

J-123-84-61

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

PROGRAM CODE NO7

BUREAU OF
CONSUMER PROTECTION

August 22, 1984

**COMMISSION
APPROVED**

MEMORANDUM TO: Commission

FROM: Carol T. Crawford, Director
Bureau of Consumer Protection

Timothy J. Muris, Director
Bureau of Competition

John Peterman, Acting Director
Bureau of Economics


SUBJECT: Proposed Joint Bureau Comments Regarding State
Law Restrictions on Commercial Practice by
Optometrists and Dentists in Oregon

We recommend that the Commission authorize submission of the attached joint Bureau letter to the Oregon Legislative Research Office. The proposed letter addresses restrictions on corporate employment of optometrists and dentists, and on other forms of business associations between them and non-licensees. The letter also discusses limitations on trade name and other non-deceptive advertising.


Respectfully submitted,



Carol T. Crawford, Director
Bureau of Consumer Protection



Timothy J. Muris, Director
Bureau of Competition



John Peterman, Acting Director
Bureau of Economics

memorandum

DATE: August 15, 1984

REPLY TO
ATTN OF: Renee Kinscheck, ^{*}Attorney
Division of Service Industry Practices

SUBJECT: Intervention in Oregon Sunset Review

TO: Andy Strenio, Assistant Director
for Regulatory Evaluation

Attached are proposed joint bureau comments regarding state law restrictions on commercial practice by optometrists and dentists in Oregon. These comments were prepared in response to a request from Alan Tresidder of the Oregon Legislative Research Office to assist it in conducting sunset reviews of these professions.

This year in Oregon, the Boards of Optometry and Dentistry are scheduled for sunset review. Legislative committee hearings are scheduled for November of this year, and the reports of the Legislative Research Office are due around the beginning of October. Mr. Tresidder stated that he would like to receive our comments by the end of August.

In summary, the proposed comments address restrictions in Oregon law on corporate employment of optometrists and dentists and other associations between these professionals and non-licensees, and limitations on trade name advertising by optometrists and dentists. Several restrictions on non-deceptive advertising by optometrists are also briefly discussed. The proposed comments describe the studies prepared by the staff regarding restrictions on commercial practice in optometry and contact lens fittings, and are similar in some respects to the comments recently approved by the Commission regarding the Colorado sunset review and the recently approved letter to the California Legislature regarding proposed legislation.



Mr. Alan Tresidder
Legislative Research Office
Legislative Administration Committee
S-420 State Capitol
Salem, Oregon 97310-1316

Dear Mr. Tresidder:

The Federal Trade Commission's Bureau of Consumer Protection, Economics and Competition¹ are pleased to respond to your request to assist you in your sunset review of the Oregon State Boards of Optometry and Dentistry by providing comments concerning the competitive effects of laws and regulations that prohibit certain business practices by members of these professions.

The Federal Trade Commission seeks to promote the national policy of encouraging 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 effects of state restrictions on the business practices of professionals, including optometrists, dentists, lawyers, physicians and others. Our goal is to identify and seek the removal of restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits. In offering these comments, we acknowledge that we are not in a position to offer advice on what minimum level of quality of care the states

¹ These comments represent the views of the Bureau 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. However, the Federal Trade Commission has reviewed these comments and has voted to authorize their presentation.

should require.

Oregon Board of Optometry regulations prohibit optometrists from forming partnerships or entering into agreements to practice optometry with non-optometrists.² In addition, the Oregon Supreme Court has interpreted the optometry statute to prohibit lay corporations from employing optometrists to offer optometric services to the public.³ These restrictions prohibit, for example, partnerships between optometrists and physicians or other health care professionals who might provide complementary health care services in a single office, as well as associations to practice optometry between optometrists and lay persons or business corporations.⁴ Also, Oregon Board of Dentistry regulations prohibit splitting of fees between dentists and other persons in connection with providing dental service.⁵ This type of regulation is interpreted by many states to prohibit partnerships and other associations between dentists and other professionals or lay persons and to prohibit corporate employment of dentists.

You have indicated that the Boards of Dentistry and Optometry have interpreted Oregon law to allow the use of trade names by both optometrists and dentists, but that they require

² Oregon Administrative Rules (OAR) §852-10-025(f).

³ State ex rel. Sisemore v. Standard Optical Co., 182 Or. 452, 188 P.2d. 309 (1947) (interpreting ORS §683.020).

⁴ These restrictions are apparently not interpreted to ban landlord-tenant relationships between optometrists and lay corporations.

⁵ OAR §818-11-020(7).

disclosure in all trade name advertising of the names of all the practitioners practicing at each advertised location. This disclosure requirement may discourage advertising under a trade name.

We recognize that ensuring identification and accountability of individual practitioners practicing under a trade name is necessary. However, there may be more cost-effective ways to achieve this goal. For example, states might require that the names of individual practitioners be conspicuously posted in professional offices. The current disclosure requirement could create particular problems for chains or large group practices who employ many practitioners and wish to advertise on a state-wide or regional basis. The requirement that the names of all licensees at all locations be disclosed in every advertisement may make advertising prohibitively expensive, particularly on television or radio. By increasing the cost of trade name advertising, this disclosure requirement could effectively prohibit trade name advertising by large group practices and chains, and possibly discourage the development of such firms.

Restrictions such as these on the business practices of professionals can reduce competition in health care markets by preventing the formation and development of innovative forms of professional practice, such as chain firms, that may be more cost efficient than traditional practitioners. Restrictions on corporate employment of optometrists and dentists limit the availability of equity capital for professional practices and hinder the development of high-volume practices that may be able

to reduce costs through economies of scale. These firms provide comparable quality services, and the competitive pressure they place on traditional providers forces them to pay greater attention to their own costs and fees.

In a case challenging 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 violated the antitrust laws.⁶ 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.

Proponents of restrictions on employment, partnership or other business relationships between licensed professionals and non-licensees and restrictions on the use of trade names claim that they are necessary to maintain a high level of quality in the professional services market. For example, they claim that employee-employer and other business relationships between professionals and non-professionals will diminish the overall

⁶ In re American Medical Association, 94 F.T.C. 701 (1978), aff'd, 638 F.2d. 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982).

quality of care because of lay interference with the professional judgment of licensees. They assert that lay corporations such as chain retailers would be unduly concerned with profits to the detriment of the quality of professional care. It is alleged that, while such firms might offer lower prices, they might also encourage their professional employees to cut corners in order to maintain profits. The public would suffer doubly, according to those who favor restrictions, because professionals who practice in traditional, non-commercial settings would be forced to lower the price and quality of their services in order to meet the prices of their commercial competitors.

The Federal Trade Commission's Bureau of Economics and Consumer Protection have issued two studies that provide evidence that restrictions on commercial practice by optometrists -- including restrictions on business relationships between optometrists and non-optometrists and limits on the use of trade names -- do, in fact, harm consumers.

The first study,⁷ 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 across cities with a variety of legal environments. Cities were classified as markets where advertising was present if there was advertising of eyeglasses or eye exams in local newspapers or "Yellow Pages." Cities were

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

classified as markets with chain optometric practice if eye examinations were available at large interstate optical firms. This study provides important information on the likely effects of state laws that restrict the operation of chain optometric firms.

The study found that prices charged in 1977 for eye examinations and eyeglasses were significantly higher in cities without chain firms and advertising than in cities where advertising and chain firms were present. The average price charged by optometrists in the cities without chain firms 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 if chain firms offering eye exams were not present; the remaining 15.7% price difference was attributed to the absence of advertising.

The data also showed that the quality of vision care was not lower in cities where chain optometric practice 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.

Our information indicates that although corporate employment of optometrists is forbidden in Oregon, chain optical firms are able to provide eye exams on the premises, apparently through independent optometrists who lease space from the chains. For this reason, notwithstanding the legal ban on corporate employment of optometrists and the restrictions on trade name

advertising, the study referred to above classified Portland as one of the cities with chain optometric practice, which, on average, had lower prices. Even though consumers in Oregon already enjoy some of the benefits of commercial optometric practice, we believe that Oregon's restrictions on the corporate practice of optometry may preclude Oregon consumers from realizing all of the cost efficiency advantages available from commercial optometric practice. For example, requiring chain firms to use lease arrangements rather than more flexible employment contracts may complicate management and increase costs. In addition, a ban on corporate employment could make it more difficult for optical firms to advertise the price and availability of eye exams and other optometric services. For example, price advertising would be difficult because agreements as to price would have to be reached with all the leasing optometrists.

Further, our study may be relevant to Oregon's restrictions on dental practice. Based on the information available to us, it appears that dentists in Oregon do not practice within drug, discount or department stores.⁸ Thus, Oregon's laws may be interpreted to entirely preclude, or at least severely restrict, commercial dental practice and the development of chain dental firms. The results of our optometry study indicate that these

⁸ See, J. Trauner & H. Luft, *Entrepreneurial Trends in Health Care Delivery: The Development of Retail Dentistry and Freestanding Ambulatory Services* 28 (1982). We also have checked the "Yellow Pages" of Portland, Oregon and found no evidence of such practice.

restrictions may be causing higher prices with no increase in quality.

The second study issued by the FTC staff compared the cost and quality of cosmetic contact lens fitting by various types of eye care professionals.⁹ This study was designed and conducted with the assistance of the major national professional associations representing ophthalmologists, optometrists and opticians. Its findings are based on examinations and interviews of more than 500 contact lens wearers in 18 urban areas.

The study found that there were few, if any, meaningful differences in the quality of cosmetic contact lens fitting provided by ophthalmologists, optometrists, and opticians. The study also showed that, on average, "commercial" optometrists -- that is, optometrists who were affiliated with a chain optical firm or advertised heavily -- fitted contact lenses at least as well as other fitters, but charged significantly lower prices.

These studies provide evidence that restrictions on employment, partnership, or other relationships between professionals and non-professionals and limits on the use of trade names by professionals tend to raise prices above the levels that would otherwise prevail, but do not seem to raise the quality of care in the vision care market. Although these studies deal specifically with restrictions on the practice of optometry, the results may be applicable to analogous

⁹ Bureaus of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists, and Opticians (1983).

restrictions in other areas, such as dentistry.

We would also like to comment briefly on several provisions of Oregon law that appear to prohibit nondeceptive advertising by optometrists. These regulations have the potential to stifle the communication of nondeceptive information that facilitates informed consumer choice.

Oregon Administrative Rule ("OAR") §852-10-030(3) states that any advertisement containing the words "contact lenses" shall be considered advertising of the practice of optometry. Although it would be deceptive for opticians to advertise that they fit contact lenses because they are apparently not permitted to do so under state law,¹⁰ this rule appears to go beyond prohibiting such claims. If opticians are permitted to sell contact lenses with an eye doctor's prescription -- and it is our understanding that they are permitted to do so -- this rule may prohibit nondeceptive advertising of the sale of contact lenses by opticians.

OAR §852-10-030(4), which appears to prohibit an optometrist from advertising in the yellow pages of a telephone book or elsewhere under "retail optical goods" or as a seller of optical goods, may have the effect of limiting an optometrist's ability to solicit increased sales of eyeglasses and contact lenses by emphasizing in advertising this portion of his or her business.

Finally, ORS §683.140(12), which prohibits advertising professional methods or professional superiority, may also limit

¹⁰ State ex rel. Reed v. Kuzirian, 228 Or. 619, 365 P.2d 1046 (1961).

truthful advertising by prohibiting nondeceptive claims about a practitioner's background, experience, training, office equipment, personnel or quality of service.

These regulations, which may restrict the free flow of information in the market, can make it more difficult for buyers to learn about the differences in price and quality of optometric goods and services. These restrictions may therefore contribute to an increase in prices and a decrease in consumer welfare.

In conclusion, thank you for your willingness to consider our comments. We have enclosed copies of the studies referred to in our comments. Please let us know if we can be of any further assistance.

Sincerely,

Carol T. Crawford
Director
Bureau of Consumer Protection

Enclosures



LEGISLATIVE ADMINISTRATION COMMITTEE
LEGISLATIVE RESEARCH OFFICE
S-420 State Capitol
SALEM, OREGON 97310-1316
(503) 378-8871

Co-Chairman:
REP. GRATTAN KERANS
Speaker of the House

Members:
REP. LARRY CAMPBELL
REP. PETER COURTNEY
REP. BARBARA ROBERTS
REP. BILL RUTHERFORD
REP. RICK BAUMAN
(Alternate)

June 7, 1984

mission
20580

losed for your review and comments copies of
ministrative rules regarding the Oregon Board of
e Oregon Board of Optometry. Your specific com-
ations concerning these two boards as well as any
you may have regarding health licensing will be

very much for your cooperation.

Sincerely,

Alan Tresidder
Research Analyst