



CNA HealthPro

Dental Advertising: Risks and Liabilities

Once banned, dental advertising is now a part of mainstream society. Whether in electronic media such as radio and television, or print ads in local newspapers, telephone directories, and coupon mailers, dental advertising is more pervasive than ever.

The statements made in dental ads may seem harmless at first glance. However, they could pose legal, ethical or liability problems to dentists who haven't examined the potential impact of the message. Dentists and other health care providers are held to stricter standards of honesty than other service providers, and advertising messages that promise too much or explain too little may attract trouble along with new patients.

Background

For many years, the American Dental Association Principles of Ethics and Code of Professional Conduct, along with many state dental practice acts, prohibited dental and other professional advertising in the belief that it constituted undignified, unprofessional and potentially fraudulent behavior.

That position changed following a series of court decisions and a review by the Federal Trade Commission. In 1977, the U.S. Supreme Court ruled that the State Bar of Arizona could no longer prohibit attorneys from advertising their services. Blanket advertising bans were determined to constitute both a violation of First Amendment rights and an unfair restraint of trade. In this landmark decision, the Court concluded that the public has a legitimate interest in comparing the services and fees of local practices. Non-deceptive advertising can "provide an incentive . . . to offer services and prices desirable to consumers," according to an FTC pronouncement at the time.

Their legal position weakened, dental and medical professional associations began softening their positions on advertising. In 1979, the American Dental Association entered a consent decree with the FTC to revise its Principles of Ethics and permit advertising. Since then, advertising has turned into a commonly accepted marketing tool for dentists.

State dental boards and professional associations still regulate the content of ads. Boards may penalize practitioners whose advertisements contain dishonest or misleading claims with fines, suspension of license or other sanctions. Board actions can be time consuming and expensive. Although the Professional Protector Plan for Dentists provides reimbursement of defense costs associated with patient care issues, it does not cover proceedings related solely to advertising.

Advertising and the law

Courts and regulators have held that dental advertising serves a constructive purpose when it conveys factual information that may influence patient decisions. Acceptable information includes training and experience, available treatments and areas of specific interest (as long as the ad distinguishes between "interest" and approved specialty). Other appropriate subjects of advertising include office hours, fees and credit terms, office accessibility and languages spoken in the office.

However, dentists should be cautious about hard-sell advertising methods as well as claims that may be perceived as unverifiable, excessive or misleading. An Illinois dentist, for example, was disciplined by the

state Department of Financial and Professional Regulation for using the phrases “total comfort” and “quality” care. The Illinois Supreme Court upheld the ruling, declaring that the use of these phrases in advertising was “inherently misleading” in that they cannot be empirically proven. In addition, a phrase such as “we provide quality care” implies that other dentists do not, which could have a negative effect on the public image of the dental profession.

Other messages and techniques that pose a risk include

- patient testimonials that may depict an unbalanced picture of treatment results, especially when portraying photographs of other dentists’ work as your own
- imprecise fee claims, such as references to unspecified discounts
- suggestions that one’s skill is superior to that of other licensed practitioners

Some dentists have advertised that they and their staffs have tested negative for HIV. A San Francisco dentist who ran such an ad was ordered to cease and desist by the district attorney because the claim lacked scientific validity. The American Dental Association (ADA) has condemned these ads as unethical unless they explain that an HIV-negative test result does not guarantee that the dentist is free of the virus at the time of treatment. Over the years, the ADA has emphasized that patient safety is best protected by complying with infection control standards, not by annual or semi-annual HIV testing.

Advertising and liability

Exaggerated, generalized or potentially misleading ads also may increase the possibility of malpractice allegations and dental board complaints brought by unsatisfied patients. Advertisements are potential patients’ first impressions of a practice, impressions that persist as patients undergo treatment. If an ad promises good results and painless care without qualification or disclaimers, the patient has every right to expect what is promised.

Unprofessional advertisements pose two primary risks to a practice. First, they can be taken by patients as implied warranties. An ad that appears to ensure success may lead to excessive disappointment and the possibility of legal action if the results fail to meet the standard fostered by the ad.

Second, such ads may compromise the informed consent process. Ads containing excessive promises can be presented as evidence that the plaintiff had not been truthfully and adequately informed about treatment risks and the prognosis for success.

Underlying expectations

In addition to potentially violating state advertising rules, even the seemingly most mundane statement can create an underlying expectation in the mind of a prospective patient. Consider the following statements found in dental advertising, and how the lay reader may misinterpret the intended message.

- “*Quality and affordable dental care.*” Quality compared to what, and affordable for whom?
- “*24-hour emergency service.*” Does this mean you are willing to treat patients at 2:00 a.m.? And who defines what is or isn’t an emergency?
- “*Dentures repaired while you wait.*” What if the repair requires sending the case to a dental lab? That would be an extremely long wait.
- “*Drill-less dentistry.*” This implies that handpieces are *never* used.
- “*Senior citizen discounts.*” How old must one be to qualify?

- “*Emergencies seen promptly.*” Who gets to decide what constitutes “prompt”? Is within one hour prompt? Two hours? By the end of the day?
- “*Safest and most painless procedures available.*” Safest by what standard and by whose determination?

As you can see, the intended message may not be what the patient ultimately takes away from the advertisement. Therefore, you should always consider the possible interpretations and consequences of your message before using it in advertising or marketing.

While marketing is an important aspect of every practice, your marketing tactics should never conflict with your risk management strategy. The following guidelines can help ensure that your advertisements comply with professional standards and reinforce your image as an ethical practitioner.

- Familiarize yourself with applicable statutes. Advertising regulations vary considerably from state to state. Consult your state dental association for information and seek guidance from the association’s legal counsel.
- Use restraint. Remember that what seems to you like harmless hyperbole (“You’ll be as good as new!”) may be taken literally by potential patients. Ask yourself how a patient in pain might interpret an advertised claim that a practice offers “24-hour emergency service,” when, in fact, all after-hour patients with oral surgery needs are referred to an oral surgeon for care.
- Be sure your advertisements contain no express or implied promises, representations, or warranties, however subtle, about treatment outcomes.
- Don’t mention fees or fee discounts for treatments that may vary in length or complexity. Emphasize that fees depend upon the individual situation.
- Print only claims that you can back up with written evidence. Avoid vague generalizations open to different interpretations.
- Have an attorney examine advertising material before it’s printed or broadcast.

Remember that the goal of advertising isn’t simply to bring in more patients, but to attract the right patients for your practice and to communicate the correct messages to them. While a valid, ethical advertising message begins the dentist-patient relationship on the right foot, an unprofessional message can snowball into disappointment and distrust. For this reason, dentists should think of advertising as a form of patient education and as an extension of their practice philosophies.

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