

DENTAL LEGAL UPDATE

Specialty Advertising: National and Texas Update

by Jeanine Lehman, Attorney

INSIDE THIS ISSUE:

Specialty Advertising:
National and Texas
Update.....1

ADA Code of Ethics.....1

ADA Specialty
Recognition Summit.....2

American Board of
Dental Specialties.....2

Dental Board of
California.....3

Texas SBDE Lawsuit.....3

Practice Tip: Unsigned
Employment Agreement
and Noncompete.....4

About our Firm.....4

Breaking News:
The ADA Council on Dental Education and Licensure announced that it will hold a Specialty Recognition Summit on February 27-28, 2017.

ADA Code of Ethics. In August 2016, the Council on Ethics, Bylaws and Judicial Affairs submitted to the House of Delegates of the American Dental Association (ADA), Resolution 65H-216 to revamp the ADA’s approach to specialty advertising. The House of Delegates adopted the resolution on October 24, 2016 – substantially changing specialty advertising in the ADA Code of Ethics (Code). The resolution amends section 5.H of the Code to remove the limitation of specialist advertising to the nine ADA recognized specialties. Instead, the resolution provides that “a dentist may ethically announce as a specialist to the public in any of the dental specialties recognized by the American Dental Association including dental public health, endodontics, oral and maxillofacial pathology, oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics and dentofacial orthopedics, pediatric dentistry, periodontics, and prosthodontics, and in any other areas of dentistry for which specialty recognition has been granted under the standards required or recognized in the practitioner’s jurisdiction, provided the dentist meets the educational requirements required for recognition as a specialist adopted by the American Dental Association or accepted

in the jurisdiction [State] in which they practice.” The resolution also removes the limitation of requiring exclusive practice in a specialty, in order to advertise as a specialist. Instead, dentists who choose to announce specialization will be required to devote a sufficient portion of their practice to the announced specialty or specialties to maintain expertise in that specialty or those specialties.

The Council indicated that it proposed amending the Code to achieve alignment with the changes in the scope of specialty recognition in some jurisdictions and to permit educationally qualified dentists practicing in areas of dentistry recognized as specialties in their jurisdictions, but not by the ADA, to announce as specialists. The Council indicated that the Council on Dental Education and Licensure (CDEL) is supportive of this amendment to the Code.

The Council noted that there is no ethical impropriety in a dentist announcing as a specialist while practicing other areas of dentistry so long as the dentist is permitted to do so under the licensing provisions of the jurisdiction in which the dentist prac-

continued on page 2

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 or jeanine@jeanine.com

**Website Favorites**

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

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

American Dental Association
www.ada.org

American Board of Dental
Specialties
DentalSpecialties.org

American Society of Dentist
Anesthesiologists
www.asdahq.org

Specialty Advertising (cont.) --

tices, the public is not misled by the dentist announcement, the announcement is not false in any material respect, and the dentist maintains his or her level of skill and expertise in the specialty practice area and is clinically competent in the other areas of dentistry in which the dentist practices. Further, the Council cautioned that, to the contrary, the existing provision in the Code requiring exclusivity may be viewed as restricting dentist ability to engage in free competition and as such creating a legal risk to the ADA. The Council noted that the removal of this exclusivity restriction will alleviate that risk.

This proviso needs stating – the ADA's change to its Code of Ethics is a major development, but it does not change the requirements of Texas law concerning specialty advertising.

ADA Specialty Recognition Summit.

In October 2016, the ADA Council on Dental Education and Licensure (CDEL) announced that it will hold a Specialty Recognition Summit on February 27-28, 2017 at the ADA headquarters. In this major announcement, CDEL indicated that it has contemplated changes to and is conducting a study on the ADA's process for recognizing dental specialties, dental specialty certifying boards and interest areas in general dentistry, with a focus on how the current recognition process can be improved. CDEL notes that it believes that a study of this magnitude must now involve a discussion with

the broader community of interest. Representatives of 35 national dental organizations were invited to participate in the Summit.

The ADA Board of Trustees has created a task force to conduct a critical evaluation of the process and criteria by which specialties and specialty certifying boards are recognized. Members of the ADA Task Force on Specialty and Specialty Certifying Board Recognition will also attend the Summit.

American Board of Dental Specialties. The American Board of Dental Specialties (ABDS) was formed as an Illinois nonprofit corporation in 2013 and is headquartered in Chicago. The objective of ABDS is to provide a fair, equitable, and evidence-based process for evaluating and recognizing dental certifying boards, their certification requirements, and their respective areas of practice as specialty areas in dentistry, to allow an impartial mechanism for state regulators to recognize dental specialists. ABDS has procedures and an application and qualification process for a dental certifying board to seek membership in ABDS. ABDS has established two dental specialty levels: Level I – Dental Specialty, and Level II – Subspecialty, with specific requirements for education, training and experience.

The following specialty boards are recognized by the ABDS: American Board of Oral Implantology /

continued on page 3

Specialty Advertising (cont.) --

Implant Dentistry, American Board of Oral Medicine, American Board of Orofacial Pain, and American Dental Board of Anesthesiology.

The ABDS website is DentalSpecialties.org

Dental Board of California. California law restricting the advertising of diplomate credentials was the subject of litigation in the case of Potts v. Hamilton, and was ruled by a federal court as an unconstitutional restriction on commercial speech. Subsequently, the unconstitutional restrictions were deleted from the California statute in 2012, but they were not taken out of the rules. In 2016, the Dental Board of California repealed its rules, which limited advertising of specialty. These repeals were filed on August 30, 2016.

Texas State Board of Dental Examiners Lawsuit. The Texas State Board of Dental Examiners (Board) is the defendant in a lawsuit involving specialty advertising. The lawsuit began on March 5, 2014, when the American Academy of Implant Dentistry, 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 (Plaintiffs), sued the Board in Austin federal court claiming the Board's specialty advertising Rule violates their First Amendment constitutional right to commercial free speech and their rights to due process and equal protection.

At issue in the lawsuit are the requirements of Board Rule 108.54 "Advertising of Specialties" (Rule), which allow 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 ADA recognized specialty areas are Endodontics, Oral and Maxillofacial Surgery, Or-

thodontics and Dentofacial Orthopedics, atoric Dentistry, Periodontics, Prosthodontics, Dental Public Health, Oral and Maxillofacial Pathology, and Oral and Maxillofacial Radiology. A dentist who wished to advertise as a specialist or a multiple-specialist in one or more recognized specialty areas 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.

On January 21, 2016, U.S. District Court Judge Sam Sparks decreed that the Board Rule 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 the opinion.

The Board appealed the decision to the U.S.

continued on page 4

Jeanine Lehman is an Austin, Texas health law attorney who practices dental, health, employment, real estate, and business law.

Past issues of the Dental Legal Update are available at www.jeanine.com

The information in this newsletter is not a substitute for legal advice. The information is general in nature and should not be relied upon as legal advice generally, nor is it applicable to any particular situation. For legal advice in a particular situation, the reader is advised to retain an attorney. For reprints, call (512) 918-3435 or email jeanine@jeanine.com. © 2016 Jeanine Lehman.

Specialty Advertising (cont.) --

Fifth Circuit Court of Appeals in cause no. 16-50157. Oral arguments were heard on November 1, 2016 before a three judge panel in New Orleans. The panel requested that both parties file letters with the court as to the effect, if any, of the ADA's recent revision to its Code of Ethics, which allows dentists to advertise a specialty not specifically recognized by the ADA. Those letters have been filed with the court.

At the time this article is written, the appellate court's decision has not yet been issued. Interested persons need to follow carefully the outcome of the appeal, and Board action concerning specialty advertising, given the significant impact on advertising by Texas dentists.

For further background on this lawsuit, see the May 2014 and March 2016 issues of the Dental Legal Update at my website, www.jeanine.com

Also note: Texas Rule 108.54 has an exclusivity requirement similar to the ADA Code of Ethics exclusivity requirement that was repealed. Rule 108.54 requires that dentists, who satisfy the requirements to advertise as specialists and communicate their specialization, should limit their practice exclusively to the advertised specialty area(s) of dental practice.

When the Board rewrites or repeals its advertising rules, the exclusivity requirement is an additional area to watch and about which to provide comments to the Board.

Practice Tip: Unsigned Employment Agreement and

Noncompete. Knowing what contracts must be in writing and signed is important. An employer dentist in North Texas learned a hard lesson. In that case, the employer dentist had discussions with an employee dentist over an extended period concerning an employment agreement with noncompete provisions. The employment agreement was never signed. The case went to court. The court opinion indicated that the former employee dentist opened up an office some 100 feet from the employer's office, hired a significant number of the employer's staff members, and proceeded to contact the patients on the employer's patient list. In that 2004 case, the court held that the noncompete provisions in an unsigned written dentist employment agreement were not enforceable.

TIP: Meet with a knowledgeable attorney to have a legal checkup to check the status of your critical contracts and take corrective action.

**Have you moved?
Please send us a
change of address
to receive future
issues.**

**Please share this
newsletter with
your dentist col-
leagues, office
manager, and ad-
visors.**

Thanks!

**To receive this
newsletter by
email, call
(512) 918-3435.**

About Our Firm ... Call us at (512) 918-3435

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 and physicians. 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 been in private practice as the owner of her firm for over 25 years and has over 30 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. Suggestions for future newsletter topics and invitations to speak to professional groups are appreciated!