



BUREAU OF
CONSUMER PROTECTION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

COMMISSION
APPROVED

December 4, 1986

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David Garcia, Esquire
Office of the Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

Dear Mr. Garcia:

We are pleased to submit this letter in response to the New Mexico Board of Optometry's ("Board") request for public comments on its proposal to repeal or modify Board rules 5 and 6.¹ We understand that the Board is considering repeal of rule 5, which restricts the manner in which optometrists may advertise in the yellow pages of the telephone directory, and we endorse that proposal.² Since we believe that several other of the Board's rules have the potential to harm consumers by impeding competition among optometrists, we recommend that the Board consider repealing or amending those rules as well.

The Federal Trade 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. Pursuant to this statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others. The Commission's goal has been to identify and seek removal of restrictions that impede competition, increase costs, and harm consumers without providing significant countervailing benefits.

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

² We have no comments regarding rule 6, which relates to continuing education requirements.

I. ADVERTISING RESTRICTIONS

As a 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 nondeceptive advertising.³ Studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.⁴ Studies have also provided evidence that restrictions on advertising raise prices but do not increase the quality of goods and services.⁵ Therefore, to the extent that nondeceptive

³ 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 regulations. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, _____ U.S. _____, 105 S.Ct. 2265 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and 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); and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

⁴ 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); Benham and 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).

⁵ 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).

advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Commission has examined various justifications that have been offered for restrictions on advertising and has concluded that these arguments do not warrant restrictions on truthful, nondeceptive advertising. For this reason, only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices.

A. The Board is correct in repealing the content restrictions in rule 5.

We support the Board's proposal to repeal rule 5, which we believe imposes unnecessary restrictions on the ability of optometrists to advertise in the yellow pages of telephone directories. The rule presently states that the only information optometrists may publish in the yellow pages is their name, address, telephone number, and a specified description of their practice. They may not deviate from this format without prior Board approval. The Board's proposal to repeal this rule suggests that it recognizes the rule's potential to discourage the advertising of much useful information about the availability and the nature of optometric services. Optometrists in other states commonly provide additional information in their ads, such as their office hours and their willingness to accept insurance payments. Rule 5 precludes them from doing so in New Mexico, unless they take the extraordinary step of seeking prior Board approval for their ads. We think repeal of this rule will benefit consumers by allowing them access to valuable information that has not been available in the past.

B. The prohibition on all superiority claims should be repealed.

We also urge the Board to examine rule 11(H)'s prohibition on claims of professional superiority. Bans on superiority claims clearly lessen competition among sellers. At a minimum they restrict comparative advertising, which can be a highly effective means of informing and attracting customers. When sellers cannot truthfully compare the attributes of their services to those of their competitors, the incentive to improve or offer different products, services, or prices is likely to be reduced.

Bans on claims of superiority are likely to injure competition and consumers even more if they are interpreted to prohibit a wider range of factual statements. Virtually all statements about an optometrist's qualifications, experience, or performance can be considered to be implicit claims of superiority. Bans on all such claims would make it very difficult for optometrists to

provide consumers with truthful information about the differences between their services and those of their competitors.

We recognize that N.M. Stat. Ann. § 61-2-13.J(5) (1978) authorizes the Board to discipline optometrists who make claims of professional superiority whether or not they are true. To the extent that the Board is empowered to do so, however, we recommend that it construe the statute narrowly to permit optometrists to make truthful, nondeceptive statements about their professional qualifications and the goods and services they provide. We also urge the Board to recommend that the state legislature amend this statute to permit all truthful and nondeceptive claims of superiority.

C. The need for disclosure requirements in rules 13 through 16 should be evaluated.

Because truthful, nondeceptive advertisements are valuable to consumers, other restrictions contained in the Board rules should be reconsidered as well. We therefore recommend that the Board consider relaxing the disclosure obligations imposed by rules 13, 14, 15, and 16. These rules forbid price advertisements of ophthalmic products and services unless the ads contain additional information, much of which may not be particularly helpful to consumers, and some of which may actually obscure or otherwise detract from the message communicated in the ad.

Rule 14 requires, for example, that price advertisements for lenses disclose whether the lens is "single vision, bifocal, trifocal, occupational, industrial safety or aphakic." It further requires that ads for aphakic lenses describe the lens as "lenticular or full field, non aspheric, aspheric, hyper aspheric, or other single vision or multifocal, tinted or non-tinted." Rule 14 imposes additional affirmative disclosure obligations with respect to the advertising of frames, including for example, a requirement that the ad specify whether the frame is composed of plastic, wood or metal, and in the case of metal frames, the type of metal.

These requirements and others contained in rules 13, 15, and 16 embody disclosure obligations that, in our view are not necessary to prevent deception and that are likely to reduce the amount of price advertising. Because the cost of advertising is based on the length of the message, disclosure obligations increase the cost of the ads. Moreover, lengthy disclosures detract from the impact of the ads, particularly radio and television ads, by cluttering them with information that distorts the primary message of the ads and that overwhelms consumers with too much data to assimilate within a short period of time.

We recognize that, in general, the more information available to consumers the better prepared they are to make well-reasoned purchases. In the present context, however, we believe that disclosures such as those required by Board rules 13 through 16 are counterproductive. The Board should bear in mind that elimination of these requirements would not preclude consumers who desire such information from requesting it from the advertiser. Consequently, we recommend that the Board reconsider the need for the disclosure requirements in rules 13, 14, 15, and 16.⁶

II. COMMERCIAL PRACTICE RESTRICTIONS

We turn now to two Board rules that restrict the manner in which optometrists may do business. Although not specifically mentioned in the request for public comment, these rules are sufficiently important to be included in any general review of the competitive implications of the Board's rules. Rule 3 prohibits optometrists from locating on commercial premises, from using a "commercial business as a 'feeder' to his practice," and from accepting employment from a non-optometrist. Rule 11(G) prohibits optometrists from maintaining and using more than two offices.

These provisions unnecessarily hamper optometrists who wish to market their services in a cost-effective manner.⁷ For

⁶ We also call the Board's attention to rule 4, which requires that optometrists practice in a "professional manner and in conformity with the Code of Ethics of the American Optometric Association." We have several observations about this provision. First, advertising and competition were once considered by many as antithetical to "professionalism." Thus, optometrists might construe this provision to inhibit the use of innovative marketing practices that are legal and desirable. Second, although we are unaware of unlawful restrictions in the AOA's Code of Ethics, we caution the Board that insofar as it adopts the Code of Ethics of the AOA, it may be liable for any anticompetitive restrictions presently contained in the Code, or that are added in the future.

⁷ On January 4, 1985, the Commission proposed an Ophthalmic Practices Trade Regulation Rule ("Eyes II") that would prohibit state-imposed bans on employment or other business relationships between optometrists and non-optometrists, bans on locating in retail centers, bans on nondeceptive names, and bans on branch offices. The Commission stated in its Notice of Proposed Rule-making 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. See 50 Fed. Reg. 598, 599-600 (1985).

example, banning the practice of optometry on the premises of a commercial concern prevents optometrists from locating their practices inside retail drug or department stores. Such locations, because of their convenience and high number of walk-in customers, may permit an optometrist to service a high volume of patients. The rule thus has the effect of prohibiting the realization of scale economies that may be passed on to consumers in the form of lower prices. The rule may also increase costs for chain optical firms, particularly insofar as it forbids optometrists from working as employees of such firms. The higher costs may then decrease the number of chain firms, and again result in higher prices for consumers.

The Commission staff has recently published its report on the proposed rule. The staff concluded that "the rulemaking record demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the quality of care in the market." The staff also concluded that the restrictions provide no quality-related benefits to consumers. The staff therefore recommended that the Commission promulgate a trade regulation rule prohibiting these restrictions. Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986).

While the Presiding Officer also found that commercial practice restrictions raise prices to consumers and limit access to eyecare, he did not believe that the evidence cited in the two Commission studies, discussed infra at 7-8, provided an adequate basis upon which conclusions about the quality of care issue could be drawn. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986).

In a case challenging various ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution, and from entering into partnerships or similar relationships with non-physicians, unreasonably restrained competition and thereby violated the antitrust laws. 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 Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

Similarly, the rule prohibiting optometrists from practicing in more than two offices may harm consumers in a number of ways. First, it may unduly deter the establishment of high-volume practices that can realize significant cost savings, which can in turn result in lower prices for consumers. Second, it may reduce the number of optometrists available to practice in any particular area and thus may decrease or eliminate local competition. Third, it may prevent optometrists from splitting their time among a number of locations, no one of which has a sufficient volume of patients to support a full-time optometrist. As a result, consumers in these areas may be deprived of local optometric care altogether. In short, this restriction seems to provide no benefits to consumers and should be eliminated.

Commercial practice restrictions are frequently defended on the grounds that they help to maintain a high level of quality in the professional services market. Proponents claim, for example, that employer-employee and other business relationships between professionals and non-professionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

The available evidence, however, including comprehensive survey evidence, contradicts these contentions. Two studies conducted by the staff of the Federal Trade Commission indicate that, rather than protecting consumers, restrictions on commercial optometric practice, including such restrictions as those at issue here, in fact harm consumers by increasing prices without providing any quality-related benefits.

The first study,⁸ conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses provided by optometrists in cities with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in cities without chains and advertising than in cities where advertising and chain optical firms were present. 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. Estimates based on further analysis of the study data showed that prices were 17.9% higher due to the absence of chains; the remaining price difference was attributable to the absence of advertising.

⁸ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

The study also provided evidence that commercial practice restrictions do not result in higher quality eye care. The thoroughness of eye exams, 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.

A second study⁹ of cosmetic contact lens fitting concluded that, on average, "commercial" optometrists -- that is, for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

Other evidence, including survey evidence, establishes that state restrictions on commercial practice actually decrease the quality of care in the market by decreasing the frequency with which consumers obtain care. As a result of the higher prices associated with the restrictions, consumers tend to purchase eyecare less frequently and may even forego care altogether.¹⁰

CONCLUSION

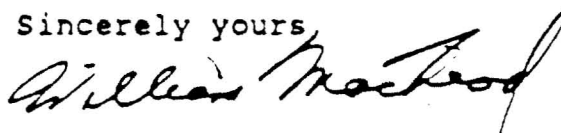
In sum, the evidence indicates that consumers are not helped by restrictions on truthful, nondeceptive advertising and prohibitions on commercial practice by optometrists. Such restrictions raise prices above the levels that would otherwise prevail, decrease the quality of care, and do not provide any consumer benefit. We recommend, therefore, that you repeal or amend the rules discussed above to remove unnecessary constraints on innovative forms of optometric practice and advertising.

⁹ Bureaus 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 major national professional associations representing ophthalmology, optometry and opticianry.

¹⁰ This evidence is discussed in more detail in the staff's report to the Commission. Bureau of Consumer Protection, Federal Trade Commission, *Ophthalmic Practice Rules: State Restrictions on Commercial Practice* (1986).

Thank you for considering our comments. We have referred to several studies, cases, and other materials. We would be happy to supply copies of these if you so desire, or to provide any other assistance.

Sincerely yours,

A handwritten signature in cursive script that reads "William MacLeod". The signature is written in black ink and is positioned to the right of the typed name.

William MacLeod
Director

cc: Randy Lovato
New Mexico Board of Optometry
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Albuquerque, New Mexico 87107