



# American Academy of Pediatric Dentistry

211 East Chicago Avenue, Suite 1700 • Chicago, Illinois 60611-2637 • 312-337-2169 • Fax: 312-337-6329 • [www.aapd.org](http://www.aapd.org)

September 17, 2009

Ms. Mary Ann Wilkinson  
Administrative Secretary  
State Board of Dental Examiners of Alabama  
5346 Stadium Trace Parkway  
Suite 112  
Hoover, AL 35244

Dear Ms. Wilkinson:

I am writing on behalf of the American Academy of Pediatric Dentistry (AAPD) to bring to your attention some current issues related to advertisements by general dentists who treat children. Founded in 1947, the **American Academy of Pediatric Dentistry (AAPD)** is a not-for-profit membership association representing the specialty of pediatric dentistry. The AAPD's 8,000 members are primary oral health care providers who offer comprehensive specialty treatment for millions of infants, children, adolescents, and individuals with special health care needs. The AAPD also represents general dentists who treat a significant number of children in their practices. As advocates for children's oral health, the AAPD develops and promotes evidence-based policies and guidelines, fosters research, contributes to scholarly work concerning pediatric oral health, and educates health care providers, policymakers, and the public on ways to improve children's oral health.<sup>1</sup>

As you are aware, *Pediatric Dentistry* is the current name of the specialty and has been so recognized under this name since 1986. The current definition of pediatric dentistry, adopted by the American Dental Association (ADA) in 1995, is as follows:

"Pediatric dentistry is an age-defined specialty that provides both primary and comprehensive preventive and therapeutic oral health care for infants and children through adolescents, including those with special health care needs"

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<sup>1</sup> For further information, please visit the AAPD Web site at [www.aapd.org](http://www.aapd.org).

Pediatric dentistry is in fact the only dental specialty that is age-defined. This means that any practitioner using the term "pediatric dentistry" is using the name of the specialty, as is a dentist when advertising under the term "pediatric dentist."

The AAPD welcomes general dentists as Affiliate members, and currently has over 600 such members. In April 2009 the AAPD offered its second continuing education course on pediatric dentistry for the general dentist. The AAPD encourages general dentists to advertise to the public that children are welcome in their practices and that dental services for children are provided in their practices.

In the interest of fairness to both Active (pediatric dentists) and Affiliate (general dentist) members of the AAPD and for the clarity of parents/guardians seeking oral health care for their children, the AAPD has clear membership requirements related to public advertisements of general dentists who treat children in their practices. The AAPD's requirements for Affiliate members provide that:

**"Affiliate members may not use the Academy name, membership status or logo, nor imply special expertise or training in pediatric dentistry." (AAPD Bylaws, Chapter I, Section 3, H)**

The AAPD Bylaws incorporate by reference the standards of the *ADA Principles of Ethics and Code of Professional Conduct*.<sup>2</sup> The full text of the ADA Code of Professional Conduct section 5.1, General Practitioner Announcement of Services, is as follows:

**"5.I. General Practitioner Announcement of Services. General dentists who wish to announce the services available in their practices are permitted to announce the availability of those services so long as they avoid any communications that express or imply specialization.** General dentists shall also state that the services are being provided by general dentists. No dentist shall announce available services in any way that would be false or misleading in any material respect." *[emphasis added]*

To comply with these membership requirements, the AAPD advises our Affiliate members to use advertising terms such as: Family Dentistry, General Dentistry for Children, or General Dentistry for Children and Families.

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<sup>2</sup> Chapter XIII, Section 1 of the AAPD Bylaws provides that the professional conduct of AAPD members is governed by the ADA's *Principles of Ethics* and the *Advisory Opinions*.

Conversely, terms likely to confuse the public when used by a general dentist are: Child Dentistry, Children's Dentistry, Dentistry for Children, Dentistry for Kids, or Pediatric Dentistry.

The AAPD reserves the right to review member advertisements that may be contrary to the above provisions, and to potentially impose appropriate sanctions related to membership. It is understood that the AAPD's actions can only impact continued membership status within the AAPD.

State dental boards of course hold authority over dental practice in terms of issuing, suspending, or revoking licenses to practice dentistry. It is the AAPD's understanding that most if not all state boards have promulgated regulations that prohibit a general dentist from advertising as a specialist.

**The AAPD believes that state dental boards have appropriate regulatory authority to enforce compliance with advertising regulations for any general dentist who falsely advertises as a pediatric dentist.** The AAPD believes this authority encompasses Yellow Page advertisements (print and on-line) under the category of Pediatric Dentists (Children & Adolescents), Dentists- Pediatric Dentistry (Children), Dentists-Pediatric, or similar terminology.

Understandably, the area of dental board regulation of dentist advertising raises certain legal issues. In reviewing the legal justification for such enforcement of advertising regulations, it is clear that reasonable advertising regulations may be promulgated and enforced by state dental boards. Commercial speech is subject to limitation despite First Amendment rights. A state dental board may prohibit false, misleading, or deceptive advertising-- all of which is unprotected speech.<sup>3</sup>

Below is a brief summary of significant and applicable legal opinions:

- In *Simm v. Louisiana State Board of Dentistry*, No. 02-30304 (5<sup>th</sup> Cir. Jan. 9, 2003) the U.S. Court of Appeals for the 5<sup>th</sup> Circuit upheld the state dental board's enforcement of regulations which required non-specialists to disclose General Dentistry or Family Dentistry in print larger and/or bolder and noticeably more prominent than any area of practice or service advertised. The District Court concluded that the board

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<sup>3</sup> *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S.Ct. 2084, 2088 (1994); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Parker v. Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504, 509.

demonstrated a substantial state interest in support of the challenged regulation—preventing public confusion or deception about dentists' qualifications. Further, the District Court observed that the regulations, which were described as disclosure provisions (versus a ban on advertising), directly and material advanced this interest and were narrowly drawn to accomplish their purposes.

- In *Borgner v. Brooks*, 284 F.3d 1204 (11<sup>th</sup> Cir. 2002), the U.S. Court of Appeals for the 11<sup>th</sup> Circuit Court of Appeals held that states can regulate advertising of licensed dentists by mandating that dentists include disclaimers when advertising specialty areas and credentialing organizations not approved by the state. The U.S. Supreme Court declined to hear the plaintiff's appeal in this case.
- In *California Dental Association v. Federal Trade Commission*, 224 F.3d 942 (9<sup>th</sup> Cir. 2000) the 9<sup>th</sup> Circuit U.S. Court of Appeals ruled against the Federal Trade Commission, who had argued that the CDA's advertising restrictions were anti-competitive. This case has a long history. In 1996, the Commission issued a Final Order and an Opinion finding that the California Dental Association ("CDA") had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1995), *In re California Dental Ass'n*, 121 F.T.C. 190, 284 (1996). In 2000, after various appellate proceedings including a Supreme Court decision, the U.S. Court of Appeals for the Ninth Circuit vacated the Commission's Final Order and remanded to the Commission with instruction to dismiss the case. The Commission then determined not to seek further review by the United States Supreme Court, but instead to return this matter to adjudication and dismissed the complaint. While this complaint focused on issues related to price advertising under the CDA's member advertising code of ethics— and pricing is an issue far more fraught with antitrust implications than regulations concerning non-specialist advertising-- the Court of Appeals still concluded that:

“Having closely examined the record under the rule of reason, we conclude that the Federal Trade Commission failed to prove that the restrictions were anti-competitive.”

- An older case addressing dentist advertising regulations is *Parker v. Kentucky*, 818 F.2d 504 (6<sup>th</sup> Cir. 1987). This case involved a general dentist who advertised in the local yellow pages under the heading

"Dentist," and placed an advertisement with the title "COMPLETE DENTAL CARE." The dentist listed the services he provided below the title, and the listed services included, without limitation, "hidden partials & bridges" and "orthodontics." Under the applicable Kentucky statutes, "orthodontics" is a specialty and, therefore, any dentist not licensed as an orthodontist was prohibited from using the word "orthodontics" in its advertisements. The court stated that the term "orthodontics" was not deceptive in and of itself, and that such term could be used to describe the services performed by a general dentist. The court further determined that the use of the term "orthodontics" by the dentist in *Parker* was not misleading because the advertisement included the phrase "COMPLETE DENTAL CARE," was included under the heading entitled "Dentists" rather than the specialty and heading "Dentists-Orthodontists.

The fact pattern in the *Parker* case is a completely different situation from a general dentist advertisement that uses the name of the specialty (e.g. pediatric dentistry) in the practice name or that appears under a heading such as Dentists-Pediatric Dentistry (Children). In fact, such use would specifically contradict one of the primary factors relied upon by the *Parker* court to strike down the Kentucky statute. The advertisement in *Parker* was entitled "COMPLETE DENTAL CARE," which is broad in concept, as opposed to a general dentist's statement that he or she will only provide services described by the term used for a specialty.<sup>4</sup> And there is certainly much greater possibility for confusion by the public in the latter situation. Further, the *Parker* court itself added in dicta that "we in no way imply that a state does not have a substantial interest in enabling the public to distinguish between general practitioners and specialists or in ensuring the professional conduct of dentists."

You are also probably aware of a very recent decision from a Florida Circuit Court judge concerning dental advertising laws. In *Ducoin v. Viamonte* (Circuit Court of the Second Judicial Circuit, Leon County, Florida, Case No. 2003 CA 696), decided on April 3, 2009, the judge struck down a section of Florida statutes (Section 466.0282) which prohibited the advertising of any credentials/specialties not recognized by the Florida Board of Dentistry or the American Dental Association without the following disclaimer:

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<sup>4</sup> Some states deal with this issue by requiring a general dentist to disclose his general dentistry license in a font that is larger than the fonts used to describe any area of practice.

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“(NAME OF ANNOUNCED AREA OF DENTAL PRACTICE) IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY”

“(NAME OF REFERENCED ORGANIZATION) IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.”

This case is also a completely different fact situation from that of a general dentist advertising in a manner that misleads the public into thinking the general dentist is a recognized dental specialist. Indeed, the *Ducoin* opinion specifically notes that “[t]he plaintiffs have repeatedly stated that they do not desire to hold themselves out as “specialists” in the field of implant dentistry.”

Therefore, in the AAPD’s estimation state dental boards should have the power to enforce applicable advertising laws and regulations that prohibit general dentists from advertising as pediatric dentists.

If you have any questions concerning this letter, please do not hesitate to contact me at 312-337-2169 (ext. 29) or [slitch@aapd.org](mailto:slitch@aapd.org)

Sincerely yours,

C. Scott Litch, Esq., CAE  
Chief Operating Officer and General Counsel

cc: AAPD Board of Trustees

This letter was sent to the following people.

Ms. Mary Ann Wilkinson, Administrative Secretary, State Board of Dental Examiners of Alabama  
Ms. Brenda Donohue, Licensing Examiner, Alaska Board of Dental Examiners  
Ms. Elaine Hugunin, Executive Director, Arizona State Board of Dental Examiners  
Ms. Donna Cobb, Executive Director, Arkansas State Board of Dental Examiners  
Ms. Cathleen Poncabare, Executive Officer, The Dental Board of California  
Ms. Maulid Miskell, Program Director, Colorado State Board of Dental Examiners  
Ms. Jennifer Filippone, Dental Board Liaison, Connecticut State Dental Commission  
Mr. David Mangler, Delaware State Board of Dental Examiners  
Ms. Janet McCormick, Executive Director, DC Board of Dentistry, Dept. of Health  
Ms. Sue Foster, Executive Director, Florida Board of Dentistry  
Ms. Anita Martin, Executive Director, Georgia Board of Dentistry  
Mr. James Kobashigawa, Executive Officer, Hawaii State Board of Dental Examiners  
Mr. Arthur Sacks, Executive Director, Idaho State Board of Dentistry  
Ms. Alice Purchase, Prof. Svcs. Section Manager, Division of Professional Regulation  
Ms. Cindy Vaught, Board Director, Indiana State Board of Dentistry  
Mrs. Constance L. Price, Executive Director, Iowa Board of Dental Examiners  
Ms. Betty Wright, Executive Director, Kansas Dental Board  
Mr. Brian K. Bishop, Executive Director, Kentucky Board of Dentistry  
Mr. C. Barry Ogden, Esq., Executive Director, Louisiana State Board of Dentistry  
Ms. Teneale E. Johnson, Acting Executive Director, Maine Board of Dental Examiners  
Mr. Murray Sherman, Asst. Executive Director, Maryland State Board of Dental Examiners  
Ms. Kathy Atkinson, Executive Director, Massachusetts Board of Registration in Dentistry  
Ms. Rae Ramsdell, Licensing Director, Michigan Board of Dentistry  
Mr. Marshall Shragg, Executive Director, Minnesota Board of Dentistry  
Ms. Leah Diane Howell, Executive Director, Mississippi State Board of Dental Examiners  
Mr. Brian Barnett, Executive Director, Missouri State Dental Board  
Mr. Dennis Clark, Administrative Specialist, Montana Board of Dentistry  
Ms. Becky Wisell, Section Administrator, Nebraska Board of Dentistry

Ms. Kathleen J. Kelly, Executive Director, Nevada Board of Dental Examiners  
Dr. Raymond J. Jarvis, Executive Secretary, New Hampshire Board of Dental Examiners  
Mr. Jonathan Eisenmenger, Executive Director, New Jersey State Board of Dentistry  
Ms. Anita Villegas, Administrator, New Mexico Board of Dental Health Care  
Mr. Lawrence H. Mokhiber, Executive Secretary, New York State Board for Dentistry  
Mr. Bobby White, Esq., Chief Operations Officer, North Carolina State Board of Dental Examiners  
Ms. Rita Sommers, Executive Director, North Dakota Board of Dentistry  
Ms. Lili C. Reitz, Esq., Executive Director, Ohio State Dental Board  
Ms. Linda Campbell, Executive Director, Oklahoma Board of Dentistry  
Mr. Patrick D. Braatz, Executive Director, Oregon Board of Dentistry  
Ms. Lisa Burns, Board Administrator, Pennsylvania State Board of Dentistry  
Mr. Carlos Santana Rabell, Puerto Rico Board of Dental Examiners  
Ms. Gail Giuliano, Administrator, Rhode Island State Board of Examiners in Dentistry  
Ms. Veronica Reynolds, Administrator, South Carolina State Board of Dentistry  
Ms. Brittany Novotony, Executive Secretary, South Dakota State Board of Dentistry  
Ms. Dea Smith, Executive Director, Tennessee Board of Dentistry  
Ms. Sherri Sanders Meek, Executive Director, Texas State Board of Dental Examiners  
Ms. Diane W. Lafaille, Staff Asst./Executive Secretary, Vermont Board of Dental Examiners  
Ms. Sandra Kay Reen, Executive Director, Virginia Board of Dentistry  
Ms. Lydia Scott, Executive Assistant, Virgin Islands Board of Dental Examiners  
Ms. Jennifer Santiago, Executive Director, Dental Health Care Quality Assurance  
Mr. Marc L. Harman, Executive Secretary, West Virginia Board of Dental Examiners  
Mr. Thomas Ryan, Bureau Director, Wisconsin Dentistry Examining Board  
Ms. Debra Bridges, Executive Director, Wyoming Board of Dental Examiners