



November 4, 2019

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Extension 628

HAND DELIVERY

South Dakota State Board of Dentistry
Rules Review Committee

Re: Rules

Dear Committee:

I am the Board of Dentistry's attorney. I apologize I must appear before you via this letter and telephone, but the Board was not aware that its proposed Rule change to ARSD 20:48:08:02 would be objected to at the Rules Review Committee hearing by the National American Association of Orthodontists (AAO) until this morning.

I am in receipt of a memorandum prepared by the attorney hired by the National Association to defeat the South Dakota Board's proposed Rule changes. Please accept this letter as my response to the National Association's arguments.

First, the Rules Review Committee should be aware that, without the Board enacting these specific Rule changes, the South Dakota Board of Dentistry, individual Board members, and the State of South Dakota itself will more than likely face costly and extensive litigation arguing that we have violated the Sherman Act and Dormant Commerce Clause.

Indeed, similar actions have been initiated and successful in States such as Alabama and Georgia. Ultimately, without these Rules, an argument exists that Board members are trying to unreasonably limit competition for their own personal benefit. I prepared a memorandum for the Board of Dentistry when they were considering the proposed Rule changes after thoroughly researching and analyzing the litigation faced by other Boards of Dentistry. I also asked the AAO to address these litigation concerns during the meetings and hearings before the Board at which the AAO appeared. They have yet to provide a legitimate response to this very real litigation concern.

Second, regardless of the litigation threat, the South Dakota Board of Dentistry believes these Rule changes are absolutely necessary to address the concerns raised by its members and to ultimately protect the public while allowing for safe, affordable, and available care. Notable, the

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South Dakota orthodontists involved with the proposed Rule changes are not objecting to the proposed Rule changes, and these local stakeholders were involved in the process to develop these Rule changes over the course of the last year or more.

Ultimately, the Board has authority to detail the specific functions a dental assistant may perform with either direct or indirect supervision. While the statutes define those levels of supervision, the existing statutes do not reflect the specific supervision level for dental assistants. As the National Association pointed out, the Statute pertaining to dental assistants, SDCL 36-6A-1(8), defines a dental assistant as “a person who, under the supervision of a dentist or dental hygienist, renders assistance as authorized by this chapter.”

The Statute does not define what level of “supervision” is required and does not further define what “assistance” is authorized. This is problematic for practitioners. However, the Legislature specifically gave the Board of Dentistry authority to address these matters. Through SDCL 36-6A-14, specifically subsections 1 and 10, the Legislature provided the Board the authority to further define the “supervision” required for dental assistants and the “assistance” authorized. This is exactly the kind of “duties” the Legislature intended for a regulatory Board like the Board of Dentistry.

The South Dakota Legislature no doubt recognizes that the orthodontists, dentists, dental hygienists, and other practitioners who make up the Board of Dentistry would understand the dental assistant procedures requiring either direct or indirect supervision. Having been present for some of those extensive and detailed conversations, I can assure you that the Board thoroughly considered what procedures require direct supervision and what procedures require indirect supervision to protect the public.

SDCL 36-6A-14 states that the Board may, “establish standards for, and promote, the safe and qualified practice of dentistry. The statute also states that the Board may “permit . . . dental assistants to perform, under the supervision of a dentist, additional procedures established by rules promulgated pursuant to chapter 1-26.” The proposed Rule before the Committee today is an example of the Board executing its “powers and duties” under SDCL 36-6A-14. The Board is charged with this responsibility. Again, the statute references “supervision” but further explanation as to the level of supervision is needed in a Rule like that proposed by the Board.

Ultimately, the Board is charged with the responsibility to “carry out the purposes and enforce the provisions of this chapter.” SDCL 36-6A-14(22). This proposed Rule is an example of the Board carrying out the Legislature’s statutes.

I can also assure you that the Board considered the thoughts and recommendations from local providers when preparing the proposed rule changes. At the end of the day, the Rules mostly reflect what is being practiced in dental clinics across our state under the loosely defined statute, which requires further direction through a Board Rule.

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As the AAO points out, the existing statutes define “direct supervision,” “general supervision”, and “indirect supervision.” But there is no definition for the term “supervision” like that used in the dental assistant definition. This requires the Board to explain what specific level of supervision applies to dental assistants and, as the proposed Rule explains, that level depends on what assistance the dental assistant is providing.

Contrary to the AAO’s argument, no South Dakota statute contradicts the proposed rule changes. There is no statute, and none cited by the AAO, that prohibits a dental assistant from providing assistance without the dentist actually present in the clinic.

It is also noteworthy to point out that the proposed rule changes would also allow a registered dental assistant to the dental assistant procedures outline in the Rule. There is nothing that prohibits a registered dental assistant from performing dental assistant functions. The registered dental assistants are simply allowed to perform additional procedures than a dental assistant.

This objection by the AAO is not meant to protect the citizens of South Dakota. This objection is part of a broader attempt by the AAO to limit competition for national orthodontists. The AAO may be fine subjecting South Dakota to litigation against such competition, but I doubt the AAO will be prepared to pay for the legal defense to combat such litigation.

I hope that this e-mail helps the Rules Review Committee with its analysis. Please let me know if you need anything further.

Sincerely,

WOODS, FULLER, SHULTZ & SMITH P.C.



Michele A. Munson