



American Association of Dental Boards

Guidelines on Advertising

**The Report of the AADB
Board Attorneys Roundtable
Committee to Develop
Guidelines on Advertising**

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AADB ADVERTISING GUIDELINES

AADB Attorney Roundtable, October 10, 2011

SECTION 1. INTRODUCTION, PURPOSE AND DISCLAIMER.

- A. **INTRODUCTION AND PURPOSE:** These provisions are intended to provide guidance to regulatory bodies in order to protect the health and general welfare of patient consumers from advertising that is false, or materially deceptive or misleading.
- B. **DISCLAIMER:** The following guidelines are deliberately generalized and intended for educational purposes only. The statutory and regulatory authority of each state dental board of examiners to regulate advertising and take action on infractions differs significantly as does each state's burden of proof in substantiating an infraction (i.e.,... "preponderance of evidence" versus "clear and convincing evidence" of an infraction.) Therefore, each state board should confer with assigned counsel to determine how to appropriately incorporate or modify these provisions in order to effectively protect patients from false or deceptive advertising in any material respect. In addition, the substance contained herein, except where otherwise specifically cited, consists of a compilation of individual state statutory and regulatory provisions as well as Section 5 of the 2011 edition of the American Dental Association Principle of Ethics and Code of Professional Conduct.

SECTION 2. DEFINITIONS.

- A. False or misleading.¹ Statements which a) contain a material misrepresentation of fact; b) omit a fact necessary to make the statement considered as a whole not materially misleading, c) intend or create an unjustified expectation about results the dentist can achieve, d) contain a material, objective representation, whether express or implied, that the advertised services are superior in quality to those of other dentists, if that representation is not subject to reasonable substantiation.
- B. "Material" Misrepresentation or Practice. A misrepresentation or practice which is likely to affect a consumer's choice of or conduct regarding a product or service.²
- C. Commercial Speech. Communication (such as advertising and marketing) that involves only the commercial interests of the speaker and the audience, and is therefore afforded lesser First Amendment protection than social, political, or religious speech.³

SECTION 3. SAMPLE REGULATORY PROVISIONS.

- A. *ADVERTISING IN SPECIALITIES AND INTEREST AREAS:*
1. Recognized Specialties. A dentist may advertise as a specialist or use the terms "specialty" or "specialist" to describe professional services in recognized specialty areas only if the dentist limits the dentist's practice exclusively to one or more specialty areas that satisfy both of the following criteria:

¹ See American Dental Association Principle of Ethics and Code of Professional Conduct, Section 5, Advisory Opinion 5.f.2. (2011)

² See FTC Policy Statement on Deception, 103 F.T.C. 110, 174 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>

³ Black's Law Dictionary – 9th Edition

- a. Recognized by a board that certifies specialists for the area of specialty. Board certification means that the dentist who has met the requirements of a specialty board and who has received a certificate from the recognized specialty board, indicating the dentist has achieved diplomate status;
- b. Completed an education program accredited by the Commission on Dental Accreditation of the American Dental Association in a recognized specialty as set forth in Section 3(A)(3) below. A dentist is educationally qualified if he has successfully completed an educational program of two or more years in a specialty area accredited by the Commission on Dental Accreditation of the American Dental Association, as specified by the Council on Dental Education of the American Dental Association;

2. Interest Areas. Any dentist who advertises as a specialist or uses the terms "specialty" or "specialist" to describe professional services provided within his practice, which do not meet each of the criteria of Section 3(A)(1)(a) and (b) above, and therefore, technically, are not recognized specialty areas, shall ensure the advertisement reasonably discloses to the public the type of training the dentist completed and the dentist's experience in the interest area. To determine if a dentist's advertising disclosure for an interest area comports with this provision and is not misleading, the Board may consider the following factors:

- a. Whether the disclosure indicates that the dentist's practice is limited to the asserted interest area;
- b. Whether the disclosure reasonably informs the public of the educational curriculum the dentist obtained in the asserted interest area including the duration of the program. Full disclosure of education content may further include a statement by the dentist which indicates whether the curriculum is:
 - (i) Formal or Informal;
 - (ii) Full-time or Part-time;

- (iii) Graduate or Post-Graduate Level;
 - (iv) Recognized by any board which certifies specialists for an asserted interest area;
 - (v) Accredited by the Commission on Dental Accreditation of American Dental Association;
 - c. Whether the disclosure identifies the institution which conferred completion of the curriculum in the interest area; and
 - d. Whether the disclosure sets forth the number of clinical and didactic classroom hours the dentist has successfully completed in the asserted interest area.
- 3. The following are recognized specialty areas and meet the requirements of Section 3A(1)(a) and (b) above:
 - a. Endodontics,
 - b. Oral and maxillofacial surgery,
 - c. Orthodontics and dentofacial orthopedics,
 - d. Pediatric dentistry,
 - e. Periodontics,
 - f. Prosthodontics,
 - g. Dental Public Health,
 - h. Oral and Maxillofacial Pathology, and
 - i. Oral and Maxillofacial Radiology.
- 4. A dentist whose license is not limited to the practice of a recognized specialty identified under Section 3(A)(3)(a)-(i) above may advertise that the dentist performs or limits practice to the aforementioned recognized specialty services even if the dentist is not a specialist in the advertised area of practice so long as the dentist clearly discloses that the dentist is a general dentist or a specialist in a different specialty. For example, the following disclosures would be in compliance with this rule for dentists: "Jane Doe, DDS, General Dentist, practice limited to pediatric dentistry." "John Doe, DMD, Endodontist, practice includes prosthodontics."
 - a. In addition to this provision, if a dentist advertises he is a specialist in an interest area [an area not specifically recognized and set forth in Section 3(A)(3)(a)-(i) above],

the dentist should reasonably disclose the type of training he has obtained, and its duration, in the asserted interest area. Factors in determining whether the dentist has reasonably disclosed this information include an assessment of each of the aforementioned criteria set forth in Section 3(A)(2)(a)-(d) above.

- b. For example, the following disclosures would comply with this rule for dentists: "John Doe, DDS, General Dentist, services including dental anesthesia. Certification as a Dental Anesthesiologist from the Dental Anesthetist Institute, after successfully completing an oral examination, not based on psychometric principles and following his successful completion of an informal, part-time, graduate level program lasting 2 days and consisting of 2 clinical hours of training and 2 didactic classroom hours of instruction. Dental Anesthesia is not recognized by a board which certifies specialists and is not accredited by the Commission on Dental Accreditation of the American Dental Association.
5. Dentists who choose to advertise specialization in a recognized specialty area as set forth in Section 3(A)3(a)-(i) above should use "specialist in" or "practice limited to" and shall limit their practice exclusively to the announced special area(s) of dental practice, provided at the time of the advertisement such dentists have met in each approved specialty for which they advertise the existing educational requirements and standards set forth by the American Dental Association. Dentists who use their eligibility to advertise as specialists to make the public believe that specialty services rendered in the dental office are being rendered by qualified specialists when such is not the case are engaged in unethical conduct. The burden of responsibility is on specialists, within recognized specialty areas, to avoid any inference that general practitioners who are associated with specialists are qualified to advertise themselves as specialists in said recognized specialty areas.

6. **Standards For Multiple-Specialty Advertisements in Recognized Specialty Areas.** The educational criterion for announcement of limitation of practice in additional specialty areas is the successful completion of an advanced educational program accredited by the Commission on Dental Accreditation (or its equivalent if completed prior to 1967) in each area for which the dentist wishes to advertise. Dentists who are presently ethically advertising limitation of practice in a specialty area and who wish to advertise in an additional recognized specialty area must submit to the appropriate constituent society documentation of successful completion of the requisite education in specialty programs listed by the Council on Dental Education and Licensure or certification as a diplomate in each area for which they wish to announce.
7. **Specialist Advertisement of Credentials in Non-Specialty Interest Areas.** A dentist who is qualified to advertise specialization under this section may not advertise to the public that he or she is certified or a diplomate or otherwise similarly credentialed in an area of dentistry not recognized as a specialty area by the American Dental Association unless the advertisement contains a disclosure which reasonably informs the public of the dentist's training and experience in the non-recognized area. To determine whether the dentist's disclosure comports with this provision, the Board may consider the factors identified in Section 3(A)(2)(a)-(d) above.

B. *ADVERTISING CREDENTIALS AND CERTIFICATIONS:*

1. **Unearned, Non-health Degrees.** A dentist may use the title Doctor or Dentist, DDS, DMD or any additional earned, advanced academic degrees in health service areas in an announcement to the public. The announcement of an unearned academic degree may be misleading because of the likelihood that it will indicate to the public the attainment of specialty or diplomate status. An unearned academic degree is one which is awarded by an educational institution not

accredited by a generally recognized accrediting body or is an honorary degree.

- a. The use of a non-health degree in an announcement to the public may be a representation which is misleading because the public is likely to assume that any degree announced is related to the qualifications of the dentist as a practitioner.
- b. Some organizations grant dentists fellowship status as a token of membership in the organization or some other form of voluntary association. The use of such fellowships in advertising to the general public may be misleading because of the likelihood that it will indicate to the public attainment of education or skill in the field of dentistry.
- c. Generally, unearned or non-health degrees and fellowships that designate association, rather than attainment, should be limited to scientific papers and curriculum vitae. In all instances, state law should be consulted.
- d. Recognizing the potential of the public being misled or deceived by advertisement in these circumstances where a degree or status has not actually been conferred, the practitioner must include a disclosure in the advertisement which sets forth each of the following criteria:
 - (i) The institution the practitioner enrolled in educational program as well as the date of initial enrollment;
 - (ii) The fact the degree or status has not yet been earned or conferred;

2. **Credentials in General Dentistry.** General dentists may advertise fellowships or other credentials earned in the area of general dentistry so long as they avoid any communications that express or imply specialization in a recognized specialty and the advertisement includes the disclaimer that the dentist is a general dentist. In order to prevent a reasonable person from concluding that abbreviations indicate a designation of an academic degree, any use of abbreviations to designate credentials in interest area areas in an advertisement shall be accompanied by reasonable disclosure of the dentist's training and experience in the interest area. To determine whether the disclaimer reasonably discloses this information to the public, the Board may use the factors set forth in Section 3(A)(2)(a)-(d) above.

C. NAMES AND RESPONSIBILITIES:

1. Practice under name of licensee; full disclosure required.
 - a. No person shall:
 - (i) Practice dentistry under the name of a corporation, company, association, limited liability company, or trade name without full and outward disclosure of his full name, which shall be the name used in his license or renewal certificate as issued by the board, or his commonly used name.
 - (ii) Conduct, maintain, operate, own, or provide a dental office in the state of licensure, either directly or indirectly, under the name of a corporation, company, association, limited liability company, or trade name without full and outward disclosure of his full name as it appears on the license or renewal

certificate as issued by the board or his commonly used name.

- (iii) Hold himself out to the public, directly or indirectly, as soliciting patronage or as being qualified to practice dentistry in the state of licensure under the name of a corporation, company, association, limited liability company, or trade name without full and outward disclosure of his full name as it appears on the license or renewal certificate as issued by the board or his commonly used name.
- (iv) Operate, manage, or be employed in any room or office where dental service is rendered or conducted under the name of a corporation, company, association, limited liability company, or trade name without full and outward disclosure of his full name as it appears on the license or renewal certificate as issued by the board or his commonly used name.
- (v) Practice dentistry without displaying his full name or his commonly used name as it appears on the license or renewal certificate as issued by the board in front of each dental office location if the office is in a single-story and/or single-occupancy building, or without displaying his full name or his commonly used name as it appears on the license or renewal certificate as issued by the board on the outside of the entrance door of each dental office if the office is in a multi-occupancy and/or multi-story building.

b. **Name of Practice.** Since the name under which a dentist conducts his or her practice may be a factor in the selection process of the patient, the use of a trade name or an assumed name that is false or misleading in any material respect is unethical. Use of the name of a dentist no longer actively

associated with the practice may be continued for a period not to exceed one year.

- c. **Dentist Leaving Practice.** Dentists leaving a practice who authorize continued use of their names should receive competent advice on the legal implications of this action. With permission of a departing dentist, his or her name may be used for more than one year, if, after the one year grace period has expired, prominent notice is provided to the public through such mediums as a sign at the office and a short statement on stationery and business cards that the departing dentist has retired from the practice.

2. **Responsibility.** The responsibility for the form and content of an advertisement offering services or goods by a dentist shall be jointly and severally that of each licensed professional who is a principal, partner, officer, or associate of the firm or entity identified in the advertisement regardless whether the advertising has been generated by them personally, by their employees, or a third-party contractor.

D. FEES.

1. **General:** Dentists shall not represent the fees they charge in a false or misleading manner when advertising. Dentists shall state availability and price of goods, appliances or services in a clear and non-deceptive manner and include all material information to fully inform members of the general public about the nature of the goods, appliances or services offered at the announced price.
2. **Disclosures:** An advertisement which includes the price of dental services shall disclose:
 - a. The professional service being offered in the advertisement.
 - b. Any related services which are usually required in conjunction with the advertised services and for which additional fees may be charged.

- c. A disclaimer statement that the fee is a minimum fee and that the charges may increase depending on the treatment required.
- d. The dates upon which the advertised service will be available at the advertised price.
- e. When a service is advertised at a discount, the standard fee of the service and whether the discount is limited to a cash payment.
- f. When a service is advertised at less than market value, how the market value was determined.
- g. If the advertisement quotes a range of fees for a service, the advertisement shall contain all the basic factors upon which the actual fee shall be determined.

E. *RECORD KEEPING OF ADVERTISEMENTS.*

1. Retention of broadcast, print and electronic advertising. A prerecorded copy of all broadcast advertisements, a copy of print advertisements and a copy of electronic advertisements shall be retained for a **reasonable period of time** following the final appearance or communication of the advertisement. In addition, the dentist shall document the date the dentist discovered a false or misleading advertisement, as well as the date and substance of all corrective measures the dentist took to rectify false or misleading advertisements. The dentist shall maintain documentation of all corrective measures for a reasonable period of time following the most recent appearance or communication of the advertisement which the dentist discovered was in inaccurate.
2. The advertising dentist shall be responsible for making copies of the advertisement available to the board if requested.

F. FALSE AND MISLEADING ADVERTISING:

1. The dentist has a duty to communicate truthfully. Professionals have a duty to be honest and trustworthy in their dealings with people. The dentist's primary obligations include respecting the position of trust inherent in the dentist-patient relationship, communicating truthfully and without deception, and maintaining intellectual integrity. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the profession. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect. No dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect.
2. **Published Communications.** If a dental health article, message or newsletter is published in print or electronic media under a dentist's byline, to the public without making truthful disclosure of the source and authorship or is designed to give rise to questionable expectations for the purpose of inducing the public to utilize the services of the sponsoring dentist, the dentist is engaged in making a false or misleading representation to the public in a material respect.
3. **Examples.** In addition to the plain and ordinary meaning of the provisions set forth throughout these guidelines, additional examples of false or misleading advertising include but are not limited to:

 - a. Claims to provide or perform painless dentistry.
 - b. A statement which implies or suggests a procedure is guaranteed to be successful or creates false or unjustified expectation of favorable results.
 - c. A statement which implies or suggests superiority of services or materials that cannot be reasonably substantiated. In this regard, the Board may request the licensee submit his or her evidence to sustain his claim to the licensing board before using the advertisement that includes the claim of superiority.

- d. A statement which implies or suggests any guarantee of satisfaction except the guarantee to return a fee if the patient is not satisfied with the treatment rendered.
- e. A statement which implies or suggests that a service is free or discounted when the fee is built into a companion procedure provide to the patient and charged to the patient.
- f. A statement which contains a testimonial from a person who was not a patient of record.
- g. A statement which misrepresents or misnames any dental method or system.

SECTION 4. LEGAL REQUIREMENTS FOR ADVERTISING REGULATIONS:

A. **FOUR PART TEST:** In commercial speech cases, the court will use a four-part analysis to determine whether a regulatory provision violates the First Amendment of the U.S. Constitution (see *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 at 566, 100 S.Ct 2343, 65 L.Ed.2d. 341 (1980)). The provision must meet **each** of the following criteria:

1. An expression which is protected by the First Amendment is one which concerns a lawful activity and is not misleading.
2. If the expression concerns a lawful activity and is not misleading, the governmental interest in regulating the expression must be substantial.
3. The regulation directly advances the (substantial) governmental interest asserted in that the regulation addresses actual harm (not a hypothetical harm); "[M]ere speculation or conjecture" (that the regulation will advance the substantial government interest) will not suffice; rather the State "must demonstrate that the harms it recites are real and that its restriction will in fact

alleviate them to a material degree." *Id* at 143 citing *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

- a. Public surveys are an acceptable means for a State Board to demonstrate the actual harm and to demonstrate that the proposed regulation will remedy the harm (See *Borgner v Brooks*, 284 F.3d 1204 at 1213 (11th Cir. 2002).
4. The regulation cannot be more extensive than is necessary to serve the government's (substantial) interest.
 - a. Courts favor Boards requiring disclaimers in advertising as an alternative to categorically banning or restricting content. (See *Borgner* at 1213-1214 and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-649, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

SECTION 5. GROUNDS AND PROCEDURES FOR DISCIPLINARY ACTION FOR ADVERTISING VIOLATIONS.

- A. In accordance with the Board's statutory and regulatory authority for disciplinary action and denial of licensure for advertising violations as set forth below, the Board may refuse to issue or renew a license, may suspend or revoke a license, may reprimand, restrict or impose conditions on the practice of a licensee or applicant for licensure.
 1. "Advertising violations" consist of expressions explicitly or implicitly authorized by a licensee, or applicant for licensure, which are false or misleading as otherwise referenced in these guidelines;
- B. A licensee or applicant for licensure explicitly or implicitly authorizes advertising when the individual permits or fails to correct statements that are false or misleading. Failure to attempt to retract or otherwise correct advertising violations as directed by the Board may constitute a willful violation of these provisions and may be a separate and

distinct independent violation of the Board's statutory or regulatory authority. A willful violation of the Board's directive may subject the licensee or applicant to disciplinary action, non-renewal or denial of licensure.

- C. When determining whether an "advertising violation" has occurred, the Board shall proceed in accordance with due process and its statutory and regulatory provisions which govern investigations and contested case proceedings.