

CAUSE NO.: _____

THETELEDENTISTS, LLC; and
CELESTE MOHR, D.D.S.,

Plaintiffs,

v.

TEXAS STATE BOARD OF DENTAL
EXAMINERS; DAVID TILLMAN, D.D.S.,
in his official capacity as board member of
the Texas State Board of Dental
Examiners; JORGE QUIRCH, D.D.S., in
his official capacity as board member of
the Texas State Board of Dental
Examiners; BRYAN HENDERSON,
D.D.S., in his official capacity as board
member of the Texas State Board of
Dental Examiners; DAVID YU, D.D.S., in
his official capacity as board member of
the Texas State Board of Dental
Examiners; ROBERT MCNEILL, D.D.S.,
M.D., in his official capacity as board
member of the Texas State Board of
Dental Examiners; MARGO MELCHOR,
M.ED., ED. D., in her official capacity as
board member of the Texas State Board of
Dental Examiners; LORIE JONES,
R.D.H., in her official capacity as board
member of the Texas State Board of
Dental Examiners; LOIS PALERMO,
R.D.H., in her official capacity as board
member of the Texas State Board of
Dental Examiners; RODNEY
BUSTAMANTE, in his official capacity as
board member of the Texas State Board of

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

Dental Examiners; KATHRYN SISK, in her official capacity as board member of the Texas State Board of Dental Examiners; LINDA BURKE, D.D.S., in her official capacity as board member of the Texas State Board of Dental Examiners; and CASEY NICHOLS, in her official capacity as the Executive Director of the Board,

Defendants.

**Plaintiffs' Original Petition for Declaratory Judgment
and Application for Injunctive Relief**

To the Honorable Judge of the District Court, COME NOW Plaintiffs TheTeleDentists, LLC, and Celeste Mohr, D.D.S., and file their Original Petition for Declaratory Judgment and Application for Injunctive Relief against the Texas State Board of Dental Examiners ("Board"), board members David Tillman, D.D.S., Jorge Quirch, D.D.S., Bryan Henderson, D.D.S., David Yu, D.D.S., Robert McNeill, D.D.S., M.D., Margo Melchor, M.Ed., Ed. D., Lorie Jones, R.D.H., Lois Palermo, R.D.H, Rodney Bustamante, Kathryn Sisk, and Linda Burke, D.D.S., and the Executive Director of the Board, Casey Nichols (Defendants herein). In support of their Petition and Application, Plaintiffs show as follows:

I. INTRODUCTION

1. Plaintiffs TheTeleDentists, LLC, and Celeste Mohr, D.D.S—a startup teledentistry platform and one of its affiliated dentists—seek to pursue a livelihood providing affordable, high-quality remote dental consultations via tablets, smartphones, and computers.

2. For years, Plaintiffs offered their services to Texans without incident, but in 2020—at the onset of a global pandemic—the Board inexplicably banned the practice of teledentistry. The Board did so in a statement on its website interpreting an earlier rule that requires dentists to document the findings of any visual or tactile exams.

3. Rather than interpreting this rule according to its plain language, the Board interpreted the rule as requiring a physical, tactile exam in every patient-dentist interaction, and therefore as prohibiting remote consultations. Under this interpretation of the rule, dentists are required to provide a tactile exam regardless of the nature of the interaction, and regardless of whether the dentist believes it necessary or appropriate.

4. Defendants' interpretation of the rule, and the resulting ban on teledentistry, arbitrarily robs Texans of the myriad benefits of remote

dental care and deprives Plaintiffs of their constitutional right to earn a living.

5. Plaintiffs contend that the ban is *ultra vires* and violates the Texas Administrative Procedure Act, as well as the Due Course of Law and Equal Rights provisions of the Texas Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. They have brought this suit to vindicate their right to pursue a livelihood providing safe, effective remote dental services to people who vitally need them.

II. PARTIES AND SERVICE OF PROCESS

Plaintiffs

6. Plaintiff TheTeleDentists, LLC (TheTeleDentists), is an online teledentistry platform founded in 2014 by licensed dentists who sought to expand access to dental services in rural communities and throughout the country. TheTeleDentists is a Missouri company with a principal place of business in Kansas City, Missouri.

7. TheTeleDentists provides direct-to-consumer teledentistry services through affiliated dentists such as Plaintiff Dr. Mohr. It would provide those services in Texas if not for the Board's ban. Because it

cannot operate in Texas without risking fines and other penalties levied by the Board, and because its insurance partners have declined to reimburse it for services in Texas in light of the ban, TheTeleDentists has ceased operations in the state.

8. Plaintiff Celeste Mohr, D.D.S., is a dentist licensed to practice in Texas, North Carolina, and Michigan. She is in good standing with the Texas, North Carolina, and Michigan dental licensing boards and complies with all applicable rules, regulations, and standards of care established by those jurisdictions.

9. Dr. Mohr currently resides in South Carolina with her husband and children.

10. In addition to working as a dentist, Dr. Mohr cares for her two autistic children. She practices dentistry remotely through the TheTeleDentists' platform so that she can fit consultations in from home when time allows. Dr. Mohr is not affiliated with any brick-and-mortar dental practice; teledentistry is the way she earns a living.

11. Before Defendants purported to ban teledentistry in Texas, Dr. Mohr saw Texas patients remotely on a regular basis. She would resume such practice immediately if allowed by law.

Defendants

12. Defendant Texas State Board of Dental Examiners is the state agency tasked with ensuring compliance with state dentistry laws. *See* Tex. Occ. Code § 254.001. The Board may be served with process at its business address, 333 Guadalupe Street, Tower 3, Suite 800, Austin, TX 78701.

13. The Board is comprised of 11 members, 9 of which are practicing members of the dental industry. Defendants David Tillman, D.D.S., Jorge Quirch, D.D.S., Bryan Henderson, D.D.S., David Yu, D.D.S., Robert McNeill, D.D.S., M.D., Margo Melchor, M.Ed., Ed. D., Lorie Jones, R.D.H., Lois Palermo, R.D.H., Rodney Bustamante, Kathryn Sisk, and Linda Burke, D.D.S., are members of the Texas State Board of Dental Examiners. Defendant Casey Nichols is the Executive Director of the Board.¹ Defendants may be served with process at the Board's business address, 333 Guadalupe Street, Tower 3, Suite 800, Austin, TX 78701.

¹ For ease of reference, Defendants are referred to collectively as "the Board."

14. As an executive agency authorized to make rules consistent with the Dental Practices Act, the Board is subject to the notice and comment rulemaking requirements of the Texas Administrative Procedure Act (APA).

15. The state Attorney General is notified of this proceeding pursuant to Section 37.006(b) of the Texas Civil Practices and Remedies Code. The state Attorney General may be served with process by serving the Honorable Ken Paxton at his business address, 300 West 15th Street in Austin, Texas 78701.

III. DISCOVERY

16. Plaintiffs intend to conduct Level 2 discovery under Rule 190.3 of the Texas Rules of Civil Procedure.

IV. JURISDICTION AND VENUE

17. Subject matter jurisdiction is proper because Plaintiffs seek to vindicate their rights under the Texas Constitution, *see* Tex. Gov't Code §§ 24.007, 24.008, because they seek a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, *see* Tex. Gov't Code § 2001.038; Tex. Civ. Prac. & Rem. Code § 37.003, because they seek a declaratory judgment pursuant to the APA, *see* Tex. Gov't Code

§ 2001.038, and because they seek injunctive relief under Tex. Civ. Prac. & Rem. Code § 65.021.

18. Venue in Travis County district courts is proper under Tex. Civ. Prac. & Rem. §§ 15.002 (a)(1), 15.002 (a)(3), 15.005, and 65.023; Tex. Gov't Code § 2001.038(b).

V. FACTUAL ALLEGATIONS

Teledentistry and Its Benefits

19. Telehealth is the remote provision of healthcare services via the internet, phone, or other telecommunications technology. Examples can include videoconferencing with a family doctor about a chronic condition over one's smartphone, transmitting photos of moles or other skin conditions to a dermatologist for evaluation, or speaking with a therapist remotely through secure online platforms.

20. In recent years, the popularity of telehealth has grown as individuals have realized the benefit of obtaining healthcare from one's fingertips. In 2020, the number of patients who utilized telehealth grew by 53%.

21. Teledentistry is a form of telehealth. Examples of teledentistry include consulting with dentists by smartphone about sores

or tooth pain, remote medical triage, and mail order teeth-straightening devices. Patients may also seek to speak to a dentist virtually to obtain a second opinion about the treatment recommendations they were given by another dentist or to receive more information about treatment options.

22. Because of its convenience, and because it often costs less than a visit to a brick-and-mortar office (or a visit to the emergency room), teledentistry makes it easier for people to access dental services.

23. Texas is experiencing a shortage of dentists. At least 80 counties have been designated by the Texas Department of State Health Services as having a shortage of dental professionals.

24. Shortages and high costs prevent people from securing dental care. According to estimates from Gallup and the National Center for Health Statistics, roughly a third of Americans fail to visit the dentist each year. Cost is the primary barrier, although it can also be particularly difficult for people in rural areas to access care when they are not located near a brick-and-mortar office.

25. By reducing costs, reducing travel time, and increasing the ease of reaching a dentist, teledentistry promotes access to care.

26. Teledentistry also relieves the pressure on overwhelmed emergency rooms.

27. While many emergency room visits each year are people presenting with toothaches, a small percentage (estimated at less than 5%) of these patients experience medical emergencies that require immediate care.² Dental issues make up a large percentage of “avoidable” ER visits where minimal care (or even no care) is given and the patient is discharged.³

28. Teledentistry allows licensed dentists to function as triage, limiting the number of people who unnecessarily show up at the ER.

29. Moreover, teledentistry can alleviate dental anxiety by allowing patients to seek advice from the comfort of their own homes as opposed to a clinical setting surrounded by dentistry tools and equipment.

30. According to one study, 36% of Americans suffer from dental anxiety and 12% suffer from extreme dental anxiety that would prevent them from seeking in-person dental care.

²https://www.ada.org/~media/ADA/Science%20and%20Research/HPI/Files/HPIBrief_0814_1.ashx.

³ <https://academic.oup.com/intqhc/article/29/5/642/4085442>.

31. Beyond the direct benefits to patients, teledentistry can help avoid the spread of diseases like COVID-19. In fact, early in the pandemic, the Board urged patients to avoid all non-emergency dentist appointments for the purpose of curbing the spread. Remote dental practice eliminates unnecessary exposure.

32. Accordingly, as part of its COVID-19 guidance (updated Dec. 4, 2020), the U.S. Centers for Disease Control recommended that dentists implement teledentistry and triage protocols.

Plaintiffs' Teledentistry Services

33. Prior to the Board's teledentistry ban, Plaintiffs provided teledentistry services in Texas.

34. TheTeleDentists was founded by a group of experienced dentists and aspiring entrepreneurs who understood that a substantial portion of the population lacks access to important dental services.

35. Recognizing a growing demand for non-emergency and triage services, the founders envisioned a company that would provide inexpensive, high-quality remote dental care. Part of the company's mission was to reach underserved communities and to help patients avoid unnecessary and expensive ER visits.

36. TheTeleDentists presents a broad array of virtual services, including patient care, oral hygiene education services, and remote health monitoring. For example, licensed dentists often communicate with patients via TheTeleDentists' platform to determine whether a patient's symptoms indicate an emergency, give advice about broken, sensitive, or misaligned teeth, prescribe non-narcotic medication when appropriate, offer second opinions, answer questions about proposed treatment regimes, educate patients on how to maintain good oral health, and engage in follow-up visits or review subsequent photos or x-rays.

37. Through video and phone consultations via the TheTeleDentists' platform, affiliated dentists have seen patients virtually with nearly every complaint presented at a traditional dentist's office—including toothaches, jaw pain, swelling, bleeding gums, broken fillings, etc.

38. Teledentists refer clients to local dentists when in-person care is necessary. If a teledentist believes that a tactile exam or x-rays is needed, that dentist will refer the patient to a brick-and-mortar establishment for a tactile exam or x-rays.

39. TheTeleDentists' services are much less expensive than the traditional alternatives. A consultation through TheTeleDentists costs \$59—a cost that is often split between insurers and patients. A person who doesn't have teledentistry as an option and instead presents at the emergency room with tooth pain will pay between \$400 and \$2,000. Thus, TheTeleDentists' platform provides an alternative for those who would otherwise avoid the cost and inconvenience of an emergency room visit.

40. TheTeleDentists complies with all applicable federal and state laws regarding patient privacy, including compliance with the Health Insurance Portability and Accountability Act.

41. All dentists affiliated with TheTeleDentists are duly licensed and in good standing with their respective state licensing boards. Only dentists licensed in Texas would provide remote dental services to patients residing in Texas.

42. Affiliated dentists must comply with all applicable rules and regulations in the respective jurisdictions where patients reside and abide by the same applicable standards of care as brick-and-mortar dental practices.

43. When deprived of TheTeleDentists' platform, patients experience increased costs, higher travel time, substantial inconvenience, and potential infection from COVID-19 contact. Many rural patients, members of underserved communities, and individuals with dental anxiety may forgo dental healthcare altogether.

44. Moreover, when deprived of TheTeleDentists' platform, dentists are deprived of their livelihood.

45. Dr. Mohr joined TheTeleDentists' platform in 2019 after discussing the public benefits of teledentistry with representatives from the company. Like the company's founders, Dr. Mohr has dedicated her practice to extending dental care to underserved communities or patients overwhelmed by dental anxiety.

46. Inspired by her godfather to become a dentist, Dr. Mohr graduated from the Case Western Reserve University dental program in 1985. Dr. Mohr has practiced dentistry for nearly 36 years.

47. Dr. Mohr does not maintain a brick-and-mortar office. As a caregiver for two autistic children, she prefers to work from home when time allows. TheTeleDentists' platform allows her to pursue her calling while providing care for her children.

48. The Board’s prohibition on teledentistry has caused Dr. Mohr to lose her entire teledentistry practice in Texas, stopping her from earning a living, and arbitrarily robbing her patients of her vast expertise. But for the Board’s decision, Dr. Mohr would continue her decades-long endeavor to provide high-quality dental care to those who need it.

The Board’s Statement Prohibiting Teledentistry

49. In March 2020, the Board issued guidance for dental practices during the Coronavirus pandemic. Buried within this guidance was a declaration that “[d]entists in Texas are not authorized to practice teledentistry.” *See* Exhibit A.

50. There is no statute or rule banning teledentistry, or any statute authorizing the Board to ban teledentistry. Instead, the Board indicated that its ban was based on Board Rule 108.8(c)(2)(C), which requires “documentation of the findings of a tactile and visual examination of the soft and hard tissues of the oral cavity.”

51. The Board interpreted Board Rule 108.8(c)(2)(C) as not merely requiring documentation any time a tactile or visual examination has been provided, but instead as affirmatively requiring a tactile and

visual exam during each encounter regardless of whether a dentist thinks it necessary. Because tactile exams are not possible through remote care, the Board interpreted its rule as effectively prohibiting teledentistry.

52. The Board further noted that Texas “currently does not have rules that would permit teledentistry.”

53. The Board’s “interpretation” of Rule 108.8(c)(2)(C), which bans teledentistry in Texas, was not promulgated in accordance with the requirements of the Texas Administrative Procedure Act. Nor did the Board subsequently promulgate rules banning Teledentistry in accordance with APA. The ban was communicated solely as a statement on the Board’s website.

54. In response to the Board’s ban, TheTeleDentists’ insurance partners, Cigna, Anthem, and Envolve, rescinded insurance coverage for teledentistry visits in Texas, costing Plaintiffs the patronage of thousands of clients.

55. The Board’s decision also eliminated access to dental care for many rural families and prevented Texans from seeking remote dental healthcare assistance while offices were closed in the early days of the Coronavirus pandemic.

56. On March 20, 2020, the President of TheTeleDentists, Maria Kunstadter, D.D.S., sent an email to members of the Board explaining the effect of the Board's statement on TheTeleDentists and requesting clarification on the scope of the teledentistry ban. On the same day, Casey Nichols, Executive Director of the Board, responded and confirmed that Board rules prohibit teledentistry in Texas. *See Exhibit B.*

57. On April 1, 2020, Dr. Kunstadter sent another email requesting clarification regarding the definition of "teledentistry" and the scope of the Board's restriction on the practice. On the same day, Casey Nichols responded once again, declining to clarify any of the Board's statements regarding teledentistry. Plaintiffs have received no further clarification from the Board.

58. Since April 1, 2020, the Board has not issued further guidance or promulgated any rules related to the practice of teledentistry.

59. The Board's prohibition on the practice of teledentistry has completely dissolved Dr. Mohr's virtual Texas practice. And TheTeleDentists has been deprived of one of its largest patient markets.

60. But for the Board's statement on teledentistry, Plaintiffs would engage in the business of teledentistry today.

61. TheTeleDentists and Dr. Mohr have been irreparably harmed and will continue be harmed unless the Board's rule is invalidated.

VI. LEGAL CLAIMS

COUNT I

THE BOARD'S BAN ON TELEDENTISTRY VIOLATES THE TEXAS ADMINISTRATIVE PROCEDURE ACT (TEX. GOV'T CODE § 2001.001-902)

62. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

63. The APA, Tex. Gov't Code § 2001.001–902, sets out the requirements for agency rulemaking.

64. The APA requires that agencies shall give at least 30 days' notice of its intention to adopt a rule before such adoption takes place and file notice of the proposed rule with the Secretary of State for publication in the Texas Register. *See* § 2001.023.

65. The APA also requires that agencies give an explanation for the rule, including a statement of claimed statutory authority, a certification that the proposed rule has been reviewed by legal counsel and found to be within the state agency's authority, and a note about public benefits and costs. *See* § 2001.024.

66. The APA further requires that agencies shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing about a proposed rule and fully consider such submissions about a proposed rule. *See* § 2001.029.

67. According to the APA, a “rule” requiring notice and comment procedures is an agency statement of general applicability that (1) implements, interprets, or prescribes law or policy; or (2) amends an existing rule. The APA does not permit rulemaking through agency guidance.

68. The Board’s ban is a statement of general applicability that implements, interprets, and prescribes law and policy. The statement implements the Board’s official position on teledentistry—an issue not explicitly addressed in the Board’s other rules. And the Board’s ban reflects its construction and application of Rule 108.8.

69. The Board’s ban also amends an existing rule. While it purports to be based on a mere application of Rule 108.8, the plain and common meaning of that rule is that records must be kept whenever a tactile examination is given; there is no affirmative requirement that

dentists perform such an examination in every encounter. Yet that is what the Board now requires with its statement and its ban.

70. The Board's ban was therefore a rule requiring notice and comment procedures before promulgation.

71. The Board did not provide notice of a proposed rule change before prohibiting teledentistry, in violation of the APA.

72. The Board did not allow a reasonable time for interested parties to comment on the proposed rule change before prohibiting teledentistry, in violation of the APA.

73. Because the Board violated the APA when it issued a rule banning teledentistry without providing notice or a reasonable opportunity for public comment, the Court should declare the Board's ban on teledentistry invalid.

COUNT II
THE BOARD MEMBERS' BAN ON TELEDENTISTRY
IS *ULTRA VIRES*

74. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

75. Where government officials act without legal authority, their actions are *ultra vires* and void.⁴

76. By prohibiting teledentistry without legislative authority, the individual board members have acted *ultra vires*.

77. Under the Texas Dental Practices Act (DPA), Tex. Occ. §§ 245.001-245.003, the Board may “adopt and enforce rules necessary” to “perform its duties” and to “ensure compliance with state laws relating to the practice of dentistry to protect health and safety.” It may further adopt rules related to its own proceedings, the examination of applicants for licensure, the making of certain contracts, and the spread of infection. The board has no further authorization to restrict the dentistry field.

78. Teledentistry can be employed without running afoul of any existing state law relating to the practice of dentistry.

⁴ Because the Board exercised legislative judgment with regard to teledentistry without authority, its *ultra vires* actions necessarily violate the Separation of Powers provision of the Texas Constitution, art. II, § 1, which ensures that the powers of government “shall be divided into three distinct departments,” and that no department shall exercise the powers properly vested in another.

79. The Texas Legislature has not passed any legislation prohibiting teledentistry or requiring dentists to perform a tactile examination at every patient visit.

80. The Board claims that its ban is required by Board Rule 108.8, which purportedly requires a tactile exam. But Rule 108.8 merely requires documentation of a tactile exam if a tactile exam is given.

81. The Board further claims that its ban is justified because no law specifically authorizes the practice of teledentistry. But that gets the Board's authority to regulate dentistry exactly backwards. All activity not specifically prohibited is presumed allowed, and the Board may not unilaterally declare such activity illegal without legislative authority to do so.

82. In sum, the Board's decision to ban teledentistry has no relationship to "ensur[ing] compliance with any state law relating to the practice of dentistry." And, even if it did, a tactile exam is unnecessary for Plaintiffs' interactions with patients, the ban has no connection to protecting public health or safety.

83. In implementing the ban, the individual board members exceeded the authority delegated to them by the Texas Legislature through the DPA. The ban is therefore *ultra vires* and void.

COUNT III

THE BOARD'S BAN ON TELEDENTISTRY VIOLATES DUE COURSE OF LAW UNDER THE TEXAS CONSTITUTION (ART. I, § 19, OF THE TEXAS CONSTITUTION)

84. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

85. Article I, § 19, of the Texas Constitution provides that “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”

86. TheTeleDentists possesses a constitutionally protected right to conduct its business providing a teledentistry platform for patients to seek dental advice.

87. Dr. Mohr possesses a constitutionally protected right to pursue her chosen profession as a duly licensed Texas dentist providing teledentistry services to Texas residents.

88. The Board may not take regulatory, administrative, enforcement, or other actions burdening Plaintiffs' right to engage in the occupation of their choice where (1) the action's purpose or effect is not rationally related to a legitimate governmental interest; or (2) when considered as a whole, its actual, real-world effect is so burdensome as to be oppressive in light of the governmental interest.

89. The Board's ban on teledentistry is not rationally related to a legitimate governmental interest.

90. The prohibition is not related to health or safety. Tactile exams are not needed in every dentist-patient interaction and are not needed in the type of interactions that Plaintiffs engage in.

91. If Plaintiffs determine that, in their professional judgment, a patient needs a tactile exam, Plaintiffs refer the patient to a brick-and-mortar provider.

92. There is no evidence that teledentistry is unsafe or substandard. Myriad studies demonstrate that teledentistry is safe, effective, and expands access to needed dental care,⁵ the Occupational Safety and Health Administration, Centers for Disease Control, and

⁵ <https://www.sciencedaily.com/releases/2016/08/160802151321.htm>.

American Dental Association encourage the practice, and patients report high satisfaction with teledentistry services.⁶

93. Plaintiffs abide by all relevant rules and regulations that are applicable to brick-and-mortar providers.

94. Moreover, teledentistry helps avoid the spread of diseases like COVID-19.

95. The Board's ban does not serve any other legitimate interest, including patient privacy or data security. Plaintiffs abide by state and federal privacy laws and use secure platforms to interact with patients.

96. The purpose and effect of the Board's decision is to protect traditional dental practices, including their own practices, from economic competition.

97. Economic protectionism is not a legitimate state interest.

98. Moreover, the Board's ban on teledentistry is unreasonably burdensome and oppressive in light of the governmental interest.

99. The Board's statement with regard to teledentistry does not merely regulate teledentistry, it bans the practice outright.

⁶<https://www.nature.com/articles/s41415-020-1919-6>

100. Any benefits of the ban are outweighed by the burdens on practitioners and consumers, including loss of livelihood, decreased access to care, and increased costs.

101. The Board's ban violates the Due Course of Law Clause.

COUNT IV

THE BOARD'S PROHIBITION ON TELEDENTISTRY VIOLATES TEXAS'S EQUAL RIGHTS PROVISION (TEX. CONST. ART. 1, § 3)

102. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

103. Article I, § 3, of the Texas Constitution prohibits the government from arbitrarily treating similarly situated persons differently.

104. Plaintiffs' profession consists of providing online dental consultations.

105. These consultations consist of ideas, opinions, and guidance that Dr. Mohr gives (and TheTeleDentists disseminates) based on her extensive education in dentistry and her years of professional experience.

106. The ban on teledentistry does not apply to other forms of medical consultations. If Dr. Mohr practiced other forms of medicine, she would be able to provide individualized advice to patients using

telecommunications technology and without performing a tactile examination. *See* Tex. Occ. § 111.001.

107. The ban, therefore, discriminates based on the content of a practitioner's speech.

108. Because the ban burdens a fundamental right, it is subject to strict scrutiny, which it cannot meet.

109. Banning teledentistry, but not other forms of telehealth, is not narrowly tailored to a compelling state interest.

110. There is no evidence that teledentistry is more dangerous or otherwise riskier than other forms of telehealth.

111. In fact, Plaintiffs' interactions are safer absent tactile exams than other forms of telehealth that are currently permitted, including cardiology, internal medicine, and non-oral emergency triage.

112. There is no health or safety rationale underlying this disparate treatment.

COUNT V

THE BOARD'S BAN ON TELEDENTISTRY VIOLATES THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION (U.S. CONST. AMEND. XIV)

113. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

114. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects the right to earn a living in a chosen profession free from unreasonable government interference.

115. No person may be deprived of his or her right to earn a living unless the restriction is rationally related to a legitimate government interest.

116. The Board's decision to ban teledentistry is not rationally related to a legitimate government interest.

117. The Board's decision is not rationally related to protecting health or safety.

118. Teledentistry by licensed dentists using the same standard of care as brick-and-mortar practitioners is safe and effective.

119. A tactile exam is not needed in every patient interaction. If a teledentist believes that a tactile exam is necessary, he or she refers the patients to a brick-and-mortar office.

120. Banning teledentistry is counter to public safety since it deprives people of access to safe care.

121. The Board's ban is not rationally related to protecting patient privacy, patient satisfaction, data security, or any other conceivable government state interest.

122. The Board's decision serves only the illegitimate end of protecting brick-and-mortar offices, including their own offices, from competition.

COUNT VI

THE BOARD'S PROHIBITION ON TELEDENTISTRY VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION (U.S. CONST. AMEND. XIV)

123. Plaintiffs repeat and incorporate the preceding paragraphs by reference.

124. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the government from treating similarly situated persons differently unless such unequal treatment bears a rational relationship to a legitimate government interest.

125. The Board's ban on teledentistry draws an arbitrary and irrational distinction between teledentistry and other telehealth practices.

126. This ban is based on the content of a person's speech, meaning the ban is subject to strict scrutiny.

127. The ban is not narrowly tailored to any compelling government purpose.

VII. REQUEST FOR DECLARATION

128. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

129. Plaintiffs respectfully ask the Court for a declaration that the Board's interpretation of 108.8(c)(2)(C) and its ban on teledentistry are void for failure to comply with the APA. Plaintiffs further request that the Court the interpretation and ban are invalid and inapplicable to Plaintiffs and others similarly situated.

VIII. APPLICATION FOR PERMANENT INJUNCTION

130. Plaintiffs hereby incorporate the allegations set forth above, all of which are fully re-alleged here.

131. Plaintiffs respectfully ask the Court for a permanent injunction following trial.

IX. REQUEST FOR ATTORNEYS' FEES

132. Plaintiffs hereby request all costs and reasonable attorneys' fees, as permitted by Section 37.009 of the Texas Civil Practices and Remedies Code.

X. JURY DEMAND

133. For all triable issues, a jury is demanded.

XI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray as follows:

A. For a declaratory judgment that the Board's ban on teledentistry violates the Texas Administrative Procedure Act;

B. For a declaratory judgment that the Board's ban on teledentistry, on its face and as-applied to Plaintiffs, is *ultra vires* and unconstitutional in violation of the Due Course of Law and Equal Rights provisions of the Texas Constitution, and the Due Process, Equal Protection, and Interstate Commerce Clauses of the U. S. Constitution;

C. For a permanent injunction barring Defendants from enforcing the teledentistry ban on its face and as applied to Plaintiffs;

D. For an award of attorneys' fees and costs; and

E. For such further legal and equitable relief to which Plaintiffs show themselves entitled and which this Court may deem just and proper.

DATED: February 11, 2021.

Respectfully submitted,

/s/ John R. Hays, Jr.

JOHN R. HAYS, JR.

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**Pro hac vice* applications to be
filed

Attorneys for Plaintiffs

MAR **APR** MAY

2019 **2020** 2021

23 captures
19 Mar 2020 - 29 Nov 2020

▼ About this capture

A telephonic board meeting has been scheduled for Friday, April 17, 2020
at 9:30am CST.

For details click here

Licensing Extension for March, April, and May - 4/6/2020 notice.

Texas State Board of Dental Examiners

HOME LICENSING BOARD AND COMMITTEES COMPLAINTS RESOURCES
LAWS & RULES

Important COVID-19 Information

**CDC Recommendation: Postpone Non-Urgent Dental Procedures,
Surgeries, and Visits**



<https://tsbde.texas.gov/covid-19/>

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19 Mar 2020 - 29 Nov 2020

Resources for Clinics and Healthcare Facilities



What Healthcare Personnel Should Know about Caring for Patients with Confirmed or Possible COVID-19 Infection.



COVID-19 Materials Now Available in ASL



Important Announcement from the Drug Enforcement Administration (DEA)

March 31, 2020

Today, Governor Abbott extended his Executive Order No. GA-08 by issuing Executive Order No. GA-14. EO GA-14 extends the agency's work from home status, as well as other provisions, from an end date of April 3, 2020 to April 30, 2020. However, provisions of Executive Orders GA-09, GA-10, GA-11, GA-12, and GA-13 have not been extended at this time.

As a reminder, Executive Order GA-09, issued by Governor Abbott on March 22, 2020, remains in effect until April 22, 2020. EO GA-09 mandates that licensed health care facilities **must postpone all surgeries and procedures that are not immediately medically necessary**. The

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At this time, dental offices are not mandated to close. Dental offices may stay open to see patients for **emergency procedures only**. Patients in pain and/or suffering from infection/abscess would fall under the executive order provision that states “a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences.” Violation of executive orders could lead to potential fines and even jail time for those who do not comply.

If you know of a dental professional who is continuing to perform non-essential procedures, please file a complaint by clicking [here](#).

Additionally, TSBDE has received several questions related to teledentistry. Dentists in Texas are not authorized to practice teledentistry because of established legal requirements such as Rule 108.8(c)(2)(C), which requires “documentation of the findings of a tactile and visual examination of the soft and hard tissues of the oral cavity.” Remember, teledentistry is regulated by state statute and board rule, not associational recommendations. Please note – Texas currently does not have any rules that would permit teledentistry.

See Executive Order GA-09

See Executive Order GA-14

The offices of the Texas State Board of Dental Examiners are open and operational, and we will continue to perform the essential functions of our agency while providing the highest level of service possible. Please note that many of our staff are working remotely and our physical office is not open for visitors. The best way to contact the office for all issues is by email at licensinghelp@tsbde.texas.gov.

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May – 4/6/2020 Notice



Useful Links



TSBDE Employment



William P. Hobby Building | 333 Guadalupe Street | Tower 3, Suite 800 | Austin, TX 78701
512.463.6400 (PHONE) | 512.463.7452 (FAX) | 1.800.821.3205 (COMPLAINT HOTLINE)

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For your review:

From: Casey Nichols <cnichols@tsbde.texas.gov>
Sent: Monday, August 17, 2020 2:11 PM
To: Maria Kunstadter <mariak@theteledentists.com>
Cc: Wendy Richardson <wrichardson@tsbde.texas.gov>
Subject: Re: Patient Care

Dr. Kunstadter,

My position on this topic remains unchanged. I am not in the position to define teledentistry without input and approval from the Board. I understand your concerns, but again, the Board does not have rules that would support teledentistry at this time.

Thank you,



Casey Nichols
Interim Executive Director
Texas State Board of Dental Examiners
Phone: (512) 305-9380
Fax: (512) 305-9364

--How are we doing? The Texas State Board of Dental Examiners asks that you provide us with feedback by completing the following survey. [Please click here](#). Your response is appreciated

NOTICE: This communication may be confidential and/or privileged under law - specifically including Tex. R. Civ. P. 192, Article V of the Texas Rules of Evidence, and other applicable statutory, quasi-statutory, and common law. Accordingly, pursuant to Chapter 552 of the Texas Gov't Code (the Texas Public Information Act) and court interpretations thereof, the information that is contained within this communication may not be subject to disclosure to the public under Section 552.101, et seq., of the Code - specifically including Sections 552.103, 552.107, 552.108 and 552.111 - and further may be protected from disclosure or production for other purposes, such as in the context of civil discovery.

On Mon, Aug 17, 2020 at 3:01 PM Maria Kunstadter <mariak@theteledentists.com> wrote:

Ms. Nichols,

Our company continues to grow with large insurance carriers that have members in Texas, so I wanted to revisit your previous statement that dentists "have the ability to communicate with patients to assess their needs" as not part of teledentistry. We would like to operate under those guidelines of your state, as that is how we work with our patients currently in all other states. All the dentists serving Texas patients are existing Texas licensed dentists. Please advise limitations that we should adhere to when communicating with their Texas patients. Our goal is to assess patients' needs and thereby, helping more Texans get the dental care they need.

Since Covid, the ADA and WHO and many state dental boards recommend virtual visits to prescreen patients prior to their visit and provide virtual visits when hands on care is not needed to reduce exposure and PPE requirements. We comply with all those guidelines.

I look forward to hearing from you and to helping Texans in need.

Thanks,

Maria Kunstadter, DDS

President and Co-Founder

The TeleDentists

From: Casey Nichols <cnichols@tsbde.texas.gov>
Sent: Wednesday, April 1, 2020 11:34 AM
To: Maria Kunstadter <mariak@theteledentists.com>
Cc: W. Boyd Bush Jr. <wbush@tsbde.texas.gov>; Wendy Richardson <wrichardson@tsbde.texas.gov>
Subject: Re: Urgent Action Needed for Texans

Dr. Kunstadter,

Dentists and staff have the ability to communicate with patients to assess their needs without practicing teledentistry. I am not in the position to define teledentistry without input and approval from the Board. I understand your position and your concerns, but again, the Board does not have rules that would support teledentistry at this time.

Thank you,



Casey Nichols
General Counsel
Texas State Board of Dental Examiners
Phone: (512) 305-9380
Fax: (512) 305-9364

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On Wed, Apr 1, 2020 at 10:42 AM Maria Kunstadter <mariak@theteledentists.com> wrote:

Thank you again for your input.

To assist all Texas Dentists that need to contact their patients on a tele-phone, can we get a definition of tele-dentistry? Patients are desperate and dentists need to provide care for their patients via tele-communication or it's patient abandonment. The ruling would prevent telephone communications as tele-dentistry. I know that is not the board intent. Dentists need to communicate with patients to triage true emergencies to their offices. Having a video component will enable the dentists to see the patient, triage true emergencies, keep the patients out of the emergency rooms where sick people are and get patients in for care to offices during emergency hours.

This is about triaging patients to dental offices for treatment.

Thank you in advance from all the patients and dentists in Texas.

Maria

From: Casey Nichols <cnichols@tsbde.texas.gov>

Sent: Monday, March 30, 2020 3:49 PM

To: Maria Kunstadter <mariak@theteledentists.com>; W. Boyd Bush Jr. <wbush@tsbde.texas.gov>; Wendy Richardson <wrichardson@tsbde.texas.gov>

Subject: Re: Urgent Action Needed for Texans

Dr. Kunstadter,

Thank you for your email. The information you provided will be forwarded to our Board members for review. As you are likely aware, the teledentistry bill failed to pass during the last legislative session. Dentists in Texas have not been allowed to practice teledentistry because of the requirements found in Rule 108.8(c)(2)(C) which require, "documentation of the findings of a tactile and visual examination of the soft and hard tissues of the oral cavity." Although the issue is on the Board's radar, we do not currently have rules in place that would allow for teledentistry at this time.

Sincerely,



Casey Nichols
General Counsel
Texas State Board of Dental Examiners
Phone: (512) 305-9380
Fax: (512) 305-9364

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On Mon, Mar 30, 2020 at 3:39 PM Maria Kunstadter <mariak@theteledentists.com> wrote:

March 30.2020

To: Texas Dental Board

Re: Teledentistry

Dear Sirs/Madams,

Healthcare is in crisis and that includes dental patients. All patients are isolated at home and can't get into a dentist office unless it's an emergency. President Trump said his administration will waive certain federal rules to make it easier for more doctors to provide care remotely using video chats and other services. Texas has 29 Million people that need your help so they don't have to suffer dental pain or go to an emergency room and get exposed to the virus because they had no other options. Your emergency action is needed to help your dentists and the population of Texas.

It is critical for doctors to have access to their patients and visa versa during this time. With self-isolation, every patient is "remote" at this time. That's where teledentistry is important. The TeleDentists offers patients consultations to patients of record of The TeleDentists and/or the patients of the practice. Telehealth is defined as "Telehealth is the distribution of health-related services and information via electronic information and telecommunication technologies. It allows long-distance patient and clinician contact, care, advice, reminders, education, intervention,

monitoring, and remote admissions.” Dental software is being used all over the Texas currently to send “reminders” for appointments, webinars are used for education and patient-clinician contact happens by the millions when a dentist speaks to a patient on the telephone.” Not all “teledentistry” is alike. And now, during this crisis, to enforce a “tactile” portion would violate the guidelines of the CDC on virus transmission. Since dental practices have been required to close, dentists have no other options to communicate with their patients for non-urgent and urgent needs than to use a telephone. Telephone communication is tele-dentistry. If you disallow teledentistry, you will have to prohibit dentists from talking to their patients on the telephone, sending reminders for appointments, email contact, and providing education via webinars to patients and professional. This is a new era and, because of Covid-19, we are writing history every day—let’s make history be to benefit the 29 million Texans and provide them with teledental benefits.

Providing video consultations for patients now and in the future is merely adding the convenience of modern technology to communicate with patients. Now, more than ever, we need people to stay safe, stay home and be able to get help when they need it—either by telephone, which is teledentistry or by video communication.

The ADA supports teledentistry and many insurance companies are paying for the service. Covid19 has changed the way we live. Let’s take this opportunity to improve access to oral health care, not restrict it.

Please take this time to define telephone, teledentistry, and services that are part of everyday patient care with new technology.

Thank you for your sincere consideration at this very stressful time.

Dr. Maria Kunstadter

Co-Founder, The TeleDentists®

1108 W. Santa Fe Trail

Kansas City, MO 64145

Phone: 888-641-5505

Cell.: 816-550-0388

Casey Nichols, General Counsel, Texas State Board of Dental Examiners

The Hon. Greg Abbott, Governor

The Hon. Dan Patrick, Lt. Governor

The Hon. Ken Paxton, Attorney General

The Hon. Lois Kolkhorst, Chair, Senate Health & Human Services Committee

The Hon. Charles Perry, Chair, Senate Water and Rural Affairs Committee

The Hon. Kelly Hancock, Chair, Senate Business & Commerce Committee

The Hon. Bryan Hughes, Chair, Senate Administration Committee

The Hon. Jane Nelson, Chair, Senate Finance Committee

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The Hon. Trey Martinez Fischer, Chair, House Business & Industry Committee

The Hon. Eddie Lucio III, Chair, Chair, House Insurance Committee

The Honorable Drew Springer, Chair, House Agriculture and Livestock

The Honorable Stephanie Klick, Chair, House Elections

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The Hon. Tom Oliverson, Texas House of Representatives