

# DENTAL LEGAL UPDATE

## Advertising of Specialties Rule Unconstitutional

by Jeanine Lehman, Attorney

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The Court noted that the right to advertise as a specialist in Texas is undoubtedly a financial boon to dentists in the state.

On January 21, 2016, U.S. District Court Judge Sam Sparks decreed that Rule 108.54 – “Advertising of Specialties” (the Rule) of the Texas State Board of Dental Examiners (the Board) is an unconstitutional restriction on the Plaintiffs’ First Amendment right to free commercial speech. An injunction was also issued against the Board to prevent it from enforcing the Rule, to the extent it prohibits Plaintiffs from advertising as specialists, or using the terms “specialty” or “specialist” to describe an area of dentistry “not recognized as a specialty by the American Dental Association, or any other provision of Texas law inconsistent with this opinion”. The judgment was issued in response to motions for summary judgment by the parties to the suit.

### Take-Away

***A dentist, who is board certified by the American Academy of Implant Dentistry, the American Society of Dentist Anesthesiologists, the American Academy of Oral Medicine, or the American Academy of Orofacial Pain (the Organizational Plaintiffs), may now advertise as a specialist in Texas, in his or her respective field of:***

- ***Implant Dentistry***
- ***Anesthesiology***
- ***Oral Medicine***
- ***Orofacial Pain***

### Background

The suit began on March 5, 2014, when the American Academy of Implant Den-

tistry, the American Society of Dentist Anesthesiologists, the American Academy of Oral Medicine, the American Academy of Orofacial Pain, and five Texas dentists, including two dental school professors (the Plaintiffs), sued the Board in Austin federal court, claiming the Board’s specialty advertising Rule violates their First Amendment right to commercial free speech, and their rights to due process and equal protection. During the pendency of the suit, the Texas Society of Oral and Maxillofacial Surgeons (TSOMS) intervened in the suit, supporting the Rule. The Board and TSOMS are the Defendants.

### Specialty Ad Rule

Rule 108.54 – “Advertising of Specialties” allows a dentist to advertise as a specialist, or to use the terms “specialty” or “specialist”, only in recognized specialty areas that are: (1) recognized by a board that certifies specialists in the area of specialty, and (2) accredited by the Commission on Dental Accreditation of the American Dental Association. The nine recognized 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. A dentist who wishes to advertise as a specialist or multiple-specialist in one or more recognized specialty areas

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**Advertising of Specialties (cont.) --**

must satisfy the requirements of the Rule. These requirements include being educationally qualified by completion of a specialty program of two years or more accredited by the ADA, or meeting the requirements of a specialty board accredited by the ADA.

**Specialty Advertising Lawsuit**

In the lawsuit, the Plaintiffs alleged that the specialty advertising rule prohibits licensed Texas dentists from advertising to the public as specialists based on the credentials conferred by certain *bona fide* dental organizations, namely, the Organizational Plaintiffs in the lawsuit, and their certifying boards. It was also alleged that the Rule delegates regulatory authority to a private trade association, the American Dental Association, which is not subject to the control of the State of Texas. The Plaintiffs alleged that the Rule bans truthful, non-misleading commercial speech, or minimally has a chilling effect on their right to engage in truthful, non-misleading commercial speech.

The Plaintiffs noted that the Board can punish licensed dentists for violation of the Rule with monetary penalties and suspension of their licenses to practice dentistry.

Licensed Texas dentists are permitted to perform dental services in all areas of dental practice, in both ADA-recognized specialty areas, and areas of dentistry not recognized by the ADA as specialty areas, such as those represented by the Plaintiffs. Licensed Texas dentists are permitted to advertise that they offer specific services in areas of dentistry recognized by the ADA as specialties, and areas of dentistry not recognized by the ADA as specialties regardless of their actual education, experience, or expertise in performing those dental services. For

example, all Texas dentists may place dental implants, whether or not they have had any formal training, education, or experience in placing implants.

The Plaintiffs stated that each of the individual Plaintiffs is a member of the AAID, ASDA, AAOM, or AAOP, and has earned credentials from his respective organization, each expending substantial funds and time to earn credentials and gain expertise. The Plaintiffs alleged that the Rule has deprived the individual Plaintiffs of the opportunity to recoup their investments and to be rewarded for their initiative in earning these credentials, and of the opportunity to declare themselves specialists in their respective areas of expertise. The Plaintiffs further allege that the Rule deprives the public of knowledge of those dental professionals, who are more highly educated, trained, and tested in their respective fields of dental implants, dental anesthesia, oral medicine, and orofacial pain.

**Opinion and Judgment**

The Court performed an analysis and ruled that the speech sought to be made by the Plaintiffs is protected by the First Amendment of the U.S. Constitution.

First, the Court noted that there can be no dispute that the Plaintiffs' proposed advertising concerns lawful activity. Further, the Court found that the Plaintiffs' desired speech is not inherently misleading, and the potential for the Plaintiffs' speech to mislead the public is not an adequate justification for its outright ban.

The Defendants claimed that the Rule advances the state's substantial interest in creating a uniform standard of qualification for dental specialists and

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**Advertising of Specialties (cont.) --**

specialties – arguing that the ADA’s specialty recognition process, including accreditation by CODA, is a valid basis on which to distinguish general dentists and specialists, because it is the industry standard for state dental advertising restrictions. In response, the Court noted that the Defendants have presented no evidence the ADA’s chosen list of specialties is accurate; based on standard and uniformly applied criteria; or will actually help the public properly distinguish between general practitioners and specialists by weeding out false, deceptive, or misleading claims. The Court noted that, in fact, the record suggests the Rule works in conjunction with Texas’s dental licensing rules to increase confusion and perhaps even ban truthful claims. Licensed dentists may lawfully provide services to their patients in any area of dentistry, including dental implants, dental anesthesiology, oral medicine, and orofacial pain, and the Board has no authority to specify dental specializations. Licensed dentists may exclusively practice in any of these four fields of dentistry. Further, the Board has adopted the ADA’s list of specialties without regard to whether the non-ADA-recognized fields are actually bona fide and meet standards of minimal competency. Taken together, this means Texas dentists may specialize in non-ADA-recognized fields; they are just prohibited from saying so. Further, the Court stated that the incongruity between the rights of dental licensees to practice, and the rights of dental licensees to advertise is confusing at best, and perhaps even forces licensed dentists to misrepresent the nature of their practices. In a footnote, the Court recognizes: This risk is exacerbated by 22 Tex. Admin. Code §108.55 (another Board advertising rule). Under rule 108.55, a dentist, who exclusively limits his or her practice to a non-ADA-recognized specialty and wishes to advertise the services he or she provides, must include the notation “General Dentist” in the advertisement. Such a notation risks misleading the public to believe a practitioner, who only practices dental anesthesiology, also provides general dentistry services.

The Court found the Defendants have not shown that the Rule is not more extensive than necessary to serve the state’s interest in eliminating confusion in the marketplace and creating uniform standards. First, requiring non-ADA-recognized specialists to

include a disclaimer that their specialty area is not certified by the state or by the ADA would be a less extensive means of mitigating any potential confusion than an outright ban. The Court noted that the Defendants have not carried their burden of showing why a disclaimer would be inappropriate in this case. Again, the Court noted that if the state was interested in protecting dental consumers from misleading advertisements, such an interest would be furthered by more disclosure, not less. Second, and perhaps more importantly, the Defendants have failed to explain why blind reliance on the ADA is not more stifling of commercial speech than is reasonably necessary. The Court noted that this framework does not account for the risk that a non-ADA-recognized specialty board or credentialing organization could meet the standards of integrity set by the ADA, but still not be recognized as a specialty for political or economic reasons.

The Court stated that wholesale deference to the ADA risks suppressing the truthful speech of dentists, who have achieved high levels of training, education, or experience, but have not successively petitioned the ADA for specialty recognition. In a footnote, the Court stated that the ADA has denied specialty recognition to dental anesthesiology four times, most recently in 2012. Further, since the 1990s, the ADA has twice denied specialty status to oral medicine and has once denied specialty recognition to implant dentistry and orofacial pain.

The Court noted that one obvious less-burdensome

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**Advertising of Specialties (cont.) --**

alternative would be to peg the term “specialty” or “specialist” to a set of statutory or regulatory qualifications that signify the credentialing board has met some uniform standard of minimal competence. The Court further noted that the Defendants have failed to offer justification for choosing not to devise some set of uniform criteria for distinguishing between bona fide credentialing organizations.

The Court ruled in favor of Defendants on Plaintiffs’ equal protection claims and due process claims. On the due process claim, the Court noted that the Board made a voluntary legislative decision to rely on the ADA’s professional judgment with regard to what disciplines should be recognized as specialties for purposes of professional advertising, and the Board did not delegate authority to the ADA. These rulings do not change the effect of the injunction.

In conclusion, the Court noted that the right to advertise as a specialist in Texas is undoubtedly a financial boon to dentists in the state. The Court further stated that while ostensibly promulgated to protect consumers from misleading speech, it appears from the dearth of evidence that the Rule’s true purpose is to protect the entrenched economic interest of organizations and dentists in ADA-recognized specialty areas. Finally, the Court observed that, indeed, Defendants have presented little more than industry bias in favor of the ADA to support the argument that Plaintiffs’ desired speech is deceptive, false, or mis-

leading, or that the Board can trust the ADA to carve out specialty areas without the need to make any substantive determination of whether the Plaintiffs’ dental organizations are actually bona fide. The First Amendment demands more. The Court found that the Rule is an unconstitutional restriction on free speech and enjoined its enforcement.

**The Future**

The future is unknown and this is an area to watch for further developments, which may include the Board appealing the judgment or adopting a new rule using a different approach.

**Conclusion**

Careful attention should be given by dentists to compliance with the law applicable to their advertising, including conferring with a knowledgeable attorney. For further background on this lawsuit, see the May 2014 issue of the Dental Legal Update at [www.jeanine.com](http://www.jeanine.com) ■

**Student Loans - Public Service Loan Forgiveness Program:**

Under a 2007 law, there is a program for forgiveness of student loan debt for people, who perform public service, including by working for governmental entities and certain nonprofits (for example, nonprofit hospitals). Dentists, who satisfy all of the requirements of this law, are eligible for the program. To note: the program has been costly, so there have been efforts to scale the program back or eliminate it. For more detail, see <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service>

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