

DENTAL LEGAL UPDATE

Texas Dental Board Sued on Specialist Ad Rule Commercial Free Speech Claims in Federal Court

by Jeanine Lehman, Attorney

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On March 5, 2014, the Texas State Board of Dental Examiners (Board) was sued in Austin federal court by 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, who claimed the Board's specialty advertising rule 108.54 violates their First Amendment constitutional right to commercial free speech, and their rights to due process and equal protection.

Specialty Advertising Rule

On May 1, 2013, the Texas Board adopted a new set of advertising and business promotion rules applicable to Texas dentists, including rule 108.54. 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. The nine recognized specialty areas are:

- Endodontics
- Oral and Maxillofacial Surgery
- Orthodontics and Dentofacial Orthopedics
- Pediatric Dentistry
- Periodontics
- Prosthodontics

Free Contracts Seminar Tuesday, May 20, 2014 5:30 p.m. to 6:00 p.m.

Knowing the basics of what a contract is, how it is formed, some defenses to a contract, and, yes, traps for the unwary, is critical for dentists and their office managers.

Contracts 101: Business Contracts Basics, by attorney Jeanine Lehman, covers those basics and more. Contracts 101 will also provide practical take-aways for contract formation, contract management, and risk avoidance. Attend this free seminar online or in person at the Business Success Center, 7600 Burnet Rd. #130, Austin, TX. To sign up, go to: <https://www.eventbrite.com/e/business-success-center-first-success-workshop-contracts-101-tickets-11120609041>

- Dental Public Health
- Oral and Maxillofacial Pathology
- Oral and Maxillofacial Radiology

A dentist who wishes to advertise as a specialist in a recognized specialty area must satisfy the requirements of rule 108.54. These requirements include being educationally qualified by

Beyond the scope of the current lawsuit is the policy question -- "Should additional dental specialties be recognized?"

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

Dental Board Ad Lawsuit (cont.) --

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.

2014 Lawsuit – Specialty Advertising

In the lawsuit, the Plaintiffs allege 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 is also alleged that the rule delegates standardless regulatory authority to a private trade association, the American Dental Association, which is not subject to the control of the State of Texas. They allege 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 note that the Board can punish licensed dentists for violation of rule 108.54 with monetary penalties and suspension of their licenses to practice dentistry.

For background - 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 as specialty areas, such as those represented by the Plaintiffs (perhaps, with the exception of some areas of the specialty of oral and maxillofacial surgery, because the scope of that specialty is different under the Texas Dental Practice Act than other areas of practice). 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 specialty areas of practice, 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. However, if a dentist does not satisfy the applicable standard of care for his work, he faces potential Board disciplinary action and civil liability to his patient.

The Plaintiffs state 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 allege that rule 108.54 has deprived the individual Plaintiffs from the opportunity to recoup their investments and to be rewarded for their industry in earning these credentials and declaring themselves to be 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 in dental implants, dental anesthesia, oral medicine, and orofacial pain.

2012 Lawsuit – Additional Credentials Advertising

For background - a prior lawsuit was filed against the Board In April 2012, concerning a different advertising rule. In that lawsuit, the American Academy of Implant Dentistry (AAID) and two Texas implant credentialed dentists sued the Board in Austin

federal court, claiming that one of the Board's rules severely limited advertising of additional credentials in dental practice areas that are not recognized as a specialty by the American Dental Association or the Board. That suit was dismissed by the agreement of the parties on May 3, 2013, after the rule at issue was substantially revised by the Board. The new rule 108.56 allows dentists to advertise credentials with some caveats, including that they avoid any communications that express or imply specialization in a recognized specialty, or specialization in an area of dentistry that is not recognized as a specialty, or attainment of an earned academic degree. 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:

Jane Doe, DDS, General Dentist
 FAAID, Fellow American Academy of Implant Dentistry
 DABOI/ID, Diplomate American Board of Oral Implantology/
 Implant Dentistry

Rule 108.56 should be read in conjunction with rule 108.55 that requires that 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.

Interestingly enough, the Plaintiffs in the 2012 lawsuit pleadings stated that they did not seek to advertise that implant dentistry is a dental "specialty", nor did they seek to advertise that they offer specialty credentials or they are "specialists", and that they merely sought to advertise truthful statements relating to the credentials they and other dentists have earned from the AAID and its certifying board.

Should More Specialties be Recognized?

Beyond the scope of the current lawsuit is the policy question – "Should additional dental specialties be recognized?" Arguably, the Board has the right to recognize other specialty areas and set standards for achievement/certification of specialist status.

In the ADA's 2001 report, Future of Dentistry – Today's Vision: Tomorrow's Reality, there is recognition that advanced clinical training pro-

grams in areas that are not recognized as specialties by the ADA are offered by some dental schools and hospitals. Four examples are given, namely, dental anesthesiology, oral medicine, geriatric and special care dentistry, and operative dentistry. See page 102 of the report. The report also notes that "Monitoring of non-ADA recognized specialty training is needed. As it has recently done for oral and maxillofacial radiology, the dental profession would do well to continue reviewing the informal specialties for their potential to rise to formal specialty status." See page 111 of the report. The report is available at: http://www.ada.org/sections/professionalresources/pdfs/future_execsum_fullreport.pdf

The Future

The 2014 lawsuit is in its early stages, and it is unknown if the lawsuit will result in any changes to the specialty advertising rule, including by court action or rule changes by the Board. In the meantime, the specialty advertising rule is still in effect. Careful attention should be given by dentists to compliance with all the Board advertising rules, including conferring with a knowledgeable attorney in advance of placing the advertising. ■

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

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Legal Tips

Office Leases. There is no such thing as a “standard” office lease. Have your lease reviewed by your attorney before you sign it. Consider a sublet and assignment clause to have choices if your practice needs to close, or if it contracts or expands, or if you plan to sell your practice. Check today, to see when your lease expires and for upcoming deadlines in your lease such as deadlines to exercise options to renew your lease and options to purchase the property. Meet with your attorney to develop a plan for your office space legal needs and to prepare a calendar of your lease deadlines.

Overtime Pay. Failure to pay certain employees overtime pay at the overtime rate is a violation of the Fair Labor Standards Act. This is illegal and subjects the practice to substantial penalties. This is an area to review with your attorney, especially when employees work over 40 hours in a work week.

Limited Liability Entity. To help protect your personal assets from many types of liability, have an appropriate limited liability entity, such as a professional corporation or professional limited liability company formed by your attorney for operating your practice. Consult with your attorney concerning appropriate choices of entity.

Piercing Corporate Veil. To lessen the chance that the owners of a practice, operated as an entity,

are held personally liable for its debts through the “piercing of the corporate veil”, observe the formalities of running the practice entity, including but not limited to, keeping separate bank accounts and credit card accounts, avoiding commingling of funds, holding at least annual meetings of the directors and shareholders for professional corporations and associations, issuing stock certificates for professional corporations and associations, satisfying tax filing and payment obligations, and carrying on the affairs of the practice in the entity name.

Assumed Name Certificates. When a material change occurs in the information on your assumed name certificate (dba) or your dba has expired, a new one needs to be filed. Changes of your practice’s location, ownership for nonincorporated businesses, form of business or entity, and name are examples of changes that may require a new filing. Certain entities need to file with both the State of Texas and the County, including corporations, limited partnerships, registered limited liability partnerships, limited liability companies, and professional associations.

Professional Association Annual Statements. Practices, which are operating as professional associations, need to be sure to file their Annual Statements with the Texas Secretary of State. Failure to do so will result in the termination of the professional association. ■

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Please send us a
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to receive future
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newsletter with
your dentist col-
leagues, office
manager, and ad-
visors.

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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!