

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

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**COMMISSION
APPROVED**

BUREAU OF
CONSUMER PROTECTION

February 14, 1985

E.E. Tuhy, O.D.
President
North Dakota State Board of Optometry
P.O. Box 220
Carrington, ND 58421

Dear Dr. Tuhy:

The Bureaus of Consumer Protection, Economics, and Competition¹ of the Federal Trade Commission are pleased to submit these comments respecting the North Dakota Board of Optometry's proposed amended Rules and Regulations, because the current rules and proposed amendments raise consumer protection and competition concerns. The Commission is empowered under 15 U.S.C. § 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce, and has joint responsibility with the Department of Justice for enforcement of the federal antitrust laws.

We strongly support your proposal to broaden the scope of permissible advertising by optometrists. As is described in Section III below, however, the proposed amendments retain several advertising and commercial practice restrictions that could unnecessarily discourage competition and harm consumers.

I. Interest and Expertise of the Federal Trade Commission

The Federal Trade Commission strives to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. The Commission's objective is to identify and seek the removal of restrictions that impede competition, increase costs or harm consumers without providing countervailing benefits.

For some time the Commission has been concerned about restrictions that limit the ability of professionals to engage in nondeceptive advertising and particular forms of commercial

¹ These comments represent the views of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission and do not necessarily represent the views of the Federal Trade Commission or any individual Commissioner. The Federal Trade Commission, however, has reviewed these comments and has voted to authorize their presentation.

practice. In its American Medical Association (AMA) opinion,² the Commission held that the AMA's ethical restrictions on physician advertising and employment and other contractual relationships violated Section 5 of the Federal Trade Commission Act. With regard to the AMA's advertising restrictions, the Commission stated that because of the integral role of advertising in the proper functioning of the market, the very nature of the restrictions at issue was "sufficient alone to establish their anticompetitive quality."³ Citing the United States Supreme Court's decisions in Bates v. State Bar of Arizona⁴ and Virginia Citizens Council v. Virginia State Board of Pharmacy⁵, the Commission recognized the importance of a free and competitive market to the health care field:

Nor can it be questioned that broad bans on advertising and soliciting are inconsistent with the nation's public policy. "Advertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of

² In re American Medical Association, 94 F.T.C. 701 (1979), aff'd sub nom. American Medical Ass'n v. FTC, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982).

³ 94 F.T.C. at 1005.

⁴ 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment to the United States Constitution, and according great importance to the role of advertising in the efficient functioning of the market for professional services).

⁵ 425 U.S. 748 (1976). The Court stated in reference to the advertising of pharmaceutical drugs:

Advertising, however tasteless and expensive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable. 425 U.S. at 765.

exchange" And "[i]t is a matter of public interest that [purchasers'] decisions, in the aggregate, be intelligent and well-informed." Apart from its economic function, commercial advertising may convey important information of general public interest. . . . On a more individual level, restraints on the advertising of medical services have a disproportionate effect on the poor, the sick and the aged. . . . Given the prevailing disparity of prices, information as to who is charging what "could mean the alleviation of physical pain or the enjoyment of basic necessities." (citations omitted)⁶.

The FTC's expertise in the area of professional advertising and commercial practice has been furthered by two studies issued by the Commission's Bureau of Economics and Consumer Protection. These studies provide evidence that restrictions on commercial practice by optometrists -- including restrictions on truthful advertising, business relationships between optometrists and non-optometrists, commercial locations, and trade name usage -- are, in fact, harmful to consumers. The first study,⁷ conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without advertising and commercial firms (i.e., chains or high volume, low cost providers) than in cities where advertising and commercial firms were present.⁸ The data also showed that the quality of vision care was not lower in cities where commercial firms and advertising were present. 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 both types of cities.

⁶ 94 F.T.C. at 1011.

⁷ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

⁸ The average price charged by optometrists in the cities without chains and advertising was 33.6% higher than in the cities with advertising and chains (\$94.46 versus \$70.72). Prices were approximately 17.9% higher as a function of the absence of chains; the remaining 15.7% price difference was attributed to the absence of advertising.

The second study compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.⁹ The study found that on average, optometrists who worked for commercial optical firms or advertised heavily fitted contact lenses at least as well as other fitters, but charged significantly lower prices.

These studies provide evidence that prices tend to be higher where restrictions on truthful advertising, business relationships between professionals and non-professionals, commercial locations, and trade name usage are found than where there are no such restrictions. There is no relationship between the quality of care in the market and the presence or absence of these restrictions.

Our experience in examining restrictions on health care professionals together with our review of other empirical data¹⁰ leads us to conclude that, generally, only advertising and trade names that are false or deceptive should be prohibited. Any more restrictive standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices. We would therefore recommend that the Board consider removing all currently existing trade name bans and advertising restrictions except those that employ a false or deceptive standard. Such action would give consumers access to more complete information about prices and other attributes of available optometric services, while at the same time protecting them from false or misleading claims. The greater availability of information would enable consumers to make more informed decisions about their optometric care.

⁹ Bureau of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983). This study was designed and conducted with the assistance of the American Academy of Ophthalmology, the American Optometric Association, and the Opticians' Association of America. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

¹⁰ Several empirical studies have confirmed the relationship between advertising and lower prices in markets for professional services. See, e.g., Bureau of Economics and Cleveland Regional Office, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising (1984); Muris & McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179; Benham & Benham, Regulating through the Professions: A Perspective on Information Control, 18 J. Law & Econ. 421 (1975); Benham, The Effect of Advertising on the Price of Eyeglasses, J. Law & Econ. 337 (1972).

II. Disadvantages and Costs of Existing Rule

While we recognize that the Board has proposed eliminating some of the restrictions in the existing rule, we are taking this opportunity to summarize our concerns respecting the existing rule's restrictive provisions. Although Rule 8 in its present form appears to raise constitutional issues,¹¹ we will confine our remarks to its anticompetitive effects and the resultant consumer harm. Rule 8 presently provides, among other things, that any printed advertising by an optometrist may include only specified statements or items. Advertising is now limited to disclosing the practitioner's name, title, address, telephone number(s) and office hours. The authorized size of newspaper advertisements is strictly regulated, as are the frequency and size of new office announcements. Regardless of its truthfulness or usefulness to a potential patient, any advertisement which does not come within these limitations is prohibited. Thus, for example, it is now a violation of the Rule for any optometrist to advertise fees, specialties and certifications, accepted health insurance plans, or even that his or her office has convenient parking facilities, or for a sole practitioner to publish a newspaper advertisement exceeding one column in width and one inch in height.

Other restrictions mandated by the present Rule include bans on external office signs containing information other than the practitioner's name and title; illuminated signs; street-level signs exceeding four inches in height; corridor door signs exceeding two inches in height; quotations of prices or discounts; references to "free examination," "moderate prices," "low prices," "guaranteed glasses," or "satisfaction guaranteed"; bold face telephone directory listings; and window displays of optometric products.

¹¹ See, e.g., In re R.M.J., 455 U.S. 191 (1982), holding that a Missouri Supreme Court rule restricting attorney advertising to ten permissible categories violated the First and Fourteenth Amendments because it was more restrictive "than reasonably necessary to further substantial [state] interests." The Supreme Court also said that "[a]lthough the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." Rule 8's present exclusive categorization of permissible advertising may, therefore, impose unconstitutional restrictions, i.e., restrictions that are broader than reasonably necessary to prevent deception. Accord, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (non-deceptive price advertising of routine legal services is constitutionally protected); Virginia Citizens Consumer Council v. Virginia State Board of Pharmacy, 425 U.S. 748 (1976) (state restrictions on price advertising of prescription drugs are unconstitutional).

These restrictions clearly deprive consumers of useful and desirable information. Because they render comparison shopping virtually impossible, the restrictions severely limit valuable competition among optometrists. In economic terms, the existing Rule 8 unnecessarily increases the "search costs" to optometric patients of identifying those practitioners who offer the price, quality and kind of care suited to the patients' specific needs and desires. Consequently, we support your decision to consider modifying the Rule.

III. Suggested Modifications to the Proposed Amendment

Although the proposed amendment to Rule 8 would go far toward increasing consumer welfare and market efficiency, several problematic restrictions remain.

First, the draft Rule creates several affirmative disclosure obligations. Affirmative disclosure requirements such as those contained in Rules 8(8)c.2(b)-(f) can have the effect of unnecessarily limiting consumer information by increasing advertising costs. Some disclosure requirements may discourage certain forms of advertising altogether. For example, under Rule 8(8)c.2(c), statements such as "All Single-Vision Eyeglasses, \$40 or Less" would require the impractical disclosure of the precise inventory or availability of each product covered by the advertisement. A similarly prohibitive burden is imposed by Rule 8(8)c.2(d)'s requirement that if an optometrist advertises "20% Off All Eyeglasses," the pre-discount price of every pair of eyeglasses the optometrist offers must be disclosed. This would effectively preclude all across the board discounts, including those to identified groups such as senior citizens. Since it would be impractical to state in an advertisement the regular prices and available quantities of all of the goods and services covered by such an offer, these rules would likely implicitly ban certain forms of truthful and valuable advertising and make other nondeceptive advertising more costly. Although affirmative disclosures may be justified in some instances, such requirements should be no broader than necessary to prevent deception of the public. We therefore believe the Board should re-examine the need for its proposed disclosure provisions.

Second, draft Rule 8(8)e. retains language that seems to ban all advertising of "free examinations." As the Commission has observed in its guidelines concerning the advertising of free products and services,¹² this kind of advertising is frequently used to attract new customers. Thus, offers of free examinations can be a valuable competitive tool. Although we support the Board's efforts to prohibit activities such as the deceptive use of gift offers, offers of free examinations are not inherently

¹² For a discussion of deceptive offers of "free" examinations or products, see the Federal Trade Commission's Guide Concerning Use of the Word "Free", 16 C.F.R. § 251.1 (1984).

deceptive. A total ban on such offers appears to be an overbroad restraint; therefore, we urge that the ban on advertising of free examinations be eliminated.

Third, draft Rules 8(8)a.(2) and (3) prohibit optometrists from maintaining "professional relationships" with persons or firms that advertise falsely or fraudulently. It is unclear whether these provisions would impose a duty on all licensed optometrists to refrain from dealing with any optometrists they believe are advertising deceptively, or whether it would require that they not deal with anyone whom the Board has found guilty of deceptive advertising. In either case, these provisions raise serious concerns. Under the former interpretation, the Board would effectively be requiring its licensees to punish suspected false advertisers -- by denying them referrals and other commercial relationships they may need to compete -- without any determination of wrongdoing. Under the latter interpretation, where the duty to refrain from dealing is limited to those actually found guilty by the Board, the proposed rule would still impose a severe sanction on the guilty party, in addition to any fines or limitations on practice the Board might impose, that may be far more punitive than the violation would warrant. Finally, these proposed provisions might serve to discourage optometrists from maintaining any professional relationship with any practitioner who advertises at all, however truthfully, because of a fear that their own licenses might be threatened if the advertiser's conduct were called into question.

Fourth, we are concerned about the potential impact of draft Rule 8(8)d's ban on guarantees of cures. The rule might be interpreted to prohibit optometrists from advertising satisfaction or money back guarantees. While we recognize the vulnerability of consumers to false and deceptive claims of curative results, we believe that a truthful communication of a satisfaction guarantee is beneficial to consumers. For example, an optometrist might advertise that he or she will refund any fees paid by a consumer who is dissatisfied with the service rendered. This would not necessarily constitute a guarantee of cure, but the rule might be interpreted to forbid such legitimate marketing efforts. We suggest that the rule be redrafted to make it clear that advertising such guarantees is not prohibited. Draft Rule 8(8)b.(1), which proscribes creating false, fraudulent or unjustified expectations of favorable results, should be sufficient to prohibit false or deceptive guarantees.

Finally, draft Rule 8(8)f. prohibits the practice of optometry under a trade name. Trade names -- such as "Seventh Avenue Optometric Clinic" or "Diamond Optical" -- can be virtually essential to the establishment of large group practices that are able to offer lower prices through economies of scale. Trade names are chosen because they are easy to remember and may also identify the location or other characteristics of a practice. Over time, a trade name may also come to be associated with a certain level of quality, service and price, thus

facilitating consumer search. Without convenient and enduring trade names, development of high-volume, low-price practices is hampered.

Proponents of commercial practice restrictions such as trade name bans claim that they are necessary to maintain a high level of quality in the professional services market. As we discussed in Section I above, however, restrictions on the business practices of professionals can reduce competition in health care markets by preventing the development of such innovative forms of professional practice as commercial optometric firms, which may be more efficient, provide comparable quality, and offer competition to traditional providers. The Commission recently issued a Notice of Proposed Rulemaking for a Proposed Ophthalmic Trade Regulation Rule that would prohibit, among other things, state-imposed bans upon trade name usage by optometrists.¹³ The Commission stated in its Notice that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety.¹⁴ Similarly, in the above-referenced American Medical Ass'n case,¹⁵ the Commission recognized that prohibitions that prevent health professionals from adopting more economically efficient business formats may violate the Federal Trade Commission Act. We recommend that the Board consider the AMA decision, the Commission's Proposed Rule, and the studies discussed in Section I above, and eliminate, or at least substantially cut back, draft Rule 8(8)f.'s trade name restrictions.

IV. Conclusion

In conclusion, we reiterate our strong support for amendment of Rule 8. It is our view that the benefits to the public from the adoption of the proposed amendment, modified in accordance with our comments above, are likely to be real and substantial. Such an amendment would permit the public access to the widest possible range of truthful information on the availability of optometric services. It would help to stimulate valuable competition among optometrists for optometric services and, in the process, improve the efficiency with which optometric goods

¹³ 50 Fed. Reg. 598 (1985). The Commission's proposed Rule also would prohibit total bans on employment or other relationships between optometrists and non-optometrists that are imposed either by statute or regulation. We note that the Board's draft Rules 2(6) and 8(7) contain restrictions on such relationships and seem to track §§ 43-13-22(7) and 43-13-28 of the North Dakota Century Code.

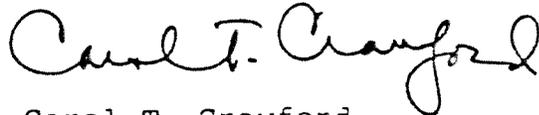
¹⁴ Id. at 599-600.

¹⁵ 94 F.T.C. at 1011-1018 (1978).

and services are delivered, while still protecting the public from false and deceptive advertising.

Thank you for your consideration of our comments on the proposed amendment. Please let us know if we can provide you with further information.

Sincerely,

A handwritten signature in cursive script that reads "Carol T. Crawford". The signature is written in black ink and is positioned above the typed name.

Carol T. Crawford
Director
Bureau of Consumer Protection