



Federal Trade Commission

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APPROVED FOR SIGNATURE AUTHORIZED

Senator Gerry E. Hinton, D.C.
900 Riverside Mall
State Capitol Building
Senate Sub-basement
Baton Rouge, LA 70804

Dear Senator Hinton:

The Federal Trade Commission staff is pleased to have this opportunity to respond to your letter of June 3, 1987, requesting our comments on House Bill 631.¹ This bill would regulate dental advertising and participation by dentists in paid patient referral programs. We recognize and support Louisiana's interest in preventing deceptive practices by dentists. The proposed bill represents a substantial improvement over current law by eliminating a variety of restraints on truthful, nondeceptive dental advertising, and thus is likely to benefit consumers in many respects. However, we are concerned that the bill might, if enacted, substantially inhibit price advertising for dental services by mandating more extensive disclosures than are necessary to prevent deception. We also identify below certain other provisions that appear broader than necessary to serve Louisiana's interest in protecting consumers of dental services.

INTEREST AND EXPERIENCE OF THE FEDERAL TRADE COMMISSION

Our interest in this legislation stems from the Commission's mandate to enforce the antitrust and consumer protection laws of the United States. Section 5 of the FTC Act prohibits unfair methods of competition and unfair or deceptive acts or practices. In enforcing this statute, the Commission staff has gained substantial experience in analyzing the impact of various restraints on competition and the costs and benefits to consumers of such restraints.

For several years, the Commission has been investigating the effects of public and private restrictions on the business practices of dentists, optometrists, lawyers, physicians, and

¹ The comments represent the views of the Dallas Regional Office and the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission and are not necessarily those of the Commission itself. The Commission has, however, voted to authorize us to present these comments to you.

other state-licensed professionals. As part of the Commission's efforts to foster competition among licensed professionals more generally, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.² The Commission staff has submitted numerous written comments to state legislatures and state boards of dentistry analyzing the effects on consumer welfare of various regulations governing advertising and other practices by dentists.³

Studies suggest that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.⁴ Although some concern has been voiced that

² 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, 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 advice regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding a 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 a Virginia prohibition on advertising by pharmacists invalid).

³ See, e.g., Letter to The Honorable Harry Hill, Missouri State Representative (May 12, 1987); Letter to Dr. William Overton, President, Tennessee Board of Dentistry (April 29, 1987); Letter to Ms. Gwen Mathews, Executive Director, Florida Board of Dentistry (April 23, 1987); Letter to Ms. Nancy Feldman, Executive Director, Virginia State Board of Dentistry (April 23, 1987); Letter to R. B. Thompson, Executive Director, Kentucky Board of Dentistry (Nov. 21, 1986).

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 on 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).

advertising may lead to lower quality services, the empirical evidence suggests that advertising restrictions raise prices but do not increase the quality of services available.⁵ Therefore, to the extent that truthful and nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare are likely to result. For this reason, we believe that only false or deceptive advertising should be prohibited.

DISCLOSURES IN PRICE ADVERTISING

At present, Louisiana apparently regulates price advertising, including disclosures in such advertising, only to the extent necessary to prevent deception.⁶ Offers of free examinations and services, however, are prohibited under current law.

Certain provisions of HB 631 would substantially increase the burdens currently imposed on dentists who provide price information in advertising. Proposed Section 37:775(1)(a) would require that dentists who advertise fees or free dental services must disclose all procedures included in those services. In addition, proposed Section 37:775(8) would require the dentist who advertises denture prices to include information about the materials used, adjustments that may be necessary, and charges. In instances where the advertised price does not include both upper and lower dentures, the dentist would be required to disclose this fact in extra large type or, in the case of broadcast advertisements, to repeat such information three times.

⁵ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris & 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); McChesney & Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A. J. 1503 (1979).

⁶ Although Section 37:775(8) of the Louisiana Revised Statutes purports to prohibit truthful price advertising, that provision was declared unconstitutional to the extent that it restricts such advertising. Dewey v. Louisiana State Board of Dentistry, 491 F. Supp. 132 (1978), aff'd per curiam, 625 F.2d 499 (5th Cir. 1980). In addition, in 1985, the Louisiana State Board of Dentistry entered into a consent agreement with the Federal Trade Commission in which the Board agreed to cease and desist from restricting or discouraging truthful, nondeceptive price advertising. Louisiana State Board of Dentistry, 106 F.T.C. 65 (1985).

⁷ La. Rev. Stat. § 37:775(f).

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 HB 631 are counterproductive. By increasing advertising costs, they may discourage some dentists from advertising and thereby deny consumers useful information respecting available dental services.⁸ We therefore recommend that the Louisiana Senate consider eliminating the above-discussed affirmative disclosures from the proposed legislation, and instead require only those disclosures that are necessary to prevent deception.

VAGUE AND SUBJECTIVE STANDARDS

Proposed Section 37:775(5) defines unprofessional conduct to include "any communication which is likely to create an unjustified expectation about results the dentist can achieve." This provision employs vague criteria susceptible to subjective interpretations that may have little to do with the truth or falsity of particular statements in advertisements. For example, a communication by a dentist that having your teeth straightened could make you more attractive might subject the practitioner to censure, although the statement is not deceptive or misleading.

Also, the standard outlined in Section 37:775(5) may serve to chill the communication of nondeceptive information. Since false, misleading, or deceptive statements are prohibited under proposed Section 37:775(3),⁹ Section 37:775(5) of HB 631 appears to be unnecessary.

TRADE NAMES

Proposed Section 37:775(2) would prohibit the use of any trade name in dental advertisements "other than that which appears on the license of the dentist" or which is authorized under the law relevant to dental corporations. Dental corporation law also requires the use of the name appearing on the dentist's license and does not authorize trade names.

⁸ Elimination of the disclosure requirements in HB 631 would not, of course, preclude consumers who desire such information from requesting it from the advertiser.

⁹ We recommend that the remainder of Section 37:775(3) prohibiting "the omission of material information from any statement or claim about the dentist or the dentist's services" be modified by adding at the end the phrase "without which the communication would be deceptive." We believe this change is appropriate to prevent the provision from inhibiting some truthful, nondeceptive advertising.

Trade names can perform several useful functions. They can be essential to chains or group practices that employ many practitioners and provide service on a state-wide or regional basis. They are also easy to remember and can convey useful information such as the location or other characteristics of a practice. For example, Section 37:775(2) would prohibit assumed names such as "Preston Road Dental Clinic" or "Children's Dental Associates." Over time, trade names can come to be associated with a certain level of quality, service, and price. Thus, facilitating a ban on trade names would deny dentists an important marketing tool and unnecessarily increase consumer search costs.

In addition, proposed Section 37:775(9) would require that all advertising "contain the dentist's full name, address, and telephone number." Such a requirement could impose burdensome advertising expenses on those chains or group practices that include many partners or associates if it is interpreted to require disclosure of each individual dentist's name, address, and telephone number, thereby making broadcast and other types of advertising by such firms impractical. Both this provision and the ban on trade names could discourage the development of such firms by effectively prohibiting their advertising.

Trade name bans and disclosure requirements such as proposed Section 37:775(9) are generally defended on the ground that they are necessary to ensure the identification and accountability of the individual dentists who practice under a trade name. However, there may be effective ways to achieve this goal without impeding the development of group practices and chains. For example, the state could require that the names of individual practitioners be conspicuously posted in the reception area of dental offices and noted on bills, receipts, or patient records. For these reasons, we suggest that the Senate consider removing this provision from HB 631.

SUBSTANTIATION

Proposed Section 37:775(4)(a) would prohibit "any communication for which the dentist does not have substantiation in hand at the time the claim is made." This provision also appears to be broader than necessary to prevent deception. Advertisers should have a reasonable basis for objective claims

they make about products or services.¹⁰ However, substantiation of claims that do not express or imply to consumers any degree of factual support, such as puffing claims, is not necessary to prevent deception. Requiring substantiation of such claims as "friendlier service" or "convenient location" could unnecessarily deter truthful, nondeceptive advertising. Louisiana, therefore, may wish to make clear that its substantiation requirements will apply to claims for which consumers expect that advertisers have a reasonable basis.

REFERRAL FEES

Proposed Section 37:775(7) would prohibit a licensee from "offering, giving, receiving, or agreeing to receive any fee or other consideration to or from a third party for the referral of a patient in connection with the performance of a dental service." This proposed provision would appear to prevent dentists from participating in referral services that match clients with appropriate practitioners and charge a fee to the practitioner. Such services may be valuable in helping consumers locate needed dental care. Indeed, by facilitating the gathering of information by consumers, these services may increase competition among health care professionals.

A prohibition against referral fees may also interfere with the operation of alternative health care delivery systems such as PPOs and HMOs that have arrangements with health care professionals in which fees are divided between the medical plan and the professional. Consequently, we suggest considering modifications to HB 631 that would allow dentists to participate in legitimate independent referral services and alternative health care delivery systems.

CONCLUSION

We believe that HB 631 would more effectively advance Louisiana's legitimate interest in protecting its consumers from misleading dental advertisements if certain modifications were

¹⁰ For example, the Federal Trade Commission requires substantiation when an advertisement refers to specific facts or figures. *Thompson Medical Co.*, 104 F.T.C. 648, 822 (1984), aff'd, 1986-1 Trade Cas. (CCH) ¶ 67, 103 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3569 (U.S. Feb. 23, 1987), or when an advertisement expressly or implicitly represents that the truth of a claim is scientifically established. *Bristol-Myers Co.*, 102 F.T.C. 21, 318 (1983), aff'd, 738 F.2d 554 (2d Cir. 1984), cert. denied, 105 S. Ct. 960 (1985). See generally FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

incorporated into the proposed bill. The dissemination of truthful and nondeceptive information will be unnecessarily limited if the state requires extensive affirmative disclosures in price advertising or prohibits referral fees and trade names. Vague and subjective standards may also chill the dissemination of nondeceptive information. The proposed sections thus have the potential to harm consumer welfare by making it more difficult for consumers to identify the types of dental services that they prefer and by increasing the prices of dental services. For these reasons, we believe that the public interest would be better served if HB 631 were modified in the manner suggested above.

We appreciate this opportunity to provide our views on these issues. We have referred to several studies and other materials. We would be happy to supply copies of these if you so desire, or to provide any other assistance that you may find helpful.

Sincerely,

Jim Moseley
Regional Director
Dallas Regional Office