

DENTAL LEGAL UPDATE

The Gavel Fell: DSO Court Cases, Ownership & Unauthorized Practice of Dentistry

by Jeanine Lehman, Attorney

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Engaging in the unauthorized practice of dentistry in violation of Section 256.001 of the Texas Occupations Code is a felony of the third degree. Each day of the violation is a separate offense.

Dentist ownership of dental practices has been under attack for some time. While the law, with few exceptions, requires dental practices in Texas to be owned by Texas licensed dentists, there is a trend for non-dentists owning dental practices directly, or engaging in complex contractual schemes to attempt to circumvent the law. Scant attention is given to the requirements of the Texas Occupations Code and court cases. Texas Occupations Code section 251.003(a)(4) provides that a person practices dentistry if the person owns, maintains, or operates an office or place of business in which the person employs or engages under any type of contract another person to practice dentistry. With few exceptions, a person who is not a Texas licensed dentist, who performs an activity described in section 251.003(a)(4), is engaged in the unauthorized practice of dentistry. The unauthorized practice of dentistry in Texas is a third-degree felony.

Penny, Orthalliance and OCA Cases

In 2003, in a case of first impression, the US District Court for the North District of Texas, in the Penny v. Orthalliance case, addressed the provisions of Texas Occupations Code section 251.003(a)(4). In

that case, Orthalliance entered into a series of agreements in which it acquired the physical assets of the individual dentist plaintiffs' orthodontic practices and agreed to provide practice management services. In return, the individual plaintiffs received a substantial amount of money and agreed to remain working at their practices for at least five years and to not compete with Orthalliance following the termination of the parties' agreements. The plaintiffs claimed that Orthalliance failed to perform its obligations under the agreements and brought a lawsuit seeking a declaration that the parties' agreements were invalid because they constituted the unauthorized practice of dentistry. The Court found, in interpreting the plain language of the Texas Dental Practice Act, that the agreements violated sections 251.003(a)(4) and 256.001 of the Act and, therefore, are illegal because: (1) the Purchase and Sale Agreements transfer title in all of the tangible assets of the orthodontic offices to Orthalliance, thus transferring ownership of the offices to Orthalliance; (2) the Service Agreements obligate Orthalliance to operate and maintain the orthodontic offices; and (3) the Employment Agreements require that

Speaking Requests

For **Jeanine Lehman** and her colleagues to speak to professional and business groups on legal and practice management topics, please contact Jeanine Lehman at (512) 918-3435 or jeanine@jeanine.com

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www.capitalareadental.org

Texas State Board of Dental
Examiners
www.tsbde.state.tx.us

Texas Dental Association
www.tda.org

Texas Academy of
General Dentistry
www.tagd.org

American Dental Association
www.ada.org

Texas Legislature Online
www.capitol.state.tx.us

Texas Constitution
& Statutes
www.statutes.legis.state.tx.us

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the individual plaintiffs remain employed at Orthalliance's offices for a term of years, therefore Orthalliance employs or engages the individual plaintiffs. The interrelationship of the agreements thus permits Orthalliance to own, operate, and maintain the offices in which it employs or engages the individual plaintiffs to practice dentistry. The Court ruled in favor of the individual dentist plaintiffs, holding that the agreements were illegal in their entirety. (255 F. Supp.2d 579)

There was a stream of litigation against Orthalliance and its affiliates brought by Texas orthodontists. There was also litigation in other states, which is not germane to Texas dentists.

Then, in 2006, OCA, Inc., formerly doing business as Orthodontic Centers of America, Inc., filed for bankruptcy and pursued orthodontists under its business services agreements (BSAs) in the bankruptcy court. The bankruptcy court held that the BSAs were illegal under Texas law, and therefore void, based on several prior Texas federal district court rulings in similar cases. OCA then appealed to the US Court of Appeals for the Fifth Circuit in the In the Matter of OCA, Inc. case. The Court noted that according to the terms of the BSAs, OCA purchased or leased office space and purchased equipment for each office. OCA was also responsible for billing patients, filing insurance claims, hiring nondental personnel, setting dress codes, and managing a bank account through which the dental practice's funds flowed. The Ortho-

dontists were not authorized to withdraw funds from the operating account, so OCA periodically transferred money from these accounts to pay the Orthodontists their compensation. In exchange, the Orthodontists agreed to work a minimum number of hours each week at the practice and not to perform orthodontic work outside that office. The Orthodontist would receive an hourly rate for seeing patients, and OCA would receive an hourly management fee in addition to being reimbursed for its overhead. Profits were then split according to the respective ownership interests of OCA and the Orthodontists. The BSAs were to be in force for long periods of time, some up to forty years, and their terms severely restricted the Orthodontists' ability to terminate or assign them. The Court also analyzed the amount of control. The Court noted that the BSAs create an interlocking set of obligations that required OCA to exercise considerable control over the Orthodontists' practices. For instance, OCA conducted the financial and marketing activity of the practices, and it maintained the facilities, equipment, and support personnel required to operate the practices. The BSAs also stipulated how much each Orthodontist was required to work, and greatly restricted their ability to perform services outside of the BSAs. In exchange for these services, OCA charged a fee that was tied to the profits of the practices. The BSAs provided little to no

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ability for the Orthodontists to oversee any of OCAs decisions related to their practice. Ultimately, the Orthodontists were essentially only left with control over diagnosing and treating their patients. Accordingly, the subject matter of the agreement runs afoul of section 251.003(a)(4)'s prohibition of unlicensed persons from owning, operating, or maintaining a premises at which those persons also employ or engage another person to practice dentistry. The Court of Appeals upheld the ruling of the bankruptcy court that the BSAs violated Texas law and were void. (552 F.3d 412)

In 2010, OCA appealed the Packard v. OCA case to the US Court of Appeals for the Fifth Circuit. The Court stated that: This appeal arises out of an illegal business relationship between a corporation from Delaware and a dentist from Texas. Dr. Packard, his former partner, and their professional corporation entered into a long-term service agreement with Apple Orthodontix, Inc. ("Apple"). Apple provided "practice management services" to orthodontic practices in seventeen states before filing for bankruptcy in 2000. With the bankruptcy court's blessing, Apple sold some of its assets, including the Packard–Apple contract, to OCA. Shortly thereafter, Packard and OCA entered into several agreements. OCA paid to Packard almost five million dollars in exchange for, among other things, the entry into a long-term management services agreement that superseded the Packard–Apple contract. This new agreement, the Business Services Agreement ("BSA"), included a twenty-five year term for which OCA would provide Packard with business and administrative support and services. These services included employment, scheduling, and training of non-licensed office staff; provision and maintenance of the offices, telephones, utilities, furniture, fixtures, and equipment; bookkeeping and accounting services; billing and collection services; administration and disbursement of funds; installation of

computer hardware and software, and training staff; ordering and management of supplies and inventory; preparation of statistical data and analyses of operations; legal services for routine operations; consulting advice on efficiency and productivity, marketing, office locations and set-ups, and staff salaries, benefits, and performance and incentive plans, as requested; marketing and advertising services; and all other business services reasonably required for routine business operations. The BSA also called for OCA to develop up to seven new offices with Packard, with OCA agreeing to advance Packard the money needed to develop the new offices. OCA sought recovery from the Texas orthodontist of certain monies paid, on equitable grounds, including but not limited to unjust enrichment and money had and received, claiming that Dr. Packard had received a net monetary benefit. The district court had found no exception to the general rule that a court will not assist parties to an illegal contract and ruled against OCA, denying recovery from the orthodontist. The US Court of Appeals for the Fifth Circuit upheld the ruling of the District Court against OCA. (624 F.3d 726)

Direct Ownership of Dental Practices

There is a disturbing trend for persons, who are not

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The Gavel Fell (cont.) --

licensed Texas dentists, owning dental practices in whole or part, either directly or through ownership of an entity. These persons may include, but not be limited to, family members, co-workers, investors, and even private equity funds. Given that, with few exceptions, such ownership is the unauthorized practice of dentistry, such persons are in precarious legal positions. First, the unauthorized practice of dentistry is a third-degree felony. Second, the State of Texas has the ability to pursue a cease and desist order targeting the ownership. Third, given the rulings in the Penny and OCA cases, there is a potential risk that the investment will be at risk.

Third Degree Felony

Engaging in the unauthorized practice of dentistry in violation of Section 256.001 of the Texas Occupations Code is a felony of the third degree. Each day of the violation is a separate offense. Under the Texas Penal Code, the ordinary punishment for a third degree felony is imprisonment for 2 to 10 years, with a possible additional fine of \$10,000.

Dentist Liabilities and Risks

The liability of and risks to Texas dentists participating in, or aiding and abetting, illegal dental practice ownership

schemes are significant. These include risk of State disciplinary actions against the dentist's dental license, up to loss of dental license. Further, the cost and stress of litigation, alone, can be a very heavy burden to a dentist. The court cases cited in this article, involved substantial litigation over multi-year periods.

Conclusion

Before signing contracts or changing dental practice ownership, it is prudent for a dentist to consult with an attorney, who is knowledgeable in this area, and to have the overall arrangement reviewed. Similarly, if a dentist is already involved in a potentially illegal arrangement, legal advice and services from a knowledgeable attorney should be obtained. ■ © 2015 Jeanine Lehman.

Legal Update - Professional Associations:

Beginning in 2016, Texas professional associations will no longer be required to file an annual statement with the Texas Secretary of State. This improvement in the law will save professional associations from being terminated for failure to file the annual statement. Instead, they will file a public information report with the Texas Comptroller of Public Accounts, with their franchise tax return.

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About Our Firm ... Call us at (512) 918-3435

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