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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
SAN FRANCISCO REGIONAL OFFICE

COMMISSION AUTHORIZED

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February 22, 1988

Alfred Otero, D.D.S., President
California Board of Dental Examiners
1430 Howe Avenue, Suite 85-B
Sacramento, California 95825

Re: Proposed Regulation Regarding Definition of Dental
Patient of Record

Dear Dr. Otero:

We are pleased to provide these comments in response to the Board of Dental Examiners' request for public views on a recent proposal that would define a dentist's "patient of record" and revise the requirements for supervision of dental auxiliaries.¹ As discussed below, we believe that the proposal may have serious adverse effects on consumer welfare. First, the proposal may restrict dental screening and fluoride programs that now benefit as many as 370,000 California school children annually. Second, the proposed regulation may restrict dentists' ability to use dental auxiliaries, thereby decreasing the efficiency of the dentists' practices. As a result, the cost of dental services may increase, and consumers may be able to purchase fewer services.

Interest of the Commission

Our interest in this matter stems from our involvement in competition and consumer protection policy. For more than a decade, the Commission has carried on a program to investigate the effects on competition and consumers of regulation constraining the business practices of state-licensed professionals, including dentists, physicians, pharmacists, and other health care providers. In particular, the Commission and

¹ These comments represent the views of the San Francisco Regional Office and the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission, and do not necessarily represent the views of the Commission itself or any individual member thereof. The Commission has, however, voted to authorize their submission to you.

its staff have analyzed restrictions on various aspects of dental practice,² including restrictions on the use of dental auxiliaries.³ Our goal has been to identify those restrictions that impede competition, increase costs, and harm consumers without providing substantial countervailing benefits.

The Proposed Regulation

Under California's existing statutory and regulatory scheme, dental assistants, registered dental assistants, and registered dental hygienists are authorized to provide a variety of services under the supervision of a licensed dentist. The kind of supervision required of the dentist varies by the type of service and type of dental auxiliary. For example, registered dental assistants and registered dental hygienists may perform mouth-mirror inspections (including charting lesions, existing restorations and missing teeth) under the general supervision of a dentist.⁴ Other duties, such as the sizing of steel crowns, temporary crowns, and bands, may be performed by a hygienist under general supervision, but by a registered dental assistant only under direct supervision.⁵ In addition, the dentist must check and approve, prior to the dismissal of the patient from the office, the performance of any procedure that is subject to the

² See, e.g., Indiana Federation of Dentists, 101 F.T.C. 57 (1983), aff'd, 476 U.S. 447 (1986) (group boycott of third-party payers by dentists); Louisiana State Board of Dentistry, Dkt. 9118 (August 26, 1985) (consent order) (advertising restrictions by state board); Letter to New Jersey State Board of Dentistry (July 14, 1987) (advertising restrictions); Letter to Tennessee Board of Dentistry (April 30, 1987) (advertising restrictions); Letter to Florida Board of Dentistry (April 23, 1987) (advertising restrictions); Letter to the California State Assembly on A.B. 417 (March 30, 1987) (dental branching).

³ See J. Liang and J. Ogur, Restrictions on Dental Auxiliaries (1987) (FTC Bureau of Economics staff report).

⁴ 16 Cal. Admin. Code §§ 1086(c)(1) and 1088(b). "General supervision" means that the service is provided pursuant to a licensed dentist's instruction, but the dentist need not be physically present during the performance of the procedure. 16 Cal. Admin. Code § 1067(j).

⁵ 16 Cal. Admin. Code §§ 1086(d)(6) and 1088(c)(6)(B)(3). "Direct supervision" means that the supervising dentist must be physically present in the treatment facility during the performance of the procedure. 16 Cal. Admin. Code § 1067(i).

direct supervision requirement.⁶ Post-treatment examination by the dentist is not required with respect to procedures for which general supervision is mandated. Regardless of whether a procedure is done under general or direct supervision, however, the ultimate responsibility for the proper performance of the procedure rests with the supervising dentist.

The regulation recently proposed to the Board of Dental Examiners ("the Board") by the California Dental Association would make two significant changes in the current regulatory scheme.⁷ First, it would prohibit dental auxiliaries from performing procedures currently permitted under general supervision until the patient becomes a "patient of record" of the supervising dentist. The proposal defines a "patient of record" as one who has been:

examined by the licensed dentist, has had a medical and dental history completed and evaluated by the licensed dentist, and has had the oral condition diagnosed and a written treatment plan developed by the licensed dentist.

Therefore, a dentist would have to examine any patient before an auxiliary even screened the patient.

Second, the proposal would require that the dentist "examine the patient within a reasonable period of time" after the patient has received clinical services performed by an auxiliary under general supervision.⁸ "Reasonable period of time" is not defined in the proposal; however, unless patients are to be inconvenienced by being required to return for a second appointment for the post-procedure examination, the dentist may need to see the patient prior to dismissal from the office. As a practical matter, this means that the dentist may need to be physically present and available to conduct the examination. The effect of the post-treatment examination requirement may be to convert duties now permitted under general supervision into direct supervision duties. This may be a substantial change in the current regulatory scheme.

⁶ 16 Cal. Admin. Code §§ 1085(c), 1086(d), 1088(d).

⁷ California Business and Professions Code §§ 1670 and 1680(n) require dentists and dental auxiliaries to comply with the Board's regulations.

⁸ The proposal does not specify what types of services are considered "clinical services."

Proponents of the proposed regulation contend that good dental practice requires that, prior to treatment, a dentist evaluate the patient's health and dental history, diagnose the patient's oral condition, and develop a written treatment plan.⁹ They believe the proposed regulation is necessary because some dentists do not do this. The proposal, however, applies only when the patient is to receive care from a dental auxiliary under general supervision. Such a standard would create certain anomalies. For example, the proposed regulation would not appear to permit a registered dental assistant or hygienist to chart existing restorations or missing teeth or take an x-ray of the patient's teeth prior to the development of a treatment plan, even though such procedures may be necessary prerequisites to the development of that plan.

The Proposed Regulation May Have the Effect of Impairing or Eliminating Dental Screening and Related Programs that Benefit Consumers.

The most dramatic effect of the proposed regulation will be to impair current programs that provide basic dental services to consumers who do not receive regular, on-going dental care. The clearest example of this is the California S.B. 111 school dental screening program. Every year, as many as 370,000 school children are screened for serious dental problems and receive regular fluoride treatments through this program. Screenings are conducted in schools, often by registered dental hygienists who inspect the children's teeth, identify serious dental problems that require a referral to a dentist, and administer regular fluoride mouth rinses. Many of the children in the program cannot afford and do not receive any other professional dental care.

The proposed regulation could hamper the S.B. 111 and similar screening programs by requiring that, before a hygienist screens a child or provides a fluoride rinse, a supervising dentist must review the child's health and dental history, diagnose the child's oral condition, and develop a written treatment plan. In addition, the supervising dentist would have to examine each child after the screening is performed and after each weekly fluoride rinse treatment is completed. The proposed regulation's pre- and post-treatment examination requirements are likely to raise substantially the costs of school dental screening programs. Indeed, the increased costs may make such programs infeasible.

⁹ See summaries of testimony on patient of record proposal at hearings before the Committee on Dental Auxiliaries of the Board of Dental Examiners in August and October, 1987.

Other programs in which dental hygienists provide care will be similarly affected. For example, hygienists participate in a program in which they work under the general supervision of dentists to provide oral prophylaxis and anti-caries sealants for children of migrant workers. Other hygienists participate in dental screenings at health fairs and senior citizen centers. In all these cases, the proposed regulation would prohibit the hygienist from seeing any patients until the patient had become the patient of record of the supervising dentist, and unless the supervising dentist was available to examine the patients within a reasonable period of time after the treatment was provided.

If the proposed regulation is adopted, school children and others who receive dental screenings and care through special programs will likely be denied the benefits of these programs. This loss will be particularly serious for those consumers who cannot afford other dental care.

The Proposed Regulation May Increase the Cost of Dental Care to Consumers by Increasing Restrictions on the Use of Dental Auxiliaries.

The proposed regulation may also have a detrimental effect on consumer welfare by restricting dentists' ability to best use dental auxiliary personnel to provide services to patients. Health care professionals frequently use trained auxiliary personnel to perform preliminary screenings, or to provide treatment or other services under the professionals' supervision. By converting to direct supervision those procedures that the Board previously determined require only general supervision,¹⁰ the proposed regulation may increase the cost of dental care to consumers without providing countervailing benefits. If costs increase, consumers may purchase fewer dental services and overall dental health may decrease as a result.

A 1987 study by the FTC's Bureau of Economics found evidence that restrictions preventing dentists from using dental auxiliaries to perform the tasks for which they are qualified reduce the efficiency of providing dental services. The study also found that restrictions on the use of dental auxiliaries raise the prices of dental procedures and the average price of a

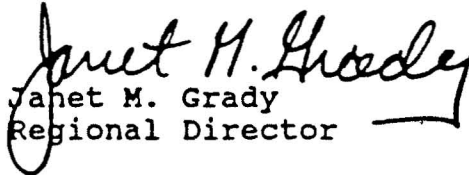
¹⁰ We take no position on the degree of supervision that is appropriate for specific procedures performed by dental auxiliaries.

dental visit.¹¹ As the prices charged for dental care increase, consumers may decrease their purchases of these services.¹²

Conclusion

We believe that the regulatory proposal could cause a significant loss in consumer welfare by inhibiting school and other public screening programs, and by restricting the efficient use of dental auxiliaries. We appreciate this opportunity to provide comments on the proposed regulation. We would be pleased to provide a copy of any of the reports we have discussed.

Very truly yours,


Janet M. Grady
Regional Director

¹¹ See J. Liang and J. Ogur, Restrictions on Dental Auxiliaries 2 (1987) (FTC Bureau of Economics Staff Report). The study examined state statutory or regulatory restrictions on the number of dental hygienists a dentist could employ, as well as restrictions on functions dental auxiliaries were permitted to perform. The study did not analyze restrictions on independent practice by dental auxiliaries or the issue of direct versus general supervision.

¹² This is of particular concern because large numbers of consumers do not currently see a dentist regularly. A 1977 survey by the National Center for Health Statistics found that over one-third of the United States population had not visited a dentist in two years or longer, and approximately 20 million Americans had never visited a dentist. One of the major reasons given for this finding was the high cost of dental visits in terms of price and time. General Accounting Office, Increased Use of Expanded Function Dental Auxiliaries Would Benefit Consumers, Dentists, and Taxpayers., HRD-80-51, March 1980, at 14-15.