



BUREAU OF
CONSUMER PROTECTION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSIONER

April 23, 1987

Ms. Gwen Mathews
Executive Director
Florida Board of Dentistry
130 North Monroe Street
Tallahassee, FL 32399-0705

Dear Ms. Mathews:

The staff of the Federal Trade Commission¹ is pleased to offer these comments in response to your invitation of April 3, 1987, for public comments on the Florida Board of Dentistry's proposed regulations restricting dental advertising.

Advertising is beneficial to consumers because it provides information about the individuals or firms offering services that they may wish to purchase. Information facilitates purchase decisions that reflect true consumer preferences, and promotes the efficient delivery of services. We therefore urge the Board to eliminate the provisions in its proposed rules that restrict the use of truthful, nondeceptive advertising. We also suggest that the Board recommend legislation repealing state laws that similarly restrict such advertising.

Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission staff has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, optometrists, lawyers, physicians, and others. Our goal has been to identify and seek the removal of restrictions that impede competition and increase cost, without providing significant countervailing benefits to consumers.

¹ These comments represent the views of the Federal Trade Commission's Bureaus of Consumer Protection, Economics, and Competition, and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the submission of these comments.

As a part of the Commission's efforts 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.² Studies indicate that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.³ Studies also provide evidence that restrictions on advertising raise prices but do not increase the quality of goods and services.⁴ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

² See, e.g., American Medical Ass'n, 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 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, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and regarding the legal rights of potential clients to use nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding invalid state supreme court prohibition on advertising under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding invalid a Virginia prohibition on advertising by pharmacists).

³ 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, Regulation 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).

⁴ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); 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). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

We have examined various justifications that have been offered for restrictions on advertising and have concluded that these arguments do not warrant restrictions on truthful, non-deceptive communications. 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 contribute to an increase in prices.

Affirmative Disclosure Obligations

Any disclosure obligation increases advertising costs, either because it increases the length of the message or requires practitioners to forego some portion of the advertising message they would have delivered had the space not been occupied by the disclosure. Unnecessary disclosure requirements could therefore result in less useful information being made available to consumers. Consequently, we believe that disclosures should be mandated only where they are necessary to prevent deception. Although affirmative disclosures may be justified in some instances, several of the Board's proposed regulations appear broader than necessary to prevent deception of the public.

Rule 21G-4.002(2) would require that all advertising "contain the name, address, telephone number of the dentist, and of other dentists with whom the dentist is associated."⁵ This rule could impose burdensome advertising costs on those group practices that include many partners or associates, and could make any advertising by such firms impractical, particularly broadcast advertising. We believe that the Board can better accomplish the goal of ensuring identification and accountability of individual practitioners by requiring that the name of each dentist be displayed in a conspicuous place, or noted on bills, receipts and patient records.

Rule 21G-4.002(4) would require that dental advertisements mentioning a fee include "a description of [the] service using the exact wording for that service contained in the American Dental Association 'Code on Dental Procedures and Nomenclature.'" This requirement is troublesome for two reasons. First, it appears to require advertisers to use technical terminology that may be confusing and not easily understood by consumers. It thus limits the ability of dental advertisers to convey their message as effectively as possible and may have a chilling effect upon desirable advertising. Second, this provision appears to preclude the advertising of fees for any services that are not included in the ADA Code on Dental Procedures and Nomenclature,

⁵ We note that this language was previously included in the statute but was specifically deleted in amendments adopted by the legislature last year.

such as new or innovative techniques that are not yet widely used by dental practitioners.

Section 21G-4.002(3)(g) provides that advertisements for free or discounted services must comply with Section 455.25 of the Florida Statutes. This statutory provision requires various health care providers, including dentists, to include a lengthy disclosure in all advertisements for free or discounted services.⁶ According to this disclosure, consumers are not obligated to pay for any treatment performed as a result of responding to an ad for free or discounted services. This disclosure requirement is not necessary to prevent deception since there is nothing inherently misleading in offering free or discounted services. Furthermore, the disclosure may be so burdensome as to reduce the amount of price advertising. Not only will advertising costs increase, but the dentist's ability to provide necessary dental services to his or her patients may be impaired. According to this provision, if a consumer responds to an ad for a discount on dental x-rays, and the x-rays reveal that the consumer has an abscess that needs immediate treatment, the consumer could have this work done and then legally refuse to pay for it. Such a result would most likely reduce dentists' incentive to advertise free or discounted services, or else encourage dentists to avoid the application of this provision by delaying necessary treatment for several days. The Board can better accomplish its apparent goal of preventing dentists from charging consumers for hidden costs by requiring that dentists seek the patient's permission before undertaking any additional procedure that is not included in treatment advertised as free or discounted.

We recognize that, in general, the more information that is available to consumers, the better prepared they will be to make well-reasoned purchases. We believe, however, that the disclosures required by the Board are counterproductive. By increasing advertising costs, they may discourage some dentists from advertising and thereby deny consumers useful information respecting available dental services.⁷ We recommend that the Board not

⁶ The required disclosure consists of the following:

The patient and any other person responsible for payment has a right to refuse to pay, cancel payment, or be reimbursed for payment for any other service, examination, or treatment which is performed as a result of and within 72 hours of responding to the advertisement for free, discounted fee, or reduced fee service, examination, or treatment.

⁷ The Board should bear in mind that elimination of these requirements would not preclude consumers who desire such information from requesting it from the advertiser.

adopt these provisions, and that it seek the repeal of the underlying statutory provision, Fla. Stat. § 455.25.

Prohibitions on Solicitation

Rule 21G-4.002(7) would prohibit all "in person and telephone solicitation of dental services by a dentist or his agent." This provision would restrict the flow of commercial information more than is necessary to protect consumers because it would preclude truthful, nondeceptive communications in circumstances that pose little or no risk of undue influence.

In-person and telephone contacts may provide consumers with truthful, nondeceptive information that will help them select a dentist. Such contacts can convey information about the availability and terms of a dentist's services and, in this respect, they serve much the same function as print advertising. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 457 (1978).

Some restrictions on solicitation may be justified. Certainly, false or deceptive solicitation and solicitation of persons who have informed the dentist that they do not wish to be contacted by him may appropriately be prohibited. We recognize that in certain circumstances in-person and telephone solicitation could result in overreaching or undue influence, and a state may therefore legitimately insist that dentists and their agents not exert such undue influence. See Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). But in our view, this does not justify a blanket ban on the use of all in-person and telephone solicitation. Such a ban might, for example, bar dentists from speaking to interested groups about dental care, a situation unlikely to result in overreaching or undue influence.

The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Association, 94 F.T.C. 701 (1979). After weighing the possible harms and benefits to consumers, the Commission ordered the AMA to cease and desist from restricting solicitation, but permitted the AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence. We suggest the Board consider using this standard, which protects consumers from harm while allowing them to receive information about available dental goods and services.

Telephone solicitation, like in-person solicitation, can also convey useful information to consumers, and it may present no greater risk of the exercise of undue influence than does in-person solicitation. Consumers are accustomed to telephone marketing. They receive calls from persons offering the sale of various goods and services, conducting surveys about the products and services consumers use, seeking contributions to charities, and requesting support for political candidates. Consumers can

easily terminate offers of dental services communicated by telephone.

Although the standard for in-person solicitation discussed above may also be appropriate here, we are not prepared to make a final recommendation on the proper treatment of telephone solicitation. We do believe, however, that it should not be regulated any more stringently than in-person solicitation, and that an absolute ban on telephone solicitation is unnecessarily restrictive.

Prohibitions on Quality and Specialization Claims

Section 21G-4.002(3)(c) and Fla. Stat. § 466.019(2)(c) prohibit advertisements containing "laudatory statements about the dentist or group of dentists." In addition, Section 21G-4.002(3)(e) of the Board's proposed Rules and Fla. Stat. § 466.019(2)(e) prohibit any dental advertisement which "relates to the quality of dental services as compared to other available dental services." We recommend that the Board eliminate these proposed rules and seek the repeal of the statutory provisions.

These two provisions in effect prohibit virtually all quality and superiority claims. These prohibitions restrict many forms of comparative advertising, which can be a highly effective means of informing and attracting customers. They also lessen competition among dentists. When sellers cannot truthfully compare the attributes of their services to those of their competitors, their incentive to improve or offer different products, services, or prices is likely to decrease.

Bans on laudatory claims are particularly likely to injure competition and consumers when they are interpreted to prohibit a wide range of factual statements. For example, virtually all statements about a practitioner's qualifications, experience, or performance can be considered to be laudatory. Bans on all such claims would make it very difficult for dentists to provide consumers with truthful information about the differences between their services and those of their competitors.

Section 21G-4.002(5) of the proposed rules allows general dentists to advertise specialty services so long as the advertisement states that the service will be performed by a general dentist. Because we believe it is important that general dentists with expertise or experience in specific areas be allowed to communicate that expertise or experience to the public, we support the Board's effort to allow general dentists to advertise specialty services. In our view, only specialization claims that are deceptive, such as a claim falsely stating that a dentist is a specialist, need be prohibited. The Board's proposed rule apparently leaves general dentists free to make truthful, non-deceptive claims that they concentrate in a particular field of

dentistry, if accompanied by a disclosure that they are general dentists. Although we are not convinced that this affirmative disclosure requirement is necessary to avoid deception, it may not be greatly burdensome and it apparently permits dentists to promote the whole range of services they are licensed to perform.

Prohibitions on Appeals to Fear

Section 21G-4.002(3)(f) of the proposed rules and Fla. Stat. § 466.019(2)(f) prohibit any dental advertising which "is likely to appeal primarily to a layperson's fears." We urge the Board to eliminate this Rule and seek the repeal of the statutory provision.

This particular restriction is ambiguous in that it could be intended to ban ads intended to heighten fears or it could be intended to prohibit ads intended to diminish fears. Under either interpretation, however, the restriction is overly broad and susceptible to subjective interpretations that may have little to do with the truth or falsity of a particular statement.

If the purpose of the provision is to prevent ads intended to heighten consumer fears, this purpose could best be met through the Board's prohibition on deceptive or misleading ads under Section 21G-4.002(3). If the Board construes this provision as prohibiting all ads intended to diminish consumer fears, then this provision could deter dentists from engaging in advertising that dentists think the Board would consider likely to allay a layperson's fears, but which is, nevertheless, non-deceptive and beneficial to consumers. In fact, millions of Americans are dental phobics -- "so terrified of dental treatment that they avoid it entirely," and millions of other Americans suffer from dental anxiety.⁸ Yet "modern dental techniques and equipment have greatly reduced and often eliminated any pain associated with dental treatments."⁹ Bans on ads likely to appeal to a layperson's fears could prevent dentists from any advertising directed to those consumers who may be most in need of dental care -- consumers who are so frightened or anxious about dental treatment that they postpone necessary care to the detriment of their dental health. Such bans may even discourage dentists from using such unobjectionable terms such as "gentle" care.

⁸ American Dental Association, Guide to Dental Health 37 (1986).

⁹ Id.

Conclusion

In sum, we recommend that the Board not adopt restraints on nondeceptive advertising and that it seek repeal of the statutory provisions discussed above. We believe those changes will provide substantial benefits to the public, and permit access to a wider range of truthful information about the availability of dental services. They should also help to stimulate valuable competition among dentists and improve the efficiency with which dental services are delivered, while still protecting the public from false or deceptive advertising.

Sincerely,

A handwritten signature in cursive script, appearing to read "William MacLeod".

William MacLeod
Director