



# The Wager-Smith Law Firm

California

## DENTAL LAW ADVISOR

### What to "Do" With Due Diligence

When entering into an agreement for the purchase of a dental practice, the buyer will be charged with the duty to exercise "due diligence" in evaluating the assets to be purchased. If due diligence is not exercised, the buyer may be held to bear the burden of their own oversight. But what does this duty require? Here are some tips to conducting an effective due diligence investigation:

- **Financial Records:** In order to determine whether the

#### We've Moved:

Please note that our offices have moved to  
700 Ygnacio Valley Road  
Suite 350  
Walnut Creek, CA 94596

practice is as advertised, the first step is to obtain all relevant financial records of the practice.

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NEWSLETTER

Summer 2016

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# OUCH!

## Minimizing the Sting of Nerve Injury Claims

Nerve injury cases represent one of the greatest sources of malpractice litigation, and create the greatest exposure, for dentists and their malpractice insurers. Although nerve injuries in dentistry occur in the absence of negligence, post-operative conduct can create liability where none originally existed. Similarly, liability for a negligently caused nerve injury can be compounded by ill-advised post-operative action, or inaction. Here are some helpful tips to reduce exposure in these difficult cases.

- **Refer! Refer! Refer!:** A common theme in nerve injury cases is the failure to make a timely referral of the patient to an oral surgeon upon discovery of a nerve injury. Knowledgeable attorneys practicing in this area frequently allege that an earlier referral would have provided the patient with an opportunity for surgical repair of the nerve and that a delay in the referral robbed the patient of a "cure." Take this argument away

by: 1) referring nerve injury patients to an oral surgeon at the earliest opportunity; 2) document the referral, and; 3) take steps to ensure the patient follows your instruction. Depending on the mechanism of the injury (i.e. compression, stretch, toxicity, direct trauma, etc.) surgery windows and surgical success rates will differ widely. The 24-48 hour surgical window for direct trauma nerve injuries commonly attributed to M. Anthony Pogrel, M.D., D.D.S., is often relied upon by plaintiff attorneys (even though Dr. Pogrel has largely abandoned attempts at surgical intervention within this window in recent years due to a lack of success and surgery risks). The general surgical repair windows of six months for IAN, and three months for lingual nerve, injuries are also widely known. Therefore, a timely referral will do much to mitigate a patient's claims of injury and damage. In short, the earlier the referral the better, even if you

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## Employment Law Update:

### New Minimum Wage Law:

On April 4, 2016, California enacted the highest statewide minimum wage in the nation. The new law mandates that employers with 26 or more employees increase minimum wage according to the following schedule:

1/1/17 through 12/31/17:  
\$10.50/hr;

1/1/18 through 12/31/18:  
\$11/hr;

1/1/19 through 12/31/19:  
\$12/hr;

1/1/20 through 12/31/20:  
\$13/hr;

1/1/21 through 12/31/21:  
\$14/hr;

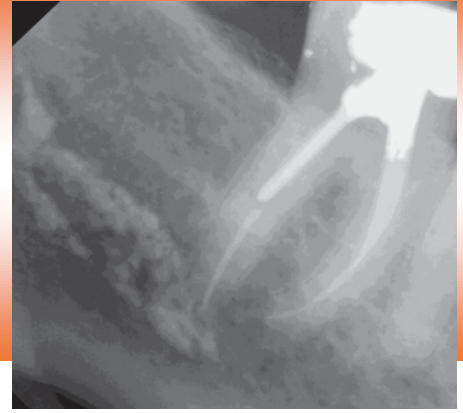
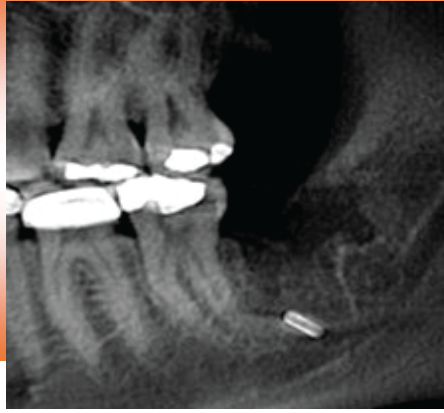
Beginning 1/1/22: \$15/hr.

Employers with 25 or less employees are required to follow the same schedule, but it is delayed by one year.

### Minimum Salary for Exempt Employees Also Increased:

Because, under California law, exempt employees must earn at least twice the state's minimum wage for full-time employment, the minimum wage increase will have the affect of significantly increasing salaries for exempt employees as well. As an example, minimum annual salaries for exempt employees will jump from

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### Ouch:

think the patient is ultimately not a candidate for nerve repair surgery.

#### • **Be Careful When Discussing Prognosis:**

With nerve injuries, as with all other alleged dental malpractice injuries, the patient must file a lawsuit within one year from the date they first suspect, or should have suspected, their injury was the result of some wrongdoing, or three years from the date of injury, whichever occurs first. When the patient has failed to file within the one year statute of limitations period, skillful attorneys will argue that the patient was prevented from discovering their injury, or its negligent cause, because the dentist misled the patient into believing their symptoms would improve with time, that they were “normal” post-

operative symptoms, or that a change in symptoms equated to nerve healing. If such statements are made, they may provide an avenue for the patient to overcome the statute of limitations bar. Such statements may also form the basis for a claim of fraud and/or concealment which, in turn, may result in a claim for punitive damages. Importantly, punitive damages, as well as allegations of intentional tortious conduct, are generally not covered by malpractice insurance. In addition, it is now widely accepted that the onset of pain or

dysesthesia is not indicative of nerve regeneration or repair. And, although it is generally hoped that nerve injury symptoms will improve with time, there is seldom any improvement after 12 months. Therefore, nerve injury patients should always be advised, and such advice should always be well documented, that their symptoms may be permanent. Let the specialist provide more specific information regarding prognosis.

#### • **Map Nerve Injury Areas:** Early neurosensory

testing and mapping of the affected areas can advance several important purposes. First, it provides an early assessment of the extent of the alleged injury. Frequently, nerve injury patients exaggerate the extent of their injuries once litigation has been

initiated. This early testing and mapping can provide critical evidence necessary to impeach the patient's credibility on this issue and help to portray them as a malingerer. Performing this testing and mapping at each post-operative visit can also be used to determine whether the patient is improving. Again, documentation of improving symptoms can be a powerful litigation tool to demonstrate that the patient is prone to exaggeration. It is vital, however, that the testing be as objective and accurate as possible. The patient's attorney will always



argue that the testing results were manipulated in order to minimize the extent of injury or to deceive the patient, so make sure the results are not dismissive or overly optimistic. In addition to providing information regarding the extent of the patient's injury, solid post-operative neurosensory testing and mapping can be used to show that the dentist is thorough, detail oriented, and current in his field. All of which are enormously important in nerve injury litigation.

With timely referrals, guarded discussions regarding prognosis, and good post-operative documentation regarding the extent of injury, practitioners can minimize their exposure and enhance their chances for success should they find themselves embroiled in a nerve injury lawsuit. •

## Recent Results:

**Refund in "3-D":** Doctor entered into purchase agreement for a new CBCT machine based on promises of "turn-key" installation and instant increase in production. When machine failed to function as advertised, doctor sought return of the machine and a full refund. The seller refused to accept a return unless the doctor paid tens of thousands of dollars as a "re-stocking" fee. After advising the seller that their actions constituted fraud, breach of contract, breach of the covenant of good faith

and fair dealing and intentional and negligent misrepresentation, the seller agreed to issue a full refund and to accept the return of the machine, at seller's expense, with no re-stocking fee.

**Google This!:** Doctor entered into an agreement with company for the design of a "custom" practice webpage and online marketing program, including search engine optimization (SEO) and email marketing services, at a cost of tens of thousands of dollars over multiple years. When the doctor refused payment because of the poor quality of the webpage and marketing services provided, the company sued for breach of contract. We took the deposition of the company's Managing Partner, at which time it was acknowledged that template webpage designs and email marketing materials were used to create the doctor's "custom" online marketing program. In addition, the Managing Partner admitted using a stock photograph of a dentist who was of a different race to depict the doctor on his webpage and that the doctor had not pre-approved any of the online marketing materials as was required by the contract. After the deposition, the company dismissed all claims against the doctor. •

***These results are illustrative only and are not intended to constitute a guarantee, warranty, or prediction regarding the***

### Update:

\$41,600.00 under current law to \$62,400.00 when the minimum wage becomes \$15 an hour. •

### Legislative Watch:

**"Caleb's Law" (AB 2235):** Recently introduced and working its way through the legislative process, this law may be the first salvo in the effort to restrict the ability of dentists and oral surgeons to provide oral and I.V. sedation anesthesia to young patients. On its face, this law requires the Dental Board to "establish a committee to investigate whether the current laws, regulations, and policies of the state are sufficient to guard against unnecessary use of anesthesia for young patients and potential injury or death." It is anticipated, however, that the passage of this law would ultimately result in future legislative efforts to curtail the use of conscious and I.V. sedation for all patients, especially the young. •



## Diligence

This involves obtaining at least three years of:

- 1) tax returns;
- 2) production reports;
- 3) profit and loss statements;
- 4) referral revenue reports (if a specialty practice);
- 5) managed care plan revenue reports;
- 6) accounts receivables;
- 7) listing of participating insurance providers;
- and 8) any third party payer audits.

- **Practice Culture:** Make sure the practice conforms with your view of dentistry by:
  - 1) observing the seller at work in the office with both staff and patients;
  - 2) review practice management software and recall/referral protocols;
  - 3) review billing practices;
  - 4) determine what procedures the seller performs and what techniques are used;
  - and 5) inquire as to how disgruntled patients are handled and whether the practice has an inordinate number of "problem" patients.

- **Reputation of the Practice:** Ask which professional organizations the seller is a member of and whether the seller has been the

subject of any peer review, Dental Board, or civil actions. Demand to see a list of referral sources and contact some of them to get a feel for how the referral community views the practice.

- **Staffing/Benefit Issues:** Request information regarding the pay structure of all staff, including benefit packages, and determine whether any staff members have expressed an unwillingness to continue their employment if the practice is sold. Find out the length of service of staff members and the compensation history of each. Determine the status and employment expectations of any associate dentists working in the practice and whether adequate safeguards are in place to protect against patient loss in the event they depart the practice.

This is not an exhaustive list, but provides a good starting point to conducting a comprehensive due diligence investigation. •