

Alberta Dental Association and College Hearing Tribunal Decision October 3, 2016

IN ACCORDANCE WITH BYLAW 19(7) OF THE ALBERTA DENTAL ASSOCIATION AND COLLEGE

On October 3, 2016, a Hearing Tribunal of the Alberta Dental Association and College found Dr. David Merrell guilty of unprofessional conduct and he was sanctioned. A Hearing Tribunal is an independent group comprised of a member of the public appointed by the Government of Alberta and three dentists registered in Alberta.

Dr. Merrell admitted he was guilty of unprofessional conduct because he used or was included in advertising or promotional material:

1. Where he did not include a clear statement that services are provided by a general dentist, contrary to Articles B4.8 of the Code of Ethics.
2. Where he did not include the names of the individual dentists at his dental practice, contrary to Article B4.4 of the Code of Ethics and included statements in his advertising or promotional material that were misleading, deceptive, ambiguous or fraudulent in that they implied multiple dentists worked at Dr. Merrrell's practice but did not do so, contrary to Articles B4(a), B4,1 and section 102 of the Health Professions Act.
3. Where he expressly or implicitly promoted that he had specialty status or specialty training or that led the public to believe that services, equipment, materials or techniques were delivered by a specialist or a dentist with specialty training and this was also misleading or deceptive contrary to Articles B4(a), B4(e), B4.1, B4.7 or B4.8 of the Code of Ethics and sections 102 and 128(11) of the Health Professions Act.
4. Where he stated or implied that he and his services, equipment, materials or techniques were superior to those of other dentists or that he could achieve superior results or provide superior care, contrary to Articles A8, B4(b), B4(d), B4.1 and B4.2 of the Code of Ethics.
5. Where he advertised or promoted himself or his services, equipment, materials or techniques using statements, testimonials, photographs or any of them that could create unreasonable expectations in patients or potential patients or that are incapable of objective verification, are misleading, deceptive or ambiguous, contrary to Articles A8, B4(a), B4(b), B4(c), B4.1 or B4.2 of the Code of Ethics and section 102 of the Health Professions Act.
6. Where he advertised or promoted himself, his services, equipment, materials or techniques that referred to courses, programs, awards, positions, fellowships, memberships, or credentials beyond his DDS degree and which is misleading, deceptive or ambiguous, contrary to Articles A8, B4(e), B4.1, B4.6, B4.7 or B4.8 of the Code of Ethics and section 102 of the Health Professions Act.
7. Where he advertised a coupon or time-limited discount or the provision of gifts or other consideration in exchange for the referral of patients, contrary to Articles B4 and B5 of the Code of Ethics.

8. That did not refer to research, studies, data, or sources without making truthful or any disclosure of their source or authorship, contrary to Articles B4(a), B4(b), B4.1 or B4.3 of the Code of Ethics and section 102 of the Health Professions Act.

The Hearing Tribunal concluded that Dr. Merrell's advertising and promotional activities were proven breaches of Dr. Merrell's professional duties and the provisions of the Code of Ethics and the Health Professions Act. These breaches clearly constituted unprofessional conduct.

Each of the eight listings of unprofessional conduct and reasons and comments of the Hearing Tribunal are outlined below.

ONE: Not including a clear statement that services are provided by a general dentist, contrary to Articles B4.8 of the Code of Ethics.

The Hearing Tribunal found Dr. Merrell did not include a statement that the services advertised on his website or in his promotional materials were provided by a general dentist.

TWO: Not including the names of the individual dentists at his dental practice, contrary to Article B4.4 of the Code of Ethics and including statements in his advertising or promotional material that were misleading, deceptive, ambiguous or fraudulent in that they implied multiple dentists worked at Dr. Merrell's practice but did not do so, contrary to Articles B4(a), B4.1 and section 102 of the Health Professions Act.

The Hearing Tribunal found that during the period that Dr. Merrell did have other dentists working with him and who were part of his practice, he did not include their individual names. After the dentists ceased working at the practice, he continued to advertise in a manner that expressed that other dentists were practicing with him such as "The dentists in our clinics do this as their major, full time occupation" and "We are leaders in our field".

THREE: Where he expressly or implicitly promoted that he had specialty status or specialty training or that led the public to believe that services, equipment, materials or techniques were delivered by a specialist or a dentist with specialty training and this was also misleading or deceptive contrary to Articles B4(a), B4(e), B4.1, B4.7 or B4.8 of the Code of Ethics and sections 102 and 128(11) of the Health Professions Act.

The Hearing Tribunal referenced several specific excerpts from Dr. Merrell's advertising that made claims of specialty status or specialty training and that were also misleading or deceptive, some of which are as follows

- A trusted expert in Sleep Disordered Breathing
- Specializing in Sleep Disordered Breathing
- Specially trained dentists to treat sleep disordered breathing
- Advanced training, experience and credentials
- We do have a 90 % success rate
- Doctors who perform this work specialize in this field ... it is their major full time occupation
- Years of experience necessary to offer a unique dental solution

- Ask the Expert Dr. David Merrell
- Dr. David Merrell is a specialist in dental sleep medicine
- Dr. David Merrell, a pioneer in the use of oral appliances for Sleep Disordered Breathing
- Dr. Dave Merrell, a qualified sleep specialist

FOUR: Where Dr. Merrell stated or implied that he and his services, equipment, materials or techniques were superior to those of other dentists or that could achieve superior results or provide superior care, contrary to Articles A8, B4(b), B4(d), B4.1 and B4.2 of the Code of Ethics.

The Hearing Tribunal referenced some of the specific excerpts from Dr. Merrell's advertising that expressed or implied that his services, equipment, materials, techniques or results were superior to those of other dentists, could achieve superior results or he could provide superior care and therefore were not objectively verifiable, such as:

- Superior result
- Gold standard
- With the use of revolutionary dental techniques and technology
- We are leaders in this field. We are developing new technologies and protocols constantly... our practice guidelines exceed those from ... you are seeing the best trained people in this field.
- The first choice for treatment of mild to moderate obstructive sleep apnea
- The body of the appliance ... offers the patient a much greater degree of comfort than the harder acrylic materials
- Years of experience necessary to offer a unique dental solution
- Treatment process is first class
- Unfortunately, most dentists are unprepared to properly diagnose and treat sleep apnea
- Customized approach
- Leader in the field
- An industry leader
- Extremely successful in diagnosing and treating hundreds of clients

FIVE: Advertising or promoting himself or his services, equipment, materials or techniques using statements, testimonials, photographs or any of them that could create unreasonable expectations in patients or potential patients or that are incapable of objective verification, are misleading, deceptive or ambiguous, contrary to Articles A8, B4(a), B4(b), B4(c), B4.1 or B4.2 of the Code of Ethics and section 102 of the Health Professions Act.

The Hearing Tribunal referenced some of the specific statements that were unprofessional, as follows:

- Our patients are talking – which was followed by multiple patient testimonials.
- Unrecognized sleep disordered breathing ... may account for a significant proportion of motor vehicle accidents
- Most patients experience relief the very first night they wear their TAP
- A highly effective solution for both snoring and sleep apnea

- The TAP can help prevent conditions linked to sleep apnea: Chronic daytime sleepiness, high blood pressure, heart attack, stroke, heartburn, reflux, morning headaches, depression.
- Relief for systemic hypertension
- Most report that they aren't aware they are even wearing a dental appliance
- A C-PAP machine ... has a 50 %failure rate
- We have seen all of these symptoms
- (severe snoring, heart and blood pressure problems, depression, lack of energy, moodiness, marital problems, sore throat, mental fogginess and numerous other symptoms) improve with appliance therapy.
- Stop snoring and save your sex life.
- Relationship assistance
- Keep your employees energized
- hundreds of research papers have documented the success of dental appliances for sleep disordered breathing
- Sleep better today
- Score snoring relief today and score goals tomorrow

The Hearing Tribunal stressed that these unsupportable statements about the likely success of products, procedures, and treatments are contrary to Article A8 of the Code of Ethics.

SIX: Where he advertised or promoted himself, his services, equipment, materials or techniques that referred to courses, programs, awards, positions, fellowships, memberships, or credentials beyond his DDS degree and which is misleading, deceptive or ambiguous, contrary to Articles A8, B4(e), B4.1, B4.6, B4.7 or B4.8 of the Code of Ethics and section 102 of the Health Professions Act.

The Hearing Tribunal relied on the following specific references to conclude this conduct was clearly unprofessional:

- A fellow of the Academy of General Dentistry (AGD) and the Canadian and American Dental Examining Boards.
- A founding member of the Dental Organization for Sleep Apnea and a member of the Canadian Sleep Society.
- The American Academy of Sleep Medicine, American College of Chest Physicians, the American Academy of Dental Sleep Medicine
- Chief of Dentistry at Peace Arch Hospital
- Postgraduate courses in sleep medicine
- Completed courses from the leading authorities in dental and medical fields related to sleep medicine disciplines
- Training in the United States and Foothills Sleep Clinic
- Extensive postgraduate training in sleep medicine.

SEVEN: Using a coupon or time-limited discount, or offered a gift or other consideration in exchange for the referral of patients, contrary to Articles B4 and B5 of the Code of Ethics.

The Hearing Tribunal noted the following specific references in support of their finding that Dr. Merrell had engaged in unprofessional conduct:

- Share your success at the Merrell clinic and be rewarded.
- Once your friend or family member books a consult at the Merrell Clinic, completes their Sleep Study and provides your name as the referring party, you will receive your choice of one or more of the following gifts:....
- Each new patient receives a free sleep study (up to \$250 value)
- Our thank you gift for patient booking.

EIGHT: That did not refer to research, studies, data, or sources without making truthful or any disclosure of their source or authorship, contrary to Articles B4(a), B4(b), B4.1 or B4.3 of the Code of Ethics and section 102 of the Health Professions Act.

The Hearing Tribunal noted several specific references about sleep apnea, including:

- 93% of women and 82% of men with moderate to severe sleep apnea syndrome have not been clinically diagnosed.
- Snorers are 3x more likely to have multiple motor vehicle accidents
- Snorers with SDB are 7x more likely to have multiple motor vehicle accidents.
- Male snorers have 3x the risk of occupational accidents.
- Claims for the USA of more than 10 people per day dying from injuries on the job and costs of over \$100 billion annually for lost wages and productivity and a primary cause of major disasters.
- Some studies have reported as high as 30% of patients develop significant bite issues
- Medical literature has hundreds of research papers that have documented the success of dental appliances for snoring and sleep disordered breathing (apnea).

The Hearing Tribunal made many conclusions about the findings and the penalty, such as:

- Dr. Merrell had a personal professional responsibility to ensure his advertising complied with the Code of Ethics and he failed to comply with this important duty over a period of several years.
- It is very serious that after several years of discussion and review of his advertising, there remained outstanding issues and Dr. Merrell had a professional responsibility to promptly deal with these issues. His delay in resolving the issues is unacceptable and unprofessional.
- The penalty addressed public protection. It also is meant to ensure Dr. Merrell does not continue this advertising.
- The dentist has the personal responsibility to review the advertising of the dental practice.

The Hearing Tribunal accepted the Joint Submission on Penalty and issued the following orders:

1. Dr. Merrell is reprimanded;
2. Dr. Merrell shall be suspended for a period of one week to be served within 6 months of service of the Hearing Tribunal's decision.
3. Dr. Merrell shall successfully complete the 30 hour Ethics Program which shall not count toward Dr. Merrell's continuing education credits.
4. Dr. Merrell shall pay costs of the investigation and hearing of \$20,549.24 by October 31, 2017.
5. Dr. Merrell will bring his advertising into compliance with the Code of Ethics.