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Background:

Nationwide the practice of dentistry has been moving from a model of sole proprietorship/solo practitioner toward more complex business entities. Practice management companies and group practices are becoming more common. The American Dental Association (ADA) has recognized this trend and recently suggested categorizing group practices for the purpose of gathering and discussing data related to the changing nature of dental practice ownership. The growth in new business models has also raised concerns about the quality of dental care and the treating dentists’ ability to meet their professional responsibility to their patients. These concerns arise in connection with non-dentists gaining influence over issues related to dental treatment through various means, including:

- Employment contracts with treating dentists
- Production or profit incentives for dentists
- Daily or weekly quotas for number of patients treated or requirements for number of new patient visits
- Company or corporate policies that direct or influence treatment decisions or favor treatments with for example greater Medicaid reimbursement rates
- Ownership or control over the office space and equipment used in the dental practice
Abuses in billing practices, overtreatment, and poor care have generated lawsuits, Medicaid recovery litigation, and Congressional scrutiny.\(^1\)

The Dental Quality Assurance Commission (commission) established the Dental Corporate Practice Committee (committee) on November 4, 2011 to explore the impact of corporate practice of dentistry in Washington State. In authorizing the committee, the commission noted with particular concern that newly qualified dentists, burdened by educational debt and lacking experience, may be poorly positioned to assert their professional duty to their patients. The commission also noted concerns about financial incentives for overtreatment, continuity of care, and patient abandonment.

The commission’s concerns rise from both observation of national trends and from experience in reviewing discipline cases involving corporate or complex group practices. In the commission’s discipline caseload, commission members and Department of Health (DOH) staff have reviewed cases involving allegations of:

- Patient abandonment when a corporate dental practice closes a location without notice or referral to patients at that location
- Patient and subsequent provider inability to obtain treatment records from the corporate practice
- Corporate policies influencing the level of care provided
- Failure to complete treatment plans and provide continuity of care as a result of company policies controlling which dentist a patient sees or as a result of staff changes at a location
- Non-dentists exercising ownership and control of a dental practice

The discipline cases are in various stages of investigation, prosecution or closure and the committee cannot give specific details. In addition, the Department of Health database used to track health care provider discipline does not provide tracking or counting cases based on the whether they involve these issues.

The committee began by exploring the legal issues surrounding the corporate practice of dentistry in Washington by inviting various large group, multi-location practices to present their business models and practices to the committee.

To provide clarity in this report, the committee will use the term “complex group practice” as a general term to describe any ownership model more complex than a sole proprietor in solo practice or a general partnership between licensed dentists. Where a more specific legal entity is addressed the more specific term will be used.

\(^1\) Joint Staff Report on the Corporate Practice of Dentistry in the Medicaid Program, June 2013, Baucus and Grassley, S.Prt. 113-16
The committee gathered input through in person open public meetings with stakeholders on the following dates:

January 6, 2012
March 2, 2012
April 20, 2012
September 14, 2012
December 14, 2012
April 26, 2013
September 13, 2013
January 17, 2014
April 18, 2014
September 12, 2014

The following dental practices and dental support organizations (DSOs) presented overviews of their practice models or the models they support, provided input on the committee’s work and generously gave their time to respond to committee questions:

- Bright Now Dental
- Clear Choice Dental
- Gentle Dental
- Kool Smiles
- Pacific Dental Services
- Willamette Dental

Representatives of the Washington State Dental Association also attended the meetings and provided valuable input. The committee also received a presentation from the Association of Dental Support Organizations.

The committee appreciates these groups for their participation in working with the committee on this complex issue.

In addition to the overview of their practice model, Pacific Dental Services presented an analysis of Washington law with suggested changes to statues and regulations they believe would address some of the issues related to corporate practice. This analysis was forwarded to the commission for consideration and comment.

The committee explored multiple issues, including:

- Dental treatment records
  - Ownership and maintenance the records
  - Responsibility for providing records to:
    - The commission
    - Subsequent providers
    - Current providers
Patients
- Effect of a location closure on access to records
- Responsibility when a dentist leaves the practice

Treatment decisions
- Treating dentist
- Corporate/group policy/procedure, including
  - Available materials and supplies
  - Calendar control and available time with patients
  - Choice of dental laboratory
- Effect of compensation schemes including bonus structures on treatment decisions

Auxiliary Staff
- Clinical supervision vs. employment supervision
- Hiring and firing authority

Patient treatment continuity
- Patient scheduling
- Location closures
- Discharge of a treating dentist

Dental practice ownership
- Licensed dentist
- Non-licensed individual
- Out of state – licensed dentist
- Access to records of ownership and business relationships

Washington State dental and corporation laws

Other state laws associated with practice ownership

In exploring these issues and considering the presentations of the various practices, the committee became aware that the issues and concerns were not limited to a single type of legal entity. The concerns are present in limited liability companies, large practice partnerships, corporations, and other practice ownership models. In recognition of this aspect of the committee’s work, the committee forwarded to the commission a stakeholder request to change the committee name. The commission declined, noting Dental Corporate Practice Committee is a clear title and makes the public aware of the topic when on an agenda.

Various groups noted that a sole practitioner has a strong incentive to make a profit. To the extent that the concern is that profit motives may drive a complex group practice to engage in practices that impact the standard of care, a sole practitioner has the same incentive. Pacific Dental Services expressed the concern that the report appears to focus on DSO supported and
complex group practices. Similar issues can happen in all practice models including sole proprietorships.

While the committee recognizes that the profit motive may drive a sole practitioner to unethical or unprofessional practices, the committee also notes that criminal laws, malpractice litigation and the commission’s discipline authority apply clearly and directly to the sole practitioner. In addition, there is legal precedent for relying on the integrity of the individual professional in meeting his or her duty to their patient\(^2\). The tools for addressing a sole practitioner’s misconduct are well established and familiar to the commission. The committee’s concern is how other participants in the ownership/management model might be responsible for actions that impact patient care, and how that responsibility might be addressed. Similarly, it is not the committee’s purpose to seek elimination or restriction of either complex group practices or dental service organizations beyond the restrictions in current statute and case law. The committee’s purpose is to explore the proper attribution of responsibility in such organizations and the means of holding the appropriate entities or individuals responsible for misconduct.

This report provides an overview of existing Washington laws related to corporate practice of dentistry, suggests approaches to complaint fact patterns involving complex group practices, and proposes possible next steps for both the commission and the committee.

**Corporate Practice under Washington Law\(^3\)**

**The Dental Practice Act:**
In Washington the dental practice act specifically prohibits the practice of dentistry by corporations. RCW 18.32.675. The law provides exceptions for nonprofit corporations providing services to the poor, and for a corporation employing a dentist to provide dental care to the corporation’s employees at low or no cost. The statute does not apply to “... corporations or associations furnishing information or clerical services which can be furnished by persons not licensed to practice dentistry, to any person lawfully engaged in the practice of dentistry, when such dentist assumes full responsibility for such information and services.”

RCW 18.32.020 defines the practice of dentistry. Under this statute a person practices dentistry if they:

1. Represent themselves as able to diagnose, treat, remove stains and concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency deformity or physical condition of the human teeth, alveolar process, gums or jaw
2. Offer or undertake to diagnose, treat, remove stains or concretions from teeth, operate or prescribe for any disease, pain, injury, deficiency, deformity or physical condition of the same, or take impressions of the teeth or jaw
3. *Own, maintain or operate an office for the practice of dentistry*

\(^2\) State v. Boren 36 Wash.2d 522, 219 P.2d 566 (1950)
\(^3\) This section is an overview of relevant statutes and case law. It is not an exhaustive analysis and application to specific cases will vary depending on the facts in each case.
4. Engage in the any of the practices included in the curricula of recognized and approved dental schools or colleges, or
5. Represent to the public that they furnish, supply, construct, reproduce or repair any prosthetic denture, bridge, appliance or other structure to be worn in the human mouth. RCW 18.32.020.

A prohibition on corporate practice has been in the dental practice act since at least 1935.

Case Law on Corporate Practice of Dentistry and Unlicensed Practice:
A common set of principles guides Washington cases on corporate practice of learned professions and unlicensed practice. The common element in these cases is the public policy concern that a professional such as a doctor, lawyer or dentist, remain directly responsible to their patient or client. Allowing an unlicensed person to have ownership in a professional practice creates the danger that the professional will have responsibilities toward other owners that conflict with the duty to the client or patient. Allowing a corporate enterprise to practice a profession risks allowing a professional to hide behind the corporate enterprise rather than retain direct liability to the patient or client. In addition, the cases have noted the importance of training and competence in these professions and the inability of a corporate entity to be tested, establish competence and to hold a license.

Washington courts have upheld the RCW 18.32.675 prohibition on corporate practice. In doing so the courts have relied on the definition of the practice of dentistry found in RCW 18.32.020. In particular the courts have given consideration to the phrase “. . . owning, maintaining and operating an office for the practice of dentistry.” RCW 18.32.020.

In lawsuits related to complex group practices, Washington and Federal courts have analyzed the business relationship between the corporate enterprise and the practicing dentist in detail. The goal of the analysis has been to determine whether a person or corporation has been so involved in the day to day operation of the dental practice that they can be said to be owning, maintaining or operating a dental practice. The courts have looked deeply into how finances are managed, payment schemes, profit sharing, advertising, patient calendaring, ownership of equipment and facilities, etc. The courts have held that an individual or a corporation does not have to exert direct control over professional decision making in order to be practicing dentistry or other professions.4

While the dental practice act contains a specific statutory prohibition against corporate practice of dentistry, practice by a corporation is barred by case law in other professions such as medicine and law. Ownership and control of a professional practice by an individual or legal entity like a corporation is treated by the courts as the unlicensed practice of that profession. Court decisions

State ex rel Standard Optical Co. v. Superior Court for Chelan County, 17 Wash.2d 323, 135 P.2d 839 (1943) re
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make it clear that partnerships and other business arrangements not amounting to corporate enterprises or limited liability companies can result in the unlicensed practice of dentistry.

The Professional Service Corporation Act:
In 1969 the Washington legislature adopted chapter 18.100 RCW authorizing professional service corporations. This law allows professionals, including dentists, to join together as a corporation in order to provide professional services. This law provides an exception to the general prohibition on corporate practice of dentistry. Similar provisions are in the statute controlling limited liability companies. RCW 25.15.045. These are limited exceptions to the prohibition on corporate practice. Under both laws, the treating health care professional remains directly personally liable for the care rendered to the patient, and ownership and control of the enterprise is limited to persons licensed to practice.

To qualify as a professional service corporation, all owners of the corporation must all be licensed to practice the same profession. RCW 18.100.050. RCW 18.100.05(5)(a) allows licensed practitioner of certain health care professions to join professional service corporations that include other health care professions. Dentists are not included in this section and may only form a professional service corporation under this act in combination with other licensed dentists. Only persons licensed to practice dentistry may own shares in a professional service corporation organized to render dental services.

A foreign licensed dentist can own shares in a Washington professional service corporation, but only Washington licensed dentists can actually provide dental services in Washington. RCW 18.100.060. In addition, at least one officer and one director of the corporation must be licensed to practice in Washington. RCW 18.100.060(2).

Prosecution of Unlicensed Practice:
Unlicensed practice of a health care profession is governed by RCW 18.130.190. This law gives the secretary of the Department of Health the authority to investigate complaints of unlicensed practice of a health care profession that is subject to chapter 18.130 RCW. The law also gives the secretary the authority to issue a cease and desist order and to assess fines for unlicensed practice. In addition to the secretary’s authority, the law also provides that the attorney general, a county prosecutor or any other person can bring an action in superior to court seeking to enjoin unlicensed practice.

Matrix of Possible Approaches to Case Situations:
A portion of the committee’s work has been to explore approaches to specific complaints using existing law.

The following scenarios represent ownership and contract fact patterns encountered over the last several years. The various approaches outlined below may be useful in assessment and investigation of these dental practice issues and public health and safety. The cases and statutes listed are intended to provide a rough outline of the legal theory and are not a complete analysis.
Each case is unique and must be assessed according to the evidence in that case. Careful review of the evidence, including evidence related to ownership, practice policies and business relationships, will guide decisions on which cases to pursue, and how to pursue each case.

This matrix demonstrates the range of options available to address issues that may arise in complex group practice under existing law. It does not provide a mandatory approach of assessing cases, but is a resource for possible consideration. A constant theme is that the dentist actually providing treatment retains responsibility for complying with law and providing safe and adequate care, but that practice owners may also be held responsible.

For convenience in reviewing the matrix:

- Licensed Owner = Dentist licensed somewhere in the U.S.
- Washington Licensed Owner = Dentist licensed to practice in Washington.
- Owner = shareholder, partner, LLC member, sole proprietor/dba
- Professional Service Corporation = Incorporated under chapter 18.100 RCW.
- Employed Dentist = Dentist employed by a practice. Employed dentist has no ownership interest.
- Dental service organization = firm providing business office support
<table>
<thead>
<tr>
<th>Scenario</th>
<th>Possible Commission Approach</th>
<th>Relevant Statutes/Cases</th>
<th>Comments</th>
</tr>
</thead>
</table>
| Outright Corporate Ownership, employed dentist, not a professional service corporation. | Refer corporation and/or individual owners to the Secretary as an unlicensed practice complaint. Consider action against the treating dentist based on actual 18.130.180 violation. | RCW 18.32.675  
Chapter 18.100 RCW  
RCW 18.32.091  
Standard Optical 17  
Wash2d 323 (1943) | The treating dentist is responsible for providing quality care and complying with laws. Actions and policies of the corporation can be considered in assessing appropriate sanctions for the treating dentist.  
Assess whether the treating dentist may be aiding and abetting unlicensed practice depending on the contract relationship with corporation. |
| Professional Service Corporation or LLC, employed dentist, Washington licensed owners setting practice conditions that impact quality of care | Consider pursuing licensed owner for substandard care. Also consider pursuing employed dentist based on actual 18.130.180 violation. | RCW 18.32.020(3). | Treating dentist remains responsible for care.  
Actions/policies of the employing dentist, corporation, or LLC can be considered re the treating dentist and may be grounds for discipline of the dentist owners. |
| Partnership or sole proprietorship with employed dentist, Washington licensed owners setting practice conditions that impact quality of care. | Consider pursuing licensed owner for substandard care. Also consider pursuing employed dentist based on actual 18.130.180 violation. | RCW 18.32.020(3). | Treating dentist remains responsible for care.  
Actions/policies of the employing dentist, corporation, or LLC can be considered re the treating dentist and may be grounds for discipline of the dentist owners. |
<p>| Professional Service | Consider pursuing | 18.130.190 | Treating dentist |
| Corporation, employed dentist, Washington licensed owners setting practice conditions that impact quality of care | licensed owner for substandard care. Also consider pursuing employed dentist based on actual 18.130.180 violation. | remains responsible for care. Actions/policies of the employing dentist, corporation, or LLC can be considered re the treating dentist and may be grounds for discipline of the dentist owners. |</p>
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<tbody>
<tr>
<td>Professional Service Corporation or LLC. All dentist owners out of state, none licensed in Washington.</td>
<td>Refer corporation and/or individual owners to the Secretary as an unlicensed practice complaint</td>
<td>18.100.060 18.130.190</td>
<td>This analysis depends on the terms of the contract between the corporation and the individual owners, including ownership, payment terms, etc.</td>
</tr>
<tr>
<td>Dental Service Organization, with contract with a Washington Licensed owner</td>
<td>Investigate contract, payment terms, etc, between dentist and dental service organization. Possibly pursue dentist for aiding and abetting unlicensed practice, substandard care, unlicensed practice based on definition of ownership. Possibly refer dental service organization to Secretary as an unlicensed practice.</td>
<td>18.130.180(10) 18.130.190 Fallahzadeh v. Gorbanian 119 Wash.App 596 (2004) O.C.A. Inc v. Hassel 389 B.R. 469 (2008)</td>
<td>This analysis depends on the terms of the contract between the dentist and the dental service organization, including ownership, payment terms, etc.</td>
</tr>
</tbody>
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<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dental Service Organization, with contract with a Washington Licensed owner. The Washington licensed owner is conducting business as a professional service corporation.</td>
<td>Investigate contract, payment terms, etc, between dentist and dental service organization. Posibly pursue dentist for aiding and abetting unlicensed practice, substandard care, unlicensed practice based on definition of ownership. Possibly refer dental service organization to Secretary as an unlicensed practice.</td>
<td>18.130.180(10) 18.130.190 Fallahzadeh v. Gorbanian 119 Wash.App 596 (2004) O.C.A. Inc v. Hassel 389 B.R. 469 (2008)</td>
<td>This analysis depends on the terms of the contract between the franchise organization and the dentist, especially payment terms, profit sharing if any, control over scheduling, office policies, ownership of records, etc.</td>
</tr>
<tr>
<td>Employed dentist leaves a practice owned by a professional service corporation working with a dental service organization. A Patient decides to follow the departing dentist. Dentist or patient asks for treatment records from the PS Corp and/or the dental service organization.</td>
<td>The treating dentist is obligated to retain records under the dental records rule. Under our health care records law, a health care provider is obligated to provide treatment records within 15 days of a patient’s request.</td>
<td>WAC 246-817-310 RCW 70.02.080</td>
<td></td>
</tr>
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**Options for Use of the Matrix:**

The Secretary of the Department of Health can prosecute individuals and business entities like corporations for practicing dentistry without a license. The commission can prosecute licensed dentists for violations of the Uniform Disciplinary Act, chapter 18.130 RCW, including substandard care and other violations listed in RCW 18.130.180. Consideration of the combined authority of the department and the commission suggests several strategies for addressing cases in which a complex group practice is an issue.
The approaches outlined in the matrix are each a starting point for analysis of fact patterns involving complex group practices. The matrix suggests avenues to explore and not specific results. The corporate practice committee believes that this information will be helpful in considering complaints, authorizing investigations, and reviewing cases.

The corporate practice committee invites the commission to consider how these suggestions might be best made available for use by commission members and staff, and has identified the following options for preserving the matrix as an available resource.

Note that the matrix doesn’t specify outcomes or require either the commission or the secretary to take any particular action on a case. It is a reference document that notes some, but not all, of the options that may be available in complex group practice cases. Also note that the options laid out in the matrix are available now under existing law. The commission is not required to take any action on the matrix in order to make the options outlined in the matrix available. No matter which option the commission chooses, the matrix and this report are public records and the final report including the matrix would be disclosed in response to a public records request.

The matrix was conceived and drafted as an aid to DOH staff and commission members who are familiar with the discipline process. While it may be very important to raise awareness of the interplay of responsibilities between treating dentists and owners, the matrix is probably not the best method to achieve that end.

**Take no action on the matrix:** The legal theories listed in the matrix come from Washington’s statutes and case law. The theories are available to the department and to the commission regardless of whether the commission takes formal note of the matrix.

**Approve the matrix as a reference for use in the discipline process:** This option can be implemented through a vote of the commission. DOH staff would make the matrix available to commission members. This approach is the least formal, and has the advantage of being easiest to update. The disadvantage is that this approach is least likely to reach the attention of practicing dentists without further action by the commission. It is possible to approve the matrix for use on an interim basis, and to take more formal action later.

**Adopt the matrix as a commission policy:** This option raises the profile of the matrix somewhat and the information in the matrix may reach more practicing dentists. However, updating the matrix will require a slightly more formal process than simply approving the matrix as a resource.

**Adopt the matrix as Interpretive Statement:** The process of adopting an interpretive statement is governed by the administrative procedure act and is the most formal of the options available to the commission. It is in some ways similar to a rule filing. Interpretive statements are published in the Washington State Register and are available to anyone online. This option requires the most effort to implement and imposes the greatest procedural burden on updating the matrix. Further, there is a genuine question whether the matrix actually interprets the laws, or
simply restates them. To the extent the matrix only restates the law, it may not be appropriate for an interpretive statement under the administrative procedure act. Adoption of the matrix as an interpretive statement is the committee’s least favored option.

**Committee Recommendation**

The committee recommends approval of the matrix as a reference for use in the discipline process. This will provide department staff and commission members a resource for evaluating cases involving complex group practices. The committee also recommends that the corporate practice committee reconvene in six months to assess how well the matrix is working and whether other situations need to be addressed in the matrix. In further committee meetings issues related to ownership and availability of patient records will be explored.