

BEFORE THE BOARD OF DENTISTRY
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-07-0332-DEN REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 48-2008
TREATMENT OF THE LICENSE OF)	
ALLEN CASTEEL, A LICENSED)	
DENTURIST, License No. 22.)	
)	

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER**

I. INTRODUCTION

The Business Standards Division of the Montana Department of Labor and Industry (BSD) seeks to impose sanctions against the license of Allen Casteel alleging that he violated Montana Code Annotated § 37-1-316(5) (which defines as unprofessional conduct “making a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation [of denturistry]”).

On July 30, 2007, Hearing Examiner David Scrimm held a scheduling conference with the parties. Don E. Harris, agency legal counsel, represented the Department of Labor and Industry Business Standards Division (BSD). Jonathan Motl, Attorney at Law, represented Casteel. At the conference, the parties agreed to an October 30, 2007 hearing date. After some continuances, on December 14, 2007, the parties made a joint motion to vacate the hearing and to submit the matter for decision based on stipulated facts. The hearing examiner granted the motion and set January 29, 2008 as the deadline for submission of final briefs.

The parties stipulated that only those facts contained in the deposition of Lavelle Potter and documents numbered RMS 1 through 245 could be used in the briefs submitted by the parties. Based on the evidence, legal arguments of the parties, stipulated facts, and relevant law, the hearing examiner finds that BSD has failed to sustain its burden of proof and recommends that the complaint be dismissed, in accord with the following findings and conclusions.

II. FINDINGS OF FACT

1. At all times material to this case, Casteel has been a Montana licensed dentist, practicing in Great Falls, Montana.

2. In his capacity as a dentist, Casteel advertised in the Great Falls DEX Yellow Pages offering among other services “oral anti-snoring appliances.”

3. On October 16, 2006, the Business Standards Division received a complaint about Casteel’s advertisement from Kenneth C. Small, D.M.D. In his complaint, Small alleged that Casteel was providing anti-snoring appliances. His “concern [was] whether this is a legitimate area of treatment to be rendered by a dentist.”

4. On November 2, 2006, Casteel was notified of the complaint and directed by the Screening Panel of the Board of Dentistry (screening panel) to respond to it within 15 days.

5. On November 16, 2006, Casteel submitted his responses, asserting primarily that he is allowed to construct, fit, and furnish an anti-snoring device because it is a removable prosthetic dental appliance.

6. On January 29, 2007, Casteel was notified by BSD that the screening panel would hear the Small complaint on February 16, 2007.

7. The minutes of the February 16, 2007 screening panel meeting indicate the following: Chairman Christenot framed the issues before the panel: “The question is whether he can provide them [the anti-snoring devices] and whether he can advertise for them.” Don Harris, BSD legal counsel, discussed the issue of “whether the licensee was offering to diagnose and treat an abnormality. If so, then the problem would be with the advertisement rather than the practice. What is presented before the panel is the advertisement.” Helen Waller, the panel member representing the public, asked, “If it is legal for him to make the appliance, why is it not legal for him to advertise?”

After some discussion about a dentist supervising the fitting of night guards, Casteel informed the panel that the patients’ medical doctor prescribed the anti-snoring device and sent the patients to find a dental device that would treat the obstructive sleep apnea. Casteel also stated that after the device had been placed, the patients returned to their dentist and the dentist said there is no impact on the patient’s dentition or the TMJ. Casteel also stated that he believes he should refer the patients to their medical doctor or sleep center before fitting a device. Waller asked whether Casteel only fabricates the device if he has a referral from the medical doctor. He responded that he refers the patients to their medical doctor or sleep center for diagnosis of sleep apnea.

Harris then stated that “[Casteel’s] practice of fitting anti-snoring devices could be unlicensed practice.” “However, Casteel is not diagnosing and treating the problems. He is treating people who are directly referred to him by the MD.” Christenot agreed with this

characterization. Harris went on to state that just because a dentist can make, fit, alter, reproduce, or repair a denture doesn't mean that a dentist can tell a patient whether or not that patient needs a denture. Christenot added that the MD who wrote the prescription had assumed the responsibility. Waller stated that as long as there is no violation of the law, the board could not prohibit Casteel from doing what he was doing as long as he was acting under the direction of an MD.

Small then commented that his "issue is not about fabricating the device. His problem is [Casteel's] advertisement." "If Casteel is allowed to continue to advertise in this manner, people are going to bypass the medical or dental professional." Small then went on to comment on subjects not directly relevant to the matter before the screening panel. Dr. Sims believed the advertising is wrong. Christenot concurred that the public should not be misled to believe these devices are available through [Casteel] when there are other sources such as MDs or sleep centers. Small believed that the patient should be referred to denturists for the fabrication of the devices.

Ivers then made a motion to find reasonable cause that Casteel had violated Mont. Code Ann. § 37-1-316(5) and to issue a cease and desist order to Casteel to discontinue the *advertising*. After the motion passed, Waller asked for clarification as to whether this would prevent Casteel from continuing to fabricate the devices under the direction of a doctor. Harris responded that the order would only address the advertising and would not address the fabrication of the devices.

8. In its Notice of Proposed Board Action and Opportunity for Hearing, legal counsel for the Board of Dentistry asserts that "while Casteel may be permitted to craft the actual device, he is not permitted to diagnose or treat snoring itself. The advertisement does not indicate that patients seeking snoring treatment should consult a physician, dentist or other person qualified to treat the condition before obtaining the device." "The advertisement implies that a person with a snoring problem could seek and obtain care from Casteel."

III. DISCUSSION¹

This matter came about as a result of a complaint about Casteel's advertisement that included offering "oral anti-snoring appliances." At the screening panel discussion of Small's complaint, it was made fairly clear that Casteel was not prevented from making the appliances, but rather was precluded from advertising the product since he could not diagnose abnormalities for which its use was appropriate. The charging document is consistent with the screening panel discussion. Board counsel made no motion to amend the charge, which determines what conduct is alleged to constitute unprofessional conduct, despite his subsequent change in position.

¹Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Casteel's uncontroverted statements at the screening panel meeting made clear that he does not diagnose or treat any abnormalities, but recommends that patients consult either a physician or a sleep center to diagnose the condition. Casteel also stated that he obtained a "to whom it may concern" prescription for fabricating at least one of his anti-snoring devices. If Casteel is free to make the appliances and is not diagnosing or treating an abnormality, then the basis for the alleged violation of misleading advertising must fail.

Casteel also advertises partial dentures. The screening panel did not find that advertising misleading, perhaps because there are procedures on how a denturist is to address a patient who asks for partial dentures. *See* Mont. Code Ann. § 37-29-403.

Casteel stated that his procedure is to refer a patient seeking an anti-snoring device to the appropriate diagnostician. While this procedure is not established by statute, it seems to comport with Casteel's statutory obligation to not treat or diagnose any abnormalities. If Casteel's advertisement of partial dentures does not mislead the public into thinking they can just walk into his office and obtain that product, neither would his advertisement for anti-snoring devices. Further, neither the screening panel nor board counsel was presented with or proffered any evidence that Casteel supplied a patient with an anti-snoring device prior to that patient being diagnosed by the appropriate medical professional.

Moreover, without the ability to advertise his product, a prospective patient with a "to whom it may concern" prescription for an anti-snoring device would not know that Casteel could fill the prescription. The same would be true if the patient had a prescription for a partial denture.

In these circumstances Casteel did not violate Mont. Code Ann. § 37-4-316(5).

While board counsel argues that Casteel is prevented from making the device on the theory that it is not a denture, his argument is not persuasive. The screening panel itself believed Casteel could fabricate the device. Since the screening panel concluded that the device met the definition of a denture that Casteel is allowed to make by virtue of his license to practice dentistry, this hearing examiner is hard-pressed to disagree, particularly when the charge does not include counsel's theory.

See Mont. Soc'y of Anesthesiologists v. Mont. Bd. of Nursing, 2007 MT 290, ¶37, 171 P.3d 704, ¶37 (administrative boards' interpretations of statutes under their respective domains should be given deference); MT. D. of R. v. Kaiser Cement Corp. (1990), 245 Mont. 502, 507, 803 P.2d 1061, 1064. In addition, finding a violation based upon counsel's theory without timely amendment of the charge could deny Casteel notice that he was alleged to be in violation of the law for manufacturing the device.

Having determined that the Department has not proven a violation exists, it is unnecessary to review procedural and due process arguments which are for the most part, if not entirely, beyond the scope of the hearing examiner's authority. *Anaconda Co. v. D. of R.* (1978), 178 Mont. 254, 583 P.2d 421; *see also*, *Polson v. Pub. Serv. Comm.* (1970), 155 Mont. 464, 473, P.2d 508.

IV. CONCLUSIONS OF LAW

A. The Department Has Failed to Demonstrate Any Violation

1. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

...

(5) a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation.

2. BSD bears the burden of proof in this proceeding to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Bd of Funeral Service* (1998), 289 Mont. 407, 961 P.2d 126.

3. The Department has failed to demonstrate by a preponderance of the evidence that the licensee made a misleading, deceptive, false, or fraudulent advertisement or other representation in the conduct of the profession or occupation of dentistry.

B. The Failure to Demonstrate a Violation Requires Dismissal

4. If a licensee is found not to have violated any of the provisions of Mont. Code Ann. Title 37, Chapter 1, Part 3, then the Department prepares and serves the board's findings of fact together with an order of dismissal of the charges. Mont. Code Ann. § 37-1-311.

5. Because BSD has failed to demonstrate that the licensee engaged in conduct that violated Title 37, Chapter 1, Part 3, MCA, dismissal of the charges is appropriate.

V. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board of Dentistry enter its order dismissing the allegations contained in the complaint filed against the licensee as BSD has failed to prove any violation alleged in the complaint.

DATED this 2nd day of July, 2008.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Examiner

