THE U.S. EXPERIENCE

Non-dental ownership and management of dental practices

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Historically, there was very little U.S. case law surrounding the legality of business services agreements ("BSAs")[1] between dentists and non-dentist management companies.[2,3] Then, just over a decade ago, relationships between some dentists and non-dentists soured and all parties found themselves in court. For the first time, judges throughout the U.S. had to decide on the legality of non-dentists owning and managing dental practices, employing dentists, being partners with dentists, and fee splitting with dentists. In coming to their decisions, judges reviewed the facts of the case in light of relevant State laws, legal precedents, public policy arguments, and advisory opinions from State Attorneys General. Unfortunately, and as discussed below, the litany of litigation did not lay out a clear, consistent, and common-sense approach to the issue of non-dental ownership and management of dental practices.

UNAUTHORIZED PRACTICE OF DENTISTRY

Many State laws prohibit a non-dentist from owning a dental practice.[4]

For example, ***Texas' Dental Practice Act***[5]

says that a person practices dentistry if they own, maintain, or operate an office at which they employ or engage a dentist. Since only dentists can practice dentistry, non-dentists are therefore prohibited from engaging in these activities.

The Texas District Court used this law to strike down BSAs in a number of cases. For example, in ***Robert C. Penny, et al., v. Orthalliance, Inc.***,[6] the Texas District Court declared a series of business arrangements (including a BSA) illegal in their entirety and thus unenforceable because they allowed a non-dentist to acquire the assets of an orthodontic office, operate and maintain it for the dentist, and engage or employ the dentist.

The ***Penny*** decision was followed by Texas District Courts in ***David Becka, D.D.S., et al. v. Orthodontic Centers of America, Inc., et al.***[7] and ***David S. Turner, D.D.S., M.S. Inc. et al. v. OCA, Inc. et al.***[8]

But the practice of dentistry is not defined consistently through the U.S., which results in BSAs sometimes being upheld.

For example, the Indiana ***Dental Practice Act***[9] says that a person practices dentistry if they exercise direction or control over a dentist through a written contract concerning final decision relating to the employment of dental office personnel. In ***Orthodontic Affiliates, P.C. v. OrthAlliance, Inc.***,[10] the Indiana District Court upheld a BSA because it only required the non-dentist to employ business personnel (such as receptionists) and not persons employed to work on patients' teeth (such as hygienists and assistants).

In Connecticut, the practice of dentistry is defined to include owning or carrying on a dental practice or business.[11] In ***Orthodontic Centers of America, Inc. et. al. v. Thomas E. Christie et al.***,[12] the Connecticut District Court upheld a BSA because it gave the dentist ownership and control over the professional aspects of the practice and simply allowed the non-dentist to perform the business services of the practice.

Ohio's ***Revised Code*** says that a person practices dentistry if they are a "manager proprietor, operator or conductor" of a dental practice.[13] Ohio's Attorney General issued an opinion, explaining that this provision refers to a person who exercises authority over matters directly related to patient care, not someone who engages in activities more closely related to the proper and efficient management of a dental practice. So in ***Terry Scotese, D.D.S. v. Orthodontic Centers of Ohio Inc.***,[14] a U.S. Bankruptcy Court upheld a BSA because there was no direct evidence that the non-dentist controlled patient care or affected patient care decisions.

Finally, Georgia's ***Dental Practice Act***[15] takes a very clinical approach (akin to the Province of Ontario) by defining the practice of dentistry as performing operations on the human oral cavity or associated structures, tooth extractions, crown fillings, repairing appliances used on teeth, undertaking a physical examination of a patient, or diagnosing radiographs. So in ***T. Barry Clower, D.M.D., P.C. and T. Barry Clower v. Orthalliance, Inc.***,[16] the Georgia District Court upheld a BSA because the non-dentist did not perform any of these dental services; indeed, the dentist's professional corporation was given exclusive control of all dental care — including selecting equipment, employees and hygienists.

ILLEGAL DENTAL PARTNERSHIPS

Generally, only dentists — either personally, through a partnership or through a professional corporation — can practice dentistry. Sometimes, a BSA will be challenged because it allegedly creates an illegal partnership between a dentist and a non-dentist (who is unauthorized to practice dentistry).

State laws generally define a partnership as an association of two or more persons carrying on a business for profit. Courts generally examine several factors (e.g. the intention of the parties, whether the parties shared profits and losses, whether the parties participated in control or management of the enterprise, etc.) to determine if a partnership exists. The fact that a BSA specifically says that it does not create a partnership is not enough to preclude a partnership from actually existing. As discussed below, much will depend on the specific facts of each case.

For example, Louisiana and Pennsylvania District Courts found that BSAs had been used to create illegal dental partnerships in ***Robert Amason, D.D.S., P.C. et al v. OCA, Inc. et al.,***[17] ***OCA, Inc. et al. v. Stanley Starr, D.D.S., et al.,***[18] ***Orthodontic Centers of Illinois, Inc. v. Christine Michaels, D.D.S., P.C., et al.,***[19] and ***Warren Apollon, D.M.D., P.C.***

et al. v. OCA, Inc., et al.[20] In those cases, the BSAs allowed the non-dentists to share in the profits and losses of, and have considerable control and management over, the practices. The District Courts disregarded statements in the BSAs that it was not the parties' intention to create a partnership and that the parties were independent businesses.

> In the U.S., non-dentist involvement in owning and managing dental practices is complex, unclear, and perhaps even ineffectual

But in ***Re: OCA Inc. et al., v. Hector M. Bush et al.***,[21] the Bankruptcy Court for the District of Louisiana came to the opposite conclusion. In that case, the dentist argued that a partnership existed in part because of language contained in old agreements, as well as statements made in the non-dentist's public filings. But the Bankruptcy Court held that the old agreements were superseded by more recent agreement which clearly stated that the relationship between the parties was not a partnership. And the Court accepted that the public filings were an aberration and erroneously filed. In any event, evidence was adduced to show that the parties did not share the risk. Among other things, the non-dentist bore all of the risk when starting up certain offices, expenses were not shared, there was no joint ownership of capital, and the dentist ran his own show and retained control over final decisions. As such, the parties were not found to be partners and the BSA was upheld.

FEE-SPLITTING

Many States prohibit fee-splitting between a dentist and a non-dentist.

A number of Colorado District Court cases have invalidated BSAs (in whole or in part) because they permitted illegal fee-splitting and because it would be contrary to public policy to enforce them.

This happened, for example, in ***Mason v. Orthodontic Centers of Colorado, Inc.***[22] In that case, the non-dentist argued that the BSA should be upheld because the law only prohibited the sharing of referral fees. But the Court rejected this argument, saying that this interpretation was not grounded in any authority, was at odds with the dictionary definition of "fee splitting", and was nonsensical because it would allow a dentist to overtly enter into an agreement to share patient fees with their landlord, auto mechanic or barber, so long as it was not based on patient referrals. The non-dentist also argued that the fees payable were for marketing services, which was an exception to the fee-splitting prohibition in Colorado's ***Dental Practice Act***;[23] the Court rejected this argument too because the bulk of the monthly service fee was for other services unrelated to marketing. Finally, the non-dentist argued that any professional discipline imposed on the dentist for improperly sharing fees should not void the BSA. But the Court found that the public interest in prohibiting fee splitting (which included the need for dentists to avoid financial conflicts of interest, the need for informed consent by the patient, and the necessity of avoiding non-professional interference in professional decision making) outweighed any private interests the non-dentist had in enforcing the BSA. As such, the fee-splitting portions of the BSAs were declared void as against public policy.

The Colorado District Court made similar rulings in ***Jonathan R. Weinbach, D.D.S., M.S. et al. v. Orthodontic Centers of Colorado, Inc., et al.***,[24] ***Mason v. Orthodontic Centers of Colorado Inc.***,[25] ***Theresa L. Shaver, D.D.S., et al. v. Orthodontic Centers of Colorado, Inc., et al.***,[26] and ***John Gentile, D.D.S., et al v. Orthodontic Centers of North Dakota, Inc. et al.***[27]

While I have yet to come across a U.S. case where the BSA trumped public policy in these circumstances, interestingly enough, our own Ontario Courts upheld a management agreement despite allegations of improper fee-splitting. In ***Smilecorp Inc. v. Pesin***,[28] a dentist sought to void a management agreement on the basis that he had illegally fee-split with a non-dentist. But both the Ontario Superior Court of Justice and the Ontario Court of Appeal rejected this claim on the grounds that any alleged violation was

a professional responsibility matter between the dentist and the Royal College of Dental Surgeons of Ontario and did not involve the non-dentist or the Court's determination of whether the management agreement (or parts thereof) was enforceable.

CONCLUSION

The cases above illustrate how Courts have come to opposite conclusions concerning the legality of BSAs. Undoubtedly the result of allowing individual States to define the practice of dentistry, coupled with different fact patterns and the occasional opinion from State Attorneys General.

But it is important not to miss the forest for the trees. The laws discussed throughout this article are meant to protect the public by preventing those lacking certain competencies from practicing dentistry and also preventing business arrangements from interfering with a dentist's professional judgment. To these noble ends, States have taken different approaches. Some States — like Texas and Colorado — seem to have adopted a more rigid approach. By shutting out non-dentists, however, this approach may hinder improving access to high quality oral health care for the general public.[29] Other States — like Ohio, Indiana, Connecticut, and Georgia — seem to have taken a more flexible approach by preserving dentists' authority over the clinical aspects of operating a dental practice while allowing non-dentists to deal with the business aspects. But this approach could lead to the further commercialization of the dental profession and endanger patients by putting profits first.

So where does that leave us? Acknowledging that, in the U.S., non-dentist involvement in owning and managing dental practices is complex, unclear, and perhaps even ineffectual.[30]

So where should we go from here? That's a discussion for another article…

References

1. "Business Service Agreements" and similarly named agreements typically involve a non-dentist management company providing various dental office business and administrative support services (e.g. hiring and managing staff, leasing office space and equipment, providing bookkeeping, collections and other administrative services) to a dentist in exchange for a fee.
2. Throughout this article, I will use the terms "non-dentist" to refer to these dental practice management companies.
3. See Peter M. Sfikas, J.D., "Court rulings differ on legality of dental MSO agreements", *Journal of the American Dental Association*, Volume 136 (May 2005), p. 678.
4. See "Ownership of Dental Practices, Employment of Dentists, Interference with the Professional Judgment of a Dentist", American Dental Association, Department of State Government Affairs, #22 (11 August 2011).
5. Texas Occupations Code, *Dental Practice Act*, Section 251.003(a)(4).
6. 255 F. Supp. 2d 579; 2003 U.S. Dist. Lexis 4719 (decided March 26, 2003).
7. 2005 U.S. Dist. LEXIS 46904 (March 31, 2005).
8. 2006 U.S. Dist. LEXIS 98129 (December 5, 2006).
9. *Indiana Code*, Section 23.(a), (13), (F).
10. 210 F. Supp. 2d 1054; 2002 U.S. Dist. LEXIS 13627 (decided April 22, 2002).
11. Connecticut General Statutes, Chapter 379, Dentistry, Section 20-123(2).
12. 415 F. Supp. 2d 115; 2006 U.S. Dist. LEXIS 6397 (February 16, 2006).
13. Ohio, *Revised Code*, Chapter 4715: Dentists; Dental Hygienists, section 4715.01.
14. 2007 Bankr. LEXIS 2899.
15. Georgia, *Dental Practice Act*, Occupational Code, Title 43, Chapter 11, Section 43-11-17.
16. 337 F. Supp. 2d 1322; 2004 U.S. Dist. LEXIS 20038 (decided September 24, 2004).
17. 2008 U.S. Dist. LEXIS 86234 (October 24, 2008). Prior history: ***In re OCA, Inc.***, 410 B.R. 443, 2007 U.S. Dist. LEXIS 83985 (E.D. La., 2007). Subsequent history: Motion denied by ***Amason v. OCA, Inc.***, 2009 U.S. Dist. LEXIS 10343 (E.D. La., Feb. 11, 2009).
18. 2009 U.S. Dist. LEXIS 8862.
19. 403 F. Supp. 2d 690; 2005 U.S. Dist. LEXIS 33078 (December 13, 2005).
20. 592 F. Supp. 2d 906; 2008 U.S. Dist. LEXIS 106054.
21. 78 B.R. 493; 2007 Bankr. LEXIS 3496 (October 9, 2007).
22. 516 F. Supp. 2d 1205, 2007 U.S. Dist. LEXIS 68121 (decided September 14, 2007).
23. Colorado Revised States, Title 12, Article 35, Section 12-35-129(1)(v).
24. 2007 U.S. Dist. LEXIS 70614 (September 24, 2007).
25. 516 F. Supp. 2d 1205, 2007 U.S. Dist. LEXIS 68121.
26. 2007 U.S. Dist. Lexis 71615 (September 26, 2007).
27. 2007 U.S. Dist. LEXIS 72322 (September 27, 2007).
28. 2012 ONSC 1966 (March 27, 2012), upheld by 2012 ONCA 853 (December 5, 2012).
29. See for example Cassandra Burke Robertson, "Private Ordering the Market for Professional Services", *Boston University Law Review*, 94 B.U.L. Rev. 179 (January 2014).
30. Rigid laws have been easily circumvented by clever lawyers: BSAs have replaced direct employment agreements with dentists (which are generally prohibited) and have allowed non-dentists to effectively acquire the equivalent of an equity interest in the dental practice through a fee structure. See for example Andrew Fichter, "Owning a Piece of the Doc: State Law Restraints on Lay Ownership of Healthcare Enterprises", Journal of Health Law, Vol. 39, No. 1, HOSPLW, Pg. 1 (Winter, 2006).

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