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Corporate Ownership of Dental Practices, and Management Service Organization Issues: Part II

In the May 2010 *PDT* Litch's Law Log, we looked at some of the basic issues concerning how states regulate who can own and operate a dental practice, employ a dentist, and the level of control non-dentist owners and managers may exercise over a dental practice. The July 2009 issue of *AGD Transcript* indicated that:

“According to a survey conducted by the AGD, 37 percent of the state dental boards that responded said they have no provisions to allow for non-dental professionals to own dental practices. However, of the 63 percent who did allow non-dental professionals to own practices, most cited restrictions on such ownership, such as limiting ownership to public health clinics, or, in cases where the owner is deceased or incapacitated, allowing the dentist's spouse, child(ren), or legal representative to run the practice for a limited amount of time. Most of these states had a 12-month limit on how long a non-dentist may be in charge of the practice, although both Tennessee and Missouri allow up to two years for the practice to be sold or dissolved when a non-licensed dentist is in charge.

Only three states (Iowa, South Carolina and Utah) reported no restrictions concerning who could own a dental clinic, while in Virginia, the law only restricts ownership of professional corporations or limited liability companies. There are no provisions of law addressing ownership of an unincorporated practice.”

One recent case of interest in this area was summarized in *Northwest Dentistry* (Journal of the Minnesota Dental Associa-

tion).¹ The case, *Park Dental v. American Dental Partners*, involved a group of dentists who sued their management service organization (MSO). They alleged that the MSO, which was headquartered out-of-state, was practicing dentistry in Minnesota without a license. Under the agreement with the MSO, the MSO purchased the practice name, assumed all of the leases to the clinics, and employed the clinical and non-clinical staff (except for the dentists). The dentists created a professional corporation (PC) to provide direct patient care, hold contracts with third-party payers, and be the stewards of the patients' dental records.

For a while, the MSO and the dental PC had in effect a managing partner who was a licensed dentist and served as an officer with both organizations. Hence, no issue of unauthorized practice was in question. However, when this individual was relieved of duties by the MSO, the dental PC claimed that the MSO was operating dental clinics without direction from a Minnesota licensed dentist (or any dentist). The dental PC further claimed clinical employees of the MSO were providing dental services without direct dentist supervision.

Subsequent to the lawsuit filed by the dental PC, the plot thickened. The dentists wanted to set up new facilities, but claimed commercial interference from the MSO. The MSO, with 31 dental clinics to staff, created their own competing dental professional limited-liability corporation using one of the dentists from another MSO-affiliated clinic.

After trial, the jury issued a \$130 million award in favor of the dental PC, finding that the MSO violated the service agreement contract and also breached its fiduciary

duties toward the dental PC. After the jury's verdict, the parties entered court-ordered mediation. The resulting settlement returned 25 clinics to the dental PC. The MSO kept six of the clinics where dentists had signed with the new dental corporation. **Unfortunately, the jury did not address the issue of how the definition of practicing dentistry relates to MSOs.**

Earlier cases from other states also fail to provide any hard and fast rule as to the extent that an MSO can be involved in clinical operations and decision-making without violating a dental practice act. In *Penny v. Orthalliance*, 255 F. Supp. 2nd 579 (N.D. Texas 2003), the court held that contracts to transfer all tangible dental office assets to the MSO, for the MSO to operate and maintain the dental office, and for the MSO to retain the dentists as employees all constituted illegal practice of dentistry. However, in *Clower v. Orthalliance*, 377 F. Supp. 2d. 1322 (N.D. Georgia 2004), which is the same MSO from the *Penny* case in Texas, the court in reviewing almost identical agreements found them legal. The deciding factor for this court was that it concluded the agreements did not result in the dentists being employees of the MSO/corporation, and that the dentists had exclusive control over their clinical practice.

Hence, this specific issue—at what point does a MSO cross the line from providing non-clinical business services (legal) to providing clinical services (illegal unauthorized practice of dentistry in most states)? — is likely to be the subject of continued legal disputes.

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¹See: http://www.mndental.org/departments/2008/10/20/54/case_update_park_dental_vs_american_dental_partners