workforce needs, Gehani and O'Loughlin have concluded. They endorsed the legislation, called the Strengthening America's Health Care Readiness Act, with a letter on August 28, 2020 and said it would "restore the pipeline of dentists."

Dental Board Sues FTC Over Anti-Trust Investigation Into Dental Boards and Smile Direct Club

The numerous legal actions involving state dental boards and the business model of direct to consumer orthodontic services of SmileDirect Club is now reaching the point that the Federal Trade Commission (FTC) is now being sued for its investigation of anti-trust allegations by SmileDirect Club. The Alabama Dental Board started a lawsuit against the FTC over its investigation into SmileDirect's contention that teledentistry restrictions violate anti-trust laws. The Board states in its complaint that "Alabama is free to regulate the health, safety and welfare of its citizens, including by unlawful interference from the federal government or its regulatory agencies." It claims that the FTC is using the Sherman Anti-trust Act in a manner that is overbroad because of its intrusion into health and safety concerns in the dentistry field and how it is impacted by teledentistry and its focus on off-site dentistry without ongoing supervision of licensed orthodontists. The suit follows a surge of suits involving SmileDirect Club which now involves a number of states, including an anti-trust action in Georgia which has resulted in one federal court decision. The U.S. Court of Appeals for the 11th Circuit denied the Georgia Dental Board's appeal of SmileDirect Club's ability to go forward with an anti-trust suit in Georgia.

In that suit, the Georgia Board's argument that its role as a state regulator shielded it from anti-trust liability. "The board members' argument is ultimately without merit," Judge R. Lanier Anderson III wrote, and he stated that the board "established no more than the mere potential for active supervision on the part of the Governor." It appears as though these kinds of issues, which are just of few of the lawsuits begun by states over SmileDirect's failure to include on-site orthodontists to provide treatment that may result in complications may ultimately be headed for the U.S. Supreme Court if a number of differing opinions are handed down by U.S. Appellate Courts.

Florida Judge Approves \$1.3M Settlement with Dental Office Managers Over Overtime

A lawsuit brought by over 100 dental office managers against Dental Services Organizations Intelident Solutions, LLC and Coast Dental Services, LLC regarding an overtime dispute has been settled for \$1.3 million and approved by a Florida Magistrate Judge. The dental managers sought protection under labor laws to claim that they were denied overtime as required for all employees who work more than forty hours a week. The managers claimed they were misclassified as exempt employees. Each of the managers were awarded approximately \$11,193.55 as a result of the settlement. Labor laws allow for administrative exemptions for some managerial employees who are paid on a salaried basis, but the managers said that they did not meet the exemption requirements.

Patient Stalker Arrested with Homicide Equipment

A patient in Wales who was disgruntled with the way his gum treatment had been handled by his dentist was arrested recently with "homicide equipment," including a crossbow, which he possessed waiting for "the occasion." Police said that Thomas Baddeley, 42, of Gwent, Wales, had been stalking his orthodontist, Dr. Ian Hutchinson, for several years as he tried to remain undetected with the use of numerous different vehicles and disguises while he conducted surveillance of Hutchinson. A neighbor alerted police, who found items such as the crossbow, a large kitchen knife, black ski

masks, torch, gloves, lighters, hammer, mud sheets, bleach and wipes in his automobile. Baddeley had taken extensive notes about TV cameras, how not to leave fingerprints and what to tell police if he was caught. He was sentenced to 16 months in prison.

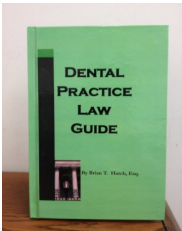
Attorney Brian Hatch Assists Clients in the Dental Practice Purchase and Sale Process from Valuations to Letters of Intent to Drafting and Review of Documents Necessary to Complete the Sale.

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

HIPAA and OSHA Infection Control Training by Zoom is now available through Hatch Legal Group in conjunction with Dental Compliance of New England.

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