Dental Practice Pitfalls

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Whether you are a dental student on the threshold of a bright dental career (but laboring under a mountain of student debt), an orthodontist with a successful practice looking to expand, a senior practitioner pondering a deal with a dental service organization (“DSO”), or a dentist entangled in the web of corporate dentistry (and looking for a way out), there are a multitude of legal rules that must be observed. These rules likely are not emphasized in dental school, and are often beyond the experience of lawyers who do not practice in this highly regulated arena. These rules, depending on your perspective, may be thought of metaphorically as keys—either opening doors of opportunity or confining you within a dangerous long-term relationship.

We will discuss below some significant dental practice pitfalls (this is not exhaustive), but first would emphasize what lawmakers were trying to do in crafting laws regulating the dental profession. The rules are not, as some would contend, only quaint and irrelevant relics of an antiquated practice model from the past. Rather, their purpose generally is to ensure that the judgment and duties of the dentist are focused on quality patient care and not torn between quality patient care and revenue-maximizing demands from persons or entities outside the profession. In other words, dental practice regulations continue to be relevant and continue to be vigorously enforced in most parts of the country.

Most states have statutes making it unlawful for a dentist to become a party to an arrangement that affects or interferes with his/her independent professional judgment. Doing so jeopardizes the licensure of the dentists and also may subject the counterparty to sanctions for the unlicensed practice of dentistry. Moreover, these unlicensed practice of dentistry restrictions are not limited to the diagnosis and treatment of dental-related maladies, as one large dental franchisor recently learned from the Washington Department of Health, Case No. M2016-153 In the Matter of Comfort Dental Group, Inc., et al (the “Washington Order”). In an “Agreed Order To Cease And Desist,” contract restrictions on “which vendors can be used for clinical supplies, lab work (dentures, bridges), janitorial, and office supplies” were found to constitute the “unlicensed practice of dentistry in violation of RCW 18.32.091 and RCW 18.32.020.” Likewise, in OrthAlliance, Inc. v. McConnell, No. CIV. A. 8:08-2591-RBH 2010 WL 1344988, at *5 (D.S.C. Mar. 30, 2010), the court invalidated an agreement making a corporation responsible for “employing and training office staff, providing and
maintaining office space, marketing and advertising, and handling payroll” for an orthodontic office. In Packard v. O.C.A., Inc., No. 4:05 CV273 2009 WL 334645, at *6 (E.D. Tex. Feb. 5, 2009), another federal court held that an agreement for a corporation to provide “office space and equipment, and provide marketing and advertising services” was illegal and void. As these cases illustrate, professional judgment has been found to implicate far more than just diagnosis and treatment, extending to numerous aspects of a dentist’s practice.

Washington has long been in the forefront in enforcing dental practice laws, having long ago enforced the prohibition against the unlawful corporate practice of dentistry by declaring in 1950 that the practice of dentistry “is not a commercial transaction. It is a profession.” State v. Boren, 219 P.2d 566, 572 (Wash. 1950). Washington courts have continuously affirmed that non-dentists may violate the prohibition by excessive entanglement in the operation of the practice, even if these entanglements have no direct connection to the actual provision of dental services to patients:

- In Fallahzadeh v. Ghobarian, 82 P.3d 684 (Wash. Ct. App. 2004), the Washington Court of Appeals held that an agreement in which a non-dentist purchased and leased a building to a dentist in exchange for above-market rent payments of 50% of the practice’s net profits, the non-dentist’s office management, and a drawn salary went beyond the normal landlord-tenant relationship and constituted an illegal practice of dentistry. Id. at 685.

- In Engst v. Orth.Alliance, Inc., No. C01-1469C, 2004 WL 709226, *1 (W.D. Wash. Mar. 1, 2004), the federal district court held that agreements with dentists for “practice management services, . . . ‘payroll support, business systems and forms, information systems and accounting, inventory control, acquiring legal services, marketing and financial services,’ as well as providing office facilities and equipment” were so interconnected to the actual practice of dentistry as to violate Washington law.

- In Nicholson v. Orthodontic Ctrs. of Washington, Inc., No. 59946-1-1, 2008 WL 2231783 (Wash. Ct. App. June 2, 2008), the Washington Court of Appeals reviewed a Business Services Agreement (“BSA”) between a dental management company and an individual dentist. Id. at *1. The BSA required the dentist to use the computer hardware, staff, and operating procedures as determined by the company, and further gave the company control over the dental practice’s bank accounts, a “Base Consulting Fee” and 50% of the practice’s net operating margin. Id. at *1-2. The Court held the agreement to be an illegal, unenforceable contract for the unlawful practice of dentistry. Id. at *2.

- In Choong H. Lee, DMD, PLLC v. Thaheld/Lee-01, LLC, No. 68417-5-I, 2014, 2013 WL 953761 (Wash. Ct. App. Mar. 10, 2014), the Court of Appeals reviewed a service agreement between a non-dental service company and a number of dentists. Id. at *4. The agreement gave the service company policy control, the right to execute contracts, and a substantial beneficial interest in the practices’ profits. Id. at *4-5. The Court held this arrangement amounted to “owning, operating, or maintaining” a dental practice in violation of Washington law. Id. at *6.¹

Many states also prohibit unlicensed persons from having any ownership interest in or operating any dental practice. “To operate” has been broadly construed to prohibit contracts that permit a non-licensed person “to control the functioning of; run” or “to conduct the affairs of; manage” a practice. *Penny v. Orthalliance, Inc.*, 255 F. Supp. 2d 579, 582. (N.D. Tex. 2003).

Certainly, efficiencies might be gained by aggregating multiple practices, especially in group buying, administrative services and marketing. All can benefit, including patients, by properly structuring the aggregation. Often, however, corporate dental practices emphasize efficiencies and revenue generation at the expense of patient care and independent professional judgment. Dentists need to be particularly wary of arrangements with others where there is a divergence of economic interests, e.g., the DSO or franchisor is remunerated based on gross revenue while the dentist is remunerated on the basis of profits or the DSO or franchisor is a vendor and the dentist is a customer. Compensation schemes based on percentage of fees are particularly suspect. Four federal courts in Colorado condemned these percentage-based arrangements as unlawful fee-splitting. *See, e.g., Mason v. Orthodontic Ctrs. of Colorado, Inc.*, 516 F. Supp. 2d 1205, 1216-17 (2007); *Weinbach v. Orthodontic Ctrs. of Colorado, Inc.*, No. 06-CV-00256 REB-MEH, 2007 WL 2786426 (D. Colo. Sep. 24, 2007); *Gentile v. Orthodontic Ctrs. of North Dakota*, No. CIV.A.05-CV-02062EW, 2007 WL 2890199 (D. Colo. Sep. 27, 2007); *Shaver v. Orthodontic Ctrs. of Colorado, Inc.*, No. CIV.A.06-CV-00151-W, 2007 WL 2870992 (D. Colo. Sep. 26, 2007). In the same Washington Order referenced above, the Washington State Department of Health found that use of “a monthly five percent ‘royalty’ fee based on gross Collections . . . .” amounted to “unlicensed practice of dentistry in violation of RCW 18.32.091 and RCW 18.32.020(3).”

Multiple practice marketing also presents challenges that must be navigated with care. To achieve economies of scale in marketing, there needs to be a common corporate identity, but professional services are inherently furnished by individual licensed professionals. Arrangements under which “licensed professionals, in effect, . . . subordinate their individual identities to the advertising image of a corporation are illegal because they lead the public to believe the franchises are controlled by the same entity and not by the individual professionals. *See California Ass’n. of Dispensing Opticians v. Pearle Vision Ctr., Inc.*, 191 Cal. Rptr. 762, 769 (Cal. Ct. App. 1983).

The New York Attorney General found that Aspen Dental Management, Inc. confused the public by downplaying the individual ownership of the dental practices and projecting the appearance that

Reportedly a compromise between the association of licensed dentists and the powerful DSO lobby,¹ the legislation appears to make certain previously illegal actions permissible (i.e., owning or leasing assets used by a dental practice; employing/contracting for services of personnel other than registered/licensed dental professionals; providing business support and management services to a dental practice; and receiving fees for the above services). It is unclear whether the legislature intended to legitimize payments based on a percentage of patient revenues, particularly where those percentages bear no relationship to the value of the services rendered. The statute clearly does not affect federal prohibitions on payments intended to induce referrals. *Id.* at 4. SB 5322 clarifies Washington’s prohibitions on other unlawful practices, including the following activities if undertaken by unlicensed persons: (i) limiting the time spent with a patient or in performing dental services; (ii) placing conditions on the number of patients treated or procedures completed; (iii) limiting or imposing requirements on: a dentist’s treatment decisions; the manner in which a dentist uses equipment or materials; the use of a laboratory or materials, supplies, instruments, or equipment necessary to provide diagnoses and treatment; the professional training necessary to serve patients; referrals to other practitioners; advertising, subject to certain conditions; or communications with patients; or (iv) interfering with access to patient records or a refund of payments.

¹ In 2016 Colorado modified its statute prohibiting fee-splitting, though the exemption from the prohibition (even under the modified statute) is inapplicable if the right to interfere with a dentist’s professional judgment continues.
Aspen itself was a provider of dental care. See In re Aspen Dental Management, Inc., Assurance No: 15-103 (June 18, 2015). The multiple experiences of Aspen Dental Management, Inc. (“ASDI”) also have demonstrated that state attorneys general will prosecute dental management companies that “manage” dental practices in a manner that interferes with dentists’ ability to provide dental services to patients:


In addition to issues arising under state laws, arrangements with DSOs may also raise issues under federal law, particularly the laws that apply to services reimbursed through a federal health care program (e.g., Medicare and Medicaid). Although coverage of dental items and services under some federal health care programs is limited, coverage under other programs can be more extensive (particularly, coverage under some state Medicaid programs can be relatively extensive). Accordingly, those providing services in the dental industry need to be aware of these laws. Two of these laws, the Ethics in Patient Self-Referral Act (commonly known as the Stark Law), and the Anti-Kickback Statute, are implicated in situations where a financial relationship exists between dentists or dental practices and a DSO. Potential penalties for violating these laws can range from civil monetary liability to criminal liability, as well as certain administrative or regulatory penalties (e.g., exclusion from being able to receive reimbursement from federal health care programs). Violations also could be used to challenge existing contractual arrangements between dentists or dental practices and the DSO.

Kutak Rock LLP has built a multi-disciplinary team of health care, litigation and transactional lawyers with a deep understanding of and extensive experience with dental practice laws, with expertise in helping dentists and dental groups in evaluating various practice structures and in taking action to address legal risks arising in this highly regulated arena. Kutak Rock’s 18 offices, including one in Spokane, Washington, have extensive experience in litigating dental practice disputes (including private disputes and government disputes) as well as in analyzing and in structuring multiple office practices in compliance with applicable regulations. Kutak Rock can assist, whether you are entangled in (and want out of) a multiple location practice with questionable contractual provisions and regulatory concerns, you are confronted with an opportunity to sign up with a DSO.
or join a multiple location practice, you are looking to expand your single location practice, or you are thinking of retirement and want to transition your practice.

Additional Information

For additional information, please contact any of our Government Disputes Group lawyers, or Corporate Health Care Group partners if you'd like to discuss any of these issues, or visit us at www.KutakRock.com.

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