CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance." CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. *See* ID at 69-71.

IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for respondent 68-69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "'contract,

combination . . . or conspiracy' between separate entities." *Copperweld*, 467 U.S. at 768 (emphasis in original).[5] In Copperweld, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for Section 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors. Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, Antitrust Law ¶ 1477, p. 343 (1986); *see Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with

[5] Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, *see infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

an agreement among competitors." Similarly, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) ("*NCAA*"), expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 FTC at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Brief for respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). *See also Monsanto Co. v. Spray-Rite Serv. Corp*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 FTC at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. *See* CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, *see, e.g.*, CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, *see, e.g.*, CX 843-B, CX 585-A. *See* generally IDF 168-82.

CDA restricts nonprice advertising as well. *See* generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," *see, e.g.*, CX 1083-A; CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, *see, e.g.*, CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, *see, e.g.*, CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, *see* CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. *See, e.g.*, CX 1115-A; CX 1167-A.[6]

[6] Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A,

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

V. LEGALITY OF RESTRAINTS ON TRADE

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy*

CX 780 B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Parto Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameddin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, *see, e.g.*, *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). *See* generally, *AMA*, 94 FTC at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. *See* generally, R. McAuliffe, Advertising, Competition, and Public Policy (1987); P. Nelson, Advertising as Information, 82 Journal of Pol. Econ. 729 (1974); J. Langenfeld and J. Morris, Analyzing Agreements among Competitors, 1991 Antitrust Bulletin 651, 667 and n.21; C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in AMA that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish

their anticompetitive quality." 94 FTC at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); *see also id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. *See, e.g., Association of Independent Dentists,* 100 FTC 518 (1982); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se*, or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. *See NCAA*, 468 U.S. at 104; *Professional Engineers*, 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,

the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See Indiana Federation of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, *see United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, *see, e.g., Northwest Wholesale Stationers, supra. See also Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of

competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). *See also Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 & n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E. Areeda, VII Antitrust Law ¶ 1508, p.408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. *See, e.g., FTC v. Superior Court Trial Lawyers, supra; Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (*per curiam*).[7] We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

[7] Commissioner Starek notes in his concurrence that Massachusetts Board of Optometry "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" Post, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 FTC at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

A. Per Se Illegality -- Restraints on Price Advertising

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, *see e.g.*, *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in which it is achieved. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, Section 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

> "3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.
>
> "4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX 1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular

fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list all of the following":

(1) "[t]he dollar amount of the nondiscounted fee,"
(2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
(3) "[t]he length of time, if any, that the discount will be offered,"
(4) "[v]erifiable fees", and
(5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." *See* CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. *See* IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist

lacked a reasonable basis for the fee representations made. *See also* T. 361-78 (Dr. Miley).[8]

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "'[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive,'" *Morales*, 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. *See, e.g.*, Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything ... you would have to be a little flexible and ... not ... require that ... every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. *See* CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. *See* CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

---

[8] *See* FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1984), (appended to *Thompson Medical Co., Inc.*) (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). *Cf. infra* note 25.

2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*. That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in Socony-Vacuum, *supra*, the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano*, 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in AMA, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 FTC at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price

of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying Parke Davis, the District Court in Seagram expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p.81,275. Finally, the Seventh Circuit confirmed the view that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).[9]

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in Illinois Corporate Travel, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

[9] In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).