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DENTAL SUPPORT ORGANIZATIONS AND THE CORPORATE PRACTICE OF DENTISTRY: WILL STREAMLINING CREATE LEGAL VIOLATIONS?

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I. Introduction

Where do you look first when seeking a new health care provider? Some might log in to their health insurer's website of their health insurance; some might turn to Google; others might search Yelp or other sites that provide user reviews. Regardless, many consumers do just what they do when shopping for anything in this modern age: utilize technology. When it comes to consumption in America, the Internet assists us in selecting everything from cars and clothing to dentists, doctors, and other health care providers. Modern consumerism, informed by technology, has changed what it means to practice medicine.[1]

Fueled by the ease of comparison shopping, consumers have higher expectations when purchasing most goods and services, including selecting providers in any field, and consumer expectations of the dental and medical fields are not what they once were.[2] As a result, especially with technological advances over the past few decades, people find themselves with access to information about dental and medical practices and practitioners that had, in the past, been unavailable to consumers.[3]

This increased use of technology means that consumers of dental care are more concerned with efficiency in making appointments and paying bills, immediate access to information, clear pricing, and transparency when it comes to choosing a provider and a facility to visit.[4] All these factors create convenience for the consumer.[5] Consumers of dental care are no

[1] Marc Cooper, *The Disappearing Solo Practice Model in Dentistry*, DENTISTRY IQ (June 26, 2018), https://www.dentistryiq.com/practice-management/industry/article/16367668/the-disappearing-solo-practice-model-in-dentistry.
[2] *Id.*; Jeff Simpson et al., *The New Digital Divide: The Future of Digital Influence in Retail*, DELOITTE INSIGHTS (Sept. 12, 2016), https://www2.deloitte.com/insights/us/en/industry/retail-distribution/digital-divide-changing-consumer-behavior.html.
[3] Simpson et al., *supra* note 2.
[4] Cooper, *supra* note 1.
[5] *Id.*

longer as concerned with having a personal relationship with their doctor as they were prior to the widespread use of technology. Instead, they seek validation of the dentist's skills and reputation from technological resources, as well as ease of access in making appointments and paying bills.[6] This increased consumer demand for ease of access and a stellar online reputation has changed the type of dental service provider that can meet these sought-after standards.[7] Keeping up with the increased demands for efficiency and technological advances presents a challenge to sole practitioner dentists, which is the standard dental practice model.[8] Dental support organizations ("DSOs") have seen an increase in popularity recently, especially over the last five to ten years, in part to meet both the needs of dentists and the increased demands of patients.[9] DSOs are corporations that provide management support for dentists and dental offices.[10]

Examining the body of case law beginning in 2002 regarding litigation against the "OrthAlliance" chain of DSOs, decided in district courts across the United States, reveals how DSOs intersect with the corporate practice of dentistry doctrine,[11] which is a subsection of the corporate practice of medicine doctrine. The corporate practice of medicine doctrine says that

[6] Simpson, *supra* note 2.
[7] Cooper, *supra* note 1.
[8] Jason Post, *The Future of DSOs: Technology, Performance, and Growth Trends*, DENTISTRY IQ (May 15, 2017), https://www.dentistryiq.com/practice-management/dsos-and-corporate-dentistry/article/16366382/the-future-of-dsos-technology-performance-and-growth-trends; Marc Cooper, *Why the Future is DSOs*, DENTAL PRODUCTS REPORT (Apr. 19, 2017), https://www.dentalproductsreport.com/view/why-future-dsos.
[9] Cooper, *supra* note 9.
[10] *How the DSO Dental Model Impacts the Dental Industry*, PLANET DDS (Feb. 19, 2020), https://www.planetdds.com/blog/how-the-dso-dental-model-impacts-the-dental-industry.
[11] *See generally* OrthAlliance, Inc. v. McConnell, No. CIV.A. 8:08-2591-RBH, 2010 WL 1344988 (D.S.C. Mar. 30, 2010); Engst v. OrthAlliance, Inc., No. C01-1469C, 2004 WL 7092226 (W.D. Wash. Mar. 1, 2004); Clower v. OrthAlliance, Inc., 337 F. Supp. 2d 1322 (N.D. Ga. 2004); Penny v. OrthAlliance, Inc., 255 F. Supp. 2d 579 (N.D. Tex. 2003); Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054 (N.D. Ind. 2002).

corporations (in other words, non-individuals) are not authorized to practice medicine.[12] *Penny v. OrthAlliance, Inc.* demonstrates that the analysis of whether a DSO is in violation of the corporate practice of dentistry doctrine and its associated statutes is a fact-specific inquiry that requires a close look at the contractual relationship between the owner-dentist and the organization.[13] In *Penny*, the dispute arose out of a breach of contract claim.[14] The contracts were deemed to violate the corporate practice of dentistry based solely on what the contracts established as the duties and rights of each party.[15] While a contracted relationship expressed in a written agreement can indicate a legal violation, a more complicated issue arises when the scope of the work being done indicates the legal violation. This means that instead of a situation where the agreement violates the doctrine and statutes, the actual actions of the DSO are deemed to be the practice of dentistry and, therefore in violation of the corporate practice of dentistry doctrine.

The central argument of this Note is that the DSO model and the increasing popularity of DSOs could lead to more violations of the corporate practice of dentistry. More clarification and regulation regarding contractual proceedings between dentists and dental service organizations are needed to ensure compliance and to avoid future litigation. Part II of this Note provides a general background on the classic sole practitioner dentist-owner model of practicing private dentistry, DSOs, and the corporate practice of dentistry doctrine, a subdivision of the corporate practice of medicine doctrine.[16] Part III discusses *Penny v. OrthAlliance,* decided in the Northern District of Texas in 2003.[17] Part IV is a discussion of the OrthAlliance DSO line of cases from district courts across the United States and how they exemplify the fact-specific inquiry of

[12] Liberty Mut. Ins. Co. v. Hyman, 759 A.2d 894, 900 (N.J. Super. Ct. Law Div. 2000).
[13] *Penny*, 255 F. Supp. 2d at 582.
[14] *Id.* at 581.
[15] *Id.* at 582.
[16] See *infra* pp. 4–11.
[17] See *infra* pp. 11–12.

violations of the corporate practice of dentistry that almost always arise out of contractual disputes.[18] Part V recommends increased regulation in the realm of DSOs for the protection of patients and the public at large but acknowledges the important role that DSOs will play as technology advances.[19]

II. Background

A. Classic Sole Practitioner Owner-Dentist Model

The classic model of practicing dentistry is that of a sole practitioner who is both the practicing dentist and the owner of the business.[20] In this model, a sole practitioner dentist owns and runs a private practice, working directly with patients by performing hands-on dentistry and employing a usually quite-small staff, often with no associate dentists.[21] This structure of business means that sole practitioner dentistry is a "cottage industry."[22] Originally coined to describe the type of manufacturing done out of workers' homes prior to the Industrial Revolution of the eighteenth century, this term now refers to any industry characterized by a small number of employees, smaller worksites, and skilled labor.[23] The size of dental practices has not changed much in the last twenty years, and sole practitioner owner-dentists continue to dominate the field of dentistry.[24]

[18] See *infra* pp. 12–20.
[19] See *infra* pp. 20–21.
[20] ALBERT GUAY & THOMAS WALL, AM. DENTAL ASS'N HEALTH POLICY INST., CONSIDERING LARGE GROUP PRACTICES AS A VEHICLE FOR CONSOLIDATION IN DENTISTRY 2 (2016), https://www.ada.org/-/media/project/ada-organization/ada/ada-org/files/resources/research/hpi/hpibrief_0416_1.pdf.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 4.

Owner-dentists are generally not trained business professionals.[25] That results in an individual who is not trained in running a business being held solely accountable for every aspect of a dental practice, including hiring and training employees, payroll tasks, ordering supplies, and all other pertinent business duties.[26]

The solo practitioner private dental practice has been the standard for some time and remains the default model.[27] Even while the traditional owner-dentist model to date remains dominant in the field, the market share of DSOs has rapidly expanded since their introduction in the 1990s.[28] This increase in DSOs is causing many solo practices to struggle with keeping market share.[29] The American Dental Association reports that practice ownership among dentists continues to decline every year..[30] Despite this decline, only 7.4% of all dentists practice at DSOs.[31] In contrast to this low overall percentage, sixteen percent of dentists between the ages of twenty-one and twenty-four practice at DSOs, which indicates that the popularity of these employment structures is on the rise with younger dentists.[32] Many dentists are changing their mode of practice over time and considering the long-term management success a DSO may offer.[33] However, proponents of the classic model argue that a lack of corporate interference is the best model for patient-doctor relationships.[34]

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[25] Cooper, *supra* note 1.
[26] *Id.*
[27] *How The DSO Dental Model Impacts the Dental Industry*, *supra* note 10.
[28] *Id.*
[29] *Id.*
[30] AM. DENTAL ASS'N HEALTH POLICY INST., PRACTICE OWNERSHIP AMONG DENTISTS CONTINUES TO DECLINE (2022), https://www.ada.org/-/media/project/ada-organization/ada/ada-org/files/resources/research/hpi/hpigraphic_practice_ownership_among_dentists_decline.pdf?rev=fd6b08b1bbeb42b4bbcccda495922ebe&hash=A96B3211B31CDDE149A926F78F8FC9FE
[31] *Dental Support Organizations and Their Impact on the Dental Industry*, RICHMOND DENTAL & MEDICAL (Dec. 17, 2018), https://richmonddental.net/library/dental-support-organizations-and-their-impact-on-the-dental-industry/.
[32] *Id.*
[33] *Id.*
[34] *Id.*

B. Dental Service Organizations

For the past two decades, "vertical consolidation" of physicians has occurred, in which larger corporate hospitals purchase smaller private practices and employ the physicians from these private practices.[35] Being employed by a larger corporate structure like a hospital could be an ideal situation for physicians for many reasons, including reducing the doctor's responsibility for operations or administrative tasks, providing income security, and improving office organization in a steadily more complicated and technology-driven health care market.[36] These are appealing reasons that apply equally to the dental field and may be even more beneficial for dentists than for physicians.[37] This appeal may be attributed to increased dental education costs, the financial cost of which would become even more significant when investing money to purchase a practice, considering the rising prices of practice ownership.[38] Additionally, this situation offers the opportunity to gain real-life dental experience while working for a larger corporation that can alleviate the dentist from administrative and managerial tasks.[39]

According to the Association of Dental Support Organizations, DSOs contract directly with dental practices to provide management, much like the vertical consolidation of physicians.[40] This model can provide security for practicing dentists in the form of administration, compensation, networking, and technology advances.[41] Many of these advantages are advertised by the DSO industry, promoting itself as providing much-needed support for the work of dental providers, focusing on the management, administrative, and

[35] GUAY & WALL, *supra* note 20, at 3.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 4.
[39] *Id.* at 3.
[40] *How The DSO Dental Model Impacts the Dental Industry*, *supra* note 10.
[41] *Id.*

business responsibilities of these providers.[42] Most information available to the public about DSOs reads like a sales pitch for why they are the better approach to providing dental care.[43] There is little non-biased literature about DSOs and their functionality, but there is some statistical support for their actual effectiveness. For example, in a multi-year study, the DSO "Kool Smiles" was shown to be more efficient in its operations than a traditional owner-dentist model, decreasing the cost of operation of the dental practice while increasing Medicaid reimbursements.[44] Kool Smiles focused on retaining patients for regular dental visits to decrease needed restorative care, which offers a significant improvement in oral health for patients and saves the doctors time spent so that they could see an increased number of patients.[45]

The significance of these effects may increase as dentistry in the twenty-first century becomes an increasingly strong sector of primary care.[46] This would allow a dentist-owner and their staff to expand their responsibilities, performing additional tasks to provide care and evaluations beyond traditional oral health, such as cancer screenings, complete smile makeovers, and advising on the connection between oral health and other health concerns.[47] With the increased workload of providing services beyond the scope of what might be seen as traditional dentistry, DSOs could be a solution to the challenges that solo practitioners face.

[42] *Dental Support Organizations and Their Impact on the Dental Industry*, *supra* note 31.
[43] Wayne Winegarden, *DSOs Illustrate How the Private Sector Can Solve Public Health Problems*, Forbes (Feb. 17, 2016), https://www.forbes.com/sites/econostats/2016/02/17/dsos-illustrate-how-the-private-sector-can-solve-public-health-problems/#6d5b7e2811f5.
[44] *Id.*
[45] *Id.*
[46] Cooper, supra note 1.
[47] *Id.*

C. Corporate Practice of Dentistry

Historically, corporations were not permitted to engage in "learned professions" such as health care through the employment of licensed professionals except pursuant to specific statutory or regulatory exceptions.[48] This prohibition is often referred to as the "corporate practice of medicine doctrine."[49] Cases applying a common-law prohibition on corporate practice have addressed health care fields like medicine, dentistry, optometry, and chiropractic.[50]

The body of corporate practice of medicine case law was codified in many states under state statutes to bring liability to corporations practicing medicine without proper licensing.[51] Statutes regulating the corporate practice of dentistry are an area of state law.[52] A Washington state statute provides an example of the regulation of the corporate practice of dentistry, explaining that no corporation can practice dentistry nor can it solicit "dental patronage" for any dentists employed by a corporation.[53] To determine whether an illegal business relationship between a licensed dentist and a corporation exists under Washington law, courts consider two factors in tandem: (1) the extent to which the corporation exercises control over the dental practice's operations, and (2) the nature of the payment scheme between the practice and the corporation.[54]

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[48] *State v. Bailey Dental Co.*, 234 N.W. 260, 262 (Iowa 1931).
[49] Liberty Mut. Ins. Co. v. Hyman, 759 A.2d 894, 900 (N.J. Super. Ct. Law Div. 2000).
[50] *See, e.g.*, People by Kerner v. United Med. Serv., Inc., 200 N.E. 157, 163–64 (1936) (prohibiting the corporate practice of medicine); *Bailey Dental Co.*, 234 N.W. at 263 (prohibiting the corporate practice of dentistry); *Liberty Mut. Ins. Co.*, 759 A.2d at 900 (prohibiting the corporate practice of chiropractic); Ezell v. Ritholz, 198 S.E. 419, 424 (1938) (prohibiting the corporate practice of optometry).
[51] JIM MORIARTY & MARTIN J. SIEGEL, SURVEY OF STATE LAWS GOVERNING THE CORPORATE PRACTICE OF DENTISTRY 1 (2012), http://www.moriarty.com/content/documents/ml_pdfs/cpmd_4.10.12.pdf.
[52] *Id.*
[53] WASH. REV. CODE ANN. § 18.32.675.
[54] Choong H. Lee, DMD, PLLC v. Thaheld/Lee-01, LLC, 179 Wash. App. 1047 (2014).

Similarly, an Illinois statute bans the practice of dentistry by a corporation and expands on that ban by listing other ways that a corporation might violate the statute.[55] For example, not permitting corporations to "furnish dental services or dentists, or advertise under or assume the title of dentist or dental surgeon or equivalent title, or furnish dental advice for any compensation, or advertise or hold itself out with any other person or alone, that it has or owns a dental office or can furnish dental service or dentists, or solicit through itself, or its agents, officers, employees, directors or trustees, dental patronage for any dentist employed by any corporation."[56]

Dr. Allison, Dentist, Inc. v. Allison was a foundational case for establishing violation of the corporate practice of dentistry doctrine.[57] In this case, a dental corporation alleged that a dentist had breached a contract with the corporation.[58] The defendant filed a motion to dismiss the contractual breach charges on the grounds that the corporation was in violation of Section 18(a) of the Dental Practice Act of 1933.[59] The case discussed the reasoning of the corporate practice of dentistry doctrine, explaining that professional licensing to practice in a field such as dentistry requires "good moral character" for which "no corporation can qualify."[60] A corporation cannot qualify because a corporation is an entity without the ability to have honesty, conscience, or loyalty, unlike an individual.[61]

Prior to the subject case, OrthAlliance was involved in a lawsuit, *Orthodontic Affiliates v. OrthAlliance*, which exemplifies the type of DSO contracts that do not violate the doctrine.[62]

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[55] 225 ILL. COMP. STAT. ANN. 25/44.
[56] *Id*.
[57] Dr. Allison, Dentist, Inc. v. Allison, 196 N.E. 799 (Ill. 1935).
[58] *Id*. at 799.
[59] *Id*. at 799-800.
[60] *Id*. at 800.
[61] *Id*.
[62] Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054 (N.D. Ind. 2002).

This decision turned on the careful drafting of the contractual agreements between Orthodontic Affiliates and OrthAlliance, indicating that the defendant was explicitly not to engage in the practice of dentistry, subject to local rules and ordinances.[63] This case focused on the face of the contract, utilizing its literal language to determine the relationship between the parties.[64] The focus on contractual language, as opposed to the actual behavior of the parties, is a theme throughout lawsuits involving the corporate practice of dentistry.

III. Subject Opinion: *Penny v. OrthAlliance*

The subject case, *Penny v. OrthAlliance*, focuses on the contractual relationships between the DSO and the owner-dentists in implicating the corporate practice of dentistry.[65] In their lawsuit, the plaintiffs, all licensed orthodontists in Texas, alleged that OrthAlliance had failed to perform its contractual duties and sought summary judgment indicating that their agreements were invalid because the agreements constituted the unauthorized practice of dentistry.[66] The court granted summary judgment in favor of the plaintiffs, arguing that the contracts taken as a whole were illegal because the contracts violated the corporate practice of dentistry statute.[67] The court reasoned that the contractual language indicated that OrthAlliance owned, operated, and maintained the offices and employed and engaged the dentists.[68]

The contractual issues that implicated the violation of the corporate practice of dentistry included ownership, operation, maintenance, employment, and engagement.[69] The purchase and

[63] *Id*. at 1060-61.
[64] *Id*. at 1060.
[65] Penny v. OrthAlliance, Inc., 255 F. Supp. 2d 579, 581 (N.D. Tex. 2003).
[66] *Id*. at 580.
[67] *Id*. at 583.
[68] *Id*. at 580.
[69] *Id.* at 583.

sale agreements between the orthodontists and OrthAlliance transferred the "tangible assets" of the orthodontic offices to OrthAlliance, which the court interpreted as ownership.[70] The service agreements created an obligation for OrthAlliance to both maintain and operate the offices, and the employment agreements employed the plaintiffs for a minimum term of 5 years after purchase.[71] The employment agreements were made between the plaintiffs and their practice groups, but the service agreement required that the practice groups have this minimum employment term stipulation.[72] The court held that the contracts were unenforceable as a way of "circumventing" the unauthorized practice statute and deemed it to be a violation.[73] In totality, the contracts were illegal because they violated the statute and were therefore void.[74]

IV. Analysis

Generally, most judicial decisions that implicate the corporate practice of dentistry are those surrounding contractual disputes between corporations and practicing dentists.[75] Therefore, these decisions often need a careful analysis of contractual language in the agreements between corporations and practicing dentists.[76] Examples of contractual disputes exist not only in cases throughout the country for the last fifty years but also in the line of litigation against OrthAlliance, which all arose from contractual disputes.[77] The history of such cases indicates

[70] *Id*. at 582.
[71] *Id*. at 580.
[72] *Id.* at 583.
[73] *Id.*
[74] *Id.* Choong H. Lee, DMD, PLLC v. Thaheld/Lee-01, LLC, 179 Wash. App. 1047 (2014).
[75] *See* Choong H. Lee, DMD, PLLC v. Thaheld/Lee-01, LLC, 179 Wash. App. 1047, 1047 (2014); OCA, Inc. v. Hodges, 615 F. Supp. 2d 477, 480 (E.D. La. 2009); Orthodontic Centers of Illinois, Inc. v. Michaels, 403 F. Supp. 2d 690, 692 (N.D. Ill. 2005); Dr. Allison, Dentist, Inc. v. Allison, 196 N.E. 799, 799 (Ill. 1935).
[76] *See Choong H. Lee, DMD, PLLC*, 179 Wash. App. at 1047; *OCA, Inc.*, 615 F. Supp. 2d at 480; *Orthodontic Centers of Illinois, Inc.*, 403 F. Supp. 2d at 692; *Allison*, 196 N.E. at 799.
[77] *See generally* OrthAlliance, Inc. v. McConnell, No. CIV.A. 8:08-2591-RBH, 2010 WL 1344988 (D.S.C. Mar. 30, 2010); Engst v. OrthAlliance, Inc., No. C01-1469C, 2004 WL 7092226 (W.D. Wash.

that to avoid implicating statutory violations, dental support organizations may simply alter how agreements and contracts are written and executed. The danger in altering a contract to avoid litigation, rather than altering procedures, is that it can undermine the purpose of the corporate practice of medicine doctrines, which exists to protect patients.[78] The ability of corporations and individuals to possibly circumvent the policy reasoning of the doctrine and statutes themselves indicates that increased regulation in the field may be the best solution. Increased regulation would ensure patient safety as well as give dentists and other health professionals the ability to upgrade their practices to succeed in accordance with the changing standards of the new consumer generation.

A. Continuing Litigation Against OrthAlliance

The litigation that followed *Penny* shows that there is a possibility that DSOs will be able to track what contractual language illegally violates the corporate practice of dentistry and associated statutes. By tracking this unenforceable contractual language, DSOs would be able to modify their agreements accordingly to avoid prosecution under the statutes. However, this may not entirely prevent the actual corporate practice of dentistry from occurring.

In *Engst v. OrthAlliance, Inc.*, decided in Washington just a year after *Penny*, the court examined and analyzed the agreements between OrthAlliance and the plaintiffs and similarly found that OrthAlliance violated the Washington state statute against the corporate practice of dentistry.[79] The purchase and sale agreements and personal guaranties involved ownership issues

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Mar. 1, 2004); Clower v. OrthAlliance, Inc., 337 F. Supp. 2d 1322 (N.D. Ga. 2004); Penny v. OrthAlliance, Inc., 255 F. Supp. 2d 579 (N.D. Tex. 2003); Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054 (N.D. Ind. 2002).

[78] Dalton, Dalton, Little, Inc. v. Mirandi, 412 F. Supp. 1001, 1006 (D.N.J. 1976).

[79] *Engst.*, No. C01-1469C, 2004 WL 7092226, at *3.

that implicated the doctrine.[80] According to the contracts, the list of services that OrthAlliance was to be responsible for were: "providing office facilities and equipment, personnel and payroll, business systems, procedures and forms, purchasing and inventory control, accounting services and financial reporting, legal services, marketing assistance, planning for the opening of offices in new locations, billing and collection services, payment and disbursement of funds, and recordkeeping."[81] The court indicated that this went well beyond the scope of general office management, especially portions of the DSO's responsibility that included advisory roles, such as language that OrthAlliance would "consult with and advise the Orthodontic Entity on its equipment and office needs and the efficient configuration of its office space."[82] The court specifically pulled this language that triggered the statutory violations, demonstrating that future contracts made by this DSO in the state of Washington could avoid that specific language and, therefore in theory, evade the statutory violation.

In *Clower v. OrthAlliance, Inc.,* the court held that OrthAlliance did not commit the unlawful practice of dentistry.[83] The court determined that the employment agreements between the DSO and the plaintiff clearly showed that the DSO was not the plaintiff's employer.[84] In this case, the court referred to the other OrthAlliance litigation, indicating that the body of case law does not follow a "clear pattern," but instead that the inquiry is "dependent on the specific state laws in question."[85] The court declared this but then did not proceed to analyze the behavior of OrthAlliance as the literal practice of dentistry under Georgia law (i.e., examining or performing certain dentistry actions in a human's oral cavity) but rather once again analyzed the contractual

[80] *Id.* at *9.
[81] *Id.* at *8.
[82] *Id.*
[83] Clower v. OrthAlliance, Inc., 337 F. Supp. 2d 1322, 1330 (N.D. Ga. 2004).
[84] *Id.*
[85] *Id.*

relationship between the plaintiff and OrthAlliance to determine whether OrthAlliance employed the plaintiff.[86] The inquiry examined the contractual language to decide whether the DSO had control over the plaintiff's actions as an orthodontist, including termination of employees and the course of treatment for patients.[87] The court ruled that the structure of the contracts clearly showed that the plaintiff retained enough control over his position as an orthodontist and that the DSO was not employing him, meaning the contract was not illegal.[88]

Finally, in *OrthAlliance, Inc. v. McConnell*, the court determined that the contracts entered into between OrthAlliance and the plaintiff allowed OrthAlliance to assert too much control over the business to be enforceable.[89] The structure of the business relationship allowed OrthAlliance to share in the profits of the business, employ and train staff, run payroll, control office space, and hire new orthodontists.[90] While the agreements expressly stated that the DSO was not practicing dentistry, other provisions showed that the control of the DSO was too integral to the structure of the business and, therefore, the contracts were illegal.[91] The court reasoned that the issue with a DSO having control over a business supposedly owned by a dentist or an orthodontist is that the DSO's interest in the business would affect the dental professional's first and foremost responsibility: the patients.[92] The DSO's interest in the business's profitability and its stranglehold over how the business is run would, in theory, negatively impact the motivations and actions of the owner-dentist.[93]

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[86] *Id.* at 1329-30.
[87] *Id.* at 1330.
[88] *Id.*
[89] OrthAlliance, Inc. v. McConnell, No. CIV.A. 8:08-2591-RBH, 2010 WL 1344988, at *5 (D.S.C. Mar. 30, 2010).
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

The Orthoalliance cases reveal that the motivation behind investigating the corporate practice of dentistry is often to simply rule on the legality of a contractual relationship as a basis of a contractual dispute.[94] The legality of the contract in terms of the corporate practice of dentistry is the threshold question required before the court analyzes the crux of the cases: contractual breach.[95]

B. Policy Issues and Increased Regulation

As evidenced by the Orthalliance line of cases, the form of approaching violations is that of examining contractual disputes. The fact-specific inquiry courts generally use only implicates the doctrine of the corporate practice of dentistry when discussing a contractual dispute. One argument asserts that this way of approaching violations of such statutes is the best option: only question the relationships between corporations and their owner-dentists when a contractual dispute arises. Only questioning these relationships after a contractual dispute arises raises two problems: (1) this method does not pre-emptively seek out those that are illegally practicing dentistry; and (2) this method ignores the actual policy reasoning behind the corporate practice of dentistry doctrine. The corporate practice doctrine is meant to protect patients, not those who are parties to contracts.[96] A medical professional's first obligation is to the patients, and the over-involvement of corporations can influence a doctor's or dentist's professional judgment when

[94] *See generally Id. at *3;* Engst v. OrthAlliance, Inc., No. C01-1469C, 2004 WL 7092226 (W.D. Wash. Mar. 1, 2004); *Clower v. OrthAlliance, Inc.*, 337 F. Supp. 2d 1322 (N.D. Ga. 2004); *Penny v. OrthAlliance, Inc.*, 255 F. Supp. 2d 579 (N.D. Tex. 2003); *Orthodontic Affiliates, P.C. v. OrthAlliance, Inc.*, 210 F. Supp. 2d 1054 (N.D. Ind. 2002).

[95] *See generally OrthAlliance, Inc*., No. CIV.A. 8:08-2591-RBH, 2010 WL 1344988, at *3; Engst v. OrthAlliance, Inc., No. C01-1469C, 2004 WL 7092226 (W.D. Wash. Mar. 1, 2004); Clower v. OrthAlliance, Inc., 337 F. Supp. 2d 1322 (N.D. Ga. 2004); Penny v. OrthAlliance, Inc., 255 F. Supp. 2d 579 (N.D. Tex. 2003); Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054 (N.D. Ind. 2002).

[96] AM. MED. ASS'N ADVOCACY RES. CTR., ISSUE BRIEF: CORPORATE PRACTICE OF MEDICINE 1 (2015).

diagnosing and treating these patients by encouraging them to go against their better judgment to better the position of the corporation.[97]

Instead of attempts to apprehend violations of the corporate practice of dentistry through individual contractual disputes as they arise, increased regulation is needed in the field of contractual relationships between DSOs and dental service providers. This increased regulation should focus on protecting patients as a goal. Increasing regulations should not necessarily discourage DSOs and dentists from entering into relationships with each other, as the regulatory landscape is already unfavorable to increased involvement of non-dental care providers in owning and operating dental practices.[98] Instead, increasing regulation should involve specificity and control in ways that make the legality and regulation of these relationships easier.[99] The first step may be increased control over the way contracts are drafted. Still, regulations should ultimately control the actual actions and the relationship between the dental provider and the organization. The most critical areas of this control should focus on the employment relationship, profit margins, and profit-sharing. Dentists and DSOs should be sure they are not in a structure where the DSO employs the dentist and where the DSO engages in a profit-sharing structure. These two areas increase the risk that dental service providers will be less motivated by patient care and more motivated by the DSO's bottom line.

Such regulation is essential because individual patients may not have standing to bring complaints against DSOs without individualized harm under the relevant state statutory provisions.[100] Therefore, it may not be possible for the community to assist in keeping DSOs in line in terms of not practicing dentistry because until a DSO practicing dentistry harms a patient,

[97] *Id.*
[98] GUAY & WALL, *supra* note 20, at 4.
[99] *Id.*
[100] *See Treiber v. Aspen Dental Mgmt., Inc.*, 635 F. App'x 1 (2d Cir. 2016).

the patient would be unable to bring a claim against the DSO. Instead, the case-by-case contractual analysis may be necessary until a patient is harmed. Therefore, increased regulation is likely the best path, as it would help control the issues of patient harm before they happen. Increased regulation would mean that these issues could be solved without having to wait for a contractual dispute and then having a court make an individualized contractual inquiry in every situation involving a DSO.

Ultimately, when regulating this professional area, lawmakers must weigh benefits to the patient versus detriments. The general consensus on whether DSOs benefit patients seems to be yes, they do. If DSOs make health care better for patients, then they should remain a large part of the dental health industry, and regulations should encourage their ability to do so. DSOs allow practices to function better in all three of the important categories when it comes to health care: access, cost, and quality.[101] They increase access to dental care because they often purposefully install locations in rural areas that have no available dental facilities and specifically seek the ability to perform charitable acts such as mission trips to provide dentistry to these so-called "dentistry deserts."[102] This triad of benefits is beneficial for the public at large if DSOs can operate within their state.[103] Therefore, it is within the interest of the state and its citizens if DSOs can function without risking violation of the corporate practice of dentistry statutes. Hence, increased control over these contractual agreements could be seen as a positive for DSOs.

It is in the public's best interest for DSOs to avoid practicing dentistry, not only to protect themselves legally and to provide better health care for patients, but also so that DSOs can continue to operate. In addition, the continued operation of DSOs can help with other public

[101] Karri L. Meldrum, *Everyone Hates Going to the Dentist: Are Dental Service Organizations Taking the Bite out of Managing a Dental Practice in Indiana*, 16 IND. HEALTH L. REV. 147, 148 (2018).
[102] *Id.* at 167.
[103] *Id.* at 165.

health problems. Often, the quality of care of government-reimbursed health care programs is not as high as that of private insurers.[104] The reason is that government reimbursed health care programs such as Medicaid have low reimbursement rates and more responsibilities when it comes to administrative work, such as paperwork.[105] In a classic sole practitioner model, the office staff may have difficulty dealing with these issues, and the owner-dentist can lose money with each patient seen.[106] The situation can lead to decreased quality of care for Medicaid patients.[107] Because DSOs operate with an efficiency that is not possible for a sole practitioner office, they can more easily cope with Medicaid challenges and therefore provide better care for these patients.[108]

Despite all of these benefits, it still appears that at least fifty percent of dental practices will remain in their current model into the foreseeable future.[109] This could ultimately be the best decision for those dentists who do not wish to become part of the corporate structure of a DSO and prefer to practice dentistry in the classic model in order to own their own business and control decision-making.[110] The question then becomes whether the solo model will continue to be competitive with the emergence of DSOs and whether an increasing number of patients will begin to choose DSOs over sole practitioner models because of the ease of access offered.

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[104] Winegarden, *supra* note 42.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] GUAY & WALL, *supra* note 20, at 5.
[110] *Id.*

V. Conclusion

It may very well be true that an increase in the involvement of DSOs in the dental health industry will lead to more litigation regarding the corporate practice of dentistry and violations of the state statutes. In apprehension of this increase, increased regulation is needed over the contracts between DSOs and owner-dentists. Where that regulation should come from is up for debate: Should state dental boards govern the industry, or should the state itself take the lead role? Regardless of where this control or advice comes from, establishing a fixed set of rules by which the contractual relationship must abide will help avoid disputes in the future. Ultimately, dentists should not be anchored to the wishes of a corporation so that they can act in the best interest of their patients, which is why these state statutes were put into place. Despite the increase of technology and efficiency in medicine, it is important to remember what health care is all about: real people and their health.