



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
CLEVELAND REGIONAL OFFICE

COMMISSION AUTHORIZED

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April 24, 1989

Mr. Frank J. Ertz
Executive Director
Independent Regulatory Review Commission
Commonwealth of Pennsylvania
Room 22A, 333 Market Street
Harrisburg, Pennsylvania 17101

Dear Mr. Ertz:

The staff of the Federal Trade Commission (FTC)¹ is pleased to respond to your letter of November 23, 1988, requesting comments on the restrictiveness of regulations of the Pennsylvania State Board of Dentistry (Board). Our comments address restrictions on advertising practices. We believe that these restrictions may impede the flow of information to consumers, increase the cost of advertising, and adversely affect commercial aspects of the practice of dentistry.

I. FEDERAL TRADE COMMISSION INTEREST AND EXPERIENCE.

The FTC is an independent regulatory agency responsible for fostering and safeguarding the interests of consumers. Section 5 of the Federal Trade Commission Act² prohibits unfair methods of competition and unfair or deceptive acts or practices. In enforcing this statute, the Commission and its staff have gained considerable experience in analyzing the market impact of various private and governmental restraints on competition and the costs and benefits to consumers of such restraints. The staff, upon request by federal, state and local governmental bodies, regularly analyzes legislative and regulatory proposals to identify provisions that may impair competition or increase costs without offering offsetting consumer benefits.

¹ This letter represents the views of the staff of the Federal Trade Commission's Cleveland Regional Office and Bureau of Competition, and not necessarily those of the Commission or of any individual Commissioner.

² 15 U.S.C. § 45.

Moreover, for the past several years, the Commission has examined the effects of state-sanctioned limitations on the business practices of state-licensed professionals. The Commission staff has prepared numerous legislative and regulatory comments analyzing the effects on consumer welfare of regulations that limit the dissemination of information about professional services.³

II. ADVERTISING RESTRICTIONS.

Consumers need information in order to make intelligent decisions when purchasing goods and services. Restricting the availability of that information can diminish consumer welfare without providing countervailing improvements in services. Numerous studies have shown that prices for professional goods and services tend to be lower where advertising is relatively unfettered than where restrictions or prohibitions exist.⁴ In addition, advertising limitations may harm consumers by increasing search costs and decreasing information on which to make judgments. Supporters of restrictions on the advertising of professional services argue that advertising leads to lower quality services. Empirical evidence, for the most part, does not support that contention.⁵

We believe that statutes and regulations should prohibit only advertising that is false, misleading, or deceptive. Current Board regulations reflect that

³ See, e.g., Letter to Dr. Robert Rector, President, Montana Board of Dentistry (May 3, 1988); Letter to the Honorable Gerry E. Hinton, Louisiana State Senator (June 25, 1987); 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 (November 21, 1986). The Commission also has engaged in judicial and administrative challenges to restrictions on the ability of health professionals to engage in nondeceptive advertising. See, e.g., *American Medical Association*, 94 F.T.C. 701 (1979), *affd*, 638 F.2d 443 (2d Cir. 1980), *affd mem. by an equally divided court*, 455 U.S. 676 (1982).

⁴ Jacobs *et al.*, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising*, Cleveland Regional Office and Bureau of Economics, Federal Trade Commission (1984); Bond, Kwoka, Phelon, and Whitten, *Effects of Restrictions on Advertising and Commercial Practice on the Professional: The Case of Optometry*, Bureau of Economics, Federal Trade Commission (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).

⁵ Bond *et al.*, *supra* note 4; Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 Am. B. Found. Research J. 179 (1979); McChesney & Muris, *The Effects of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503 (1979); Cady, *Restricted Advertising and Competition: The Case of Retail Drugs* (1976).

standard, in accord with powers granted by the legislature to discipline dentists for "engaging in false, misleading, or deceptive advertising."⁶ The regulations provide further, however, that all practices in violation of advertising regulations "will be considered false, misleading or deceptive advertising."⁷ These proscribed practices include factual and subjective advertising representations that may benefit consumers.

In particular, the Board's regulations forbid subjective representations concerning dental services, equipment, or personnel; only "objectively verifiable representations" are permitted.⁸ Advertisers regularly use subjective representations to attract consumers' attention and communicate messages more effectively. A statement that straightening teeth will improve appearance, although not misleading, may be difficult to verify objectively. Such representations are not inherently deceptive. A prohibition of nondeceptive subjective claims may reduce the effectiveness of advertising and lower its frequency, thereby increasing costs for consumers.

In fact, consumers may benefit from the kinds of comparative statements that the Board's regulation prohibits. Some consumers may want to know, for example, which dentist believes that he or she is the "kindest" or "most sympathetic." Such statements clearly are puffery yet may provide useful information to consumers on the elements of a practice that a dentist considers most important. The existing prohibition of false, misleading, or deceptive advertising seems adequate to address harmful subjective representations without limiting nondeceptive advertisements.

The Board's rules also limit the manner in which dentists may inform the public about the particular services they offer. The regulations provide that, in certain circumstances, an advertisement that specifies areas of dentistry practiced or that includes a statement that the dentist specializes in or limits his or her practice to particular areas, must include the following statement: "Listing of the above area(s) of practice does (do) not indicate any certification of expertise therein."⁹ The statement must be included if either: (1) the area of dentistry is not one of the eight areas of dental practice that have been recognized by the American Dental Association as specialties; or (2) the advertised area is an ADA-recognized specialty for which the dentist has not successfully completed a specialty training program approved by the ADA's Commission on Dental Accreditation. While we believe that the rule probably is intended to protect consumers from deception, we think it may be overly broad and, therefore, may deprive the public of valuable information.

Affirmative disclosure requirements can sometimes be useful in addressing problems of deception. Such requirements must be used with caution, however,

⁶ Pa. Stat. Ann. tit. 63, § 123.1(a)(10).

⁷ 49 Pa. Code § 33.31(l).

⁸ 49 Pa. Code § 33.31(b).

⁹ 49 Pa. Code § 33.31(d).

because they typically impose costs on advertisers. They also may impose costs on consumers by suppressing information about the types of services offered by a dentist, which prospective patients well might find useful. The required disclaimer may convey to consumers a negative connotation which may be undeserved. The disclosure requirement's effects may be particularly significant in their relation to the many aspects of dental practice that are not ADA-recognized specialty areas. We believe that the state's interest in protecting consumers from misleading claims regarding a dentist's qualifications may be better served by a rule more narrowly focused on deceptive claims than are the disclosure provisions currently in effect.

Board regulations inadvertently also may restrict the services provided by dentists who use fictitious names for their practices. The rules require that advertisements by dentists who use fictitious names for their dental facilities must contain the name of a licensed dentist associated with the facility.¹⁰ We can understand a consumer's interest in being informed of the name of a dentist in addition to the fictitious name. We do not understand, however, what purpose the Board intends to serve through its additional requirement in that provision that the dentist identified in the advertisement indicate any ADA-recognized specialty in which certification has been received. ADA rules provide that a dentist who advertises a specialty must practice exclusively in that specialty.¹¹ Requiring a qualified dentist to indicate a specialty in advertisements may force specialists to limit their practices to their areas of recognized expertise even when they would prefer to offer more general services.

III. SIGN RESTRICTIONS.

Board rules limit the size, position, content, and number of signs maintained by a dentist and restrict the use of lights on the signs.¹² These regulations may adversely affect the dissemination of truthful information, yet do not appear to offer offsetting benefits.

The most significant limitation states that a sign maintained by a licensee may contain only the licensee's name, title, and office hours. This requirement may restrict unduly the use of signs advertising services and specialties, and

¹⁰ 49 Pa. Code § 33.22(b)(2).

¹¹ American Dental Association Principles of Ethics and Code of Professional Conduct, Code § 5-C.

¹² 49 Pa. Code § 33.32. These restrictions may be obsolete. The rules were not amended to comply with later statutory and regulatory changes. Subsection (a) is based expressly on a law that we understand is no longer in existence, and other provisions seem to be in conflict with later amendments to other regulations. For example, § 33.22(b) specifically allows the use of fictitious names, yet § 33.32(b) appears to prohibit dentists from placing such a name on a sign.

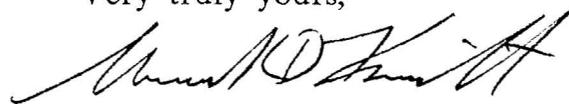
may prohibit the advertisement of a trade name. Restrictions on the size of signs may make it difficult to read them from a reasonable distance or while driving past a building. Permitting the lighting of signs only when a practice is open for business seems to inhibit the advertising message provided by such signs. A practitioner advertising through signs presumably wants to make the practice known even when closed. Under current rules, though, a sign can be of only limited benefit during evening and night hours.

IV. CONCLUSION.

The elimination or amendment of the Board's restrictions governing advertisements and signs could enhance the dissemination of truthful information to the public. Consumers would benefit through improved information on which to make choices, through lower search costs, and through lower dental prices created by the increased competition resulting from the freer flow of information.

We appreciate the opportunity to provide our views on the Board's regulations. We have referred to several studies and other materials. We will provide copies if requested, and any other further assistance that would be helpful in your analysis.

Very truly yours,



Mark D. Kindt
Director
Cleveland Regional Office