



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

~~CONFIDENTIAL~~ AUTHORIZED

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April 30, 1987

Dr. William A. Overton
President, Tennessee Board of Dentistry
283 Plus Park Blvd.
Nashville, TN 37219-5407

Dear Dr. Overton:

We are pleased to respond to your request for our comments on the advertising rules that the Tennessee Board of Dentistry ("Board") intends to consider at its rulemaking hearing on May 1, 1987. We support the Board's efforts to broaden the scope of permissible advertising by dentists, and, with certain reservations noted below, we urge the Board to adopt the proposed rules.¹

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 or deceptive acts or practices in or affecting commerce. Under its statutory mandate, the Commission encourages 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 public and private restrictions on the business practices of dentists, optometrists, lawyers, physicians, and other state-licensed professionals. Our goal is to identify and seek the removal of restrictions that impede competition and increase costs, without providing countervailing benefits to consumers.

As 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

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

professionals to engage in truthful, nondeceptive advertising.² Studies indicate that where truthful advertising is permitted, prices for professional goods and services are lower than where advertising is restricted or prohibited.³ Studies also indicate that removing restrictions on advertising does not decrease the quality of services available.⁴ We have examined various justifications that have been offered for restrictions on advertising and have concluded, as the courts have, that these reasons do not justify restrictions on truthful, nondeceptive

² See, e.g., 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 advertising regulations. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S.Ct. 2265 (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); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on price 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).

⁴ Bureau of Economics, Federal 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).

advertising. 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 and loss of consumer welfare.

PROPOSED RULES

The proposed rules represent a substantial improvement over the Board's existing regulations. They would eliminate many provisions that now appear to impede the communication of nondeceptive information to consumers.⁵ However, we believe there are certain additional changes that would still further enhance the rules' benefits for consumers. Our specific suggestions are discussed in sequence below.

1. Range of Fees

Proposed section 0460-7-.03(2) would permit the advertising of a range of fees, provided that there is a disclosure of the "basic factors on which the actual fee will be determined." We support the Board's decision to expand the scope of permissible price advertising. However, we have some concern that the disclosure requirement, if construed broadly, could unnecessarily burden truthful advertising. Vague or broad disclosure requirements often force advertisers to provide information that is only marginally related to the primary message of the advertisement. Such requirements can nonetheless require significant time in a radio or television ad and space in a printed ad, hence greatly increasing the cost of advertising. Under such circumstances, advertisers may be deterred from doing any advertising, thus depriving consumers of potentially useful information. Therefore, we urge the Board to announce its intention to interpret "basic factors" so as to require only

⁵ The current rules restrict advertising in a number of ways. For example, they limit price advertising to fixed prices for routine services; they ban the use of certain media and require all broadcast media to be prerecorded; they specify that certain categories of information may be included in dental advertising and specifically ban the use of a wide range of nondeceptive statements, including claims of superiority and affiliations with nonprofit or charitable organizations; they ban any use of testimonials as well as other attention-getting devices and require that all advertising be done in a dignified manner; they also include a broad ban on in-person solicitation, which encompasses solicitation by mail or telephone. Finally, they contain two potentially burdensome disclosure provisions which require that the names of all dentists in a practice be listed in all advertising and that all materials used and their effect on prices must be given in any advertising that includes prices.

those disclosures that are necessary to prevent deception of the public.

2. Referral Fees

Proposed section 0460-7-.04(1)(t) would prohibit a licensee from "offering, giving, receiving, or agreeing to receive any fee or other consideration to or from a third party for the referral of a patient in connection with the performance of professional services." This proposed rule would appear to prevent dentists from participating in independent referral services that match clients with appropriate practitioners. Such services may be valuable in helping consumers locate needed dental care. Indeed, by facilitating the gathering of information by consumers, these services may actually increase competition among health care professionals. The proposed rule may also interfere with the operation of alternative health care delivery systems (such as PPO's and HMO's) that may have incentive arrangements with health care professionals in which fees are divided between the medical plan and the professional.

We 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. In addition, a general provision articulating that referrals should be made and accepted based on professional considerations of the consumers' welfare rather than on financial considerations may also be appropriate.

3. Specialty Advertising

Section 0460-7-.05 of the Board's proposed rules regulates the advertising of areas of specialization by dentists. We recognize that Tenn. Code Ann. § 63-5-112 limits the manner in which non-certified dentists may advertise their expertise. Within these statutory limits, it appears that proposed regulation 0460-7-.05(2) would allow a general dentist to convey truthful information about special expertise that he or she has acquired through training or practice in a particular field, even though this has not led to formal certification. However, we draw the Board's attention to a potential ambiguity in this provision. A narrow reading would appear to allow advertising of expertise only by those general dentists who strictly limit their practices to certain branches of dentistry. Because we believe that consumers would benefit from a rule that allows all dentists with verifiable expertise to communicate that information to the public, we urge the Board to make it clear that this provision allows such advertising. Such a rule would leave dentists free to make truthful, nondeceptive claims that they have expertise in or concentrate their practice in a particular field of dentistry, even if they do not work exclusively in that field.

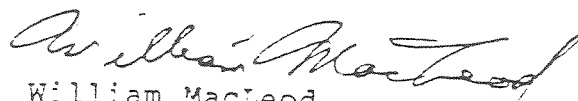
4. Responsibility for Advertising

We direct our final comment to proposed regulation 0460-7-.06(1), which specifies those individuals who will be held responsible for the form and content of dental advertising. We understand the Board's need to establish a fair system of accountability for dental advertising decisions. However, holding all licensed professional employees responsible for advertising claims-- regardless of their actual involvement in preparing or communicating these claims--could impose undue hardships on large practices where many licensed employees may play no role at all in advertising decisions. Therefore, we suggest that the Board modify this provision to read: "Each licensee who is a principal partner, officer, or licensed professional employee acting in control or management of a firm or entity identified in any advertisement, is jointly and severally responsible for the form and content of any advertisement." In this way only those employees who have some control over advertising will be held accountable for advertising decisions.

With the exception of the reservations discussed above, we support the Board's adoption of the proposed rules. They represent a significant improvement over the existing rules and, if adopted with the changes we have proposed, are likely to provide real and substantial benefits to consumers. They will permit public access to a wider range of truthful information about the availability of dental services. They would also help to stimulate competition among dentists, and, in the process, improve the efficiency with which dental services are delivered, while protecting the public from deceptive advertising.

We thank you for your willingness to consider our comments. Please let us know if we can be of further assistance.

Sincerely yours,


William MacLeod
Director

cc: Barry Turner
Assistant Attorney General