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FEDERAL TRADE COMMISSION
Chicago Regional Office

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COMMISSION AUTHORIZED

May 13, 1987

The Honorable Harry Hill
State Representative
State Capitol
Jefferson City, MO 65101

Dear Mr. Hill:

The Federal Trade Commission staff is pleased to have this opportunity to respond to your letter of March 3, 1987, requesting our comments on House Bill 529 and Senate Bill 232.[1] These bills would restrict advertising by dentists. We recognize and support Missouri's interest in preventing deceptive advertising practices by dentists, but we believe that HB 529 and SB 232 would adversely affect consumer welfare by limiting the dissemination of truthful, non-deceptive information about Missouri dentists and their services. We therefore recommend that neither of these bills be enacted. For similar reasons, we also urge Missouri to reconsider its existing statutory provisions that restrict dentists in advertising their areas of specialization.

I. INTEREST AND EXPERIENCE OF THE FEDERAL TRADE COMMISSION

Our interest in this legislation stems from the Commission's mandate to enforce the antitrust and consumer protection laws of the United States. Section 5 of the FTC Act prohibits unfair methods of competition, and unfair or deceptive acts or practices. In enforcing this statute, the Commission staff has gained substantial experience in analyzing the impact of various restraints on competition and the costs and benefits to consumers of such restraints.

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1 The views presented in this letter are those of the Chicago Regional Office and Bureaus of Competition, Consumer Protection, and Economics and are not necessarily those of the Commission itself. The Commission has, however, voted to authorize the staff to present these comments.

For several years, the Commission has been investigating the effects of public and private restrictions on the business practices of dentists, optometrists, lawyers, physicians, and other state-licensed professionals. Over the past few years, the Commission staff has submitted numerous written comments to state boards of dentistry analyzing the effects on consumer welfare of various regulations governing advertising and other practices.[2] In addition, as part of the Commission's efforts to foster competition among licensed professionals more generally, we have examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.[3] Studies in other professional areas suggest that prices for professional goods and services are lower where

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2 See, e.g., Letter to Ms. Nancy T. Feldman, Executive Director, Virginia State Board of Dentistry (April 23, 1987); Letter to Mr. R.B. Thompson, Executive Director, Kentucky Board of Dentistry (Nov. 21, 1986); Letter to Ms. Nancy T. Feldman, Executive Director, Virginia State Board of Dentistry (April 2, 1986); Letter to Mr. H. Fred Varn, Executive Director, Florida Board of Dentistry (Nov. 6, 1985); Letter to Mr. Dale J. Forseth, Executive Secretary, Minnesota Board of Dentistry (Sept. 23, 1985); Letter to Mr. Robert J. Siconolfi, Executive Secretary, New Jersey State Board of Dentistry (March 19, 1985).

3 See, e.g., In re American Medical Associaton, 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 advice 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 a 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 a Virginia prohibition on advertising by pharmacists invalid).

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 the quality of services provided by firms that advertise is at least as high as, if not higher than, that of firms that do not advertise.[5] Therefore, to the extent that truthful and nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare are likely to 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. ANALYSIS OF ADVERTISING RESTRAINTS CONTAINED IN HB 529 AND SB 232

A. Current Law

Missouri law currently prohibits a general dentist from stating that he or she is a "specialist" or from using the phrase "limited to the specialty of" unless the dentist holds a Missouri specialist certificate and license.[6] Those dentists who do not meet these criteria are further prohibited from using terms

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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 on the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

5 Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also, Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976); McChesney and Muris, The Effects of Advertising on the Quality of Legal Services, 65 A.B.A.J. 1503 (1979).

6 Mo. Rev. Stat. § 332.321(2)(14)(e)(1984).

denoting state-recognized specialties in their advertisements unless they also state that they are not licensed in Missouri as specialists.[7] In addition, Missouri dentists may not advertise any terms denoting or implying any specialty areas which are not recognized by the American Dental Association ("ADA").[8] These provisions impose extensive restrictions on dentists who wish to advertise one or more specific areas of dentistry. In light of the analysis that follows, we recommend that Missouri consider whether less restrictive provisions might adequately protect consumers.[9]

We believe it is important that a dentist with expertise or experience in specific areas be allowed to communicate that expertise to the public. In our view, only specialization claims that are deceptive, such as a claim that falsely states or implies that a dentist is a specialist, need be prohibited. Dentists should be free to make truthful, nondeceptive claims that they concentrate in a particular field of dentistry, that their practice is limited to a particular area, or to otherwise truthfully advertise their expertise in a particular area of dentistry regardless of whether they have a specialist certificate and license.

B. Proposed section 332.321(2)(14)(e) would significantly expand the current restraints

Under HB 529 and SB 232, false, misleading or deceptive advertisements or solicitations would include, but not be limited to:

> [a]ny announcement in any form including the terms "specialist" or "specializing in", or the phrases "limited to the specialty of" or "practice limited to", or other like or similar terms or phrases unless each person named in conjunction with the term or phrase, or responsible for the announcement, holds a

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7 Id. at § 332.321(2)(14)(f). Section 332.321(2)(14)(f) of Missouri's current law is Section 332.321(2)(14)(g) of HB 529 and SB 232.

8 Id. at § 332.321(2)(14)(g). This section would become § 332.321(2)(14)(i) in HB 529 and SB 232.

9 In this letter, we are not commenting upon the general merits of states' certifying professionals as specialists.

> valid Missouri certificate and license evidencing that he is a specialist in that area.[10]

The bills would prohibit a dentist from truthfully advertising that his or her practice is "limited to" a particular area of dentistry unless he or she holds a valid Missouri dentistry specialist certificate and license. The State of Missouri licenses every dentist to practice in all branches of dentistry.[11] Since Missouri also allows dentists to limit their practice to particular areas of dentistry, these dentists should be able to truthfully advertise that their practice is, for example, "limited to children's dentistry" or to "cosmetic dentistry" without having to be certified and licensed as a Missouri dental specialist. Dentists may acquire expertise through education, training, or practice in a particular field even though such development does not lead to certification. By prohibiting dentists from truthfully advertising their areas of concentration, Missouri would be depriving consumers of useful information that allows them to compare the quality and price of services provided by all legally qualified practitioners -- general dentists as well as specialists.

There is no reason to believe that consumers will be misled by the phrase "practice limited to." While this phrase may be a term of art among dentists denoting formal certification as a specialist, we are not aware of any evidence indicating that such a phrase means anything more to a consumer than that a dentist has limited his or her practice to a particular area of dentistry.

In addition to prohibiting the use of the phrase "practice limited to," proposed section 332.321(2)(14)(e) would also expand current law to prohibit dentists from using "other like or similar terms or phrases" in describing their practice unless they hold a valid Missouri specialist certificate. This provision is troublesome because it is unclear what exactly "other like or similar terms or phrases" might be held to include. For example, would a dentist not certified as a

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10 This section, and the sections cited hereinafter, are from HB 529. The language in SB 232 is virtually identical. The underlined language is the new language proposed by the two bills that is to amend current Missouri law.

11 Mo. Rev. Stat. § 332.050(2)(1984).

specialist be able to state that he or she has "twenty years of experience" in a particular field of dentistry? Since the proposed law is unclear, it is likely that some dentists will refrain from advertising out of fear of crossing the vague line of illegality. This provision would further limit the truthful, nondeceptive information that is available to consumers.

We are aware that the Missouri Supreme Court recently found the state's present law on specialist advertising to be consistent with the First Amendment.[12] HB 529 and SB 232, however, would appear to result in a significant further-narrowing of dentists' commercial speech. Thus, the proposed sections might or might not pass constitutional muster. Yet even if the advertising restrictions contained in these bills were found to be compatible with the First Amendment, we still believe that Missouri consumers would be better served by more narrowly tailored advertising restrictions.

C. Proposed section 332.321(2)(14)(f) would appear to prohibit the same advertising practices as previously described proposed section 332.321(2)(14)(e)

Under HB 529 and SB 232, false, misleading or deceptive advertisements or solicitations would include, but not be limited to:

> [a]ny announcement in any form including the terms "specialist", or "specializing in" or the phrases "limited to the specialty of" or "practice limited to", or other like or similar terms or phrases unless the area of practice so referred to is a specialty area recognized by the American Dental Association.

We question the need for HB 529 and SB 232's proposed section 332.321(2)(14)(f). Proposed section 332.321(2)(14)(e) would forbid the use of the terms "specializing in," "limited to," or other "like or similar terms or phrases" unless a dentist is a certified specialist under Missouri law. Since Missouri only certifies dentists in the specialty areas approved by the American Dental Association for specialty practice, it appears that proposed section 332.321(2)(14)(f) would prohibit the same advertising practices as proposed section 332.321(2)(14)(e).

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12 Parmley v. Missouri Dental Board, 719 S.W.2d 745 (1986)(en banc).

Thus, our previous analysis of proposed section 332.321(2)(14)(e) is also applicable to proposed section 332.321(2)(14)(f).

III. ANALYSIS OF MANDATORY DISCLOSURES CONTAINED IN HB 529 AND SB 232

A. Overview

As a general matter, we believe that mandatory disclosures often deter advertising. HB 529 and SB 232 impose several new disclosure requirements that appear burdensome, overlapping, and to some degree confusing.

B. Proposed section 332.321(2)(14)(h) is unclear and may confuse consumers

Under HB 529 and SB 232, false, misleading or deceptive advertisements or solicitations would include, but not be limited to:

> [a]ny announcement of services by a general practitioner which does not state in a prominent manner that the dental practice is one of general dentistry. Said announcement of the general practice of dentistry must be at least as prominent as the announcement of services offered.

The meaning of proposed section 332.321(2)(14)(h) is unclear. Would dentists not certified as specialists merely be required to state prominently that they are general dentists, or would they be required to state that their actual practice is one of general dentistry? If the latter interpretation is the one that ultimately prevails, then a Missouri dentist who wishes to advertise and provide only a particular dental service would be forced to advertise that he or she provides and is interested in providing general dental services. Indeed, this provision could ultimately provide a disservice to those consumers who respond under the assumption that the general dentist provides a full range of dental services when in fact the dentist is willing to provide only certain dental services.

The various disclosure provisions contained in HB 529 and SB 232, when read in conjunction with the rest of the existing regulations governing Missouri general dentists, appear to be overlapping and quite burdensome. For example, if either HB 529 or SB 232 was passed, a general dentist would be required in certain situations to place two disclosures within one single advertisement. Section 332.321(2)(14)(f) of Missouri's current law[13] requires a dentist who wishes to advertise using a term denoting a recognized specialty such as orthodontics to state: "Notice: the following dentist(s) in this practice is (are) not licensed in Missouri as specialists [sic] in the advertised dental specialty(s) of . . . ." Since particular services would have been announced, proposed section 332.321(2)(14)(h) would further require a dentist to state that his or her dental practice is one of general dentistry[14] even if it is not.

C. Proposed section 332.321(2)(14)(i) would allow certain advertising but require an unnecessary disclaimer

Under HB 529 and SB 232, false, misleading or deceptive advertisements or solicitations would include, but not be limited to:

> [a]ny announcement containing any terms [denoting or] implying specialty areas which are not recognized by the American Dental Association unless the announcement contains a disclaimer as prescribed by rule of the board.

Proposed section 332.321(2)(14)(i) would permit terms to be used that imply specialty areas that are not recognized by the American Dental Association if such terms are accompanied by a disclaimer that would be prescribed by rule of the Missouri Dental Board. To the extent that the bill would relax current restrictions and allow dentists to use terms in their advertisements that imply specialty areas which are not recognized by the ADA, the bills seem to improve upon current law. However, under these circumstances, we have strong reservations about the

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13 Section 332.321(2)(14)(f) of Missouri's current law is Section 332.321(2)(14)(g) of HB 529 and SB 232.

14 Proposed sections 332.321(14)(h) and 332.321(14)(i) of HB 529 and SB 232 could also operate together to require two similar disclosures within a single advertisement.

desirability for a disclaimer. As previously discussed, we are unaware of any evidence indicating that consumers are misled when particular dental services, regardless of whether recognized by the ADA or not, are truthfully advertised. Since a disclaimer inevitably places costs and burdens on advertising, it appears likely that any disclaimer that the Board prescribes will have the effect of deterring some truthful and nondeceptive advertising.[15]

D. Proposed section 332.321(2)(14)(j) would appear to burden advertisements for multi-location dental practices

Under HB 529 and SB 232, false, misleading or deceptive advertisements or solicitations would include, but not be limited to:

> [a]ny announcement that does not name a responsible dentist for the practice being advertised. The dentist shall be currently licensed to practice dentistry in this state and shall be regularly employed in and responsible for the management, supervision and operation of each office location listed in the advertisement.

Proposed section 332.321(2)(14)(j) appears to be much more restrictive than is necessary to protect Missouri's interest in ensuring that a named dentist will be responsible for each individual dental practice. We recognize that Missouri may wish to ensure identification and accountability of individual dentists practicing under a trade name. However, proposed section 332.082 would already require every dentist who is part of a multidentist practice to designate "for each patient a dentist of record for each procedure performed for a patient." This proposed provision would appear to adequately ensure identification and accountability of individual dentists without unduly restricting nondeceptive advertising.

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15 This provision further appears to be internally inconsistent with proposed sections 332.321(2)(14)(e) and 332.321(2)(14)(f) which more broadly prohibit the use of the terms "specializing in," "limited to," and other "like or similar terms or phrases."

In contrast, proposed section 332.321(2)(14)(j) would broadly prohibit all announcements that do not name a responsible dentist for the practice being advertised. Chain dental offices, for example, would apparently have to state the name of the dentist who is responsible at each of many locations. This requirement could be extremely burdensome, especially in broadcast advertising. It would appear that Missouri could advance its legitimate concerns through less burdensome means, such as by requiring a listing of the dentists to be posted at each location and/or by requiring dentists' names to appear on the patients' records and on all invoices and receipts.

IV. CONCLUSION

We believe that Missouri's legitimate interest in protecting its consumers from misleading dental advertisements is poorly advanced by HB 529 and SB 232. Indeed, these two overly broad bills are likely to harm consumers by limiting truthful and nondeceptive information about the kinds of services that general dentists licensed in Missouri provide in accordance with Missouri law. Provisions such as these that go far beyond prohibiting false and deceptive advertising have the potential to result in a loss of consumer welfare by making it more difficult for consumers to identify the types of dental services that they prefer and by increasing the prices of dental services. For all of the above reasons, the staff of the Federal Trade Commission recommends that these bills not be enacted. We further recommend that Missouri re-examine its existing dental laws and consider whether its existing provisions may unnecessarily deprive consumers of truthful, nondeceptive information about dental services. We appreciate having had this opportunity to provide our views on these issues.

Sincerely,

John M. Peterson
Director
Chicago Regional Office

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