

Hello Great Lakes Members! As promised, I wanted to focus this month's COGA update on the initiatives that we have going on at the state level to protect our patients, and the profession of orthodontics.

But first, let's back up a little bit....

In the past few years, it has become evident that many of the issues that have come up in orthodontics- issues that not only threaten the safety of patients, but also interfere with the professional practice of orthodontics- are occurring at the state level. Mainly, these have fallen into two categories: specialty advertising and direct-to-consumer orthodontics. As we grasp this new reality, it is important that our AAO Council of Government Affairs redirect its time, energy, and finances to make sure that we are putting our resources where we can have the most impact. To this end, AAO past president Brent Larson had developed a task force to look at this balance going forward. In addition, a resolution was submitted (by our own GLAO member Greg Oppenhuizen) to ask COGA to "reevaluate its priorities" and come up with a game plan for the budgetary and time expenditures for state vs. local issues. More to follow on this...

However, I can update you on the wealth of activity that is occurring as we delve into state issues.

The big win that the AAO has had related to direct-to-consumer, state level legal initiatives:

Federal Court Dismisses a Majority of SmileDirectClub's Claims Against the Georgia Board of Dentistry, and Finds that SmileDirectClub's Digital Scans Constitute the "Practice of Dentistry"

The American Association of Orthodontists (AAO) acted as an amicus party in the interests of the health, safety, and well-being of patients seeking orthodontic care

ST. LOUIS, May 15, 2019 – On May 21, 2018, SmileDirectClub filed a lawsuit against the Georgia Board of Dentistry (the "Board") in federal court. *See SmileDirectClub, LLC v. Georgia Board of Dentistry et al.*, Case No. 1:18-cv-02328. The lawsuit arises out of a rule (Georgia Rule 150-9-.02(3)(aa)), which requires "digital scans for fabrication [of] orthodontic appliances" to be performed by an expanded duty dental assistant acting under the direct supervision of a licensed dentist.

On February 21, 2019, the American Association of Orthodontists (AAO) filed court papers supporting the position of the Board and its individual members in the lawsuit and in opposition to the claims and arguments made by SmileDirectClub.

On May 8, 2019, the Court entered an Order dismissing a majority of SmileDirectClub's claims in the lawsuit. The Court dismissed all of the claims against the Board as an entity, as well as any claims against the Board's individual members seeking monetary damages. The only claims not dismissed by the Court were those claims against the individual members seeking non-monetary relief. [View the full order here.](#)

In addition, the Court rejected SmileDirectClub's claim seeking a declaratory judgment that its digital scanning of patients' teeth does not constitute the "practice of dentistry or dental hygiene." The Court called this argument "incorrect" (p. 5), stating,

Here, SmileDirectClub's acts of **taking digital scans of a patient's mouth** for the purpose of having a dentist or orthodontist approve of a treatment plan for correcting a malposition of the patient's teeth **falls squarely within the definition of the practice of dentistry** as set forth in O.C.G.A. § 43-11-1(6) and O.C.G.A. § 43-11-17(a)(2) and (a)(5). Accordingly, SmileDirect has failed to state a plausible claim for declaratory relief, and the Defendant's Motion to Dismiss [Doc. 29] is GRANTED as to Count I of the Complaint.

(Order, p. 6) (Emphasis added). This ruling by the Court stands in contrast to the position frequently taken by SmileDirectClub that it does not engage in the practice of dentistry and therefore its practices cannot be regulated by state dental boards. *See, e.g.,* SDC's Complaint in this Georgia lawsuit, ¶ 87 ("Accordingly, SDC seeks declarations from this Court ... that (1) the provision of digital scan services by SDC pursuant to the protocol described above does not constitute the practice of dentistry or dental hygiene ..."); and SDC's Amended Complaint, ¶ 105, in *SmileDirectClub et al. v. Ala. Bd. of Dentistry et al.*, Case No. 2:18-cv-01679, N.D. Ala. ("In sum, the taking of photographs which are stored or processed digitally through the use of an iTero or other similar device does not constitute the practice of dentistry or dental hygiene and is not in need of oversight or regulation....").

As an advocate for patient health and safety, the AAO will continue to monitor legal cases and issues arising from direct-to-consumer orthodontics.

For more information visit aaoinfo.org, which includes the AAO's "[Questions to Consider When Researching Direct-To-Consumer Orthodontic Companies.](#)" Comprehensive orthodontic treatment is a complex medical process, and the AAO has long held the position that it is in the best, and safest, interest of the public to have that treatment conducted under the direct and ongoing supervision of a licensed orthodontist.

The AAO is currently involved in SmileDirectClub's case against the Alabama Dental Board. Just last week, a majority of SmileDirectClub's counts/claims against the Alabama Dental Board were thrown out by the court. Here are the high level bullets:

- In late 2018, SmileDirectClub and Dr. D. Blaine Leeds (collectively "SmileDirectClub") filed a lawsuit against the Board of Dental Examiners of Alabama (the "Board") in federal court. (*See D. Blaine Leeds and SmileDirectClub v. Board of Dental Examiners of Alabama et al.*, Case No. 2:18-cv-01679-RDP).
- On January 9, 2019, the [American Association of Orthodontists](#) filed a motion seeking permission to file an Amicus Curiae Brief (friend of the court brief) in Support of the Alabama Board's Motion to Dismiss SmileDirectClub's lawsuit; supporting the position of the Board and its members in the lawsuit; and in opposition to the claims and arguments made by SmileDirectClub and Dr. Leeds. ([The AAO's Motion and Amicus Curiae Brief can be viewed here](#)).
- On April 17, 2019, the Court entered an order on the Alabama Board's Motion to Dismiss, and threw out six of SmileDirectClub's eleven counts against the Board.
- Given the Court's Order, other than SmileDirectClub's count for injunctive relief, the remaining causes of action that SmileDirectClub and Dr. Leeds can legally continue to proceed with against the Alabama Dental Board members in their **official capacities (not their individual capacities)**.
- The American Association of Orthodontists' involvement as an *amicus* party, in the interests of the health, safety, and well-being of patients seeking orthodontic care, did not go unnoticed by the Court, which specifically referenced the American Association of Orthodontists in its decision.

Progress is also being made on the specialty advertising issue:

The AAO recently had a big win in North Carolina. You can read about it using the following link:

<https://www.aaoinfo.org/news/2019/02/north-carolina-dental-board-adopts-aao-proposed-policy-wording-specialty-advertising>.

The Component Legal Support Fund

Our increased ability to address state issues has been made possible by creating of the Component Legal Support Fund. The 2015 HOD set aside \$1 million for the purpose of supporting component organizations facing legislative, legal, or regulatory issues that affect all orthodontists in the state. The House asked the BOT to establish a business plan to ensure that the funds are appropriately and

effectively distributed. The business plan the BOT established requires component organizations to submit an application to the BOT for funds, including a summary of the issue faced, the desired outcome, and a proposal from a lobbyist or other appropriate professional (i.e. lawyer) detailing the amount requested and the duration of time that the funds will be used.

Over half of all states are using the CLSF to help them with their state advocacy issues. Currently, AAO is active in over thirty-one (31) states and two (2) Canadian provinces. Right now, the biggest CLSF issue is state dental boards trying to revise or rescind their specialty advertising laws. For many states, the AAO is drafting comments and making arguments on behalf of the AAO in-house, which is both economical and proving effective. Additionally, the AAO is also active in over 35 states regarding the direct-to-consumer issue. We have been or are still involved in the following states on various issues:

State	Topic	Status
Idaho	Specialty Advertising	Complete
Indiana	Specialty Advertising	Pending
Iowa	Specialty Advertising	Complete
Kansas	Specialty Advertising	Pending
Massachusetts	Specialty Advertising	Pending
Michigan	Specialty Advertising	Pending
Minnesota	Specialty Advertising	Complete
Missouri	Specialty Advertising	Complete
Missouri	Craniofacial and Cleft Lip/Palate	Pending
Montana	Dental Supervision	Complete
Nebraska	Dental Supervision	Complete
Nebraska	Specialty Advertising	Pending
New Hampshire	Specialty Advertising	Pending
New Jersey	Specialty Advertising	Pending
New York	Disclaimer Language	Complete
North Carolina	Specialty Advertising	Complete
Ohio	Specialty Advertising	Pending
Oklahoma	Specialty Advertising	Pending
Oregon	Specialty Advertising	Pending
Rhode Island	Delegable duties	Complete
South Carolina	Specialty Advertising	Pending
Texas	Specialty Advertising	Complete

<u>State</u>	<u>Topic</u>	<u>Status</u>
Utah	Specialty Advertising	Pending
Virginia	Specialty Advertising	Pending
Washington	Specialty Advertising	Pending
Washington	Dental Supervision	Pending
West Virginia	Specialty Advertising	Pending
Wyoming	Specialty Advertising	Pending

<u>Province</u>	<u>Topic</u>	<u>Status</u>
Ontario	Dental Supervision	Pending
British Columbia	Dental Supervision	Pending

The progress and wins described above are made possible by having an expert legal team, headed by Sean Murphy. Sean and his team's state and national efforts are funded by two sources: dues dollars and contributions to the PAC. **Being a member of organized orthodontics matters when it comes to fighting legislative battles.** In addition, our successes wouldn't be possible without a strong PAC. This year we hit a record for funding of the PAC. *More than ever*, it is important to have the ability to put our issues in front of members of Congress. PAC money allows those meetings to happen, plain and simple. So if you have donated, thank you for helping us move these issues forward. If you haven't, please consider making a donation. It is money well spent considering how fortunate we are to have such a talented lobbying team in place, and in light of the threats facing our profession.

Respectfully submitted,

Dale Anne Featheringham
GLAO COGA Representative