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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

Mr. Dale J. Forseth
Executive Secretary
Minnesota Board of Dentistry
717 Delaware Street Southeast
Minneapolis, Minnesota 55414

Dear Mr. Forseth:

The Federal Trade Commission's Chicago Regional Office and the Bureaus of Consumer Protection, Economics, and Competition¹ are pleased to have the opportunity to comment on the proposed amendments to the rules of the Board of Dentistry. We applaud the Board's efforts to broaden the scope of permissible advertising by dentists and, with certain reservations noted in Section II below, we support the adoption of the proposed amendments.

I. Interest and Expertise 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 its 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 kinds of business practices that state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others are permitted to use. Our goal is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

¹ These comments represent the views of the Chicago Regional Office and the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission 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 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.² In this regard, studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.³ Other studies have also provided

² See, e.g., In re 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, 53 U.S.L.W. 4587 (U.S. May 28, 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); and Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

³ 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).

evidence that higher prices occur at all quality levels where advertising is restricted and that these restrictions do not change the quality of services available in the market place.⁴ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result. 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.

II. Benefits of the Proposed Rules

In the Statement of Need and Reasonableness accompanying the proposed amendments, the Board stated that it was amending the rules in keeping with its goal of prohibiting only false, misleading, or deceptive advertising. With this goal in mind, we strongly support the proposal to broaden the scope of permissible advertising by dentists by eliminating various prohibitions. In particular, we note that the proposed rules broaden the permissible formats of specific price advertising and, more generally, eliminate prohibitions on many types of advertising that are not inherently deceptive. The proposed rules also enhance the opportunity for consumers to obtain useful qualitative and comparative information.

A. Prohibitions on Communication of Price Information

1. Rule 3100.6600

Current Rule 3100.6600 prohibits all price advertising except that for certain routine services. We agree with the Board that changes in this rule are necessary. This prohibition on the communication of price information appears to be unnecessarily broad. As the Supreme Court noted in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the lack of price information in attorney advertising "serves to increase the [consumer's]

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).

difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . attorneys are isolated from competition, and the incentive to price competitively is reduced." Id. at 377. The absence of such information "serves to perpetuate the market position of established attorneys." Id. at 378. We believe that these comments concerning the lack of price information in attorney advertising are also applicable to advertising by dentists.

We agree with the Board's decision to eliminate from Subpart 1 of Rule 3100.6600 the provision that restricts fee advertising to routine services only. With this in mind, we support proposed Subpart 2a of Rule 3100.6600, which permits the advertising of "set fees" for any service for which the dentist intends to charge a standard price. These changes will give consumers valuable additional price information.

New Subpart 4 of Rule 3100.6600 would permit the advertising of a range of fees, provided that there is a disclosure of the "basic" factors on the basis of which the actual fees will be determined. We applaud the Board's decision to expand the scope of permissible price advertising. Although we have some concern that the disclosure requirement, if construed broadly, could unnecessarily inhibit truthful advertising, it is our understanding, based upon the Statement of Need and Reasonableness, that the Board intends to interpret "basic" factors so as to minimize the burden on advertisers and require only those disclosures that are necessary to prevent deception of the public. With that understanding, we support the proposed amendment.

2. Rule 3100.7100

In addition, we support the proposed amendment to Rule 3100.7100, which would eliminate a specific prohibition on the use of price-related terms that describe rather than state a price. Terms such as "low prices," "reasonable prices," "discount prices," or "as low as" are popular methods of commanding consumer attention and may serve to communicate some messages very effectively. Although some advertisers could use price related terms in a deceptive manner, such terms are not inherently deceptive. A blanket prohibition on price related terms is overly broad. The Board, of course, retains authority to address cases of abuse in price advertising under its general authority to prohibit "false, fraudulent, misleading, or

deceptive" statements or claims (Minn. Rule 3100.6500). We believe this is the better approach to deceptive price advertising.

B. Prohibitions on Communication of Nonprice Information

1. Rule 3100.6500

Rule 3100.6500 now prohibits, among other statements or claims, ones that are self-laudatory or imply unusual or superior dental ability. We agree with the Board that changes in this rule are necessary. The proposed amendment to Rule 3100.6500 eliminates these restrictions except for claims of superiority that cannot be substantiated. We endorse this proposal. Prohibitions on advertisements that contain claims of superiority restrict comparative advertising, which can be a highly effective means of informing and attracting customers and fostering competition. Furthermore, 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 can be reduced. In addition, a ban on claims of superiority, such as in Rule 3100.6500, may prohibit truthful claims concerning quality of service. This is likely to be especially injurious to competition and consumers because virtually all statements about a seller's qualifications, experience, or performance can be considered to be implicit claims of superiority. We believe the proposed amendment may increase the effectiveness of dental advertising, provide consumers with useful information, and increase competition among the providers of dental services.

2. Rule 3100.7100

Rule 3100.7100, which was discussed briefly above as it relates to price advertising, currently prohibits certain kinds of advertisements, whether or not they contain a false, fraudulent, misleading, or deceptive statement or claim. We agree with the Board that changes in this rule are necessary. Among those advertisements specifically prohibited are advertisements that include qualitative representations or comparative claims; include testimonials and endorsements; include the use of celebrities; include the use of dramatizations or graphic illustrations to imply patient satisfaction; or indicate or imply affiliation with any organization other than the dental practice being advertised.

We support the proposed amendments to Rule 3100.7100, which would eliminate these prohibitions. Qualitative or comparative claims, testimonials and endorsements, dramatizations and graphic illustrations, and disclosure of organizational affiliations all are means for a practitioner to disseminate useful and truthful information. Such advertisements may include information about the dentist's office equipment, personnel, ability or techniques, and thereby differentiate his or her services from those of other practitioners. These advertising techniques are widely used in other contexts to communicate consumer experiences and will likely provide consumers with useful information in making a dental service selection. They also may be particularly useful to attract those consumers who have had little or no contact with dentists. Such advertising techniques are not inherently deceptive, and permitting them may increase the effectiveness of advertising and result in lower prices and the dissemination of additional useful information to consumers.

3. Rule 3100.6400

We also support the proposed change in Rule 3100.6400 to eliminate the prohibition against the use of the name of a state, city, or political subdivision in the trade name of a dental practice. This change will permit a dentist to convey useful information to consumers about the location of his or her practice. Were it not for the specific statutory prohibition on practicing under any name that may "imply professional superiority" (Minn. Stats. § 105A.11), we would urge the Board to further modify Rule 3100.6400 to prohibit only trade names that may tend to deceive the public. We see no inherent deception in the use of trade names that connote "unusual or superior dental ability."

4. Rule 3100.6600 .

Finally, we wish to raise for your consideration whether proposed Subpart 1(A) of Rule 3100.6600 needs further modification. This provision would require that an advertised "examination" include radiographs and the provision of a written diagnosis and treatment plan, unless the advertisement discloses that these will not be provided. The impact of this disclosure requirement will depend largely on whether consumers generally expect that a quoted price for an examination includes the specified items, which likely turns on whether dentists routinely provide these items without any separate charge as part of an examination.

For example, if consumers generally assume that a dental exam includes x-rays, they may be misled by an advertised price that does not include x-rays. On the other hand, if dentists do not generally provide a written diagnosis or a written treatment plan, no deception would be prevented by the Board's proposed rule. The rule may, in fact, cause dentists to alter their business practices in ways that will injure competition and consumer choice. Such a result may occur for two reasons. First, like any disclosure requirement, the proposed rule may unnecessarily increase the cost of running an advertisement. Second, and perhaps more important, including a statement that an advertised examination does not include, for example, a written treatment plan may decrease the effectiveness of the advertisement by suggesting to the public that the advertised service is inferior to that typically offered by other dentists, even though other dentists may not offer such treatment plans. In order to avoid both of these effects, dentists may either stop advertising examination services or they may increase their prices for examination services to cover the cost of providing x-rays, written diagnoses, and treatment plans in all cases, regardless of whether they are needed or desired by the patient. Thus, the Board's disclosure requirement may serve to inhibit advertising and may increase prices for examination services. Consequently, we encourage the Board to consider whether the proposed disclosures are necessary to prevent deception of the public. Finally, if the Board desires to encourage the provision of x-rays, written diagnoses, and treatment plans for all patients, the proposed rule does not serve that end well because it would only affect those dentists who advertise examinations.

III. Conclusion

While we have some reservations as discussed above, we generally support the proposed amendments. The benefits to the public from the adoption of the proposed amendments, particularly as modified in accordance with our comments, are likely to be real and substantial. The amendments would permit the public to have access to a wider range of truthful information on the availability of dental services. They would help to stimulate valuable competition among dentists for dental services and, in the process, improve the efficiency with which dental services are delivered, while still protecting the public from false or deceptive advertising.

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We thank you for your willingness to consider our comments. We have referred to a number of studies in this letter. We will be happy to supply a copy of any of these if you so desire. Please let us know if we can be of further assistance.

Sincerely,

William C. MacLeod
Director
Chicago Regional Office

January 26, 1985

AMENDMENTS TO THE
RULES OF THE BOARD OF DENTISTRY
RELATING TO NAMES AND ADVERTISING

Minn. Rules pt. 3100.6400 (formerly 7 MCAR § 3.044)

IMPROPER AND UNJUSTIFIED NAMES.

Any name which incorporates the use of the name of a state, city or other political subdivision in whole or in part or used for a dental practice which connotes unusual or superior dental ability, or which is likely to create a false or unjustified expectation of favorable results shall be in violation of Minnesota Statutes, section 150A.11, subdivision 1, and 319A.07.

Minn. Rules pt. 3100.6500 (formerly 7 MCAR § 3.045 A)

COMMUNICATING DECEPTIVE STATEMENT OR CLAIM.

A person shall not, on behalf of himself, a partner, associate, or any other dentist affiliated with him through a corporation or association, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.

A false, fraudulent, misleading, or deceptive statement or claim is one which:

- A. contains a misrepresentation of fact;
- B. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
- C. is self laudatory or is intended or is likely to create false or unjustified expectations of favorable results;

- ~~D.~~ implies unusual or superior dental ability; or
- D. appeals to an individual's anxiety in an excessive or unfair way;
- E. contains material claims of superiority that cannot be substantiated; or
- F. misrepresents a dentist's credentials, training, experience, or ability;
- G.E. contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived.

Minn. Rules pt. 3100.6600 (formerly 7 MCAR § 3.045 D, E, and F)

ADVERTISING DENTAL FEES AND SERVICES.

Subpart 1. Routine services. Fees may be advertised for routine services only. A "routine service" is defined as one which is performed frequently in the dentist's practice; is usually provided at a set fee; is provided with little or no variance in technique; and includes all professionally recognized components within generally accepted standards. If the following routine dental services are advertised, either they advertised service must include adhere to these minimum standards the listed components or the advertisement must disclose the componenets which are not included. which are examples of the comprehensiveness required to satisfy this definition:

A. Examination: a study by the dentist of all the structures of the oral cavity, including the appropriate recording or charting of the condition of all such structures and appropriate history;

thereof, including as the minimum the charting of caries, the identification of periodontal disease and occlusal discrepancies, and the detection of caries and oral abnormalities, and the development of a treatment plan. If the examination does not include radiographs or the provision to the patient of a written opinion of the items found in the examination (i.e., diagnosis) or of a written itemized treatment recommendation and itemized fee (i.e., treatment plan), such facts shall be disclosed in the advertisement. If an examination fee is advertised, the same advertisement must include the following additional diagnostic procedures and their fees:

B. (1) Radiographs (X rays): Adequate X rays of the oral structures to be used for purposes of diagnosis and which include either a panograph and four bitewings, or intraoral full mouth review utilizing a minimum of 14 periapical and four bitewing films. Any films must be to provide a complete necessary radiographic study.

(2) Diagnosis: a written opinion of items found in an examination.

(3) Treatment planning: a written itemized treatment recommendation and written itemized fee estimate provided to the patient.

C.B. Denture: either a full upper complete maxillary or full lower complete mandibular replacement of the natural dentition with artificial teeth. If the service advertised is for a denture which is partially prefabricated, intended for a partial replacement of the natural dentition, or is intended to be used as an emergency or

temporary denture, or if any advertised fee does not include a reasonable number of readjustments, such a fact facts shall be disclosed in the advertisement fully set forth in the text of the advertisement. The fee shall include a reasonable period for readjustment.

D.C. Prophylaxis (cleaning): the removal of calculus (tartar) and stains from the clinically exposed and ~~unexposed~~ surfaces of the teeth by ~~sealing~~ and polishing.

E.D. Extractions: ~~this service is for~~ the removal of nonimpacted teeth, and ~~including~~ necessary X rays, anesthesia, preoperative, and postoperative care.

~~Subp. 2 Burden of proof.~~ At the request of the board, the licensee, office, or professional corporation shall bear the burden of proving that any advertised services are, in fact, "routine dental services" as defined in subpart 1.

Subp. 2. Set Fees. Set fees may be advertised for any service where the dentist intends to charge a standard price for the service.

Subp. 3. Range of Fees. When a range of fees is advertised, the advertisement must disclose the basic factors on which the actual fees will be determined.

Subp. 4. Identification of related services and additional fees. Related services which may be required in conjunction with the advertised services, and for which additional fees will be charged, must be identified as such in the advertisement.

Subp. 4. ~~Range of fees.~~ Advertising a range of fees for a given service is prohibited.

Existing subpart 5 will be redesignated subpart 6. remains unchanged.

3100.7100 (formerly 7 MCAR \$3.045 H) PROHIBITED ADVERTISEMENTS.

Advertisements shall not:

A. include descriptive words or phrases which are qualitative representations or comparative claims such as, but not limited to, "painless," "high quality," "low prices," and "reasonable";

B. include testimonials and endorsements, including but not limited to character references, statements of benefits from dental services received, or expressions of appreciation for dental services;

C. include the use of celebrities;

D. use dramatization or graphic illustrations to imply patient satisfaction;

E. A. reveal a patient's identity or personally identifiable facts, data, or information obtained in a professional capacity without having first obtained a written waiver of patient confidentiality; or

F. B. after one year, include the name of any dentists formerly practicing at or associated with any advertised location; or

G. indicate or imply affiliation with any organization other than the dental practice being advertised.