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Federal Trade Commission

Cleveland Regional Office

Suite 500  
The Mall Building  
118 St. Clair Avenue  
Cleveland, Ohio 44114  
Area Code (216) 522-1207

**COMMISSION  
APPROVED**

November 21, 1986

Ms. Deborah L. Cameron  
Kentucky Board of Dentistry  
2106 Bardstown Road  
Louisville, Kentucky 40205

Dear Ms. Cameron:

Thank you for the courtesies extended by the Board during our conversation of November 21. I understand that the enclosed letter to Mr. Thompson will be included in the record of the November 24, 1986 public hearing to be forwarded by the Board to the appropriate committee of the Kentucky legislature.

Sincerely,

A handwritten signature in cursive script, appearing to read "William W. Jacobs".

William W. Jacobs  
Director  
Cleveland Regional Office

Federal Trade Commission



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Suite 500  
The Mall Building  
118 St. Clair Avenue  
Cleveland, Ohio 44114  
Area Code (216) 522-4207

November 21, 1986

R.B. Thompson, Executive Director  
Kentucky Board of Dentistry  
2106 Bardstown Road  
Louisville, Kentucky 40205

Dear Mr. Thompson:

The Federal Trade Commission's Cleveland Regional Office and the Bureau of Consumer Protection, Economics and Competition <sup>1/</sup> are pleased to comment on the Kentucky Board of Dentistry's proposed regulation governing advertising by dentists in Kentucky. Although we recognize and support the Board's interest in preventing false or deceptive advertising, we believe the proposed regulation is unnecessary. Its adoption will adversely affect both consumer welfare and competition by limiting the dissemination of truthful, nondeceptive information about dentists and their services. We urge the Board to forgo promulgation of this regulation.

**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 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 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, increase costs, and harm consumers without providing countervailing benefits.

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<sup>1/</sup> These comments represent the views of the Cleveland Regional Office and the Bureau 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 staff to submit these comments.

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 professionals to engage in truthful, nondeceptive advertising. 2/ Studies show 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/ The Commission has also examined various justifications that have been offered for restrictions on advertising and has concluded, as the courts have, that these proffered reasons do not justify restrictions on truthful 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.

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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 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).

## II. THE PROPOSED REGULATION

The proposed regulation would restrict the manner in which general dentists could truthfully communicate information about the services they offer. Section 1 of the proposed regulation prohibits general dentists from using the name of a branch of dentistry, "such terms as 'specialist,' " or "other phrases customarily used by qualified specialists" in any form of announcement, printed material, or public advertisement. By prohibiting "advertising using such terms as 'specialist,' " it is unclear whether a general dentist could state for example, that he or she is "experienced" in a particular field of dentistry. The term "other phrases customarily used by qualified specialists" is also undefined and makes the scope of this section unclear. Section 2 of the proposed regulation permits general dentists to list their areas of interest and the services they provide in "lay terms" in advertisements that also must disclose the general nature of their practices. There is no definition of the phrase "lay terms," making it difficult to distinguish between what the regulation prohibits and what it permits. Further, the distinction between "lay terms" and "phrases customarily used by specialists" does not provide any clear guidelines as to whether an advertisement contains material considered improper under the proposed regulation. Even read narrowly, the regulation effectively prohibits a general dentist from using commonly recognized terms in advertisements or any printed materials to describe the areas of practice or the services lawfully available from that dentist. Thus, the proposed regulation will deny Kentucky consumers useful information about the availability of dental services and stifle competition among the various providers of these services.

The stated purpose of the Board's proposed regulation is to set forth "the manner in which dentists licensed in Kentucky may advertise dental services." The apparent objective of the proposed regulation is to protect Kentucky consumers from being misled into believing that a general dentist has been licensed and certified as a dental specialist and is therefore especially qualified in a particular branch of dentistry. However, Section 313.445 of the Kentucky Revised Statutes specifically permits any licensed dentist to perform dental services in any of the seven branches of dentistry recognized as suitable for the licensing and certification of dental specialists under KRS §313.400. Because general dentists are qualified to practice in all seven branches of dentistry, advertising that they practice in such areas is truthful. Therefore, we submit that the proposed regulation is unnecessary to prevent deception.

We are unaware of any support for the proposition that if general dentists employ advertising that includes the name of a branch of dentistry, consumers will be misled. Terms such as "orthodontics" and "periodontics" truthfully and accurately describe areas of practice in which general dentists are legally and professionally qualified to perform dental services in Kentucky. Although such words may sound more technical to some people than "braces" or "gum surgery," they should be understood by most consumers. An advertisement listing areas of practice for a general dentist, without making any claim of special expertise, is not likely to mislead consumers. When the advertisement also reveals the general nature of the practice, consumers are even less likely to be deceived. Furthermore, the regulation might prohibit a general dentist from distributing to patients educational material prepared by the American Dental Association or other professional groups because the material includes the name of a branch of dentistry. Absent strong evidence that consumers have been misled — or a factual record indicating that consumers are likely to be misled — by a general dentist's use of the name of a branch of dentistry, this regulation should not be adopted.

Section 2 of the proposed regulation does permit general dentists to advertise areas of interest and services provided in "lay terms." There are two problems with this provision. First, limiting general practitioners to the use of lay terms may result in an unwarranted marketing advantage for specialists, even though both groups are legally authorized to perform the same services. By reserving the use of professional terms for certified specialists, the regulation deprives 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. Second, as noted above, although Section 2 provides two examples of permissible advertisements using lay terms, it does not provide any objective standard to determine what does or does not constitute a "lay term." All dentists, generalists and specialists alike, should be permitted to describe the services they may legally provide in the same truthful, nondeceptive words.

### III. CONCLUSION

We believe that the Board's legitimate interest in protecting Kentucky consumers from misleading dental advertisements is not advanced by the proposed regulation. Rather, the regulation may harm consumers by limiting truthful information about the kinds of services all dentists licensed in Kentucky may legally provide and by hindering competition among dental service providers.

We have referred to a number of studies, cases, and other materials 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.

Yours truly,



William W. Jacobs  
Regional Director  
Cleveland Regional Office