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COMMISSION APPROVED



FEDERAL TRADE COMMISSION
Chicago Regional Office

7/30/86

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May 9, 1986

Department of Registration and Education
Attention: Kathy Campbell Lynch
320 West Washington, 3rd Floor
Springfield, IL 62786

Dear Ms. Lynch:

The Federal Trade Commission's Chicago Regional Office and Bureaus of Competition, Consumer Protection, and Economics¹ are pleased to have the opportunity to comment on the proposed amendments to the Rules for the administration of the Illinois Funeral Directors and Embalmers Licensing Act ("Illinois Rules"). In these comments, we discuss: (1) restrictions on pre-need solicitation of funeral services, and (2) restrictions in current Illinois Rules that may inhibit truthful and non-deceptive advertising.

The Federal Trade Commission ("Commission") seeks to promote 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 restrictions on the business practices of professionals, including optometrists, dentists, lawyers, funeral directors, physicians, and others. Our goal in these investigations is to identify and seek the removal of those restrictions that impede competition, increase costs, and harm consumers, but do not provide countervailing benefits.

The Commission has pursued this goal actively in the funeral industry. As you may be aware, after extensive rulemaking proceedings, the Commission adopted the Trade Regulation Rule Concerning Funeral Industry Practices ("Funeral Rule"), 16 C.F.R.

¹ These comments do not necessarily represent the views of the Commission or any individual Commissioner, although the Commission has authorized their submission.

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Part 453, which became effective in full on April 30, 1984. The purpose of the Funeral Rule is to promote increased competition and consumer choice in the funeral industry by facilitating informed purchasing decisions by consumers. Among other things, the Funeral Rule requires the disclosure of detailed information about prices and legal requirements to purchasers of funeral goods and services.

As we understand it, the Illinois Funeral Directors and Embalmers Licensing and Disciplinary Board ("Board") has proposed amendments to the Illinois Rules that would prohibit telephone solicitation, as well as all forms of solicitation by persons other than licensed funeral directors. By letter dated May 31, 1985, to State Senator Judy Baar Topinka, the Commission staff commented on Illinois Senate Bill 293, which would have imposed these same restrictions. (The bill would have also prohibited all door-to-door solicitation and prohibited the ownership of funeral establishments by unlicensed persons.) Senate Bill 293 was defeated. Commission staff also commented on these issues to the Illinois Department of Registration and Education ("Department") by letter dated November 6, 1985, and at a roundtable discussion convened by your office on that date.²

We believe that the following comments, in which we discuss the restrictions contained in the Board's proposed amendments as well as several other existing Illinois Rules containing restrictions which appear to be anticompetitive, will be of some assistance to you in evaluating the Rules' possible effects on competition and consumers.

I. Restrictions on Pre-need Solicitation of Funeral Services

The Board's proposed Rule 250.205(g) would prohibit all forms of funeral service solicitation by persons other than licensed funeral directors, and the Board's proposed amendment to Rule 250.205(e) would prohibit all telephone solicitation by sellers of funeral services. Rule 250.205(e) currently prohibits

² Commission staff has also recently commented concerning the possible anticompetitive effects of proposed funeral industry legislation in Michigan, Kansas, and Alabama. Letter of April 7, 1986, to Senator Kirby Holmes of Michigan; letter of February 14, 1986, to Representative Ginger Barr of Kansas; and letter of January 16, 1986, to Senator John E. Amari of Alabama. Copies of these comments are available upon request.

all uninvited solicitation at a residence or health care institution. We believe that the following discussion will provide the Department and the Board with a framework in which to consider the competitive and consumer protection aspects of imposing certain types of limitations on the solicitation of funeral services.

Effective communication of truthful information by sellers or their representatives to potential clients is critical to the functioning of competitive markets. Restrictions on solicitation may reduce significantly the truthful information that is available to consumers making purchasing decisions. Such restrictions on the flow of truthful information may make it more difficult for consumers to learn about the various prices, levels, and types of services that are available, as well as which firms are stressing the price factor. When consumers are unable to compare prices and other options, competitors are insulated from competition. As a result, competitors' incentives to keep prices down and to offer alternatives (in both the amount and quality of services) desired by consumers are reduced. Restrictions on solicitation may also prevent competitors, especially new market entrants or those offering innovative services, from obtaining clients.

This is not to say that all forms or methods of solicitation are always procompetitive. In certain circumstances, a particular form or method of uninvited, in-person solicitation may be so susceptible to coercion, harassment, or similar abuses that its prohibition is justified. In its decision in American Medical Association,³ the Federal Trade Commission held that an AMA code of ethics provision prohibiting virtually all advertising and solicitation by physicians violated Section 5 of the Federal Trade Commission Act. The Commission found that the "AMA's broad proscription of advertising and solicitation [had], by its very essence, significant adverse effects on competition among AMA members."⁴ The Commission did provide in its order,

³ 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).

⁴ 94 F.T.C. at 1005.

however, that "in view of the potential overreaching that may occur in the absence of professional regulation," the AMA could proscribe "uninvited in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence."⁵

In the funeral industry, restrictions on at-need⁶ solicitation may be justified because of the substantial risk of coercion, harassment, or similar abuses in such instances. Pre-need solicitation and the competitive process it encourages, on the other hand, may be especially important in the funeral industry because many consumers are not aware of the wide range of options available from pre-need sellers. Pre-need arrangements enable consumers to make choices without the time or emotional pressures associated with at-need purchases.

It is possible that, in some circumstances, even pre-need solicitation may be susceptible to coercion, harassment, or similar abuses. This possibility does not, however, justify restrictions on pre-need solicitation that are more restrictive of legitimate forms of solicitation than reasonably necessary to prevent any such abuses that could be shown to exist.

Restrictions that permit only licensed funeral directors to engage in pre-need solicitation may limit unnecessarily the ability of legitimate businesses to disseminate information that is beneficial to consumers and for which the professional expertise of a funeral director is not required. Similarly, restrictions that prohibit all telephone solicitation, as proposed, and all uninvited door-to-door solicitation, as in the present Illinois Rules, may restrict unnecessarily the dissemination of truthful information about -- and consequently the sales of -- pre-need funerals to willing and competent purchasers.

Telephone solicitation is a well established business practice that is widely used to sell goods and services in many markets. In the funeral industry, it may be an efficient, cost effective method by which pre-need sellers may impart to consumers truthful and valuable information about the broad range of pre-need purchasing options that are available. It may also be a useful means for pre-need sellers to schedule sales consultations with interested consumers at the consumers'

5 Id. at 1029-30 (emphasis added).

6 "At-need" means after a death has occurred or where death is imminent. "Pre-need" means in advance of death.

7 As discussed above, the Illinois Senate has already defeated a proposal to impose these prohibitions.

convenience. Because this method of solicitation does not involve direct, face-to-face contact between the seller and the potential buyer, it would appear to pose minimal risks of coercion, harassment, or similar abuses. Hence, a total prohibition on this mode of solicitation for pre-need sales does not appear to be warranted.

Door-to-door solicitation, although possibly more susceptible to seller abuses, is also a widely used method of disseminating truthful information about goods and services that should not be restricted unnecessarily. In determining whether a total prohibition on such solicitation as in the present Illinois Rules is justified, it is necessary to weigh the benefits of increasing the total amount of truthful information about pre-need options available to consumers against the potential risk that the incidents of coercion, harassment, or similar abuses may increase.⁸

For example, in the context of door-to-door solicitation in health care institutions, as opposed to personal residences, there is arguably a greater potential for the occurrence of seller abuses because many residents of health care institutions may be peculiarly vulnerable to such abuses. However, health care institutions probably vary greatly with respect to the percentage of resident individuals whose physical, emotional, or mental states are such as to render such individuals especially vulnerable to seller abuses. Rather than imposing a total prohibition on all door-to-door solicitation at health care institutions, the Board and the Department may wish to consider whether potential consumers residing in such institutions are afforded adequate protection by virtue of the rules or policies of such institutions or by virtue of the discretionary authority vested in the individual administrators. Such institutions and administrators presumably have a strong interest in promoting the

⁸ All consumers who purchase pre-need funerals at a place other than the place of business of the seller are protected by the Federal Trade Commission's Trade Regulation Rule Concerning Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. Part 429. The Rule requires that the seller give the consumer a notice of the consumer's right to rescind the door-to-door sale within three days. The Funeral Rule's protections are also applicable to pre-need purchasers. In addition, because at least partial payment for pre-need arrangements is typically made well in advance of death, some states have adopted regulatory measures (e.g., trust requirements) designed to protect consumers from fraud and other abuses. In these comments, we do not address what additional consumer protection measures, if any, may be appropriate in the area of pre-need sales.

welfare of their residents in relation to the commercial interests of funeral directors. An additional factor that may be weighed is that many individuals residing in health care institutions may constitute a segment of the population that has a particular interest in exploring the possibility of making pre-need arrangements.

In considering the need to impose blanket prohibitions on telephone and door-to-door solicitation, the Department and the Board may also wish to consider that a current regulation, Illinois Rule 250.205(f), already affords substantial protections to consumers by specifically prohibiting solicitation where 1) the licensee, or his representative, reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment; 2) the person solicited has made known a desire not to receive the communication; or 3) the solicitation involves coercion, duress, or harassment.

Accordingly, we urge the Department and the Board to consider whether the proposed prohibitions on telephone solicitation and solicitation by persons other than licensed funeral directors, as well as the current prohibition on all uninvited door-to-door solicitation, may be overly restrictive of competition in the market for pre-need services without necessarily providing countervailing consumer benefits.

II. Other Restrictions That May Inhibit Truthful and Non-Deceptive Advertising

As a part of its efforts to foster competition among licensed professionals, the Commission has examined the effects of public and private restrictions that limit the ability of

professionals to engage in nondeceptive advertising.⁹ In this regard, several studies have found that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.¹⁰ Studies also suggest that higher prices occur at all quality levels where advertising is restricted, and that these restrictions do not increase the

⁹ See, e.g., American Medical Ass'n, supra n.3. 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, 105 S. Ct. 2265 (1985) (holding in part that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive legal advice and other information 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 state supreme court prohibition on advertising by attorneys invalid 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 Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid under the First Amendment). See also recent consent orders issued by the Commission in Rhode Island Board of Accountancy, Trade Cas. (CCH) ¶ 22,308 (Dkt. 9181) (prohibiting Board restrictions on truthful, non-deceptive advertising, solicitation, or encroachment); Wyoming State Board of Registration in Podiatry, Trade Cas. (CCH) ¶ 22,303 (Dkt. C-3176) (prohibiting Board restrictions on truthful, non-deceptive advertising); Montana Board of Optometrists, Trade Cas. (CCH) ¶ 22,259 (Dkt. C-3161) (prohibiting Board restrictions on truthful, non-deceptive advertising of free examinations, payment terms, or "professional superiority"); Louisiana State Board of Dentistry, Trade Cas. (CCH) ¶ 22,257 (Dkt. 9188) (prohibiting Board restrictions on the advertising or offering of discount prices).

¹⁰ Cleveland Regional Office and Bureau of Economics, Federal Trade Commission Staff Report on 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. Law & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972).

quality of services available in the marketplace.¹¹ 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 unnecessary to protect consumers, is likely to suppress the dissemination of potentially useful information, and may contribute to an increase in prices.

Because several of the Illinois Rules concerning advertising appear to go well beyond the false or deceptive standard, we also take this opportunity to express our concerns regarding those Rules.

A. "Dignified" Advertising

Illinois Rule 250.205(a) requires, among other things, that advertising by funeral directors be "direct, dignified, and readily comprehensible." We believe that this provision should be eliminated, because it is vague, subjective, and not reasonably related to the prevention of false or deceptive advertising. The United States Supreme Court recently dealt with a similar rule regarding advertising by attorneys in Ohio:

[A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify abridgement of their First Amendment rights. Even if it were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must be true for advertising that some members of the bar might find beneath their dignity.¹²

¹¹ 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).

¹² Zauderer, supra n. 9, 105 S. Ct. at 2280.

We believe that the Supreme Court's comments concerning attorney advertising apply with equal force to advertising by funeral directors. Consequently, such blanket prohibitions may restrict unnecessarily the flow of truthful, non-deceptive information to the detriment of consumers.

We are not aware of any consumer injury that has resulted from "undignified" advertising by funeral directors in Illinois or elsewhere; nor is it clear to us how such injury could occur. Even if a funeral director chose to advertise in an "undignified" manner, the advertising might still provide beneficial information to consumers in two ways. Some consumers could find the advertising useful and informative. Other consumers could choose not to select a funeral director if they found his advertising to be "undignified." If many or most consumers reacted adversely to "undignified" advertising, this would create powerful incentives for funeral directors to avoid such an advertising approach. Further, if consumers do not find a given funeral director's advertising "undignified," it would not appear relevant as a policy matter whether other (perhaps competing) funeral directors or others did. Thus, there do not appear to be any consumer benefits stemming from the rule.

On the other hand, both consumer injury and competitive harm may result from the rule. The "dignified" standard could be construed very broadly in its enforcement to exclude advertising that contains such things as pictures of caskets. Furthermore, whether the Department or the Board would construe it broadly, the rule may inhibit truthful, non-deceptive advertising if funeral directors, unaware of what may or may not be considered "undignified," reduce the amount of their truthful advertising to avoid any risk of violating the vague standards.

B. Limitation on Information That May Be Advertised

Illinois Rule 250.205(b)(1-10) lists specific kinds of information that may be included in advertising by funeral directors. Subsection 11 restricts other information that may be included to that which "a reasonable person might regard as relevant in determining whether to seek the registrant's services."

As with the "dignified" standard discussed above, we are concerned that such a vague, subjective standard may tend unnecessarily to inhibit truthful, non-deceptive advertising. If a funeral director included irrelevant information in his advertising, there would not likely be any consumer injury unless the information were also deceptive. If it were deceptive, it would already be prohibited by Rule 250.205(a). It is difficult to define "relevant" in this context. Some consumers might find certain information to be relevant while other consumers would not. If any consumers find truthful information to be relevant,

it is of value. If no consumers find it relevant, it is simply wasted, inefficient promotion that doesn't harm consumers. We urge deleting subsection 11 so that -- as for all other goods and services -- it is left to the marketplace to determine what information is relevant to prospective purchasers.

C. Fee Disclosure Requirement

Illinois Rule 250.205(b)(9) requires that advertisements containing fees for funeral services and merchandise include a statement that "fees may be adjusted due to unforeseen circumstances." We believe that this requirement should be eliminated. This requirement may serve to increase the consumer's difficulty in discovering the true cost of services and merchandise and could inhibit truthful advertising unnecessarily.

As discussed above, the Commission's Funeral Rule requires disclosure of detailed information about prices to purchasers of funeral goods and services. The Commission found the failure to furnish price information to be an unfair or deceptive act or practice. Nevertheless, in adopting mandatory price disclosure requirements -- including telephone price disclosures -- the Commission did not find it necessary to require a disclaimer such as Illinois' to protect consumers.

If a funeral director wishes truthfully to advertise specific fees or a range of fees for services or merchandise, the disclosure requirement is unnecessary to prevent deception. Although unforeseen circumstances might require a fee adjustment, these circumstances do not appear to be any different from those in many other markets in which analogous disclosures are not mandated. On the other hand, with the mandated disclosure in an advertisement, a funeral director may feel freer to adjust his fees from those advertised without causing the consumer to question the funeral director's actions. If such an adjustment is made regularly and without regard to any truly "unforeseen circumstances," the fee advertisement may in fact be false and deceptive. Finally, unnecessary disclosure requirements tend to inhibit truthful advertising by making it more costly.

D. Prohibitions on Specific Types of Representations

Illinois Rule 250.205(d) prohibits certain representations even if they do not contain a false or deceptive statement or claim. Subsection 2 prohibits all representations that take advantage of the potential client's fears, anxieties, vanities, or other emotions. Subsection 3 prohibits all testimonials (as well as exaggerations) pertaining to the quality of funeral services. We are concerned that these provisions go well beyond protecting the consumer from false or deceptive advertising. We urge deleting these prohibitions.

We believe that there is nothing inherently deceptive about advertising that appeals to a person's emotions. Indeed, much advertising appeals to the emotions of consumers and, thus, would violate this standard. Like the "dignified" standard discussed above, this vague, subjective standard may similarly result in funeral directors reducing the amount of their truthful advertising to avoid any risk of violating the prohibition.

Likewise, testimonials are widely used in many markets to communicate consumer experiences with particular products and services. In the funeral industry, they can be a highly effective means of disseminating useful and truthful information, including statements about a funeral home's facilities, personnel, prices, and types -- as well as quality -- of services offered. Such advertising can foster competition by enabling funeral directors to differentiate their goods and services from those offered by competing funeral homes. For example, in order to promote the availability of relatively new types of funeral purchasing options, such as pre-need plans, some funeral directors may wish to advertise the truthful opinions and beliefs of consumers who have already purchased such plans. Testimonials may be particularly useful in attracting those consumers who have had little or no contact with funeral homes. In addition, because many characteristics of a funeral service are not readily described in objective terms, consumers may find especially useful another consumer's honest appraisal of the services rendered by a particular funeral home. Subsection 3 prohibits all testimonials concerning quality, including those that are truthful and nondeceptive. This approach raises serious antitrust concerns because it may significantly reduce the amount of truthful information available to consumers about the relative attributes of different funeral homes.

E. Prerecording and Record-keeping

Illinois Rule 250.205(c) provides that the registrant must prerecord broadcast television and radio advertisements, and that a copy of the transmission must be retained for five years. We believe that this provision should be modified to eliminate the prerecording requirement, and to eliminate or shorten the record-keeping requirement. The prerecording provision may serve to inhibit advertising by increasing its cost. In any event, it appears unnecessary as a means of protecting the public from false or deceptive advertising. The prerecording requirement prohibits the use of less expensive "spot" announcements that the registrant could prepare or approve for reading over the air by a radio or television announcer. We also recommend that the Department and the Board consider whether the five-year record-keeping requirement may be unduly burdensome. If such a requirement is deemed necessary to prevent false or deceptive advertising, we would urge that a shorter time period -- such as one year -- be considered.

Kathy Campbell Lynch
May 9, 1986

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III. Conclusion

We hope that our comments concerning the possible anticompetitive effects of restrictions on advertising and the solicitation of funeral services will assist you in your deliberations on the proposed amendments. We appreciate the opportunity to present our views and concerns.

Sincerely,



William C. MacLeod
Director
CHICAGO REGIONAL OFFICE