

Federal Trade Commission



Boston Regional Office

Room 1301
150 Causeway Street
Boston, Massachusetts 02114
Area Code (617) 223-6621

October 30, 1985

**COMMISSION
APPROVED**

Leonard Morse, M.D., Chairman
Massachusetts Board of Registration in Medicine
Leverett Saltonstall Building
100 Cambridge Street
Boston, MA 02202

Dear Dr. Morse:

The Federal Trade Commission's Boston Regional Office and the Bureaus of Consumer Protection, Economics, and Competition¹ are pleased to have the opportunity to comment on the proposed amendments to the rules of the Board of Registration in Medicine ("Board"). We applaud the Board's efforts to broaden the scope of permissible advertising by physicians and we support the adoption of the proposed amendments.²

I. INTEREST AND EXPERIENCE OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission is charged under 15 U.S.C. §45 with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission encourages competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the kinds of business practices that state-licensed professionals, including

¹ These comments represent the views of the Boston Regional Office and the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

² These comments are limited solely to that section of the Board's rules covered by the proposed amendments.

optometrists, dentists, lawyers, physicians, and others are permitted to use. Our goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

As a part of the Commission's effort to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.³ In that regard, studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.⁴ Studies also have provided evidence

³ See e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, ___ U.S. ___, 105 S. Ct. 2265 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients or using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

⁴ Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

that advertising restrictions are not associated with an increase in the quality of services available in the market place.⁵ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result. For this reason, we believe that only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and may contribute to an increase in prices.

II. BENEFITS OF THE PROPOSED REGULATIONS

We understand that the proposed regulations would amend current regulation 243 C.M.R. 2.06(11)(a) by deleting prohibitions against physician advertising that is sensational or flamboyant, uses testimonials, guarantees satisfaction, or offers gratuitous services or discounts. The amended regulation would retain a prohibition on advertising that is false, misleading, or deceptive. We strongly support this proposal to broaden the scope of permissible advertising by physicians by eliminating prohibitions on types of advertising that are not inherently deceptive. We believe that the proposed regulations will enhance the opportunity for consumers to obtain useful qualitative and comparative information.

A. Prohibitions on Communication of Price Information

We understand that the proposed regulations would eliminate current regulation 243 C.M.R. 2.06(11)(a)(5), which prohibits "[a]dvertising which offers gratuitous services or discounts the purpose of which is to increase the number of private patients." We agree with the Board that this prohibition should be eliminated.

The current regulation prohibits truthful advertising by physicians of the availability of discounts or gratuitous

⁵ Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 AM. B. Found. Research J. 179 (1979); Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976). See also Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980) (considering the impact of advertising and other restrictions on the practice of optometry).

services -- information that is valuable to consumers. The existing prohibition on the communication of this type of price information appears to be unnecessarily broad. As the Supreme Court noted in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the lack of price information in attorney advertising "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . attorneys are isolated from competition, and the incentive to price competitively is reduced." Id. at 377. The absence of such information "serves to perpetuate the market position of established attorneys." Id. at 378. We believe that these comments concerning the lack of price information in attorney advertising are equally applicable to restrictions on this type of advertising by physicians.⁶

B. Prohibitions on Communication of Nonprice Information

We understand that the proposed regulations would eliminate prohibitions on physician advertising that is "sensational or flamboyant" (243 C.M.R. 2.06(11)(a)(1)), uses testimonials (243 C.M.R. 2.06 (11)(a)(3)), or uses guarantees of satisfaction (243 C.M.R. 2.06 (11)(a)(4)). We agree with the Board that elimination of these prohibitions is desirable. The current regulations appear overbroad since they prohibit advertising techniques that are not inherently deceptive. Permitting the use of nondeceptive advertising techniques may increase the effectiveness of advertising, increase price competition, and result in lower prices and in the dissemination of additional useful information to consumers.

The current ban on sensational or flamboyant advertising appears overbroad for two reasons. First, the terms "sensational" and "flamboyant" are susceptible to subjective interpretations unrelated to the truth or falsity of particular statements in the advertisements. As such, the prohibition on sensational or flamboyant advertisements may serve to chill the communication of nondeceptive information. Second, the prohibition may be construed to inhibit the use of innovative advertising and marketing techniques commonly used by other providers of goods and services. Techniques may be characterized

⁶ The Board, of course, retains authority to address cases of abuse in price advertising under its general authority to prohibit "false, deceptive, or misleading" advertising.

as "sensational" or "flamboyant" and yet be useful to advertisers to attract and hold consumers' attention.

Similarly, the current prohibition on advertising that uses testimonials bans truthful advertising that may provide useful information to consumers. Testimonials are widely used in other contexts to communicate consumer experiences and will likely provide consumers with useful information in choosing a physician. Finally, the ban on guarantees of satisfaction also appears too broad, because it would bar nondeceptive guarantees of consumer satisfaction or their money back. While we recognize the vulnerability of consumers to false and deceptive claims of curative results, a truthful communication of a satisfaction guarantee may be beneficial to consumers.

III. CONCLUSION

We strongly support the proposed amendments. The benefits to the public from the adoption of the proposed amendments are likely to be real and substantial. The amendments would permit the public to have access to a wider range of truthful information on the availability of physician services, would help to stimulate valuable competition among physicians and, in the process, would improve the efficiency with which medical services are delivered, while still protecting the public from false or deceptive advertising.

We thank you for your willingness to consider our comments. We have referred to a number of studies in this letter. We will be happy to supply a copy of any of these if you so desire. Please let us know if we can be of further assistance.

Sincerely,



Phoebe D. Morse
Director