

NEWS RELEASE

Board of Dental Examiners of Alabama

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FOR IMMEDIATE RELEASE

JUDGE DECLARES COMMERCIAL TOOTH WHITENING ILLEGAL

In an order issued on February 5, 2009, Montgomery County Circuit Court Judge Tracey McCooley ruled that teeth whitening procedures being performed in beauty parlors, free-standing kiosks and other commercial settings constituted the practice of dentistry. Judge McCooley declared that "...the court finds that the processes by which the plaintiffs provide teeth whitening services constitute the performance of a dental operation and not merely the sale of a product. Simply put, the fact that citizens of this state may purchase and apply tooth whitening products approved by the FDA for 'over the counter' sale in their homes does not permit plaintiffs or others not properly licensed to advertise and perform dental services or operations which affect the public health, safety and welfare."

Judge McCooley's ruling was in response to a lawsuit filed by White Smile USA, Inc. and one of that company's business partners D'Markos, L.L.C. As of result of Judge McCooley's ruling, the Board of Dental Examiners of Alabama will inform all commercial tooth whitening businesses in Alabama that they are in violation of Alabama law and their failure to cease and desist will subject them to appropriate action by the Board.

Judge McCooley noted that Alabama law provides that an individual is "... deemed to be practicing dentistry who performs or attempts or professes to perform any dental operation or dental service of any kind, gratuitously or for (compensation)" Judge McCooley's ruling further stated "...the teeth whitening services provided and activities performed by the (plaintiffs)...fall within the scope of the practice of dentistry...." During oral arguments, the plaintiff's attorney asserted that the employees of White Smile USA did nothing more than facilitate their customers in using the company's products to whiten their own teeth.

Judge McCooley said printed exhibits presented by the Dental Board's counsel, James Ward, refuted the plaintiff's claim of passive involvement with their customers. The Judge stated; "...the Court finds it significant that the Plaintiff White Smile USA, INC. has adopted and published to its business partners, including Plaintiff D'Markos, L.L.C., 'Application Instructions' for their cosmetic teeth whitening system that include a process of some twenty-seven different steps, many of which call for active participation by the technicians identified in White Smile USA's own literature as 'cosmetic teeth whitening specialists.' The 'Application Instructions' are part of a White Smile USA's twelve page 'Training Manual,' the mere existence of which the Court believes underscores the significant differences between the processes by which the Plaintiffs provide teeth whitening services and any teeth whitening products approved by the FDA for 'over the counter' sale."

Judge McCooley also cited White Smile for possibly compromising the health and safety of its customers in performing teeth whitening. "The Court notes the numerous proclamations regarding the safety of the product and processes made in White Smile USA's literature... It is the Court's opinion that White Smile USA's attempt to emphasize safety accentuates what is clearly an important aspect of this case; the health, safety and welfare of the citizenry of this state. The Court finds that the processes by which the Plaintiffs provide teeth whitening services involve a number of health and safety issues, including but not limited to risk of cross-contamination and the spread of disease and/or infection. Therefore, it is in the best interest of the health, safety and welfare of the public that such activities be subject to regulation by the Board as the practice of dentistry. The Court also notes that while White Smiles USA's consent form makes reference to potential risks, it does not identify all instances where teeth whitening is contraindicated. The Court finds that a properly trained and licensed dentist will better serve the individual patient and the public at-large in this regard."

At the conclusion of the February 2, 2009, hearing, the plaintiffs requested that Judge McCooley stay her finding pending an appeal to the Alabama Supreme Court. That motion was denied by Judge McCooley.

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