

DENTAL LEGAL UPDATE

Texas Dental Advertising Revisited: New Rules

by Jeanine Lehman, Attorney

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At the November 9, 2012 Board meeting, the Texas State Board of Dental Examiners (SBDE) adopted a wholesale revision of the advertising rules for dentists. These rules will replace the SBDE's existing Business Promotion Rules. Prior to adoption, there was extensive discussion of the rules, including that the new rules were necessary so that the public was not misled, and concerns about costs to dentists for compliance with the new rules.

Overview

The new advertising rules are contained in rules 108.50 – 108.63. Rule 108.56 was not adopted because changes were proposed to that rule which require republication. The Board indicated that it would delay active enforcement of the rules until May 1, 2013 (in recognition of real life scenarios, like billboards and Yellow Pages advertising). However, it is prudent to begin complying with the new rules now.

Testimonials

The new rules allow testimonials, which are defined as an attestation or implied attestation to the competence of a dentist's services or treatment. Rule 108.57(c)(8) 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 Gift Schemes

Rule 108.58 contains new provisions restricting solicitation, referrals, and gift schemes. A licensee is prohibited from offering, giving, or making available to any third party, or aiding or abetting another person, so to do, any cash, gift, premium, chance, reward, ticket, item or thing of value for securing or soliciting patients. This rule is based on the Texas illegal remuneration statute for health care professionals and the Texas Dental Practice Act concerning referral schemes.

The rule allows a licensee to offer or give to a potential patient a non-cash gift valued at no more than \$10 to secure or solicit the potential patient. [Note, before doing so, the dentist should evaluate if such gifts violate laws, such as Medicaid or other laws, or violate insurance or other contracts.]

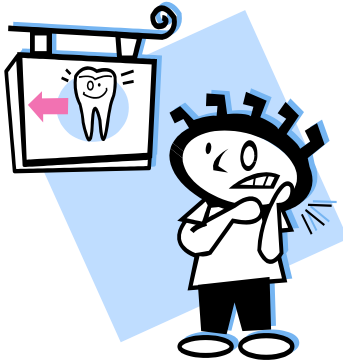
The rule does not prohibit the giving of any cash premium, chance, reward, ticket, item or thing of value to a patient of record for the continuation of that relationship as a patient of the licensee. However, the rule does prohibit the giving of a cash premium, chance, reward, ticket, item or thing of value to a patient of record for the purpose of soliciting new patients.

The 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

The 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

Texas Academy of General Dentistry: www.tagd.org

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

Law Offices of Jeanine Lehman P.C.:
www.jeanine.com

Texas Dental Advertising (cont.) --

set in advance, and is not based on volume or value of patient referrals.

Advertising of Specialties

Rule 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

Rule 108.55 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

Proposed rule 108.56 substantially modifies repealed rule 108.55. Repealed rule 108.55 is the subject of a federal lawsuit concerning 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

The rule as proposed included a subsection that the provisions of the rule would not be required for professional business cards or professional letterhead. After much discussion, it was proposed that this subsection be changed so that the rule would apply to professional business cards, professional letterhead and signage. Because of the proposed change in the subsection, the rule is being republished for public comment and will be considered for adoption at a future SBDE meeting.

Names & Degrees

Rule 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 include prominently

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, except this requirement does not apply to "location signage". Location signage is signage adhered to the building where the dental office is located or at the entry to a shopping center or parking lot that is intended as a location indicator.

A licensed Texas dentist, who is also a licensed Texas physician, may also use the initials "M.D." or "D.O." along with the dentist's dental degree.

Fees

Dentists shall not represent or advertise their fees in a false or misleading manner. Rule 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. Rule 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

Rule 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

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

Websites

Rule 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

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

Record Keeping

A copy of all broadcast, print and electronic advertisements must be retained for four 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 four years. Copies of advertisements must be provided to the SBDE if requested.

Conclusion

This article covers highlights. Readers are encouraged to review the new rules in their entirety for their advertising and communications. [Also, other laws are applicable to advertising, including but not limited to, Texas laws on deceptive trade practices.] ■

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**
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Sleep Apnea Diagnosis & Treatment

At the November 9, 2012 SBDE Board meeting, the Board discussed the diagnosis and treatment of sleep apnea by dentists. Evidently, the SBDE has received a letter from concerned dentists requesting the SBDE's position on dentists providing such services. There was discussion of the concern that there are many serious medical conditions that may occur concurrently with sleep apnea, that are beyond the scope of dental practice, and which have morbidity risk. When dentists order sleep studies, physician examination and evaluation could be bypassed. The SBDE plans to develop a rule or policy statement – possibly, as soon as at the next Board meeting. The SBDE may have presentations from sleep dentists. ■

Facial Cosmetic Surgery & Treatment

On April 16, 2010, the SBDE adopted a policy on Facial Cosmetic Surgery/Treatment. Based on the Texas Dental Practice Act, the SBDE determined that the use of facial cosmetic procedures outside the stomatognathic system is not within the scope of practice for a dentist, who does not have the specialty of oral and maxillofacial surgery. The stomatognathic system is the structures of the mouth and jaws as they relate to speech and the reception, mastication, and deglutition of food. The system is comprised of the teeth, jaws, muscles of mastication, epithelium, and temporomandibular joints and nerves that control the functioning of these structures. The products and procedures included within the heading of "facial cosmesis" (primarily Botox®, Restylane®, Dentox® and similar products) can only be used for the diagnosis and treatment of functional issues of the stomatognathic system as part of a comprehensive treatment plan. Their use for isolated cosmetic purposes is

permitted only for those dentists who have the specialty of oral and maxillofacial surgery. ■

Wastewater Permits

Some dental practices are required to have a General Industrial User Discharge Permit from the City of Austin/Austin Water Utility for the discharge of wastewater. The applicability of this requirement includes dental practices, which discharge wastewater from equipment using silver in the development of x-rays. The permit is held by the entity owning the meter, which could be the building owner when offices are not separately metered or by the dental office when it is separately metered. If silver is being used, then a silver recovery unit is needed to extract silver from wastewater. The Utility periodically tests discharges for compliance with discharge limits. For more information on the requirements, call (512) 972-1060 or see www.austintexas.gov/department/general-industrial-user-discharge-permits. Also, see City of Austin ordinances in Chapter 15-10. These ordinances include discharge limits of 0.002 mg/liter for mercury and 1.0 mg/liter for silver. Note, the ADA has adopted Best Management Practices for Amalgam Waste: www.ada.org/sections/publicResources/pdfs/topics_amalgam_aste.pdf ■

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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