STATEMENT OF THE AMERICAN DENTAL ASSOCIATION ON REGULATION BY STATE BOARDS OF DENTISTRY OF MISLEADING DENTAL SPECIALTY CLAIMS

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From time to time, general dentists who are not adequately trained in a dental specialty are holding themselves out to potential patients as specialists in a particular area of dentistry. This sort of promotional practice is misleading and does a disservice to patients who are seeking the most qualified dentist to treat their conditions. Accordingly, the American Dental Association respectfully submits that it is the obligation of State Boards of Dentistry that are charged with protecting the interests of dental patients to regulate and prevent this practice.

The ADA recognizes that some State Boards may be reluctant to regulate misleading specialty advertising by general dentists lest they be sued by the advertising dentists (or their associations) for allegedly violating the First Amendment rights of those dentists. This reluctance is understandable since some state regulation of dental advertising has been struck down, or strongly questioned, by the courts on First Amendment grounds. *See, e.g., American Academy of Implant Dentistry v Parker*, 860 F.3d 300 (5th Cir. 2017) (invalidating on First Amendment grounds a Texas regulation prohibiting dentists from advertising as "specialists" in any area of dentistry not recognized as a specialty by the ADA); *Kiser v Kamdar*, 831 F.3d 784 (6th Cir. 2016) (strongly questioning whether an Ohio regulation prohibiting a dental specialist from advertising as a specialist where that dentist also performed general dentistry could survive First Amendment challenge).

Notwithstanding these cases, the ADA respectfully submits that State Boards of Dentistry can, and should, prohibit specialty advertising by general dentists with inadequate training and experience in the specialty that they purport to have. The key is to make the appropriate record

in the administrative proceeding on which the regulation is based. This memorandum discusses various forms of misleading dental specialty advertising and explains the specific steps that a Board should take to satisfy First Amendment scrutiny of its regulation of such advertising.

In essence, there are four such steps:

1. Determine and define the minimum training, experience, and other requirements that the Board deems appropriate to justify a dental specialty claim -- and explain the reasons for those requirements;

2. Indicate that the purpose of the regulation is to prevent deception of patients and potential patients -- and to help assure that patients receive dental care from appropriately trained and experienced practitioners;

3. Discuss how the regulation will avoid deception of patients and will help to assure appropriate care for patients; and

4. Explain why a disclaimer by the advertising dentist would not be adequate to protect patients and potential patients.

These steps require some effort, but should not be too difficult to accomplish.

DISCUSSION

Advertising of dental specialties is a form of commercial speech protected under the First Amendment to the Constitution of the United States. Accordingly, any regulation of such advertising is subject to review under the four-factor test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980). That test looks at four considerations:

1. Does the regulated speech concern unlawful activity, or is it inherently misleading? If the speech concerns unlawful activity or is inherently misleading, it can be prohibited by the State without any further analysis. If not, the other three factors come into play.

2. Is the government interest in regulating the speech substantial? If not, the State Board of Dentistry may not regulate the speech. If so, the inquiry proceeds to the next step.

3. Does the regulation directly advance the governmental interest asserted? If not, the State Board may not regulate the speech. If so, the analysis proceeds to the final question in the inquiry.

4. Is the regulation more extensive than necessary to advance the asserted government interest? If so, the regulation is struck down. If not, the regulation will survive challenge under the First Amendment.

Id. at 563-566. This Statement now examines each of these four elements in the context of regulating misleading dental specialty advertising.

1. Is Specialty Advertising By A General Dentist Inherently Misleading?

At the outset, specialty practice by general dentists is not unlawful activity. In most states, licensed dentists are free to practice in all branches of dentistry. Thus, specialty advertising cannot fairly be said to promote unlawful activity unless state law limits the scope of practice of general dentists.

The question therefore becomes whether the advertising at issue is "inherently misleading." In this connection, it is crucial to be aware that the courts have drawn a distinction between speech that is "inherently misleading" and speech that is only "potentially misleading." *See, e.g., In re R.M.J.,* 455 U.S. 191, 203 (1982); *Borgner v. Brooks,* 284 F.3d 1204, 1210 (11th Cir. 2002). Speech that is found to be "inherently misleading" can be prohibited without any further analysis. By contrast, speech that is deemed to be merely "potentially misleading" requires evaluation under the three other *Central Hudson* factors. *American Academy of Pain Management v. Joseph,* 353 F.3d 1099, 1106-09 (9th Cir. 2004)

Notably, this is where the regulations in *AAID v. Parker* and *Kaiser v. Kamdar* encountered their most significant problem. Specifically, in *Parker*, the panel majority concluded that there was nothing "inherently misleading" about advertising a specialty that is not recognized by the ADA. Likewise, in *Kiser,* the Court found nothing "inherently misleading" about claims of specialty qualifications by a properly trained dental specialist just because that specialist also performed general dentistry. Rather, the speech in question in those cases was deemed to be only "potentially misleading" -- and, therefore, subject to analysis under the remaining three *Central Hudson* factors.

Armed with these precedents, general dentists challenging a regulation prohibiting them from claiming to have specialty expertise will argue that there is nothing inherently misleading about such a claim. They will point to various courses that they have taken in the specialty at issue -- no matter the length or intensity of the course. They will also truthfully claim to have performed some number of procedures in that specialty. And they may claim to have been certified by a specialty certifying body that may, or may not, have standards that justify a claim of specialty expertise. Thus, they will seek to persuade a court that their advertising is only potentially misleading -- and therefore not subject to prohibition without consideration of the other three elements of the *Central Hudson* test.

However, a well-counseled State Board of Dentistry should be able to defeat this line of argument by taking appropriate steps in the rule-making proceeding (or in a prior administrative proceeding). With respect to regulation of general claims of dental specialty expertise, the State Board should define what it regards as the minimum training and experience that dentists should have in order to hold themselves out as having specialty expertise. With respect to claims of Board-certification in a particular area of dentistry, the State Board should describe the minimum

standards that a certifying body must have in order to make claims of certification by that body non-deceptive. For both of these items, the Board should provide a reasoned explanation of why it took the positions that it did. However, an important lesson of *AAID v. Parker* is that, while the regulation can reference ADA or CODA standards, it should provide an alternative to those standards as a means of satisfying the Board's regulatory requirements.

On the general issue of specialty advertising, a State Board might, for example, issue a regulation that, in order to avoid misleading the public, a dentist claiming to be a specialist, or to have specialty expertise, must have followed either of two pathways: (a) The dentist must have completed a residency in the advertised specialty in a program accredited by CODA or in a program found by the Board to have standards equivalent to, or more stringent than, CODA; or (b) in the absence of completion of such a residency, the dentist must have done a fellowship in the specialty of at least X months and must have provided care in that specialty to at least Y patients in the course of the fellowship and in practice. This approach allows for specialty advertising in areas not recognized as specialties by the ADA and in areas, *e.g.* dental implants, for which there are no separate residency programs. At the same time, it allows a State Board to prohibit specialty claims by dentists based on week-end courses or otherwise inadequate training in the specialty. Of course, the Board should, as noted above, provide a reasoned discussion of why it believes that anything short of the requirements that it has imposed would be misleading to patients and potential patients.

With respect to advertising of Board-certification in a particular specialty, a State Board of Dentistry can define the standards that a certifying body must meet in order to permit a Diplomate to advertise as Board-certified in that specialty without deceiving the public. Here again, it would be advisable not to limit acceptable certifying bodies to those recognized by

CODA. A good example of an acceptable approach can be found in the medical context in Section 458.3312 of the Florida Statutes. That statute provides, in pertinent part, as follows:

> "A physician licensed under this chapter may not hold himself or herself out as a board-certified specialist unless the physician has received formal recognition as a specialist from a specialty board of the American Board of Medical Specialties or other recognizing agency that has been approved by the board."

Similarly, a State Board of Dentistry could provide that a licensed dentist may not claim to be Board-certified unless that dentist has been certified by a certifying body that has been recognized by CODA or that has been approved by the State Board as having requirements for certification that will fairly evaluate the training and experience of the dentist in the specialty at issue. The State Board could then establish a procedure by which a certifying body not recognized by CODA may obtain recognition by the State Board.

It was the failure of the Boards whose regulations were at issue in *Parker* and *Kamdar* to provide reasoned explanations for their regulations that left room for the argument that the advertising at issue was only "potentially misleading." By contrast, if a Board does provide a thoughtful analysis of what it regards as minimum criteria for advertising as a specialist – and if the Board builds some flexibility into its regulation, that Board is likely to receive substantial deference from a court. If, based on the Board's analysis, the court finds that the dental specialty advertising is "inherently misleading", the Board's regulation will be upheld without regard to the other three prongs of the *Central Hudson* test.

Indeed, this was precisely the result in *Joseph,* 353 F.3d 1099. There, the Court of Appeals upheld a California statute that prevented a physician from claiming to be "Board-certified" in a medical specialty unless the certifying Board that granted the certification met

specific requirements that had been adopted by the Medical Board of California. The Court held that, because the Medical Board had reasonably defined the term "Board-certified" in advance, use of that term by a physician whose certification failed to meet the requirements imposed by the Board was "inherently misleading." *Id.* at 1108. Accordingly, the restriction on speech was upheld in *Joseph* without inquiry into the other *Central Hudson* factors.

In short, the best way for a State Board of Dentistry to succeed in having its rules limiting misleading specialty advertising by a general dentist upheld as against First Amendment challenge is (a) to define in a reasonable manner, either in advance or as part of the rule-making process, what it regards as the minimum requirements to justify a claim of specialization; (b) to build flexibility into its regulation; and (c) to explain in the proceeding the basis for its conclusions. If a State Board follows these steps, a claim of specialty expertise by a general dentist who does not meet the requirements that the Board has adopted is likely to be found "inherently misleading" and therefore subject to condemnation without regard to the other three factors of the *Central Hudson* test.

2. Does Regulation Of Specialty Advertising Serve A Substantial Government Interest?

If specific dental specialty claims are deemed to be only "potentially misleading", a court will then turn to the other *Central Hudson* factors. Under the second prong of *Central Hudson,* a State Board of Dentistry may regulate claims of specialty expertise by a general dentist only if such regulation serves a substantial government interest. Every court to have considered restrictions on dental advertising has concluded that such restrictions are intended to advance substantial governmental interests.

In *Borgner*, for example, the Court of Appeals found the following interests to be substantial:

a. Regulating the dental profession in general;

b. Establishing uniform standards; and

c. Ensuring that dental advertising is not misleading.

284 F.3d at 1210-1211. Or, as the Court stated in *AAID v. Parker*, 860 F.3d at 309, "the Board has a substantial interest in 'ensuring the accuracy of commercial information in the marketplace, establishing uniform standards for certification and protecting consumers from misleading professional advertisements.'"

For these reasons, the second prong of *Central Hudson* should be the easiest for a State Board of Dentistry to satisfy. Nevertheless, such a Board is well advised to articulate its interest in avoiding deception of patients and potential patients as a significant interest to justify its regulation.

3. Does The Regulation Directly Advance The Asserted Governmental Interest?

It is not enough for a State Board of Dentistry to assert its interest in avoiding deception. Under the third *Central Hudson* factor, the Board must carry its burden to demonstrate that its regulation advances that interest. Here, it is important to recognize that "mere speculation or conjecture is not enough." *AAID v. Parker,* 860 F.3d 309. Rather, the Board must demonstrate that the harms that it recites are real and that its regulation will in fact alleviate those harms to a

material degree. *Id.* A Board "may satisfy its burden with 'empirical data, studies, and anecdotal evidence', or 'history, consensus, and simple common sense'". *Id.*

This said, a well-counseled Board will rely on more than "common sense." Indeed, in *AAID v. Parker*, the Court of Appeals held that the Texas Board did not satisfy this prong of the *Central Hudson* test -- where it did not provide any empirical or even anecdotal evidence to justify the regulation at issue. *Id.* at 310-311. Given this decision, a State Board of Dentistry seeking to regulate misleading specialty advertising should provide, at the time of the rule-making, a reasonable analysis supporting its regulation.

Such analysis might consist of making a record of reports of harm to patients that is likely to have been avoided had the patient been treated by a qualified specialist. It could consist of a record of inquiries by patients or potential patients as to whether the general dentist who advertised as a specialist was really qualified in the area of claimed specialization. Or it may consist of a reasoned explanation, even if anecdotal, of why the Board, based on its members' experience as dentists, concluded that advertising that fails to meet its standards would be misleading. This latter approach is, of course, similar to the explanation recommended in this memo for satisfying the first prong of *Central Hudson.*

4. Is The Regulation More Extensive Than Necessary To Advance The Asserted Government Interest?

Even if the regulation of misleading dental specialty advertising by the State Board advances a substantial government interest, the Board must still demonstrate that its regulation is no more extensive than necessary to advance that interest. Here, the advertising dentist will take the position that any deception in the specialty advertising can be cured by a disclaimer which will disclose that the dentist did not do a residency or a fellowship in the advertised specialty --or

by some other disclaimer reeking to justify the claim. Courts have been sympathetic to a disclaimer argument -- reasoning that it is preferable to require an explanation of potentially misleading speech rather than to ban the speech outright. *See e.g., Borgner v Brooks,* 284 F.3d at 1214.

For this reason, the disclaimer argument can be a powerful tool in the arsenal of those opposing outright prohibition of misleading dental specialty advertising. Indeed, the availability of that argument underscores why it is so important for a Board that wishes to ban such advertising to build a record demonstrating that the advertising in question is "inherently misleading."

A well-counseled State Board of Dentistry should be aware of the disclaimer argument and should address that argument in the rule-making leading up to its rule. Specifically, if the Board wants to impose an outright ban on misleading specialty advertising, it should state, in connection with the issuance of its rule, that it considered a disclaimer but concluded that a disclaimer would not adequately cure the deception inherent in the specialty advertising. It should explain that, in its experience, people don't give much weight to disclaimers and that no disclaimer in this context can cure the deception inherent in a claim of specialty expertise by a dentist who has not taken the steps that a Board believes to be necessary to justify specialty advertising. To the extent that the Board can point either to studies on the ineffectiveness of disclaimers generally -- or to incidents of deception despite the inclusion of a disclaimer, the position of the Board will be strengthened.

Of course, if a Board concludes that a disclaimer will in fact suffice to cure any deception, it should set forth that disclaimer in the rule-making and explain why it has concluded

that such a disclaimer is necessary. Assuming that the second and third prong of the *Central Hudson* test are satisfied, a disclaimer approach will be upheld if the court finds that the required disclaimer is not "especially long or burdensome, but simply an effective manner to convey necessary information to the public." *Borgner v Brooks*, 284 F.3d at 1215.

This said, a State Board of Dentistry should recognize the tension between taking the position that advertising is inherently misleading and permitting a disclaimer. For if a claim is really inherently misleading, the deception should not be curable by a disclaimer. Therefore, a Board that offers the possibility of a disclaimer should make it explicit that it regards the prohibited specialty advertising as "inherently misleading" but that, if a court were to conclude otherwise, the Board would require the specified disclaimer.

CONCLUSION

State Boards of Dentistry have a responsibility to protect dental patients and the public from misleading advertising of specialty expertise by dentists who are not adequately trained and experienced in the advertised specialty. While the prospect of litigation under the First Amendment may tempt some Boards to rely on general prohibitions against deceptive practices rather than promulgate regulations that specifically address the issue, the ADA submits that specific regulation is the preferable course. Such regulation will provide guidance to practitioners, give the Board explicit criteria to apply in evaluating dental specialty claims, and help to assure that the Board's regulation will prevail as against First Amendment challenge. This Statement has provided guidance on how State Boards can fulfill their responsibility to the public in this area of regulation in a manner that can efficiently be accomplished and that is likely to survive First Amendment scrutiny.