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Federal Trade Commission

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January 7, 1987

**COMMISSION
APPROVED**

David A. Garcia, Esq.
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State of New Mexico
P.O. Drawer 1508
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Dear Mr. Garcia:

The Dallas Regional Office and the Bureaus of Consumer Protection, Competition, and Economics are pleased to submit this letter in response to the New Mexico State Board of Chiropractic Examiners' ("Board") request for public comments on its proposed amendments to Board Rules 10 and 11.¹ We understand that the Board proposes to modify Rule 10 by eliminating its restrictions on price advertising and superiority claims in advertisements. The Board also proposes to modify Rule 11 by abolishing its restrictions on Yellow Pages advertising. In general, we applaud these proposals but, as explained in detail below, suggest two modifications to the language of the Board's proposed new rules.

I. 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 methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate, the Commission has attempted to encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has had an ongoing program examining the competitive effects of restrictions on the business practices of state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others. The Commission's goal has been to identify and seek removal of restrictions that impede competition, increase costs, and harm consumers without providing significant countervailing benefits.

¹ These comments represent the views of the Dallas Regional Office and the Bureaus of Consumer Protection, Competition, and Economics of the Federal Trade Commission and do not necessarily represent the views of the Commission or any individual Commissioner. The Commission, however, has authorized their submission.

As a 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 advertise nondeceptively.² Studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited,³ and also that advertising constraints do not increase the quality

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

of goods and services.⁴ The Commission has examined various justifications that have been offered for restrictions on advertising and has concluded that these arguments do not warrant restrictions on truthful, nondeceptive advertising. For this reason, only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices and a decrease in consumer welfare.

II. THE PROPOSED AMENDMENTS TO RULES 10 AND 11 OF THE BOARD'S RULES AND REGULATIONS

Rules 10 and 11 of the Rules and Regulations of the New Mexico State Board of Chiropractic Examiners currently limit the ability of chiropractors to advertise. The Board's decision to seek public comment on rule modifications that broaden the ability of chiropractors to engage in legitimate, nondeceptive advertising appears to reflect the Board's recognition that advertising benefits consumers as well as chiropractors who wish to market their services in innovative ways. It is particularly significant that the Board has proposed to eliminate three rules containing advertising restrictions that could thwart competition among chiropractors and deprive consumers of useful information.

We support the Board's proposal to repeal Rule 10.03(B). Under this Rule, representations that cannot be objectively verified, such as claims of superiority, are presumed to be false, misleading or deceptive. Bans on superiority claims clearly lessen competition among sellers. At a minimum, they restrict comparative advertising that can effectively inform and attract customers. When sellers cannot truthfully compare the attributes of their services to those of their competitors, the incentive to improve or offer different products, services or prices is reduced.

Bans on claims of superiority are likely to injure competition and consumers all the more if they are interpreted to prohibit a wider range of factual statements. Virtually any statement about a chiropractor's qualifications, experience or

⁴ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practices 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).

performance can be considered an implicit claim of superiority. Inhibiting such claims hinders chiropractors from providing consumers with truthful information about the differences between their services and those of their competitors.

Similarly, we concur in the Board's proposal to repeal Rule 10.04, and in particular, Rule 10.04(E). Rule 10.04(E) currently establishes a presumption that certain types of price advertising, such as "low cost," "economy," and "free," are false, misleading or deceptive. Price advertising may serve to enhance competition by facilitating new entry and by assisting existing firms to attract new customers. It is not only a useful competitive device, but also provides consumers with valuable information. Thus, this Rule may harm both the public and chiropractors.

We also concur in the Board's proposal to repeal Rule 11.04. Rule 11.04 limits the size of Yellow Pages advertisements by chiropractic referral services and prevents the use of an individual chiropractor's name in such ads. This Rule does not appear to be reasonably related to the Board's goal of preventing false, misleading or deceptive advertising, and may deprive chiropractors of a valuable competitive tool. The Board's proposal to repeal this Rule suggests that it recognizes the Rule's potential to discourage the advertising of much useful information about the availability and nature of chiropractic services.

Although we support the Board's proposal to repeal Rules 10.03(B), 10.04(E), and 11.04, we are concerned with certain features of the proposed standard for determining what types of advertising should be permitted. First, the Board's proposed rule would ban advertising that contains, inter alia, "sensational or fabulous statements." This restriction is ambiguous and could cause some chiropractors to refrain from supplying information useful to consumers in their advertisements for fear of violating the Rule. To remedy this problem, we recommend that the Board substitute the phrase "misleading or deceptive" for the phrase "sensational or fabulous." This language modification should ensure that chiropractors are able to make nondeceptive, truthful claims.

We also believe that one additional change should be made in the proposed standard. The Board's proposed Rule would ban advertising "which is intended or has a tendency to . . . impose upon credulous or ignorant persons." Under this standard, a chiropractor is responsible for ensuring that his or her advertising will not be misinterpreted by even the most uninformed, uneducated or ignorant consumer. According to the analysis contained in Federal Trade Commission's 1983 Deception

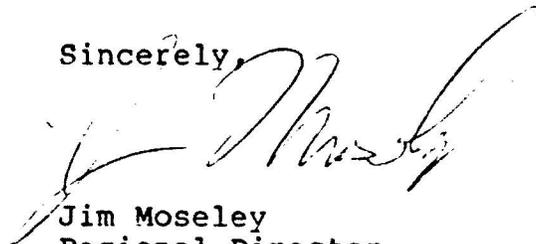
Policy Statement this would appear to be inappropriate.⁵ The Commission noted that an advertiser should only be responsible for how a reasonable consumer will interpret the advertising. If chiropractors are responsible for unreasonable interpretations of their advertising, both their ability and willingness to advertise will be greatly curtailed, thus depriving chiropractors of a significant competitive device and denying valuable information to consumers. Consequently, we recommend that the Board strike "impose upon credulous or ignorant persons" from its proposed Rule.

III. CONCLUSION

In sum, we support and commend the Board's proposals to enhance the ability of chiropractors to advertise nondeceptively in New Mexico. We do, however, recommend that the Board make the two changes in its proposed rules noted above. We believe that those two modifications will benefit both consumers and those chiropractors who wish to market their services in innovative ways.

Thank you for considering our comments. We have referred to several studies, cases, and other materials. We would be happy to supply copies of these if you so desire, or to provide any other assistance.

Sincerely,



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cc: Ms. Michelle McGinnis
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⁵ The Deception Policy Statement is contained in a letter to the Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives, Washington, D.C., October 14, 1983. A copy of the statement is enclosed.