8-27-2012

Peckham v. Idaho State Bd. Of Dentistry Respondent's Brief Dckt. 39758

IN THE SUPREME COURT OF THE STATE OF IDAHO

LON N. PECKHAM, D.M.D., a licensed Dentist in the state of Idaho, Petitioner/Appellant, vs. THE IDAHO STATE BOARD OF DENTISTRY, and KEVIN T. STOCK, as Acting Board Chairman for the IDAHO STATE BOARD OF DENTISTRY, Respondents/ Appellee.	)	Supreme Court Docket No. 39758-2012 Bonner County D.C. No. #CV-2011-00536

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF BONNER

HONORABLE JEFF M. BRUDIE
District Judge

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the district court's decision upholding the Idaho State Board of Dentistry's ("Board") Final Order adopting the hearing officer's Findings of Fact and Conclusions of Law and Recommended Order, which found that Dr. Peckham failed to advise Ms. Malby of the treatment to be rendered and alternatives, and that Dr. Peckham's advertising was false, misleading or deceptive.

B. Course of Proceedings Below.

On about April 22, 2009, the Board filed an Administrative Complaint pertaining to a complaint filed by Ms. Judy Malby alleging that Dr. Peckham failed to provide her with proper treatment relating to a "crown" that was placed on her tooth. R. Vol. I, p. 001-006. On or about December 1, 2009, an Amended Administrative Complaint was filed, alleging violations of the Board's administrative rules pertaining to Dr. Peckham's advertising. R. Vol. I, p. 019-027.

An administrative hearing was held on July 20 and July 21, 2010. On September 9, 2010, the hearing officer issued his Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Order"), finding that Dr. Peckham failed to advise Ms. Malby of the treatment to be rendered and alternatives, and that Dr. Peckham's advertising was false, misleading or deceptive. R. Vol. I, p. 262-275. On March 1, 2011, the Board issued a Final Order, adopting the Recommended Order in its entirety. R. Vol. I, p. 329-333.

Dr. Peckham filed a Petition for Judicial Review on March 29, 2011. R. Vol. I, p. 337-350. A Memorandum Opinion was issued by the district court on January 27, 2012 (R. Vol. II, p. 59-69), and Dr. Peckham filed his Notice of Appeal on March 8, 2012. R. Vol. II, p. 70-73.

C. Statement of Facts.

1. Judy Malby Complaint.

On February 16, 2007, Judy Malby had an appointment with Dr. Peckham to begin the process of having a crown placed on her tooth. Ms. Malby thought the appointment was to get impressions for the crown and a buildup. During the appointment, Ms. Malby stated that Dr. Peckham did not tell her anything about the procedure or what he was doing to her tooth. Ms. Malby claimed that Dr. Peckham put a metal ring around her tooth and was "mixing and adding stuff." Ms. Malby believed that after this appointment she would need another appointment to have the crown placed on her tooth as was done for other crowns she received in the past. She says that the procedure performed at this appointment was not a procedure she'd ever had when receiving a crown. Ms. Malby claims that Dr. Peckham did not tell her that the crown was finished but she assumed his office would notify her when she needed to return to have the crown placed. Ms. Malby paid one thousand dollars ($1,000) for what she thought was a crown.

When Ms. Malby had not heard from Dr. Peckham about scheduling her next appointment, she called and was told that the crown was already finished. In July 2008, the "crown" came off of the tooth so Ms. Malby saw Dr. Prosser and showed him the "crown." Dr. Prosser told Ms. Malby that he had never seen anything like it before. Dr. Prosser said he could not re-glue the amalgam and recommended an implant. R. Vol. I, p. 090, 174-175.

Ms. Malby then saw Dr. Bates, who determined that the tooth could be saved with a post build-up and true crown, so Ms. Malby had him perform that procedure. Dr. Bates stated that Ms. Malby brought in the piece that came off of her tooth and that it was a large pin retained amalgam. He said that it was apparent a cast crown had not been done and that $1,000 was a lot to pay for an amalgam buildup. R. Vol. I, p. 090, 176-178.

On August 27, 2008, Ms. Malby wrote a letter to Dr. Peckham explaining what happened with the "crown" on her tooth, and asking him if he stood behind his work. Dr. Peckham responded that he did stand behind his work but that he would write off the remaining balance of her bill and that their professional relationship would be terminated. Ms. Malby later filed a complaint with the Board. R. Vol. I, p. 088-102.

2. Dr. Peckham's Advertising.

Dr. Peckham's website, www.airodental.com, and print advertising contained a section called "The Truth About Dentures. What you Don't Know Just Might Kill You." This section claims that dentures are associated with dementia; people with missing teeth live an average of 10 years less than the rest of us "(this is the same life span decrease as experienced by smokers!)"; long term denture use leads to bone loss and increased risk of jaw fracture; it also leads to increasing discomfort, increasing chewing difficulty, increasing TMJ/jaw joint pain and dysfunction, increasing risk of diabetes, increasing risk of heart disease, and increasingly poor nutrition. R. Vol. I, p. 184-185.

Dr. Peckham's website also contains a section stating "Can you handle the truth? The State Dental Board doesn't think you can!!!" It contains a "disclaimer" stating "WARNING: If you are easily scared and prone to make rash decisions without understanding the risks as well as the benefits, don't read any farther. This report is only suitable for rational adults." Dr. Peckham claims his extensive experience with dentures has caused him to learn "some troubling things about dentures which have only recently begun to be corroborated by researchers around the nation. The problem now is that our political dental organizations don't think you can handle the truth, and are actively trying to hide it from you!" Dr. Peckham claims he received a "cease and desist reprimand" from the Board after running a "public service ad" stating "Shocking Research

From World Authority Finds Link Between Dementia and Missing Teeth." R. Vol. I, p. 186-188, 193-196.

D. Standard of Review.

In reviewing the discretionary decision of a lower court, the appellate court must review the lower court's decision for an abuse of discretion. In its review, the appellate court must determine: "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). If these factors are met, the lower court's decision should be upheld.

II.

ISSUES PRESENTED ON APPEAL

Whether the district court exercised sound judicial discretion in upholding the Board's Final Order, which found that Dr. Peckham failed to advise Ms. Malby of the treatment to be rendered and alternatives, and that Dr. Peckham's advertising was false, misleading or deceptive.

III.

ARGUMENT

A. Ms. Malby's Complaint.

1. Ms. Malby was not informed that she was receiving a "crown" made from amalgam.

The Board of Dentistry may revoke, suspend or take other disciplinary action in the event a dentist shall engage in unprofessional conduct as defined by Board rules. Idaho Code § 54-

924(8). IDAPA Rule 19.01.01.040.18 defines unprofessional conduct to include failure to comply with state statutes or rules governing or affecting the practice of dentistry.

IDAPA Rule 19.01.01.040.21 states that it is unprofessional conduct when there is "failure to advise patients...in understandable terms of the treatment to be rendered, [and] alternatives...relative to the treatment proposed."

Dr. Peckham argues that Ms. Malby did not recall him using the term "silver crown" and that she wanted a cheaper alternative for the tooth. Appellant's Brief, p. 12. Peckham claims that "[s]ince Ms. Malby's own testimony is that she does not recall whether the term 'silver crown' was used, the Finding that she was misled by the terms used by Dr. Peckham is unsupported by her own testimony." *Id.* Dr. Darrel Mooney, Dr. Peckham's expert witness, testified that the terms "silver crown" or "silver amalgam crown" are interchangeable. As a result, Dr. Peckham claims that "[t]he Hearing Officer's Findings that a distinction exists between the terminology silver amalgam and silver crown are unsupported by the record." Appellant's Brief, p. 14.

Ms. Malby's testimony clearly states that she thought she was getting a crown made from silver as opposed to gold or porcelain. Tr. Vol. I, p. 22, ll. 1-23. She testified that Dr. Peckham did not tell her that the "crown" was going to be made of amalgam nor did he tell her that he was the only dentist in the area that was actually using amalgam to make "crowns". Tr. Vol. I, p. 23, ll. 16-25; p. 42, ll. 7-9; p. 56, ll. 17-21. She also testified that Dr. Peckham did not tell her that using amalgam to make "crowns" fell out of use about thirty (30) years ago nor did he tell her that using amalgam as crowns is not taught in dental school. Ms. Malby was told that Dr. Peckham could provide her with a less expensive crown but she was told little else. She then went to two dentists that had never seen the technique imposed by Dr. Peckham and who could not repair the amalgam.

Dr. Blaisdell, the Board's expert, testified that there is no such thing in current dentistry as an "amalgam crown," and that amalgam was a poor substitute for a crown because it would crush to powder under stress, whereas metal would only bend. Tr. Vol. I, p. 103, ll. 4-25. Dr. Mooney, Dr. Peckham's expert, stated that there was such a thing, apparently familiar with amalgam used instead of gold or porcelain from his time in the military, thirty years ago, but admitted that he did not use amalgam crowns, was unaware of any dental school curriculum that taught students how to place amalgam instead of metal or porcelain crowns, was unaware of any dentist placing amalgam crowns in Idaho other than Dr. Peckham, and that there was not even a standard insurance billing code number pertaining to "amalgam crowns." Tr. Vol. II, p. 336, ll. 15-25; p. 337, ll. 1-10; p. 338, ll. 7-17; p. 342, ll. 7-11.

The facts show that: (1) Ms. Malby was confused as to what was put in her mouth and what she was billed for, (2) two treating dentists did not even know what they were looking at when she showed them the "crown", (3) the "crown" did not last 18 months, (4) the "crown" could not be replaced back into Ms. Malby's mouth, (5) no one can be found who makes or was taught that it was appropriate to make whatever it was that Dr. Peckham insists is a crown, and (6) no one knows how to bill for it. Clearly, there is ample evidence in the record showing that Ms. Malby believed she was being provided something different than what Dr. Peckham provided.

It may be, as Dr. Peckham insists, that he used the word "amalgam" while describing a "silver" crown, but it is transparent that he did not tell Ms. Malby about the "rest of the story." That is – no information about the fact that he was the only dentist in the area doing the procedure, and that his training consisted of attending a few hour course several years ago, that no school was teaching the procedure, and that the "crown" was in fact made from filling

material. In addition, the fact that this terminology is confusing supports the conclusion that Ms. Malby was not informed as to what was being put in her mouth. As stated above, she thought she was getting a crown made of silver as opposed to one made of porcelain or gold. She had no idea that Dr. Peckham was using amalgam, which is not standard practice for any dentists in the area. Consequently, what is clear is that Ms. Malby was not informed that she was receiving a "crown" made of amalgam.

Dr. Peckham violated the Idaho Code and the Board rules by failing to advise Ms. Malby in understandable terms of the treatment to be rendered, and failing to involve Ms. Malby in treatment decisions.

2. Amalgam "crowns" are not routine or common practice in the State of Idaho.

Dr. Peckham states that "[t]here was no testimony as to the standard of practice in Idaho or the Post Falls, Idaho area." Appellant's Brief, p. 14. He further states that "Dr. Mooney actually testified that as recently as ten (10) to fifteen (15) years ago, he and his partners stopped using amalgam crowns" because of concerns about the safety of mercury and because of "the amount of dentist time and skill required by silver amalgam crowns makes it unprofitable...." *Id.* Consequently, he claims that the hearing officer's finding "that amalgam crowns are not routine or common practice and are an unusual procedure, are unsubstantiated by the record." Appellant's Brief, p. 15.

Again, the issue here is whether Ms. Malby was informed as to the "crown" she was receiving. The fact that neither expert knew of any dentist that uses amalgam to fashion "crowns" supports the fact that this was not a routine or common practice and was an unusual procedure. As such, it should have been explained to Ms. Malby so she understood exactly what procedure was being performed.

3. The Board was not required to articulate a standard of care as to informed consent, because it is irrelevant in this matter.

Dr. Peckham argues that the hearing officer used "his own 'standard' of care without any reference to case law, rule, regulation and, most importantly, without a basis in evidence or testimony at hearing." Appellant's Brief, p. 16. He states that the Board failed to articulate any standard of care in Post Falls, Idaho as to informed consent and that the hearing officer created his own standard of care that a dentist must specifically inform the patient that amalgam will be used. Appellant's Brief, p. 17.

Dr. Peckham points out that based on his testimony, he did inform Ms. Malby that the silver amalgam crown would be a single appointment, was cheaper and looks much like a filling. Dr. Peckham also points out that even though Ms. Malby does not remember specifically what was said to her at her appointments, that alone is not "substantial evidence to support" the hearing officer's Findings. Appellant's Brief, p. 18. He further states that "[t]he Hearing Officer accepted the 'subjective' beliefs of Ms. Malby in his Findings, a standard rejected by the Idaho Supreme Court. 'I.C. 39-4304 sets forth and requires an objective, medical-community standard for determining whether a patient has been adequately informed prior to giving consent for medical treatment.'" *Id.* (quoting *Sherwood v. Carter*, 119 Idaho 246, 256, 805 P.2d 452, 462 (1991).

Dr. Peckham claims that:

> To prove non-disclosure, the BOD and Ms. Malby must prove by clear and convincing evidence that Dr. Peckham "failed to meet the objective, medical community-based standard of disclosure for informed consent as set forth in Sherwood ... 'The requisite pertinent facts to be disclosed to the patient are those which would be given by a like physician of good standing practicing in the same community.' "

Appellant's Brief, p. 19 (citations omitted). Dr. Peckham states that the record does not contain any standard of dental care in the same or similar community and that Dr. Mooney testified that "Dr. Peckham's conduct did meet the standard of dental care as far as he was concerned." Appellant's Brief, p. 20. As a result, Dr. Peckham argues that the Findings "are without foundation in the Record and constitute an arbitrary and capricious standard and violate Dr. Peckham's constitutional rights to due process." *Id.*

The Board's complaint against Dr. Peckham includes the allegation that he violated Idaho Code § 54-924(7), (8), and (12) and IDAPA Rule 19.01.01.040.21 by failing to advise a patient in understandable terms of the treatment to be rendered, i.e., providing a large amalgam build up rather than a silver crown. The complaint also alleges that Dr. Peckham violated Idaho Code § 54-924(7), (8), and (12) and IDAPA Rule 19.01.01.040.24 by failing to inform the patient of the proposed treatment and any reasonable alternatives, and failing to involve the patient in treatment decisions, i.e., providing a large amalgam build up when the patient expected to receive a silver crown. Dr. Peckham cites to an Idaho Supreme Court case and the associated statute discussing the standard of care for obtaining informed consent. However, that case and statute are irrelevant to the present matter as Dr. Peckham has only been accused of violating portions of Idaho Code § 54-924 and portions of the Administrative Rules of the Idaho State Board of Dentistry. As stated

above, IDAPA Rule 19.01.01.040.18 defines unprofessional conduct to include failure to comply with state statutes or rules governing or affecting the practice of dentistry.

IDAPA Rule 19.01.01.040.21 states that it is unprofessional conduct when there is "failure to advise patients...in understandable terms of the treatment to be rendered, [and] alternatives...relative to the treatment proposed."

In light of the evidence and testimony at the hearing, it was reasonable for the hearing officer to conclude that Dr. Peckham did not advise Ms. Malby in understandable terms that she was receiving an amalgam "crown" and that Dr. Peckham failed to include Ms. Malby in the decision to provide her with an amalgam "crown".

In addition, Dr. Peckham's statement that the hearing officer used his own standard of care without a basis in the testimony at hearing is unfounded. Again, as stated above, the standard of care as described by Dr. Peckham is irrelevant to this matter. However, there was ample testimony that Ms. Malby received an amalgam buildup and not a crown. Both Dr. Prosser and Dr. Bates testified to this, and both of those dentists practice in the area in which Dr. Peckham practices. The testimony established that amalgam crowns are not used in the current practice of dentistry. Ms. Malby's testimony that the "crown" placed on tooth #18 was nothing like the other crowns she had previously received, coupled with the statements of Dr. Prosser and Dr. Bates, clearly supports the hearing officer's conclusion that Ms. Malby should have been specifically informed that she would be receiving an amalgam "crown" whether that information was given verbally or in written form, and that she was not so informed.

B. Dr. Peckham's Advertising.

1. Missing Teeth v. Dentures – Dr. Peckham's false and misleading statements regarding the Board.

Dr. Peckham takes issue with the hearing officer's finding that the portion of Dr. Peckham's website "The Truth About Dentures" contains communications that were "false, misleading or deceptive to the public. Dr. Peckham states that "[c]ontrary to the Hearing Examiner's and Board of Dentistry's conclusion, there is no evidence in the record demonstrating that these statements are, or were in fact, misleading or deceptive to any reader. It clearly indicates there is a connection between missing teeth and various physical ailments, which is a connection supported by medical literature." Appellant's Brief, p. 24.

Dr. Peckham's website, www.airodental.com, and print advertising contain a section called "The Truth About Dentures. What you Don't Know Just Might Kill You." This section claims that dentures are associated with dementia; people with missing teeth live an average of 10 years less than the rest of us "(this is the same life span decrease as experienced by smokers!)"; long term denture use leads to bone loss and increased risk of jaw fracture; it also leads to increasing discomfort, increasing chewing difficulty, increasing TMJ/jaw joint pain and dysfunction, increasing risk of diabetes, increasing risk of heart disease, and increasingly poor nutrition.

Dr. Peckham's website also contains a section stating "Can you handle the truth? The State Dental Board doesn't think you can!!!" It contains a "disclaimer" stating "WARNING: If you are easily scared and prone to make rash decisions without understanding the risks as well as the benefits, don't read any farther. This report is only suitable for rational adults." Dr. Peckham claims his extensive experience with dentures has caused him to learn "some troubling things about dentures which have only recently begun to be corroborated by researchers around the

nation. The problem now is that our political dental organizations don't think you can handle the truth, and are actively trying to hide it from you!" Dr. Peckham claims he received a "cease and desist reprimand" from the Board after running a "public service ad" stating "Shocking Research From World Authority Finds Link Between Dementia and Missing Teeth."

As stated above, the Board may discipline a dentist who engages in unprofessional conduct (Idaho Code § 54-924(8)) or violates any other provision of law or rule adopted by the Board (Idaho Code § 54-924(12)). IDAPA Rule 19.01.01.040.18 defines unprofessional conduct to include failure to comply with state statutes or rules governing or affecting the practice of dentistry.

Idaho Code § 54-924(4) states that a dentist may be disciplined for making false or misleading statements. A dentist is also prohibited from advertising in such a way as to deceive or defraud. Idaho Code § 54-924(9). In addition, a dentist may not advertise in a manner that is:

> ... false, misleading or deceptive to the public or which is not readily susceptible to verification. False, misleading or deceptive advertising or advertising that is not readily susceptible to verification includes...advertising that...[m]akes a material misrepresentation of fact or omits a material fact.

IDAPA Rule 19.01.01.046.02.a. and f.

With respect to the section on Dr. Peckham's website regarding the truth about dentures, such statements are not readily susceptible to verification, and are in fact false, misleading and/or deceptive. Dr. Peckham's transparent advertising technique is to assert "studies" that he claims show that dentures cause dementia and other ailments such as diabetes and heart disease. R. Vol. I, p. 184-192. This "shocking" information is designed to lead a prospective patient to an article titled "*Can you handle the shocking truth about dentures? Our State Dental Board doesn't think you can!!!*" R. Vol. I, p. 193-196. This article states claims about how long term

denture use "may also lead to" diabetes and heart disease. This document then finishes with an assertion that implants "are your best choice."

At the hearing, Dr. Peckham admitted that the source of information for the "link" between denture use and dementia is a study published in the Journal of the American Dental Association in 2007. R. Vol. I, p. 197-212. To begin, this study does not in fact speak about dentures, but rather missing teeth. What Dr. Peckham omitted from his advertising is the following language from the paragraph of the study entitled "Conclusion:"

> Regardless of the issues of confounding and biological mechanisms, our findings suggest that a low number of teeth has an association with dementia late in life. However, one should not ascribe causality on the basis of the findings of this investigation. It is not clear from our findings whether the association is causal or casual. Further studies are necessary to determine the true nature of the association between tooth loss and dementia. (emphasis added).

R. Vol. I, p. 205.

Dr. Peckham omitted this information in his public advertising, obviously in the hope that the public would infer causality. Further omitting the caveats underlined in the first sentence above, Dr. Peckham's advertising implied that denture use for any reason could lead to dementia. As to the other diseases, Dr. Peckham has provided the hearing officer with various journal articles. None of these ascribe denture use to the various ailments discussed. In light of the above, the hearing officer was correct in finding that the statements contained in Dr. Peckham's website regarding "The Truth About Dentures" violate the applicable statute and administrative rules because those statements "are not linked to the use of the dentures, but have reportedly been associated with missing teeth in later life. The causal connection has not been specifically determined." R. Vol. I, p. 272.

Dr. Peckham also argues that the information contained in the portion of his website called "Can You Handle the Truth? The State Dental Board Doesn't Think You Can" was not

false or misleading, or deceptive. He claims that this "warning language" was in response to a letter he received from the Board asking him to stop this type of advertising. He argues that he "accurately conveyed to the public that the communications in his website were truthful (based upon reliable literature) and that the State Board of Dentistry sought to curtail those statement (via a cease and desist letter dated April 21, 2008)." Appellant's Brief, p. 27. He claims that these statements were not "deceptive, misleading or false." *Id.*

With respect to the section on Dr. Peckham's website wherein he states that the Board "can't handle" the truth and is actively trying to hide it, such statements are patently and demonstrably false, misleading and deceptive, and make material misrepresentations of fact and omit material facts. As demonstrated in the Board's letter to Dr. Peckham dated April 21, 2008 (R. Vol. I, p. 189-192), the Board was seeking to get Dr. Peckham to stop advertising in a way that appeared to be misleading. It was not a "reprimand" as Dr. Peckham has characterized it, nor was it designed to hide the truth from the public. If anything, the "truth" is that Dr. Peckham was making assertions that did not then bear scrutiny and do not now. Further, to ascribe improper motives to the Board, as Dr. Peckham does, is totally misleading to the public. And, of course, the entire point of the advertising is to continue the farrago that "science" has concluded that dentures cause dementia.

Dr. Peckham's jab in the Board's eye is of course offensive. But that is not the point. What is important is that his assertions are not only false but also were designed to attract "people who can handle the truth" and "rational adults" to his implant practice. It is submitted that Dr. Peckham's advertising techniques are precisely why the Board adopted rules against such practices.

2. Dr. Peckham's statements are not entitled to constitutional protection.

Dr. Peckham claims that the portion of his website that "is directed to the State Dental Board, may offend the Respondent, [but] our Idaho Supreme Court has made equally clear that words that are simply offensive to some may not be banned, otherwise free speech and the protections of the State and Federal Constitution are violated." Appellant's Brief, p. 28 (citing *State v. Poe*, 139 Idaho 885, 88 P.3d 704 (2003)). He states that "[f]or [the Board] to object now to Dr. Peckham's truthful statement in response to the 'cease and desist' letter is simply an attempt to suppress free and truthful speech protected by the State of Idaho and U.S. Constitutions." *Id.*

"The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 561 (1980) (citing *Virginia Pharmacy Board*, 425 U.S., at 761-762, 96 S.Ct., at 1825)). The Constitution affords "a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Id.* at 563 (citation omitted).

"Commercial speech" entitled to protection under the First Amendment of the United States Constitution is limited to communications about the availability and characteristics of products and services, and communications which are intended to propose a commercial transaction. *Id.* The United States Supreme Court has determined that "[a]dvertising, though entirely commercial, may often carry information of import .... [C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services .... [and therefore

assures] informed and reliable decisionmaking." *Bates v. State Bar of Arizona,* 433 U.S. 350, 381 (1977).

The Ninth Circuit Court of Appeals addressed commercial speech in the context of advertising for medical professionals in *American Academy of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir. 2004). At issue was a California statute that limited a physician from advertising that he or she was "board certified" in a medical specialty unless certain requirements were met by the certifying board or association. The *Joseph* court began its analysis by setting forth the definition of "commercial speech" as follows:

> Commercial speech represents "expression related solely to the economic interests of the speaker and its audience," and "does no more than propose a commercial transaction." In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court held that speech could properly be characterized as commercial when (1) the speech is admittedly advertising, (2) the speech references a specific product, and (3) the speaker has an economic motive for engaging in the speech.

Id. at 1106 (citations omitted).

Once it is determined that the speech is commercial in nature, the Ninth Circuit noted that the following analysis is engaged in:

> In regard to the permissible regulation of commercial speech, the Supreme Court in *Central Hudson* stated:
>
> In commercial speech cases ... a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson,* 447 U.S. at 566; *see also Clear Channel Outdoor, Inc. v. City of Los Angeles,* 340 F.3d 810, 815 (9th Cir.2003) (applying the four-part *Hudson* analysis).

> Thus, the first inquiry is whether the speech is unlawful or misleading. If it is either, then the commercial speech is not protected at all by the First Amendment. In refining the commercial speech doctrine, the Supreme Court has distinguished between "inherently misleading" speech and "potentially misleading" speech. *See R.M.J.*, 455 U.S. at 202-03. When "advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive," the advertising enjoys no First Amendment protection. *Id.* The government may ban this type of commercial speech entirely without satisfying the remaining three *Central Hudson* factors. *Id.* However, if the speech is only "potentially misleading," in other words, "if the information also may be presented in a way that is not deceptive," the speech regulation must satisfy the remaining three factors specified in *Central Hudson. Id.* at 203.

Id. at 1106-07.

Pursuant to *Joseph*, the language at issue is commercial speech. First, as discussed below in section B.3., it is clearly advertising. Second, the speech references implants as the preferred choice instead of dentures. Third, Dr. Peckham provides implants as part of his practice so encouraging people to get implants instead of dentures will benefit him financially.

Because the language is commercial speech, the four step analysis articulated in *Central Hudson* should be applied to determine whether the speech is protected by the First Amendment.

First, Dr. Peckham's speech is inherently misleading.[1] His argument that "words that are simply offensive to some may not be banned" is irrelevant. Whether the Board was offended by Dr. Peckham's statements is not the issue. Instead, the issue is that the portion of Dr. Peckham's website wherein he states that Board "can't handle" the truth and is actively trying to hide it, is patently and demonstrably false, misleading and deceptive, and makes material misrepresentations of fact and omits material facts. There is simply no way that statements telling the public that the Board is not truthful could ever be presented in a way that is not

[1] Because the Board has already explained why the relevant portion of Dr. Peckham's website is false, misleading, and/or deceptive and makes material misrepresentations of fact and omits material facts, the Board will not do so again in this argument. Instead, the Board directs this Court to the argument contained in section B.1.

deceptive. Dr. Peckham's advertising is not truthful as he has claimed. Consequently, it is misleading and not entitled to protection under the First Amendment. Pursuant to *Central Hudson*, the discussion would end here since misleading speech is not entitled to protection. However, the Board will address the remaining factors which will also support the conclusion that Dr. Peckham's speech is not protected by the First Amendment.

Second, the Board's interest in keeping deceptive advertising at bay is clearly substantial. The Board also has a substantial interest in keeping Dr. Peckham from making the public believe that it is untruthful and actively tries to hide the truth from the public.

Third, prohibiting Dr. Peckham from deceptive, false and misleading advertising certainly advances the Board's interest in protecting the public from such advertising. It also keeps the public from believing that the Board is not truthful and is trying to hide the truth from the public.

Finally, the Board's regulation of false, misleading and/or deceptive advertising is not more extensive than is necessary to serve its interest in protecting the public. There is no other way to keep people from reading Dr. Peckham's false, misleading and deceptive statements than requiring him to remove them from his website.

3. The statements on Dr. Peckham's website are advertising.

Dr. Peckham argues that his statements on the website are not advertising. He cites IDAPA 19.01.01.046 which "defines advertisement as a 'public communication about a licensee's professional services or qualifications for the purpose of soliciting business.'" Appellant's Brief, p. 28 (quoting IDAPA 19.01.01.046.01(a)). Dr. Peckham claims that "the denture report based upon health literature was intended by Dr. Peckham strictly as a public health information." *Id.*

As stated above, Dr. Peckham's advertising technique is to cite to "studies" that he claims show that dentures cause dementia and other ailments. R. Vol. I, p. 184-188, 197-212. This "shocking" information is designed to lead a prospective patient to the article "*Can you handle the shocking truth about dentures? Our State Dental Board doesn't think you can!!!*" (R. Vol. I, p. 193-196), which claims that long term denture use might lead to diabetes and heart disease. It then states that implants "are your best choice." Of course, as the hearing officer noted, Dr. Peckham provides implants to his patients. The hearing officer also noted that "[t]he 'Denture Report' offers a 'no-obligation free consultation appointment at [Dr. Peckham's] office,' and gives his toll-free office telephone number." R. Vol. I, p. 269.

In addition, Dr. Peckham's claims that the Board can't handle the truth and is trying to hide it, is simply another way for him to attract "people who can handle the truth" and "rational adults" to his implant practice. Clearly, these statements fall directly within the administrative rules' definition of advertising.

C. **The Board's Final Order is Not Deficient.**

Dr. Peckham claims that the Board's Final Order is deficient because it did not attach the hearing officer's Findings of Facts and Conclusions of Law and Recommended Order. Pursuant to Idaho Code § 67-5248, an order must include:

> (a) A reasoned statement in support of the decision. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record supporting the findings.
> (b) A statement of the available procedures and applicable time limits for seeking reconsideration or other administrative relief.
> (2) Findings of fact must be based exclusively on the evidence in the record of the contested case and on matters officially noticed in that proceeding.
> (3) All parties to the contested case shall be served with a copy of the order. The order shall be accompanied by proof of service

> stating the service date, each party who was served and the method(s) of service.

The first page of the Final Order, dated March 1, 2011, states that "[t]he hearing officer issued his Findings of Fact, Conclusions of Law and Recommended Order ("Recommended Order") on September 9, 2010. The Recommended Order is attached hereto as Exhibit A." R. Vol. I, p. 329. The second page of the Final Order states that "IT IS FURTHER ORDERED that the Recommended Order, in its entirety including all findings of fact and conclusions of law, is adopted in full by the Board, and incorporated herein by reference." R. Vol. I, p. 330. Apparently the Board failed to attach the hearing officer's Recommended Order to its Final Order.

In support of his argument that the Final Order is deficient, Dr. Peckham cites *Woodfield v. Board of Prof. Discipline of Idaho State Bd. of Medicine*, 127 Idaho 738, 746-7, 905 P.2d 1047, 1055-6 (1995) and quotes the following language from the decision:

> An agency's order must contain a reasoned statement in support of the decision including a concise and explicit statement of the underlying facts of record supporting the findings. Findings of Fact must be based exclusively on the evidence in the record and on matters officially noticed in that proceeding....It is consistent with the Board's statutory obligation to render a reasoned decision to require the Board to identify facts as well as inferences drawn from the facts upon the application of its expertise and judgment which underlie its decision.

Appellant's Brief, p. 30 (citing *Woodfield v. Board of Professional Discipline of Idaho State Board of Medicine*, 127 Idaho 738, 746-7, 905 P.2d 1047, 1055-6 (1995)). Dr. Peckham failed to mention that in *Woodfield*, the Board did not adopt and incorporate the hearing officer's findings, but departed from the hearing officer's decision. The court stated that:

> [w]hen the Board's findings disagree with those of the officer issuing the recommended order, the question for the reviewing court remains whether the Board's findings are supported by substantial evidence.

> Although the district court is not required to take into account the hearing officer's findings, this Court 'will scrutinize the Board's findings of fact more critically if they contradict the [hearing officer's] conclusions than if they accord with the [hearing officer's] findings.'

Id. (citations omitted).

Here, the Board adopted the hearing officer's Recommended Order with absolutely no departure from his decision. Further, it is clear based on the certificate of service in the Recommended Order that Dr. Peckham, through his counsel, did receive a copy of that Recommended Order. As such, Dr. Peckham knew the contents of the Recommended Order and has not suffered any damage as a result of not receiving another copy of the Recommended Order. In addition, Idaho Code § 67-5248 does not require the Recommended Order to be attached to the Final Order. In fact, had the Board simply omitted the language on page 1 stating "[t]he Recommended Order is attached hereto as Exhibit A" this would be a nonissue because on page 2, the Board incorporates the Recommended Order. As such, the Board is in substantial compliance with Idaho Code § 67-5248.

At most, this could be considered a clerical error. Idaho Rule of Civil Procedure 60(a) states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time...[d]uring the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed...and thereafter while the appeal is pending...." This rule "applies to those errors in which the '...type of mistake or omission [is] mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney.' " *Silsby v. Kepner*, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004) (citation omitted) (citing *Dursteler v. Dursteler*, 112 Idaho 594, 597, 733 P.2d 815, 818 (Ct.App. 1987)). Further, "'a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something than what

originally was pronounced." *Id.* (citation omitted) (citing *Dursteler*, 112 Idaho at 597, 733 P.2d at 818).

Although this is an administrative proceeding and Idaho Rule of Civil Procedure 60(a) does not govern such proceedings, the courts' logic applies to this situation. As stated above, the Final Order did not include the Recommended Order as an attachment despite the language on page 1 stating that it was attached as Exhibit A. Clearly this is a mistake that is mechanical in nature, it is apparent in the record and does not involve a legal decision or judgment by an attorney. As a result, there is no need for the court to reverse the Final Order and remand to the Board.

D. The Expert Testimony of Dr. Blaisdell was Not Improper.

Dr. Peckham argues that his due process rights were violated "by asking the BOD to weigh the 'expert' testimony of one of its own members against that of a disinterested expert in the process of acting in a quasi-judicial capacity to determine if Dr. Peckham has violated certain standards." Appellant's Brief, p. 31.

When the Board investigates a matter and decides whether probable cause exists to proceed with filing an administrative complaint, the investigation is anonymous and the Board does not know the name of the dentist being investigated. Although Dr. Blaisdell was a member of the Board when it investigated the claims against Dr. Peckham, Dr. Blaisdell and the other Board members did not know Dr. Peckham was the dentist involved. Once the Board decided to proceed with filing an administrative complaint in this matter, it was determined that Dr. Blaisdell would be an expert in the case. Therefore, Dr. Blaisdell immediately recused himself from voting and/or being involved in Dr. Peckham's case as a Board member. Since deciding to go forward with filing an administrative complaint, Dr. Blaisdell's role has only been as an

expert and not as a Board member with respect to Dr. Peckham's case. As a result, Dr. Peckham's due process rights were not violated due to Dr. Blaisdell acting as an expert in this matter.

E. Dr. Peckham is Not Entitled to Attorney's Fees and Costs.

Dr. Peckham seeks attorney's fees and costs pursuant to "Idaho Code § 12-117 as the BOD's Final Order and the proceedings in this matter reflect a failure to act upon a reasonable basis in fact or law." Appellant's Brief, p. 32. It is simply untrue that the Board acted without a reasonable basis in fact or law when issuing its Final Order. Clearly there is ample authority and evidence in support of the Board's decisions as has been set forth at length in this brief. The District Court agreed with the Board's findings as well, further supporting the argument that there was a reasonable basis in fact and law for the Board's decision.

IV.

CONCLUSION

For the reasons set forth above, the Board respectfully requests this Court uphold the Board's Final Order.

DATED this 27th day of August, 2012.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of August, 2012, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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