

## Consumers for Dental Choice

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### Organized Dentistry's Gag Rule

The emergence of mercury-free dentistry poses a major threat to the American Dental Association and its state and local affiliates. As the debate heats up on whether mercury dental fillings pose a major health and environmental risk, establishment dentistry is seriously threatened by patients who would vote with their feet when they learn about the issue.

#### History

In the nineteenth century, competition for care of the teeth existed between physicians specializing in oral health care, who considered mercury fillings harmful, and dentists, who relied mainly on mercury for fillings. The latter won out in the marketplace (it was quick and easy, and people took mercury for other ills, e.g., syphilis). Physicians retreated from primary caregivers of the mouth. The American Dental Association was founded as an organization of practitioners who used mercury fillings. The first defense of the ADA that mercury fillings are safe is the preposterous rationale that it has been done for 150 years. From the start, a small minority of dentists would not use such fillings, preferring gold. The development of alternative materials less expensive than gold (resin and porcelain), plus renewed concern about mercury's toxicity, brought the issue to internal dental debate a generation ago. A movement of dentists began, and grew, who firmly believe the fillings to be unsafe to patient, dentist, and dental worker; at this point, three national associations of dentists exist which unalterably oppose mercury in dentistry.<sup>1</sup> And the number of dentists switching to mercury-free practices is growing rapidly. According to data from the Christensen Research Institute (the leading provider of continuing dental education), the number of mercury-free dentists was only about 3% in 1985. But that number tripled to 9% in 1995, and then tripled again to 28% in 2001.

Mercury dental fillings involve much less time and less skilled work than resin or porcelain, hence they cost less. Increasingly, middle-class adult Americans are opting for those slightly higher-priced alternatives. But for society's vulnerable populations -- children (more likely to squirm) and for poor people (where efficiency, not service, counts) -- mercury fillings remain #1.

The ADA promotes the fillings as "silver," an obvious misnomer, because the main ingredient in the amalgam is mercury (between 43 and 54%, according to the California Dental Board), with silver under 30%. See attached ADA brochure. An ADA survey says 60% of respondents are still unaware of the public debate about amalgam's safety, a problem likely to continue as long as the ADA can call the fillings silver and can enforce a gag rule on dissenting dentists.

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<sup>1</sup> International Academy of Oral Medicine & Toxicology (headquartered in Orlando), American Academy of Biological Dentistry (Carmel, CA), and Holistic Dental Association (Denver).

## The Gag Rule

In the late 1980s, while its amalgam patents were still in effect, the ADA adopted the following provision to stop dentists from talking about adverse health effects of mercury dental fillings.

Advisory Opinion to ADA's Code of Professional Conduct, Section 5.A.:

"Based on available scientific data, the ADA has determined that the removal of amalgam restorations from the non-allergic patient for the alleged purpose of removing toxic substances from the body, when such treatment is performed solely at the recommendation or suggestion of the dentist, is improper and unethical."

### Why is the provision a gag rule?

- Its entire focus is on the communication, not on the procedure. Dentists in fact remove mercury fillings every day. But the dentist cannot say the obvious: mercury is a toxic substance, and removal of the fillings, by definition, will remove a toxic substance from the body.<sup>2</sup>
- It does not try to stop unnecessary amalgam removals. For example, dentists may still play on a patient's vanity ("get tooth-colored materials").
- As applied, it keeps dentists from giving their opinion about what must go *in* the mouth, because such opinion might lead the patient to decide to have the mercury fillings *out*.
- It only affects the more ignorant or more timid patient, those who don't know the right questions to ask at the start or who are too shy to ask (in this case, a large group, since, as noted above, 60% still don't know about the controversy.) It turns medicine on its head. Rather than the health professional telling us what we should definitely be told about mercury,<sup>3</sup> a patient must be sophisticated and bold enough to know exactly what to ask.
- The ADA singles out one practice, the one that most hotly divides the profession. Nowhere in the Code is any other single practice prohibited – *e.g.*, unnecessary removals of gold fillings, unnecessary root canals, unnecessary jaw surgery. The ADA's only concern in its rules is to stop mercury-free dentistry.
- The gag rule even harms the one category that the ADA admits to be at risk, the so-called "allergic" patient. The ADA has no protocol for the dentist to inquire about previous health conditions, thus shutting off a chance to shield patients who may be more likely not to use the product.<sup>4</sup>

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<sup>2</sup> Mercury fillings are a hazardous waste. Dentists can put them only three places: in a patient's mouth, in a hazardous waste bag, or in a mercury recycling sealed container!

<sup>3</sup> That mercury is a toxin is beyond doubt. Its use is being banned or otherwise stopped in virtually all other health uses. The disinfectant Mercurochrome is banned. Mercury has been taken out of most childhood vaccines and contact lenses – even horse medicine.

<sup>4</sup> *The Government of Canada recommends that children, pregnant women, and people with braces, or kidney problems not have mercury fillings.* The ADA doesn't even allow these warnings.

In the 1990s, the ADA's enforcers of the gag rule were the state dental boards. That the dental boards would engage in protectionist policies is based in part on their anti-competitive structure. Every state dental board is at least 50% dentists.<sup>5</sup> And in most, dentists have a privileged statutory role in deciding who sits on the state board.<sup>6</sup>

But dental board enforcement of the gag rule came under attack in the late 1990s, primarily for obvious First Amendment reasons. Consumer groups persuaded the California dental board to abandon it in 1999. A federal lawsuit attacked the practice in Maryland. The rule was attacked by libertarian organizations from the right – in Arizona, the Goldwater Center – and the left – in Oregon, the American Civil Liberties Union. State Attorneys General in Florida and Minnesota restrained their dental boards. See attached articles from the *Wall Street Journal* and the *Portland Oregonian*.

With its gag rule under siege, the ADA made a cosmetic amendment in May 2002, deleting nothing but adding these words:

“The same principle of veracity applies to the dentist's recommendation concerning the removal of any dental restorative,” so it addresses removal of amalgam and other restoratives.”

The rule remains a gag rule against mercury-free dentistry. Now the ADA has made it worse, adding a provision to gag dentists from talking about the toxic effects of *any* dental filling material.

## Enforcement shifts from Dental Boards to Dental Societies

The ADA's first line of defense to protect itself from mercury dentistry, the state dental boards, is fading. It must now act more aggressively itself. In the past year, three dentists – from California, New York, and now Massachusetts – have contacted us that they have received letters from the local or state dental society charging them with ethics violations for condemning mercury dental fillings.

The ADA's power is enormous within dentistry:

- The state dental societies are totally intertwined with the ADA. A dentist may not join the state association but not the ADA, nor vice versa. Thus, unlike, say, the bar, a dentist joins both (or neither).
- The ADA claims that about 70% of American dentists belong. This number is huge. It contrast sharply with, say, medicine; reportedly fewer than 50% of physicians belong to the AMA.

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<sup>5</sup> In Colorado and Montana, dentists are 50% of the Board. In all other U.S. jurisdictions, it is over 50%. In two-thirds of the jurisdictions, dentists constitute two-thirds – or more -- of the Board members.

<sup>6</sup> In seven states, dentists themselves (a majority of whom still support mercury) elect the dentists to the board, creating responsiveness to dentists alone and not to consumers. In 14 jurisdictions (including Maine and Puerto Rico), the state dental association (an ADA affiliate) is given primacy in the process, with a statutory role to nominate names to the Governor (who may accept or reject them). And in six states, the state dental association has absolute control: the association sends the list to the Governor, who **MUST** choose from it. An economist would describe those latter six states as a perfect cartel: a private association is given state authority to pick who regulates them.

- The ADA has been given the authority in most states to approve dental school curricula. Not surprisingly, there are no “mercury-free dental schools.”
- The ADA can provide low-cost insurance, professional seminars, and a meeting place for dentists wanting to improve their craft. With its overwhelming membership, dentists who dissent from their policy positions feel it is valuable to retain the membership.

The ADA also maintains an economic role in the marketing of mercury amalgam. When it adopted the gag rule, it had patents on amalgam; they have since expired. Now the ADA earns money from amalgam manufacturers through its “seal of acceptance” program. Whereas the AMA considers it unethical to take money for endorsing products, the ADA does not. It has contracts with the amalgam manufacturers where the manufacturers pay money and the ADA promises to promote the product vigorously with both dentists and the public.

But mercury dental fillings are becoming increasingly controversial. The issue of whether mercury fillings are safe was the subject of Congressional hearings on November 14, with both sides of the issue represented. The same topic was spotlighted by the California Dental Board at a hearing on November 7, with both sides given equal time.<sup>7</sup> Mercury dental fillings are also the subject of intense environmental criticism. A recent report by four major environmental organizations, entitled *Dentist the Menace?*,<sup>8</sup> claimed that dental offices are now the #1 source of mercury in the nation’s wastewater.<sup>8</sup>

Dentistry recognizes the two sides exist and are competitive. The lead article of Access, the magazine of the Academy of General Dentistry (the ADA affiliate for general dentists) published an article last month referring to the opposition as “anti-amalgam groups,” and stated this fear:

“Even if the legislation fails and the judges rule in favor of amalgam, the public -- based solely on the confusion fomented by the anti-amalgam groups -- may still be nervous enough to choose other alternatives and drive out amalgam as a viable material.”

Consumers need to find out their choices – they need to be allowed to learn that silver fillings are mainly mercury, that a debate exists about its safety, and that a subset of dentists are mercury-free. They need to be able to find out which dentists practice mercury-free. The ADA and its constituent societies are taking anticompetitive steps to stop consumers from learning this valuable information.

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<sup>7</sup> Even the networks debate the issue. CBS’s “60 Minutes” argues that amalgams are “poison in the mouth” that merits consumers considering either removal or never having them inserted. With equal fervor, ABC’s “Dateline” contends that amalgams do not cause injury and consumers should never have them removed.

<sup>8</sup> Consumers uncertain by the divided health debate might choose alternatives to mercury fillings solely so they do not contribute to the mercury pollution problem.