



BUREAU OF
CONSUMER PROTECTION

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

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COMMISSION
APPROVED

June 18, 1986

Omar P. Whisman, Executive Director
Ohio State Dental Board
65 South Front Street, Rm. 506
Columbus, Ohio 43215

Dear Mr. Whisman:

The Federal Trade Commission's Bureau of Consumer Protection, Economics, and Competition¹ are pleased to comment on the proposed amendments to the rules of the Ohio State Dental Board ("Board").² We endorse the proposal to broaden the scope of permissible advertising. We believe, however, that the proposed amendments retain some provisions that may unnecessarily injure competition and consumers.

I. INTEREST AND EXPERTISE 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 its 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 has been investigating the competitive effects of restrictions on the business practices of dentists, optometrists, lawyers, physicians, and other state-licensed professionals. 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 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

¹ These comments represent the views of 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 Our comments are directed only to the proposed advertising rules. We offer no opinion on proposed rule 4715-3-01, which specifies which duties dentists may delegate to dental assistants.

professionals to engage in truthful, nondeceptive advertising.³ Studies have shown that prices for professional goods and services are lower where advertising exists than where it is overly restricted or prohibited.⁴ Studies have also provided evidence that restrictions on advertising raise prices but do not increase the quality of services available.⁵ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may well result. The Commission has also examined various justifications that have been offered for restrictions on advertising and has concluded,

³ See, e.g., In re 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, 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).

⁵ 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); McChesney and Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979).

as the courts have, that, by and large, these proffered reasons do not justify restrictions on truthful advertising. For this reason, 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. BACKGROUND

On May 16, 1986, the Governor of the State of Ohio issued Executive Order 86-26 declaring an emergency that required immediate amendment of Rules 4715-13-01, 4715-13-03 and 4715-13-04, and rescission of Rule 4715-13-02. Until that time, the Board's advertising rules prohibited the communication of much truthful, nondeceptive information. The Board has invited public comment on a proposal to make permanent the emergency rules ("proposed rules"). We support the repeal of rules that limited price advertising to routine dental services,⁶ banned comparisons of fees for dental services in all advertising or patient solicitations, and required that the names of all associates and employed dentists be included in any sign or advertisement. We also endorse the elimination of rules that declared all claims of quality or professional superiority, and any use of animations, lyrics, and other attention-getting devices to be inherently misleading.

Repeal of these rules will enhance the amount of qualitative and comparative information available to consumers. While the proposed rules represent a significant improvement over the old rules, they retain provisions that appear unnecessary to protect consumers and could have significant anticompetitive effects. We therefore urge the Board to consider additional amendments that will address the problems outlined below.

III. THE PROPOSED RULES

A. Proposed Rule 4715-13-01

Proposed rule 4715-13-01 eliminates the general requirement that advertisements be presented in a "reasonably dignified and reasonably restrained professional manner." It also eliminates prohibitions on the use of pictures, cartoons, animations, and a number of other attention-getting devices. We endorse this amendment.

⁶ We were initially uncertain whether this rule was being repealed or simply amended. Based on staff's communications with the Board's attorney, we understand that the Board proposes to eliminate all restrictions on nondeceptive fee advertising.

We are troubled, however, by a number of restrictions that remain in this rule. First, subparts (C) and (D) retain the requirement that various kinds of communications, including cards, signs, letterheads, notices, testimonials, and in-person solicitations be "reasonably dignified," "reasonably restrained" and "professional." We have two concerns regarding these provisions. They set forth vague criteria that are susceptible to subjective interpretations that have nothing to do with the truth or falsity of particular statements in advertisements. As such, the standards may serve to chill the communication of nondeceptive information. The provisions also 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 as "unprofessional" or "undignified" and yet be useful to advertisers to attract and hold consumers' attention. Thus, they can help to communicate messages more effectively to consumers. Such techniques are not inherently deceptive, and prohibiting them may well decrease the effectiveness of advertising, resulting in higher costs and less frequent advertising.

We call the Board's attention to Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, in which the Supreme Court considered the proffered justifications for a rule requiring that lawyer ads "be presented in a dignified manner without the use of drawings, illustrations, ... slogans [or] lyrics." 105 S.Ct. 2265, 2272 (1985). The Court concluded that:

although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would recur so often as to warrant a prophylactic rule.

105 S. Ct. at 2280. We think the Supreme Court's reasoning applies with equal force to advertising by dentists.⁷ For these reasons we believe the Board should reconsider the need for these provisions.

Second, we question a provision in subpart (D), which, in our view, is an overbroad restriction on the use of

⁷ The Council of State Governments' has stated that "[regulators] should be wary of edifying into public law ethical codes clearly designed to serve and 'dignify' the profession." Occupational Licensing: Questions a Legislator Should Ask 12 (1978).

testimonials. This provision permits only patient testimonials of the quality of a specific service based on the patient's personal knowledge or experience. The proposed rule would appear to prohibit the communication of useful information from sources that are as reliable as patients. For example, it prohibits the use of testimonials in which a professional colleague attests to the skills, experience, or expertise of a dentist, without regard to the testimonial's potential for deception. Testimonials are widely used in other markets to communicate information concerning particular products or services. They may also be particularly useful in attracting consumers who have had little or no contact with dentists. Thus, we believe that testimonials should be permitted so long as they are truthful and not deceptive.

Third, proposed rule 4715-13-01(C) also limits in-person solicitations. It states that no solicitor may make quality representations "unless such solicitor has the educational background and expertise of a dentist." Because quality claims are likely to be either explicit or implicit in every solicitation, this provision appears to forbid altogether the use of non-dentist solicitors. We recognize that in certain circumstances an in-person solicitation may be conducive to overreaching. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464 (1978). However, in its present form, the Board's rule appears to be unnecessarily broad in that it restricts a dentist's ability to disseminate information that is beneficial to consumers, but does not require the expertise of a dentist to communicate. We submit for the Board's consideration a rule on solicitation that reads as follows: "A board licensee shall not engage in uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence." See American Medical Association, 94 F.T.C. 701, 1037-38 (1979).

Fourth, subpart (A) of the rule requires that all broadcast advertisements be prerecorded. The rule seems to forbid "live" (on air) advertisements. While the Board might legitimately require dentists to preserve advertisements for review in the event of allegations of deception, there is already a requirement that dentists file copies of the actual transmission of each ad. This requirement should eliminate any concern that the Board has about obtaining a copy of an advertisement.

The fifth provision to which we wish to call the Board's attention is also in subpart (A). This provision forbids dentists from advertising in any manner "not available on similar terms to all dentists." While we are unsure of the intent of the restriction, it could deprive advertisers of competitive advantages they have legitimately secured for themselves. For example, a dentist who engages in volume advertising may secure discounted advertising rates from a publisher or broadcaster. But the proposed rule might forbid dentists from accepting the discounted rates, which could increase advertising costs and

decrease the incentive to advertise.

In sum, rule 4715-13-01 contains a number of restrictions having the potential to chill both the incentive and the opportunity to advertise. We urge the Board to reevaluate the need for the restrictions outlined above.

B. Proposed Rule 4715-13-03

As stated above, we strongly endorse the proposal to eliminate prohibitions on claims of quality and professional superiority.

We note that subpart (B), which incorporates by reference rule 4715-5-04, contains a provision regarding advertising claims of specialization. We believe it is important that a general dentist with expertise or experience in specific areas be allowed to communicate that expertise to the public. In our view, only specialization claims that are deceptive, such as a claim that falsely states that a dentist is a licensed or certified specialist, need be prohibited. Such a rule would leave dentists free to make truthful, nondeceptive claims that they concentrate in a particular field of dentistry, that their practice is limited to a particular area, or otherwise advertise their expertise in a particular field of dentistry.

C. Proposed Rule 4715-13-04

We support the Board's decision to remove from this rule restrictions on fee comparisons and the requirement that the names of all dentists affiliated with a practice be included in its advertisements. We would like to call the Board's attention, however, to one provision, subpart 4715-13-04(B)(1). This rule declares that statements such as "if it hurts, don't pay," "teeth without plates," "we put the tooth to sleep," and "other similar statements tending to deceive or mislead the public" are inherently misleading. We submit that the Board should exercise great caution in declaring language inherently misleading. The danger in such declarations is that they may chill advertisements that are not deceptive. We are unaware of any evidence that claims such as those above are inherently deceptive. We therefore suggest that the Board reevaluate this rule to assess whether the restriction is necessary to protect the public.

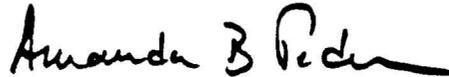
CONCLUSION

As explained above, we believe that the Board should prohibit only false or misleading advertising. Because the Board's proposed amendments are a significant improvement, we support them, but urge the Board to make additional modifications. The benefits to the public from the adoption of the proposed amendments, particularly as modified in accordance with our comments, 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 dental services. They would help to stimulate valuable competition among dentists for dental services and, in the process, improve the efficiency with which dental services are delivered, while still protecting the public from false or deceptive advertising.

We have referred to a number of studies, cases, and other materials 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.

Yours truly,

A handwritten signature in black ink that reads "Amanda B. Pedersen". The signature is written in a cursive style with a long, sweeping underline.

Amanda B. Pedersen
Acting Director