

DENTAL LEGAL UPDATE

Texas Dental Advertising: Proposed Rules & More

by Jeanine Lehman, Attorney

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At the August 10, 2012 Board meeting, the Texas State Board of Dental Examiners (SBDE) proposed a wholesale revision of the advertising rules for dentists. These rules are the result of significant work by SBDE’s Advertising Rules Ad-Hoc Committee, which was formed on April 15, 2011. If adopted, these rules will replace the SBDE’s existing Business Promotion Rules.

Overview

The proposed rules cover a range of communications, including advertising, professional communications, and referral schemes. They recognize that as professionals, dentists have the duty to communicate truthfully and without deception to the public.

Testimonials

The current advertising rules do not allow patient testimonials. Dentists have frequently received letters from SBDE to remove testimonials from their advertising, including their websites. The proposed rules allow testimonials, which are defined as an attestation, or implied attestation, to the competence of a dentist’s services or treatment. §108.57(c)(8) of the proposed rules contains guidance concerning testimonials, by stating that the following type of testimonial is an example of what may be a violation: “a testimonial from a person who is not a patient of record or that includes false, misleading or deceptive statements, or which is not

readily subject to verification, or which fails to include disclaimers or warnings as to the identity and credentials of the person making the testimonial”.

Solicitation, Referrals and Gifts

§108.58 of the proposed rules contains new provisions restricting solicitation, referral, and gift schemes. A licensee is prohibited from offering, giving, or making available to any third party or to a potential patient any cash, gift, premium, chance, reward, ticket, item or thing of value for securing or soliciting patients. A licensee is also prohibited from aiding or abetting another person to do so. This rule is based on the Texas illegal remuneration statute for health care professionals, and the Texas Dental Practice Act concerning referral schemes. (See article on page 4 below for illegal inducements under the Medicaid program.)

The proposed rule also prohibits the giving of a cash premium, chance, reward, ticket, item or thing of value to a patient of record for the purpose of soliciting new patients.

The proposed rule does not prohibit payment for advertising, marketing or other services that are provided for the purpose of securing or soliciting patients, provided the remuneration is fair market value and set in advance, and is not based on volume or value of patient referrals.

The proposed rules allow patient testimonials.

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Any advertisement of a dental service by a general dentist shall include the notation "General Dentist" or "General Dentistry" directly after the name of the dentist.



Website Favorites

Capital Area Dental Society:

www.capitalareadental.org

Texas State Board of Dental Examiners:

www.tsbde.state.tx.us

Texas Dental Association:

www.tda.org

Office of Inspector General
Texas Health & Human
Services Commission:
oig.hhsc.state.tx.us/oigportal/

Law Offices of Jeanine
Lehman P.C.:

www.jeanine.com

Texas Dental Advertising (cont.) --

Advertising of Specialties

§108.54 provides for advertising of specialties in the nine specialty areas accredited by the American Dental Association (ADA), by dentists who satisfy the specialist requirements in the rule. These specialty areas are endodontics, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, prosthodontics, dental public health, oral and maxillofacial pathology, and oral and maxillofacial radiology.

Advertising for General Dentists

§108.55 of the proposed rules allows a dentist who is not a specialist to advertise dental services in ADA specialty areas, but only if the advertisement also includes a clear disclosure that he/she is a general dentist. Any advertisement of a dental service by a general dentist shall include the notation "General Dentist" or "General Dentistry" directly after the name of the dentist. The notation shall be in a font size no smaller than the largest font size used to identify the specific dental services being advertised (either specialty or nonspecialty services). Any form of broadcast advertising by a general dentist (radio, television, promotional DVD's, etc.) shall include either "General Dentist" or "General Dentistry" in a clearly audible manner.

Other Credentials

The proposed rules in §108.56 substantially modify existing rule §108.55. Existing rule §108.55 is the subject of an April 11, 2012 lawsuit by the American Academy of Implant Dentistry (AAID) and two Texas implant credentialed dentists against SBDE, in Austin federal court, claiming that SBDE's advertising rule

violates their First Amendment constitutional right to commercial speech. The Plaintiff's alleged the SBDE's Rule 108.55 severely limits advertising of additional credentials in dental practice areas that are not recognized as a specialty by the ADA or the SBDE.

Proposed rule §108.56 allows dentists to advertise credentials with some caveats. The rule also provides guidance that a listing of credentials shall be separate and clearly distinguishable from the dentist's designation as a dentist and that any use of credential abbreviations shall be accompanied by a definition of the acronym. For example:

John Doe, DDS, General Dentist
FAGD, Fellow Academy of General
Dentistry

John Doe, DDS, General Dentist
FAAID, Fellow American Academy of
Implant Dentistry

Names

§108.52 has requirements concerning disclosure of names and responsibilities. A dentist must display his full name or his commonly used name, outside the primary entry of each location at which he practices dentistry. Each dental office must post at or near the entrance of the office in an area visible to the public, the name of each professional degree received by and each school attended by each dentist practicing in the office. The name of the owner must be prominently displayed and only the names of the dentists, who are practicing at a particular location, shall be used. An advertisement under a corporation, company, association or trade name must prominently include the name of the owner(s), and at least one dentist actually engaged in the practice of dentistry under that trade name, at each location advertised.

Fees

Dentists shall not represent or advertise their fees in a false or misleading manner. §108.53 has detailed requirements for advertising of fees and should be carefully read. If a price is given, the ad must include the offered service, any related services usually required for which an additional fee may be charged, a disclaimer statement that the fee is a minimum fee and that charges may increase, the dates for which the advertised price is available, the standard fee if the price is a discounted fee and whether the discount is limited to a cash payment, and if the ad quotes a range of fees, all the basic considerations on which the actual fee shall be determined. §108.53 also has specific requirements on copays, and prohibits advertising that services are “free” when there is a third-party payor, including Medicaid or Medicare.

False, Misleading & Deceptive Ads

§108.57 includes examples of false, misleading and deceptive advertisements. These include, but are not limited to, advertising of “painless” dentistry, appealing to an individual’s anxiety in an excessive or unfair way, intimidation, implying or suggesting superiority of materials or performance of professional services, guaranteeing the success of a dental service, referring to benefits of a dental procedure/product involving significant risks without including assessment of the safety and efficacy of the procedure/product, failing to disclose the source and authorship of any message published under a dentist’s byline, and fraud.

Awards

§108.62 has specific requirements for the advertisement of awards, honors and recognitions.

Websites

§108.59 requires dental practice websites to clearly disclose (1) ownership of the website, (2) services provided, (3) office addresses and contact information, and (4) licensure and qualifications of dentists and associated health care providers.

Photographs

§108.57(d) allows photographs or other representations of actual patients of record of the licensee to be used in advertising, provided that advance written patient consent is obtained and that the ad includes language: “Actual results may vary”.

Record Keeping

A copy of broadcast, print and electronic ads must be retained for 4 years after the final use of the ad. Also, the dentist must document the date of discovery and correction of any false or misleading advertisements and keep those records for 4 years.

Conclusion

This article covers highlights; there are many other aspects. Dentists are encouraged to review the existing and proposed rules. [Also, other laws are applicable to advertising, including but not limited to, Texas laws on deceptive trade practices.] The proposed rules will be published on the SBDE website and in the Texas Register. The public can provide comments. The next SBDE meeting is scheduled for November 9, 2012, and it is probable that the rules will be considered for adoption at that meeting. In the interim, it is important to note that these rules are PROPOSED, so compliance should continue with the existing advertising rules and other applicable law. ■

Jeanine Lehman is an Austin, TX attorney who practices health law and business law.

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- ✓ **Your Dental Office Lease: Watch the Terms**
- ✓ **Ownership Options for Your Dental Practice**
- ✓ **Financing Your Dental Practice: Tips & Terms**
- ✓ **Buying a Dental Practice: Deal Points**
- ✓ **Texas Legislative Updates**
- ✓ **Internet “Coupons”: Dental Practice Time Bombs**
- ✓ **Cover Your Bases When you Sell Your Dental Practice**

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Dental Board Meeting

At the August 10, 2012 SBDE Board meeting, staff leadership changes were announced including the hiring of attorney Julie Hildebrand as General Counsel, and accountant Irma Rodriguez as Chief Financial Officer and Director of Administration, and the promotion of Vicki Shoemsmith to Director of Licensing. Earlier this year, Glenn Parker became acting Executive Director.

The Board voted to pursue Semi-Directed Semi-Independent Status (SDSI), which would allow more autonomy in budgetary matters. Such status can be granted by the Texas legislature.

The Licensing Division reported that the average turn-around for new licenses is now down to about 2-4 weeks. The Division is working on ways to more efficiently accomplish its mission, including by combining mailings and encouraging licensees to pay fees online, rather than by check. The Division reported that disciplinary actions involving licensees can be found on the SBDE's website.

The Enforcement Division reported that the estimate for complaints for this fiscal year is 1100. The Division has been participating in meetings with the Attorney General's Office and the Office of Inspector General (OIG) of the Texas Health & Human Services Commission. The Division was provided a list of dentists by the OIG and is in the process of sending those dentists educational letters concerning their obligation not to abandon patients. These patients include orthodontic patients under the Medicaid program. The Division will be

obtaining an evidence locker to use to store evidence for its cases and will have an evidence technician. ■

Medicaid Alert: Consumers Urged to Report Improper Solicitation or Treatment by Dentists

The Texas Health & Human Services Commission (HHSC) Office of Inspector General (OIG) has become aware of dental clinics directly soliciting Medicaid clients. People hired by dental clinics have approached HHSC clients in the parking lots of state benefit offices or neighborhood grocery stores offering a variety of incentives, including free gift cards, pizzas, and manicures, in exchange for taking their children to a specific dentist or clinic.

Offering inducements to Medicaid clients is a violation of state and federal law and is subject to a penalty of up to \$10,000 per violation. In addition, some dentists are believed to have performed unnecessary dental work on children. HHSC has issued an update encouraging consumers to report this or any other suspected act of fraud, waste, or abuse in the Texas Medicaid program, by visiting the OIG website and clicking on the Report Fraud link or calling 1-800-436-6184. ■

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.

About Our Firm ...

Law Offices of Jeanine Lehman P.C. is a Texas law firm headquartered in Austin with a state-wide health law practice, including representation of Texas dentists. Our health law practice is focused on business law, transactional aspects of individual and group practices, such as contracts and incorporations, office/facility leases, building purchases/condos, and build-to-suits, practice sales/purchases/buy-ins, employment agreements, financing, and consultation concerning the day-to-day legal concerns of running a health care practice. The firm is owned by Texas Attorney **Jeanine Lehman**. Jeanine has over 25 years experience as a Texas attorney. She has had one book and over 70 articles published. She speaks to professional and business groups concerning legal topics. Jeanine is blessed to have one dentist and three dental hygienists in her family. Contact us at (512) 918-3435, jeanine@jeanine.com or PO Box 202211, Austin, TX 78720, and visit our website at www.jeanine.com

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