

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

RICHARD A. BORGNER, D.D.S.
2299 9th AVENUE NORTH, #1-E
ST. PETERSBURG, FLORIDA 33713

CASE NO.: _____

JUDGE _____

and

THE AMERICAN ACADEMY OF
IMPLANT DENTISTRY
SUITE #750
311 EAST CHICAGO AVE.
CHICAGO, ILLINOIS 60611

vs.

**COMPLAINT FOR DECLARATORY
JUDGMENT AND PRELIMINARY
INJUNCTION**

DOUG COOK, IN HIS OFFICIAL
CAPACITY OF DIRECTOR, STATE OF
FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION
C/O ROGER MOSS OR SAM POWERS
2727 MAHAN DRIVE, FORT KNOX
COMPLEX, BLDG. 3
GENERAL COUNSEL'S OFFICE
TALLAHASSEE, FLORIDA :

and

FLORIDA BOARD OF DENTISTRY
1940 NORTH MONROE STREET
TALLAHASSEE, FLORIDA 32399-0765
IN THEIR OFFICIAL CAPACITY
PETER A. KELLER, D.D.S., CHAIRMAN

and

FAUSTINO GARCIA, D.M.D.,
VICE-CHAIRMAN

Plaintiff, Richard A. Borgner, D.D.S., and The American Academy of Implant Dentistry, (hereinafter “AAID”), for their Complaint against Defendants state as follows:

JURISDICTION AND VENUE

1. This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (a), and Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988. Furthermore, this matter arises under the First Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment of the Constitution.

2. Venue is proper in this district under 28 U.S.C. § 1391 and 42 U.S.C. §§ 1983 and 1988.

NATURE OF ACTION

3. In this action the Plaintiffs challenge the constitutionality of amended Florida Statute § 466.0282 which prohibits, in part, Florida licensed dentists from advertising “membership in or specialty recognition by an accrediting organization, or advertise that his practice is limited to a specific area of dentistry . . .” unless such dentist is a “specialist” in an area of dental practice which has been deemed a “specialty” area of practice by the American Dental Association. The Plaintiffs assert that the statutory section at issue is violative of the First Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment of the Constitution.

PLAINTIFFS

4. Plaintiff Dr. Richard Borgner is a resident of the State of Florida and a Florida licensed dentist practicing general dentistry in St. Petersburg, Florida. He is a member of the Plaintiff AAID, a “Fellow” of the AAID, and a “Diplomate” of the American Board of Oral Implantology/Implant Dentistry (hereinafter the ABOI/ID). He advertises his membership status with, and credentials earned in, the Plaintiff AAID. (See Affidavit of Dr. Borgner, attached hereto as Exhibit A).

5. Plaintiff AAID is a national dental organization whose member dentists, upon satisfying certain experiential and educational and testing requirements, may earn credentials issued by the AAID in the field of implant dentistry. Plaintiff AAID is acting in this matter on its own behalf and in a representative capacity on behalf of its approximately one hundred seventy two (172) dentist-members who are engaged in the practice of dentistry in the State of Florida and who are affected by amended Fla. Stat. § 466.0282. These members possess credentials earned in, and issued by, the AAID (“Fellow” and “Associate Fellow”), and credentials earned in, and issued by, the ABOI/ID (“Diplomate”), the certifying Board which issues Diplomate certification and which Board is sponsored by the AAID. The affected Florida members of the AAID advertise their membership in the AAID and/or the aforementioned credentials to the public, and wish to continue to do so, in the exercise of their First Amendment rights. (See Affidavit of J. Vincent Shuck, Executive Director of Plaintiff AAID, attached hereto as Exhibit B).

6. A primary purpose, goal, and objective of the Plaintiff AAID is the enhancement of the dental profession’s knowledge, skill, and expertise in the field of implant dentistry.

Consistent with that purpose, it encourages and supports its members' attainment of "credentialed" status in the AAID through satisfactory completion of certain educational, experiential, and testing requirements, and further encourage the attainment of "Diplomate" status from the national certifying Board sponsored by the AAID, the ABOI/ID. To date, only approximately one hundred twenty-five (125) dentists in the entire country have attained the certification of "Diplomate, American Board of Oral Implantology/Implant Dentistry."

7. The Plaintiff AAID further encourages its members to, upon attainment, advertise the aforementioned credentials to the public in order to provide the public more information upon which to make an informed decision regarding the selection of a dentist for the provision of implant dental services.

8. The challenged statutory section at issue in this case directly conflicts with and impedes the primary purposes of the Plaintiff AAID, i.e., the enhancement of knowledge and skills in the area of implant dentistry, leading to the attainment of credentials which can be held out to the public for the purpose of providing valuable information to the public to assist dental consumers in informed decision making.

DEFENDANTS

9. The Defendants are, collectively, responsible for implementing, administering, and enforcing the various provisions of the Florida statutes regulating the practice of dentistry in the State of Florida, including the statutory provision at issue in this complaint, Fla. Stat. § 466.0282 (1996), effective October 1, 1996, attached hereto as Exhibit C. The Defendant Board of Dentistry, through its Director, is mandated by the State of Florida to enforce the provisions of

Florida Statutes, Chapter 466. The Agency for Health Care Administration, through its Director, operates within the Department of Professional Regulation, through its Director, and conducts investigations of dentists relative to the implementation and enforcement of the various provisions of Chapter 466 of the Florida Statutes.

FACTUAL ALLEGATIONS

10. Plaintiff Borgner possesses a license to practice dentistry in the State of Florida, issued by the Florida Board of Dental Examiners. Plaintiff Borgner further possesses a constitutionally protected property interest in his license and the right, under the First and Fourteenth Amendments of the Constitution of the United States, to advertise his membership in, and credentials obtained from, the AAID and from the national certifying Board sponsored by the AAID, the ABOI/ID, in the exercise of his rights to engage in commercial free speech.

11. Plaintiff American Academy of Implant Dentistry is a national dental organization, established in 1951, dedicated to the advancement of the art and science of implant dentistry, and the enhancement of dental practitioners' education, knowledge and skill in the area of implant dentistry. Plaintiff AAID grants the credentials of "Fellow" and "Associate Fellow" to member dentists who have fulfilled certain educational, experiential and examination requirements of the AAID. The AAID also sponsors and supports the ABOI/ID, its national certifying Board, which issues the credential of "Diplomate" upon fulfillment of certain educational, experiential and examination requirements.

12. Implant dentistry is an area of dental practice which has not yet been deemed a "specialty" area of dental practice by the American Dental Association. Many dentists become

members of the AAID in order to obtain the aforementioned credentials in implant dentistry and to subsequently advertise their membership and credentials earned in the AAID and ABOI/ID to the public. The challenged statutory provision at issue will cause injury to the Plaintiff AAID as it will deter dentists from seeking membership in, and the attainment of the credentials issued by, the AAID, thus adversely affecting the primary goals and objectives of the AAID.

13. The Florida Board of Dentistry has previously formally determined that the AAID and the ABOI/ID are “bona fide organizations that credential dentists in the area of implant dentistry.” (See Final Order, BOD 94-01DS, dated August 11, 1994, attached hereto as Exhibit D).

14. Similarly, In the matter of: American Academy of Implant Dentistry, Petitioner, Chicago, Illinois, the Tennessee Board of Dentistry has acknowledged, via a formal Declaratory Order, “that although Implant Dentistry is not a specialty area recognized either by the American Dental Association or the Tennessee Board of Dentistry, the American Academy of Implant Dentistry (AAID) and the American Board of Oral Implantology/Implant Dentistry (ABOI/ID) are bona fide organizations that credential dentists in the area of implant dentistry . . .” The Tennessee Board further acknowledged that the AAID was appropriately acting as Petitioner in the matter because the AAID “is affected by the interpretation and application of the above referenced statutes in that Tennessee licensed dentists who have obtained credentialed status (Associate Fellow or Fellow) in the American Academy of Implant Dentistry (AAID) and/or Diplomate status in the American Board of Oral Implantology/Implant Dentistry (ABOI/ID) wish to make their credentials known to the public through truthful statements, without fear of

disciplinary action by the Tennessee Board of Dentistry.” (See Declaratory Order of the Tennessee Board of Dentistry, 9-22-94, attached hereto as Exhibit E)

15. Plaintiff Borgner and the individual Florida members of Plaintiff AAID possess Florida dental licenses which are at imminent risk of disciplinary action, including loss of licensure, for violating the provisions of Fla. Stat. Chapter 466. Although there is presently no pending formal disciplinary action against Plaintiff Borgner or other Florida credentialed members of the Plaintiff AAID, at least one Florida credentialed member of the AAID has received an investigative inquiry from the Defendant Agency for Health Care Administration, Division of Health Quality Assurance, Florida Board of Dentistry, regarding the advertisement of his credentials in the AAID and the ABOI/ID in reference to a potential violation of the statute at issue. (See documentation attached as Exhibit F).

16. Plaintiff Borgner and other Florida members of the Plaintiff AAID advertise, through various media, their membership and credentials (“Fellow” or “Associate Fellow”) obtained in the AAID.

17. Plaintiff Borgner and Florida credentialed members of the Plaintiff AAID also advertise, through various media, the credential of “Diplomate” obtained from the ABOI/ID. Through the use of such advertising, which is supported and encouraged by Plaintiff AAID, the public is provided truthful, non-misleading information relative to bona fide credentials in implant dentistry. Truthful, non-deceptive and non-misleading commercial advertising cannot be prohibited by the State of Florida.

18. Several of Plaintiff Borgner’s and AAID Florida member credentialed dentists’

advertisements containing the aforementioned credentials are under contract for present and future advertisement and cannot be withdrawn, such as Yellow Page ads, which are currently in print and distributed to the general public.

19. In issuing BOD 94-01DS, (Exhibit D) the Florida Board of Dentistry made the determination that truthfully advertising the credentials “Fellow” AAID, “Associate Fellow” AAID, and “Diplomate” ABOI/ID constituted non-deceptive and non-misleading advertising.

20. The Plaintiff and other Florida credentialed members of the AAID have advertised, and currently are advertising, their credentials in reliance upon the aforementioned Order of the Florida Board of Dentistry and in concert with their constitutionally protected right to engage in truthful, non-misleading commercial advertising.

21. The Florida Dental Association, a professional trade association, was opposed to BOD 94-01DS. Subsequent to the Florida Board of Dentistry issuing Final Order BOD 94-01DS, the Florida Dental Association engaged in lobbying activity within the Florida legislature to effectuate the passage of the statutory provision at issue, Fla. Stat. § 466.0282 (1996). The aforementioned statute is in conflict with BOD 94-01DS and preempts BOD 94-01DS as a matter of law.

22. Amended Fla. Stat. § 466.0282 prohibits the Plaintiff from advertising “membership in or specialty recognition by an accrediting organization, or advertise that his practice is limited to a specific area of dentistry . . .” (Emphasis added) unless such dentist is a “specialist” in a area of dental practice which has been deemed a “specialty” area of practice by the American Dental Association, a private trade association (hereinafter the “ADA”).

23. In addition to the aforementioned prohibitions, the statutory provision at issue prohibits the Plaintiff and the Florida members of the AAID from advertising their credentials earned in the AAID and the ABOI/ID, in addition to prohibiting the advertising of their membership in the AAID. This new statutory provision further prohibits the Plaintiff and the other respective Florida members of the AAID from advertising any credential obtained from any bona fide professional dental organization, including those earned from the Plaintiff AAID, unless the dentist is a “specialist” in a specialty area of dental practice recognized by the ADA.

24. The House of Delegates of the ADA, a professional trade association, determines which areas of dental practice will be deemed “specialties.” The ADA has only recognized eight areas of specialty dental practice: Endodontics, Oral and Maxillofacial Surgery, Orthodontics, Oral Pathology, Public Health Dentistry, Pedodontics (children’s dentistry), and Prosthodontics.

One of the criteria which must be satisfied before specialty recognition will be granted to a specific area of dental practice by the ADA, is “substantial public need or demand for services that cannot be adequately met by general practitioners or specialists in other recognized areas must be documented.” The ADA does not evaluate any credential or any credentialing process other than those in the eight recognized specialty areas of practice.

25. Subsequent to the enactment of Fl. Stat. § 466.0282 (1996), the Plaintiff, through his counsel, submitted a written inquiry to the Florida Board of Dentistry regarding the legality of advertising eleven specific professional memberships and/or credentials in reference to the statutory provision at issue.. The Board, through its counsel, recently responded that only two

of the eleven listed memberships and/or credentials “would be acceptable under the new law.” (See letters collectively marked as Exhibit G attached hereto). Those two were “Member, American Dental Association” and “Diplomate, American Board of Prosthodontics,” (Prosthodontics is one of the eight areas of dental practice recognized as a specialty area of practice by the American Dental Association). The statutory provision at issue contravenes the legal, legitimate and beneficial purposes of the AAID. A Florida member of the AAID is not permitted to announce his or her membership in the AAID, nor allowed to advertise any credential earned in the AAID or ABOI/ID. Such a prohibition will deter membership in the AAID and have a chilling effect on the advancement of knowledge, education and training in implant dentistry through Plaintiff AAID’s credentialing processes.

26. There are many other credentials which can be earned by dentists from bona fide dental organizations in areas of dental practice which are not “specialty” areas of dentistry, including credentials in the areas of dental radiology, dental anesthesiology, implant dentistry, cosmetic dentistry, general dentistry, laser dentistry, geriatric dentistry, oral medicine, head and neck pain, dental radiology, etc. None of the aforementioned are one of the eight areas of dental practice deemed to be “specialty” areas of practice by the American Dental Association. By the terms of the statutory provision at issue, as supported by the response of counsel for the Florida Board of Dentistry, neither membership in, nor a credential from any dental organization in any of the aforementioned areas of dental practice not recognized by the ADA as a specialty area of practice, can lawfully be advertised to the public by a dentist.

27. The statutory provision at issue is an absolute prohibition against a Florida licensed

dentist advertising membership in many professional dental organizations and/or credentials earned from any such organization, without any substantive determination as to whether or not the organization is bona fide, or as to whether or not the credential is bona fide, how it is obtained, and whether or not advertising such membership or credential would be deceptive or misleading to the public. The statutory provision at issue blindly excludes all other credentials, other than ADA specialty credentials, without regard to the nature of the credential, validity of the credential, or the nature of the truthful information provided to the public through the advertisement of any such credential, in violation of the rights afforded by the First Amendment to the Constitution.

28. The Defendant Board of Dentistry, through its Director, is empowered and mandated to enforce the provisions of Fla. Stat. Chapter 466. The Florida Board of Dentistry previously determined that the credentials of Plaintiff Borgner and the other Florida credentialed members of the AAID could lawfully be advertised. The advertising of those same credentials, as noted above, is now in violation of Fla. Stat. § 466.0282 (1996) for which Plaintiff Borgner and other affected members of the Plaintiff AAID are subject to disciplinary action by the Florida Board of Dentistry, pursuant to Fla. Stat. § 466.028 (1)(aa).

29. The Agency for Health Care Administration, Division of Health Quality Assurance, Florida Board of Dentistry, has already undertaken investigations for alleged violations of Fla. Stat. § 466.0282, relative to the advertisement of the credentials held by, and advertised by, Plaintiff Borgner and other effected Florida members of Plaintiff AAID.

30. Florida Statute § 466.0282 is an unconstitutional infringement of the commercial free

speech rights of Plaintiff Borgner and other Florida members of the AAID, which rights are guaranteed by the First Amendment of the Constitution as applied to the states through the Due Process Clause of the Fourteenth Amendment.

31. Plaintiff Borgner and similarly situated members of the Plaintiff AAID are in imminent risk of irreparable injury by the Defendants by being subjected to investigations, public allegations of misconduct, public disciplinary hearings and public disciplinary action effecting a constitutionally protected property interest in licensure, all of which flow from the statutory deprivation of rights guaranteed by the First Amendment of the Constitution.

32. Plaintiff Borgner and the Florida credentialed members of the AAID are now advertising their credentials in violation of the provisions of Fl. Stat. § 466.0282, and are at imminent risk of injury, as stated in paragraph 25 above, unless this Court grants the injunctive relief sought.

33. The Plaintiffs AAID and Borgner are, and will continue to suffer injuries for the reasons stated above.

34. The injuries to Plaintiffs enumerated herein directly flow from the statutory provision at issue and the relief sought by Plaintiffs will prevent said injuries and will pose no hardship on the Defendants.

COUNT ONE

35. Amended Fla. Stat. § 466.0282 (1996) is violative of the Plaintiffs' rights guaranteed under the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States.

COUNT TWO

36. Amended Fla. Stat. § 466.0282 (1996) deprives the Plaintiffs of their rights secured by the Constitution. Thus, Plaintiffs seek redress pursuant to 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue an Injunction prohibiting the Defendants from implementing, or otherwise enforcing the provisions of Fla. Stat. § 466.0282 until the constitutionality of this provision can be determined by this Court;

2. Declare Fla. Stat. § 466.0282 (1996) to be an unconstitutional infringement on the First Amendment rights of the Plaintiffs; and

3. Award the Plaintiffs all fees, including attorneys' fees, and costs associated with this action, pursuant to 42 U.S.C. § 1988; and,

4. Award the Plaintiffs all other relief to which they may be entitled at law or in equity.

Respectfully Submitted,

Frank R. Recker (0384623)
Attorney for Plaintiffs
Frank R. Recker & Associates Co., L.P.A.
7809 Laurel Avenue, Suite 10
Cincinnati, Ohio 45243-2673
(513) 561-9600

Marilyn J. Marshall (0991805)
Attorney for Plaintiffs
254 East Sixth Avenue
Tallahassee, Florida 32303
(904) 561-0707