

COPY



Federal Trade Commission

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COMMISSION AUTHORIZED

May 3, 1988

Dr. Robert Rector
President, Montana Board of Dentistry
c/o Department of Commerce
State of Montana
1424 9th Avenue
Helena, MT 59620-0407

Dear Dr. Rector:

The staff of the Federal Trade Commission is pleased to respond to your request for comments on the rules of the Board of Dentistry.¹ We understand that the Board is undertaking a comprehensive review of its rules in connection with the consolidation of the Boards of Dentistry and Denturity. This kind of regulatory review can be extremely valuable in identifying provisions that may not be needed to protect the public. As we discuss below, we believe that several of the Board's rules may unnecessarily limit the ability of dentists to disseminate truthful, nondeceptive information about the services they offer, and thus may injure consumers of those services.

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 or deceptive acts or practices and unfair methods of competition in or affecting commerce. Under its statutory mandate, the Commission encourages 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 public and private restrictions on the business practices of dentists, optometrists, lawyers, physicians, and other state-licensed professionals. Our goal is to identify restrictions that impede competition and increase costs, without providing countervailing benefits to consumers.

¹ These comments represent the views of the Commission's Bureaus of Competition, Consumer Protection, and Economics, and of its Denver Regional Office, and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized the submission of these comments.

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 professionals to engage in truthful, nondeceptive advertising.² Studies indicate that where truthful advertising is permitted, prices for professional goods and services are lower than where advertising is restricted or prohibited.³ Studies also indicate that removing restrictions on advertising does not decrease the quality of services available.⁴ We have examined various justifications that have been offered for restrictions on advertising and have

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 advertising 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 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); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on price advertising by pharmacists invalid).

³ Schroeter, Smith & Cox, Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 J. Indus. Econ. 49 (1987); 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); Feldman & Begun, Does Advertising of Prices Reduce the Mean and Variance of Prices, 18 Econ. Inquiry 487 (1980); Benham & 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).

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

concluded, as the courts have, that these reasons do not justify restrictions on truthful, nondeceptive advertising. 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 may contribute to an increase in prices and reduction of consumer welfare.

THE BOARD'S REGULATIONS

We have reviewed the Board's "Interpretative Advertising Rules" and its "Rules of Professional Conduct." As we discuss below, we believe some of these rules appear unnecessarily to prevent dentists from communicating truthful, nondeceptive information to the public.

1. Interpretative Advertising Rules

The Board's "Rules of Professional Conduct" provide that the overriding standard for judging advertising shall be whether it is "false or misleading in any material respect," (8.16.716 & 721(a)). The "Interpretative Rules for Advertising" are apparently the Board's effort to explain the meaning of this standard in the context of particular kinds of dental advertising. Although guidelines such as these interpretative rules can be helpful, we have some concerns about these particular interpretative rules. Before turning to specific provisions, we have one general observation.

We recommend that the Board proceed carefully in evaluating the likelihood of deception in particular contexts. Deceptive advertising injures consumers and distorts the competitive process. At the same time, overly expansive definitions of deception can also harm the public by limiting the availability of information about the nature, cost, and quality of professional services. Both law and sound public policy weigh in favor of letting advertising flow freely unless it is inherently deceptive or evidence shows that it has been deceptive in practice. See In re R.M.J., 455 U.S. 191 (1982).

Our comments on specific interpretative rules fall into three categories: price advertising, quality claims, and solicitation.

a. Price advertising

Regulation 8.16.503 provides that fees may be advertised in the following three situations:

- (1) a fee for an initial consultation,
- (2) a set fee for a precisely described service, provided that the fee is fixed and is not tied to purchase of other services, and

- (3) a range of fees for precisely described services, provided that (a) all relevant variables and considerations are disclosed, (b) the minimum fee in the range is in fact charged in a "substantial proportion" of cases, and (c) the services advertised are not tied to the purchase of other services.

All other fee advertising is presumed to be misleading. Individuals who wish to use other forms of price advertising must bear the burden of establishing that their advertisements do not tend to mislead.

Price advertising, by informing the public about the availability of price alternatives, places pressure on sellers to reduce prices and instills cost consciousness in both consumers and providers. Restraints on price advertising should be narrowly tailored to avoid unnecessarily suppressing this important mechanism. The Board's rule, however, may operate to discourage some price advertising. By creating a presumption that price advertising is misleading in all but the three situations set forth, dentists may be inhibited from price advertising regardless of the nondeceptive quality of the information presented. Further, requiring the disclosure of "all relevant variables and considerations" when advertising a range of fees, as opposed to only those variables necessary to prevent deception to the public, may discourage range of fee advertising due to the fear of unintentionally leaving out a variable that the Board might deem "relevant," and due to the potential cost of complying with this expansive disclosure requirement.

For these reasons, the Board may wish to eliminate the presumption that price advertising other than in the forms prescribed by the Board is misleading. In addition, the Board might consider limiting the disclosures required for range of fee advertising to those without which the ad would be deceptive.

Regulation 8.16.505(3) prohibits use of statistical data to "imply low prices." Statistical data relating to price could be extremely useful to consumers. For instance, statistics supporting the claim that a certain dentist's prices are consistently lower than other dentists in the area would no doubt be of interest to consumers. While the potential for deception exists in this, as in virtually all forms of advertising, statistical information is not inherently deceptive, and a total ban on the use of statistics in fee advertising is likely to deprive consumers of potentially valuable information.

b. Quality claims

The interpretative rules contain several restraints on advertising claims bearing on the quality of services offered, including restrictions on announcing areas of special expertise, and restrictions on the use of statistical data, testimonials, superiority claims, and offers of guarantees.

Regulation 8.16.504 restricts claims of specialization to those dentists who have met the educational requirements and standards of the American Dental Association. Dentists not meeting those criteria may announce that they offer services in any of several specified areas, but may not advertise the fact that they limit their practice to any particular area(s), nor may they "imply" that they are "specialists". Dentists not meeting the criteria for specialty announcement may advertise services in special areas only by use of the phrase, "general dentistry including ..." apparently without regard to whether they offer the full range of general dental services. Further, this regulation states that advertisement of certain "unapproved" specialties⁵ will be presumed to be misleading.

We believe it is important that a general dentist with expertise or experience in specific areas be allowed to communicate that fact to the public, without using the phrase "general dentistry including..." or obtaining prior approval. 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. A prohibition of deceptive specialization claims would leave dentists free to disseminate truthful and valuable information 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.

Regulation 8.16.505(1) limits the type of "personal information" that can be included in dentists' advertising to that which "reasonably would assist a consumer in the selection of a dentist." Such a restraint could injure consumers by preventing dentists from including material in advertising that serves to attract the consumer's attention, and thereby makes the provision of information through advertising more effective.

Regulation 8.16.505(3) prohibits the use of statistical data or past performance to imply expertise, future success, or customer satisfaction. However, statistical data can be quite useful to consumers. Incomplete or distorted data that misleads consumers could, of course, be prohibited, but the Board's existing regulation extends to the provision of valuable information that is not inherently likely to deceive consumers.

Regulation 8.16.505(3) and Regulation 8.16.506 prohibit the use of testimonials or endorsements by the dentist's patients, or patients of any other dentist. However, these techniques may

⁵ These "unapproved" specialties are: cosmetic dentistry, holistic dentistry, restorative dentistry, and craniomandibular orthopedics. A practitioner who wants to advertise an "unapproved" specialty must seek prior Board approval.

convey valuable information to consumers, and can help to enhance the effectiveness of advertising. As with the use of illustrations in advertising, which the Supreme Court considered in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985), testimonials can serve "important communicative functions" through their potential to attract the attention of the audience to the advertised message. A total ban on testimonials, without regard to whether they are likely to mislead consumers, is overbroad.

Regulation 8.16.506 prohibits claims of superiority. At a minimum, a prohibition of advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting consumers and an important competitive force. Further, by preventing a dentist from comparing the attributes of his or her services to those of his or her competitors, such restrictions may reduce the incentive for dentists to improve or to offer different products, services, or prices.

Regulation 8.16.506(3) states that dentists should not use any "guarantee, warranty, certification, [or] assurance" with respect to claims of quality, length of life, or usefulness of any dental appliance. This regulation could prohibit "satisfaction" guarantees that offer refunds to consumers who are dissatisfied with service, and appears broader than necessary to prevent deception.

Finally, Regulation 8.16.506 also provides that dentists should not use any subjective terminology, such as "gentle dentistry", and states that representations regarding "painlessness, degree of pain, or relief from pain" are presumed to be misleading. We know of no basis for concluding that such claims are likely to mislead consumers. Because fear of pain may be a factor in deterring some members of the public from seeking dental services, truthful information about pain may serve an extremely valuable function.

c. Solicitation

Regulation 8.16.509 apparently prohibits in-person or telephone solicitations of consumers by an agent acting on behalf of a dentist and explicitly includes within this prohibition the dissemination of business cards and educational material at dental hygiene lectures unless these materials are requested by the person receiving them.

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). Indeed, Montana seems to recognize the possible benefits of solicitation in that this regulation restricts only the activities of agents, and not solicitation by dentists themselves.

By communicating useful information, agents may help consumers in their selection of a dentist. Further, use of agents to undertake such contacts can permit the dentist to concentrate on the delivery of professional services.

If there is some reason to believe that agents may be inclined towards deception, overreaching or undue influence when soliciting on behalf of dentists, we recommend tailoring the restriction to address the specific problem presented, as opposed to establishing an outright ban on such activity. For instance, false or deceptive solicitation may appropriately be prohibited. In addition, in-person solicitation that results in undue influence may be banned as well. See Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2nd Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). 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. The Board may wish to adopt this standard, which protects consumers from harm while allowing them to receive information about available dental goods and services.

2. Rules of Professional Conduct

The Board has also promulgated a set of "Rules of Professional Conduct" (sections 8.16.701 through 8.16.722). We are currently in the process of evaluating issues that could have a bearing on these rules and, therefore, must defer any comments on them until a later date. At your request, however, we would be happy to submit our comments on these provisions to you when our evaluation is complete.

CONCLUSION

The Board may wish to modify its rules to take into account the concerns discussed above. If the Board would like us to review any proposed changes in these rules or to offer our views on its Rules of Professional Conduct when we are able to do so, we would be pleased to comply. We also thank the Board for its willingness

to consider our comments. Please let us know if we can be of further assistance.

Sincerely yours,

A handwritten signature in cursive script that reads "Claude C. Wild III". The signature is fluid and includes a small flourish at the end.

Claude C. Wild III
Regional Director