



BUREAU OF
CONSUMER PROTECTION

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

MISSION AUTHORIZED

V870017

July 14, 1987

Mr. William Gutman
Executive Secretary
New Jersey State Board of Dentistry
1100 Raymond Boulevard, Room 321
Newark, NJ 07102

Dear Mr. Gutman:

The staff of the Federal Trade Commission¹ is pleased to offer these comments in response to your invitation of June 15, 1987, for public views on the advertising regulations proposed by the New Jersey State Board of Dentistry ("the Board").

As you may know, we commented two years ago on an earlier version of those proposed regulations.² We suggested then that the Board remove a number of provisions that restrained nondeceptive advertising. The proposed new regulations would eliminate several of the prohibitions that we found troublesome in the 1985 rules. We support the new rules with respect to these changes, but we must reiterate our concerns about other provisions that still appear to restrict advertising unnecessarily.

Advertising is beneficial to consumers because it provides information about the individuals or firms offering services that they may wish to purchase. This information facilitates purchase decisions that reflect true consumer preferences, and promotes the efficient delivery of services. The proposed regulations will give dentists significantly greater freedom to advertise. They will lift the existing bans on the advertising of free services, on the use of formats that are essentially "non-informational in nature and used primarily to gain attention," and on the advertising of "non-routine" services. We believe these changes will broaden the scope of useful information that dentists may disseminate, and will thereby benefit consumers.

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

² Letter to Robert J. Siconolfi from Carol T. Crawford, March 19, 1985 (hereinafter "Crawford letter").

Unfortunately, the proposed rules still retain provisions that unnecessarily inhibit truthful advertising. For example, the rules prohibit claims of superiority, limit the use of testimonials, require that advertisements list the names of all principals or partners in the practice, and require burdensome affirmative disclosures. We recommend that the Board consider eliminating these and other provisions in its proposed rules that restrict the use of truthful, nondeceptive advertising.

A. 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 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 staff has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including dentists, optometrists, lawyers, physicians, and others. Our goal has been to identify and recommend the removal of restrictions that impede competition and increase costs without providing significant countervailing benefits to consumers.

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 suggest that prices for professional goods and services are lower where

³ See, 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). 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, 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 regarding the legal rights of potential clients or for using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding invalid a state supreme court prohibition on advertising 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 invalid a Virginia prohibition on advertising by pharmacists).

advertising exists than where it is restricted or prohibited.⁴ Although some concern has been voiced that advertising may lead to lower quality services, the empirical evidence suggests that advertising restrictions raise prices but do not increase the quality of goods and services.⁵ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

We have examined various justifications that have been offered for restrictions on advertising and have concluded that these arguments do not warrant restrictions on truthful, non-deceptive communications. 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 contribute to an increase in prices.

B. Prohibitions on Communication of Price Information

It is particularly important that advertisers be able to communicate about price information freely. The Board's proposed rules are desirable insofar as they would eliminate or modify some restrictions in this area. For example, the new rules would no longer prohibit "any statement offering gratuitous services or the substantial equivalent thereof." However, various provisions of the proposed rules still appear to place unnecessarily broad restrictions on the communication of price information to the public.⁶ The Board's proposed rules would impose burdensome

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, Regulation 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).

⁶ As the Supreme Court has noted in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the lack of price information "serves to increase the [consumer's] difficulty of discovering
(continued...)

affirmative disclosure requirements on discount advertisements and restrict the use of price advertisements to those which contain a fixed or stated range of fees. We will discuss each of these provisions in turn.

1. Restrictions on Discount Advertisements

Proposed rule 13:30-8.6(g) still requires that "offers of discounts or fee reduction . . . shall indicate the advertiser's fixed or stated range of fees against which said discount is to be made" As discussed in the Crawford letter, this restriction would effectively preclude the advertising of across-the-board discounts (e.g., "10% Off All Dental Services"). The Board has partially taken this concern into account by providing in rule 13:30-8.6(g)(2) that advertisements of across-the-board discounts need only include "a representative list of services and the fixed (or stated range of fees against which discounts are to be made for these services." Nonetheless, we believe that even this modified disclosure requirement is likely to deter such offers unnecessarily. The representative list must include "a sampling of the advertiser's most frequently performed services from the areas of preventive, diagnostic, restorative, endodontic, periodontic, prosthodontic (fixed and removable) dentistry, and oral surgery." Similarly, 13:30-8.6(g)(3) requires that "licensees who limit their practice to one or more areas of dentistry . . . shall in similar manner . . . include a representative list of the most frequently performed services in the advertiser's office." Although we support the Board's attempt to allow for across-the-board discounts, the disclosure requirement still appears long and unduly burdensome and may discourage dentists from advertising, particularly in the electronic media.

We recognize that, in general, the more information that is available to consumers, the better prepared they will be to make well-reasoned purchasing decisions. Any disclosure obligation increases advertising costs, either because it increases the length of the message or requires practitioners to forego some portion of the advertising message they would have delivered had the space not been occupied by the disclosure. Unnecessary disclosures may therefore inhibit some dentists from providing consumers with useful information about available dental

⁶(...continued)

the lowest cost seller of acceptable ability. As a result . . . [professionals] are isolated from competition and the incentive to price competitively is reduced." Id. at 377. The absence of such information "serve[s] to perpetuate the market position of established [parties]." Id. at 378.

services.⁷ We believe that disclosures should be mandated only where they are necessary to prevent deception. Proposed regulation 13.30-8.6(g) appears broader than necessary to achieve that objective, and we therefore recommend that the Board specifically allow across-the-board discounts but delete the affirmative disclosure requirements.

2. Restrictions on Fee Advertisements

The proposed rules also may inhibit price advertising by requiring an unusual degree of specificity in the ads. Proposed rule 13:30-8.6(f) states that advertisements making reference to fees "shall be limited to that which contains a fixed or a stated range of fees for a specifically described professional service." The current version of this rule limits fee advertising to "routine" professional services. We support the Board's deletion of the word "routine," since the proposed rule would permit advertising of fee information for nonroutine services, including, for example, new or innovative techniques that are not ordinarily used by practitioners. However, the proposed rule still appears to prohibit any advertisements that describe rather than enumerate prices, using language such as "lowest prices" or "as low as." Such terms can be a method of commanding consumer attention and may serve to communicate a message effectively. While we recognize that some advertisers could use such terms in a deceptive manner, they need not be deceptive. The Board can correct any abuses that do arise by invoking its authority to prohibit "false, fraudulent, misleading or deceptive advertising" under rule 13:30-8.6(c)(1). We urge the Board to reexamine the need for this rule as well.

C. Prohibitions on Communication of Nonprice Information

Other portions of the Board's rules would prohibit communication of important nonprice information. We believe that these prohibitions can also have the effect of depriving consumers of information that could aid them in selecting a dentist. As a result, these restrictions could also inhibit competition.

1. Superiority Claims

Rule 13:30-8.6(c)(2) prohibits claims that "the service performed or the materials used are professionally superior to that which is ordinarily performed or used," whether or not the statement is true. At a minimum, a prohibition on advertisements that contain claims of superiority restricts comparative

⁷ 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.

advertising, which can be a highly effective means of informing and attracting customers and fostering competition. When sellers cannot compare the attributes of their services to those of their competitors, the incentive to improve or to offer different products, services, or prices is likely to be reduced.

We commented on this provision in the Crawford letter and the Board responded by saying that this provision only prohibits "unqualified statement[s] of superiority."⁸ However, we are concerned that the language of this provision could still be applied to prohibit a wide range of claims concerning quality of service. Virtually any statement about a seller's qualifications, experience, or performance could be considered to be an implicit, unqualified claim of superiority, and a ban on such claims interferes with a seller's ability to provide consumers truthful information about the differences between his or her services and those of his or her competitors.

In its Summary, the Board further states that an individual practitioner might be more skilled in one phase of dentistry and less adept at others. Although this assertion may be correct, it does not justify a general ban on truthful, nondeceptive claims of professional superiority. If the Board is concerned that a dentist might try to claim superiority in areas in which he or she has no special expertise, a more effective approach would be to prohibit unsubstantiated claims of superiority.⁹

2. Testimonials

Proposed rule 13:30-8.6(c)(5) would prohibit the use of "any personal testimonial attesting to the technical quality or technical competence of a service or treatment offered by a licensee," whether truthful or not. This provision modifies the current rule, which prohibits all testimonials, in that it apparently allows any testimonials not directed to "technical" areas. Although we appreciate the Board's willingness to permit the use of some testimonials, we believe that the prohibition on testimonials involving technical quality or competence still unnecessarily restricts advertising in that it could be interpreted to preclude many kinds of testimonials that would not be deceptive. Thus, it could eliminate a valuable means by which a practitioner can disseminate truthful information concerning, for example, his or her office equipment, personnel, or innovative techniques.

⁸ See Board Summary of Public Comments and Agency Responses, 17 N.J.R. 1320 (May 20, 1985) (hereinafter "Board Summary").

⁹ For a further discussion of substantiation requirements, see pages 7 and 8, infra.

The Board Summary questions the value of patient testimonials. However, this provision would appear to ban testimonials even from dentists or other experts in the dental area who are qualified to make technical judgments. We believe that testimonials from such professionals are a valuable method by which a dentist can differentiate his or her services from those of other practitioners. Expert testimonials are widely used in other contexts to communicate experiences with particular products or services. They may be useful in advertising dental services, particularly to attract those consumers who have had little or no contact with dentists. We therefore believe that all types of testimonials should be permitted so long as they are truthful and not deceptive.

3. Disclosure of Names of Dentists

Current rule 13:30-8.6(h) requires that advertisements and public representations as to any practice set forth the names of all licensees "who are principals, partners, or officers" in that practice. Similarly, rule 13:30-8.4(k) requires that all advertisements and public announcements that a practice specializes in or limits its services to one or more of the eight areas set forth in 13:30-8.4(b) list the names and permit numbers of all practitioners licensed to provide these services. These provisions would appear to inhibit advertising by group practices and chain firms with which large numbers of dentists are associated. Such practices could face burdensome advertising costs, and the disclosures could make any advertising by such firms impractical, particularly broadcast advertising. We believe that the Board could better accomplish the goal of ensuring identification and accountability of individual practitioners by requiring that the name of each dentist be displayed in a conspicuous place in the office, or noted on bills, receipts or patient records.

The Board Summary states that the Board's purpose in promulgating provision 13:30-8.4(k) is to eliminate the deceptive practices of advertisers who falsely claim to have specialists and specialty services available when, in fact, the specialty services are being rendered by general practitioners or the specialists are unavailable when the consumer is in need of the their services. To the extent such deceptive practices exist, it is unclear that rule 13:30-8.4(k) would be an effective remedy. We believe that such practices can be better regulated under rule 13:30-8.6(c)(1), which prohibits any "false, fraudulent, misleading or deceptive" statement.

4. Substantiation

Rule 13:30-8.6(d) states that a licensee is required "to substantiate the truthfulness of any assertion or representation

set forth in an advertisement" (emphasis added). If the licensee fails to provide such substantiation, this is deemed "professional misconduct." We believe that this provision is broader than necessary to prevent deception. Advertisers should have a reasonable basis for objective claims they make about products or services.¹⁰ However, such claims as "friendlier service" may not express or imply to consumers any degree of objective verifiability. Requiring substantiation of such assertions seems unnecessary to prevent deception and could deter truthful, nondeceptive advertising. The Board, therefore, may wish to make clear that its substantiation requirements will apply to claims for which consumers expect that advertisers have a reasonable basis.

D. Vague and Subjective Standards

Rule 13:30-8.6(b) states that advertising must be communicated "in a dignified manner." We have two concerns about this provision. First, it sets forth a vague criterion that is susceptible to subjective interpretations that have little or nothing to do with the truth or falsity of particular statements in the advertisements. As a result, the communication of useful, nondeceptive information may be inhibited. Second, the provision may be construed to inhibit the use of innovative advertising and marketing techniques commonly used by other providers of goods and services. Novel techniques may be characterized as "undignified" and yet be useful to advertisers to attract and hold consumers' attention. Thus, they can help to communicate messages more effectively to consumers. To the extent the techniques the Board seeks to prohibit are not inherently deceptive, prohibiting them may well decrease the effectiveness of advertising, resulting in higher costs and less frequent advertising. For these reasons, we believe the Board should eliminate this provision.

E. Other Restrictions

As indicated in the Crawford letter, we also have concerns about several other provisions of the Board's current rules. Although these provisions are not specifically addressed in the

¹⁰ For example, the Federal Trade Commission requires substantiation when an advertisement refers to specific facts or figures, *Thompson Medical Co.*, 104 F.T.C. 648, 822 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3569 (U.S. Feb. 23, 1987), or when an advertisement expressly or implicitly represents that the truth of a claim is scientifically established. *Bristol-Myers Co.*, 102 F.T.C. 21, 318 (1983), aff'd, 738 F.2d 554 (2d Cir. 1984), cert. denied, 105 S. Ct. 960 (1985). See generally FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984).

proposed rules, we feel it is important to comment on them because they could seriously limit competition among health care professionals.

1. Referrals

Rule 13:30-8.15 of the Board's current rules provides that it is professional misconduct for dentists to pay to or receive from a third party any fee or other form of compensation for the referral of a patient. Among other effects, this rule would appear to prevent dentists from participating in legitimate referral services that match patients with appropriate practitioners and charge a fee to the practitioner. Such services may be valuable in helping consumers locate needed dental care. (By facilitating the gathering of information by consumers, these services may actually increase competition among health care professionals. In addition, the rule may also interfere with the operation of alternative health care delivery systems (such as PPOs and HMOs) that may have incentive arrangements with health care professionals in which fees are divided between the medical plan and the professional. We therefore recommend that the Board modify this proposed regulation so that dentists are not prevented from participating in legitimate referral services and alternative health care delivery systems.

2. Specialization

We also have concerns about the rules involving specialization claims contained in 13:30-8.4. Rule 13:30-8.4(b) lists the only eight areas of dentistry that are recognized as suitable for the announcement of limited dental practices. Under rule 13:30-8.4(c), dentists are prohibited from advertising that their practices are limited to the eight listed specialties unless they are certified or eligible for certification by an American Dental Association specialty board or meet educational requirements and standards approved by the Board. Rule 13:30-8.4(e) provides that dentists who are not permitted by subdivision (c) to announce the limitation of practice in a special area of dentistry may not advertise that they are qualified in any special area of dentistry.

We can appreciate the Board's desire to prevent dentists from holding themselves out as specialists in an area where they lack necessary competence. The Board's rules, however, appear to be overly stringent. The rules limit specialization advertising to the eight specialties set forth in 13:30-8.4(b); they therefore would prevent dentists who may have expertise in areas other than the eight specified from advertising that fact. In addition, they appear to require the use of only those particular

names for specialties denominated in the rule. These limitations may restrict the flow of relevant, truthful information.¹¹

We also urge the Board to reconsider whether it is necessary to prohibit dentists from announcing in a nondeceptive manner the services they in fact provide.¹² We believe it is important that general dentists be allowed to communicate truthfully to the public that they have expertise or experience in specific areas. In our view, only specialization claims that are deceptive, such as a claim falsely stating that a dentist is a board-certified specialist, need be prohibited.

3. Retention of Records

Finally, we note that rule 13:30-8.6(1) would require licensees to retain copies of all advertisements for a period of three years. We believe that such a lengthy period may be unreasonably burdensome for a practice that advertises frequently and therefore suggest that the Board consider adopting a shorter record retention requirement.

F. Conclusion

In sum, we recommend that the Board not limit nondeceptive advertising. We believe the changes we have suggested will provide substantial benefits to the public, and will permit access to a wider range of truthful information about the availability of dental services. They should also help to stimulate valuable competition among dentists and improve the efficiency with which dental services are delivered, while still protecting the public from false or deceptive advertising.

Sincerely,



William MacLeod
Director

¹¹ See In Re R.M.J., 455 U.S. 191, 205 (1982). The Supreme Court held that "the States 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." Id. at 203.

¹² According to subdivision (g) of the rule, general dentists may provide specialized services.