COMMISSION
APPROVED
86-67

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-5509

STANLEY N. PARKER, D.M.D.,

Plaintiff-Appellee,

v.

COMMONWEALTH OF KENTUCKY,
KENTUCKY BOARD OF DENTISTRY, et al.,

Defendants-Appellants.

CERTIFICATE OF SERVICE

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AUGUST 18, 1986

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Appeal from a Judgment of the
United States District Court,
Eastern District of Kentucky,
File No. 85-289

BRIEF FOR THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE ON BEHALF OF THE PLAINTIFF-APPELLEE

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**BRIEF FOR THE FEDERAL TRADE COMMISSION
AS AMICUS CURIAE ON BEHALF
OF THE PLAINTIFF-APPELLEE**

STATEMENT OF THE ISSUE

Whether the Kentucky Board of Dentistry may prohibit the use of such terms as "orthodontics," "braces," and "brackets" in an advertisement by a general dentist, when the dentist is legally and professionally qualified to perform such services and when the advertisement identifies the general nature of the dentist's practice.

INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission ("FTC" or "Commission") is appearing as **amicus curiae** in this matter in order to call the court's attention to the adverse effects on competition and consumer welfare that will result from restrictions on truthful, non-

deceptive advertising by dentists. 1/ The FTC has joint responsibility with the Department of Justice for enforcement of the federal antitrust laws, and the FTC is the federal agency primarily responsible for preventing consumer deception through advertising. Through law enforcement activities 2/ and through studies and appearances before federal and state agencies, 3/ the Commission has developed substantial expertise in issues relating to professional advertising. Therefore, the FTC has an interest in the resolution of the issue presented in this case.

1/ The Federal Trade Commission is empowered under the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

2/ E.g., American Medical Ass'n, 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); Montana Board of Optometrists, __ F.T.C. __, Dkt. No. C-3161 (consent order entered on Aug. 29, 1985); Louisiana State Board of Dentistry, __ F.T.C. __, Dkt. No. 9188 (consent order entered on Aug. 26, 1985); Michigan Ass'n of Osteopathic Physicians & Surgeons, Inc., 102 F.T.C. 1092 (consent order entered on July 26, 1983); American Dental Ass'n, 94 F.T.C. 403 (consent order entered on Sept. 6, 1979), decision and order modified, 100 F.T.C. 448 (1982) and 101 F.T.C. 34 (1983).

3/ The Commission staff has studied in depth the effects of restrictions on professional advertising. Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); 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). In addition, the Commission has presented its views regarding restrictions on truthful, non-deceptive advertising in the Brief of the Federal Trade Commission as Amicus Curiae on Behalf of the Defendants and Counterclaimants, Committee on Professional Ethics v. Humphrey, 355 N.W.2d 565 (Iowa 1984), and has authorized staff comments to numerous state regulatory boards on this subject, including: Comments of the Bureaus of Competition, Consumer Protection, and Economics, Federal Trade Commission, to the Virginia State Board of Dentistry (April 3, 1986); Comments of the Bureaus of Competition, Consumer Protection, and Economics, Federal Trade Commission, to the Minnesota Board of Dentistry (Sept. 23, 1985); and Comments of the Bureaus of Competition, Consumer Protection, and Economics, Federal Trade Commission, to the New Jersey Board of Dentistry (March 19, 1985). See also Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2279-80 (1985).

STATEMENT OF THE CASE

Stanley N. Parker, the plaintiff-appellee, is duly licensed under the laws of Kentucky to practice general dentistry. Dr. Parker is legally and professionally qualified to perform orthodontic procedures. Approximately 50 percent of Dr. Parker's general practice consists of orthodontics (Stipulation ¶ 14), 4/ and he has completed more than two hundred hours of continuing education in the field of orthodontics. (Stipulation ¶ 3.) The Kentucky Board of Dentistry ("the Board"), the defendant-appellant, recognizes seven branches of dentistry, including orthodontia, as suitable for licensing as specialties. (Stipulation ¶ 10.) When the Board licenses dentists as specialists, it requires that they limit their practices to their fields of specialty. General practitioners, however, may perform dental services in any or all of these branches of dentistry. (Stipulation ¶¶ 17, 18.)

In June 1985, Dr. Parker placed an advertisement (Exhibit A to Stipulations) in the 1985 Ashland, Kentucky Yellow Pages under the general heading of "Dentists." (Stipulation ¶ 8.) The Board brought a disciplinary action against Dr. Parker based solely on his use of the terms "orthodontics," "braces," and "brackets" in his telephone directory

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4/ The following abbreviations are used in this Brief:

"Br."	Brief for Defendants-Appellants.
"Op."	Memorandum Opinion of the District Court, Eastern District of Kentucky, April 18, 1986.
"Order"	Order of the District Court, Eastern District of Kentucky, April 18, 1986.
"Stipulation"	Stipulations of Fact Submitted by the Parties, March 28, 1986.

listing (Stipulation ¶ 19), contending that the use of such terms constituted "unprofessional conduct" as set forth in KRS 313.140 because the terms necessarily imply that Dr. Parker is especially qualified in the field of orthodontics. Stipulation ¶ 20.)

Dr. Parker brought suit in the United States District Court for the Eastern District of Kentucky to enjoin the disciplinary action. The district court granted Dr. Parker's summary judgment motion, holding that Dr. Parker has a First Amendment right to advise the public of the nature and availability of the dental services he offers. (Order.) The Board has appealed from the district court's Order.

SUMMARY OF ARGUMENT

The judgment of the district court should be affirmed. There are three reasons for this conclusion. First, Dr. Parker's listing of his areas of practice, a form of commercial speech, was not misleading and, therefore, may not be prohibited by the state. Second, even if it might be possible in theory to list areas of practice in such a way as to be potentially misleading, this particular advertisement provides additional information sufficient to prevent that result. Third, there are strong public policy reasons for supporting truthful advertising by professionals. Unnecessary restrictions on such advertising will hinder competition as well as the flow of useful consumer information.

ARGUMENT

I. DR. PARKER'S TRUTHFUL ADVERTISEMENT LISTING HIS AREAS OF PRACTICE IS NOT MISLEADING.

The Supreme Court has held that non-deceptive professional advertising such as Dr. Parker's is protected commercial speech under the First Amendment which may not be

prohibited. In re R.M.J., 455 U.S. 191 (1982); Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The public has an interest in receiving advertising by professionals, and in learning about the availability and cost of their services:

> [C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. **See FTC v. Procter & Gamble Co.**, 386 U.S. 568, 603-604, 18 L. Ed. 2d 303, 87 S. Ct. 1224 (1967) (Harlan, J., concurring).

Bates, 433 U.S. at 364. Commercial speech may be banned if it actually misleads consumers or is likely to do so. R.M.J., 455 U.S. at 203. Commercial speech that is not misleading may be regulated by the state only when it directly advances a substantial state interest and then only when it interferes with the speech to the extent necessary to advance that interest. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980). 5/ The Supreme Court has repeatedly held that the listing of areas of practice by professionals in advertisements is not misleading and thus cannot be summarily banned by the state. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2276-77 n.9 (1985); R.M.J., 455 U.S. at 203, 205; Bates, 433 U.S. at 375-77.

5/ See also Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 54 U.S.L.W. 4956 (U.S. July 1, 1986).

In this case, we assume that the Board sought to limit the advertisement on the theory that it was either deceptive or potentially misleading, because the Board argues that Dr. Parker's advertisement "necessarily implied" that he was "especially qualified" to provide orthodontia services, and because the Board failed to identify any other substantial state interest to justify its regulation.

In this case, there was no evidence to show that the terms Dr. Parker used to explain the services he provides were misleading, nor that they were so when viewed in the context of his advertisement. 6/ As a starting point, every statement in the advertisement was perfectly true. Dr. Parker does practice orthodontics and does provide the enumerated services, as he is licensed to do. If a consumer infers from the listing of orthodontic services that Dr. Parker is competent to perform such services, this certainly is not misleading.

The district court found that Dr. Parker's advertisement clearly identified the general nature of his practice by use of the term "complete dental care." (Op. 4.) In fact, the advertisement listed other services that Dr. Parker offers and performs, including "cosmetic dentistry," "full mouth reconstruction," and "hidden partials and bridges." Under Kentucky law, a licensed specialist must limit his or her practice to the area of specialization. (Stipulation ¶ 17.) By placing his Yellow Pages listing under the category of "Dentists," rather than "Dentists-Orthodontists," Dr. Parker alerted consumers that he is a general practitioner rather than a certified specialist in the field of orthodontia.

Although Dr. Parker made no affirmative claims of special expertise, the Board argues nonetheless that he has held himself out as a specialist. (Br. at 4.) 7/

6/ Contrary to the Board's assertion that the plaintiff must show that the Board's restriction is unconstitutional (Br. at 5), the Supreme Court has clearly stated that the party seeking to uphold a restriction on commercial speech bears the burden of justifying it. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20 (1983).

7/ To the extent the Board argues that KRS 333.410, which prohibits, inter alia, "inserting the name of the specialty" and "using other phrases customarily used by qualified specialists," is a prophylactic restraint without regard to whether the terms themselves are misleading (Br. at 4), the statute is clearly unconstitutional on its face. Zauderer, 105 S. Ct. at 2278-80; R.M.J., 455 U.S. at 203.

However, the Supreme Court stated in Zauderer that absent specific claims of special expertise, the state cannot prevent a professional from presenting an accurate description of his services merely because of the possibility that some consumers might infer that he has some expertise. Specifically, the Court said:

> The absence from [the] advertisement of any claims of expertise or promises relating to the quality of appellant's services renders the Ohio Supreme Court's statement that "an allowable restriction for lawyer advertising is that of asserted expertise" beside the point .... Although our decisions have left open the possibility that states may prevent attorneys from making nonverifiable claims regarding the quality of their services (citation omitted), they do not permit a state to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

105 S. Ct. at 2276 n.9 (emphasis added).

The Board, like the Federal Trade Commission, need not find that consumers were actually misled before it can take corrective steps. However, the standards for determining that a practice is deceptive should be objective and clearly articulated. In Zauderer, 105 S. Ct. at 2279-80, the Supreme Court cited the efforts of the FTC in distinguishing deceptive from non-deceptive advertising as an example of the type of analysis the Court will require in the regulation of professional advertising.

The FTC recently synthesized decades of case law on deception into a standard composed of three elements:

> The Commission will find an act or practice deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.

Cliffdale Associates, Inc., 103 F.T.C. 110, 164-65 (1984). In applying this standard, the Commission considers available empirical evidence on the meaning of an advertisement, and takes into account whether the claims are targeted to a particularly vulnerable audience. There is no empirical evidence in this case to support the allegation that Dr. Parker's 1985 Yellow Pages listing was deceptive, nor is the Board's unaided interpretation of the listing a reasonable one.

II. EVEN IF SOME ADVERTISEMENTS FOR AREAS OF PRACTICE MAY BE POTENTIALLY MISLEADING, THE ADVERTISEMENT HERE CONTAINS SUFFICIENT ADDITIONAL INFORMATION TO AVOID THE PROBLEM.

If an advertisement is potentially misleading, of course, it can be regulated by the state. There are limits to this, however. "[R]estrictions upon such advertising may be no broader than reasonably necessary to prevent deception." R.M.J., 455 U.S. at 203.

Specifically, an absolute ban on a professional's ability to communicate the areas of practice offered is impermissible, as the Court held in R.M.J.:

> [T]he state may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive . . .

455 U.S. 191 at 203 (emphasis added). When an advertisement is only potentially misleading, in the sense that people might or might not receive a mistaken impression from it, tempered remedies are called for. The mere chance that a viewer might conceivably be misled or confused does not support a blanket prohibition on the use of terms such as "orthodontics," "brackets," and "braces" under the criteria set forth in R.M.J. The Supreme Court has stated the "preferred remedy is more disclosure, rather than less." Bates, 433 U.S. at 375.

In this case, the principle favoring disclosure of more information, rather than less, has already been accomplished. Dr. Parker has provided ample information for a reasonable consumer to conclude that he is a licensed general practitioner, rather than a certified orthodontic specialist. He identified the general nature of his practice and listed services provided in various branches of dentistry. Such additional information is the type of remedy the Supreme Court envisioned as curing potentially misleading statements. R.M.J., 455 U.S. at 203.

III. THERE ARE SOUND REASONS OF ECONOMICS AND POLICY FOR ENCOURAGING VIGOROUS COMMERCIAL COMPETITION AMONG PROFESSIONALS.

Competition is beneficial to consumers in general. It is our national policy. Competition among professionals is no exception to this rule. It is beneficial to all those consumers who must use the services of a professional. Since virtually everyone uses the services of doctors, lawyers, dentists, accountants, and other professionals, virtually everyone will benefit from a sound economic policy promoting more vigorous competition.

This policy underlies many of the legal decisions involving professional advertising. Advertising provides information to the buying public and, in this role, is indispensable to the efficient functioning of a competitive economy. It provides the marketplace with "information as to who is producing and selling what product, for what reason, and at what price." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976). "Broad bans on advertising and solicitation are inconsistent with the nation's public policy." American Medical Association, 94 F.T.C. at 1011. Advertising by professionals in the health care market increases competition by providing easier entry to new providers and allowing consumers to more efficiently locate the lowest-cost seller of acceptable ability or quality. Id. at 1005. "In

short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." (Citation omitted.) Bates, 433 U.S. at 364.

A great body of empirical literature suggests that advertising is a fundamental catalyst for other forms of competition. It reduces consumer search costs by making comparative information about professionals more readily available. This in turn encourages consumers to evaluate and compare the various providers more thoroughly. Providers are then forced to compete more actively, and prices may decline and the range of available services may increase. Many studies show that competition in professional services is enhanced by advertising. 8/ Conversely, unnecessary restrictions make advertising less effective. As advertising becomes less cost-effective, professionals — like other business people — will be less likely to use it. 9/ The amount of useful information available to consumers will then begin to

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8/ The FTC has released the results of an empirical study of the effects of advertising restrictions on the prices of legal services. Cleveland Regional Office and Bureau of Economics, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984). The findings of this study are consistent with earlier studies of the effects of product and service advertising, which demonstrate that the provision of information through advertising frequently leads to increased competition and lower prices. See, e.g., Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. L. and Econ. 337 (1972); Benham & Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. L. and Econ. 421 (1975); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979); Steiner, Does Advertising Lower Consumer Prices?, 37 J. Marketing 19 (1973).

9/ See Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising at 125 (1984). In this study of professional advertising, FTC staff found that as restrictions on advertising by lawyers were removed, there was more attorney advertising in the market.

decline. Competition among providers is likely to slacken, and prices to consumers are likely to rise.

The Commission staff recently conducted two studies that are relevant to this issue. These studies found a strong relationship between advertising and consumer welfare in another health care profession. The data indicates that consumers benefit from fair, open, robust commercial competition among the providers of professional services, including competition through advertising.

The first study involved the fitting of conventional eyeglasses. It compared the price and quality of eye examinations in markets with different regulations governing business practices. 10/ It found that the average price of an eye examination and eyeglasses was 33 percent higher in the markets without advertising and chain optical firms than in the markets where these were present. The study provided evidence that advertising and commercial practice restrictions did not result in higher-quality eye care. The thoroughness of eye examinations, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and non-restrictive markets.

10/ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980). This study was designed and conducted with the help of the School of Optometry of the State University of New York, the Pennsylvania College of Optometry, and the chief optometrist of the Veterans Administration.

The second study involved the fitting of contact lenses. 11/ It concluded that, on average, "commercial" optometrists — that is, optometrists who were associated with chain optical firms or who advertised heavily — fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

Thus, both studies support the view that a restriction on truthful advertising is unlikely to benefit consumers. The theory underlying the Board's action here has wide implications. If successful in this case, the Board could effectively ban the listing of areas of practice in advertising by all general practitioners. For example, when a dentist advertises that he or she welcomes children as well as adult patients, the Board could attempt to ban such advertising under the rationale it advanced in this case — that the dentist is holding himself out as a pedodontic specialist. Virtually every service a general dentist provides fits into one of the branches of dentistry that the Board recognizes as an area of specialty. Therefore, the Board can argue that advertising of any specific service by a general dentist must be banned because such advertising states or implies that he or she is a specialist. Consumers should not be denied useful information that allows them to compare the quality and price of services provided by all legally qualified practitioners — general dentists as well as specialists.

11/ A Comparative Analysis of Cosmetic Lens Fitting by Ophthalmologists, Optometrists and Opticians, Report of the Staff of the Federal Trade Commission (1983). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry, and opticianry.

CONCLUSION

For the foregoing reasons, the Order of the district court should be affirmed.

Respectfully submitted,

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