STATE OF MINNESOTA

COUNTY OF HENNEPIN

BEFORE THE MINNESOTA

BOARD OF DENTISTRY

In the Matter of Proposed Amendments to Dentistry Rules Relating to Dental Practice Names and Advertising, Minn. Rules parts 3100.6400, 3100.6500, 3100.6600, 3100.7100; and repeal of Minn. Rules pt. 3100.6600, subp. 2

STATEMENT OF NEED AND REASONABLENESS

I. INTRODUCTION

The Minnesota Board of Dentistry (hereinafter "Board"), pursuant to the rulemaking provisions of the Administrative Procedure Act, Minn. Stat. ch. 14 (1984), presents facts establishing the need for and reasonableness of proposed amendments to rules of the Board governing names of dental practices and advertising of dentists and dental services. Terms used in this Statement have the meaning given them in Minn. Rules, pt. 3100.0100 (1983).

In order to adopt the proposed amendments, the Board must demonstrate that it has complied with all the procedural and substantive requirements of rulemaking. Those requirements are that: 1) there is statutory authority to adopt the rule, 2) all necessary procedural steps have been taken, 3) any additional requirements imposed by law have been satisfied; 4) the rules are needed, and 5) the rules are reasonable. This statement demonstrates that the Board has met these requirements.

II. STATUTORY AUTHORITY

Pursuant to Minn. Stat. §§ 150A.04, subd. 5; 150A.11, subd. 2; and 214.15, the Board may adopt rules necessary to carry out the provisions and purposes of Minn. Stat. ch. 150A and rules relating to advertising.

The Board is authorized to promulgate rules governing the name under which a dentist may practice pursuant to Minn. Stat. §§ 150A.04, subd. 5; 150A.11, subd. 1; 319A.07; and 319A.18.

III. COMPLIANCE WITH PROCEDURAL RULEMAKING REQUIREMENTS

A. Requirements in General

The Board has determined that the amendment of the above captioned rules is noncontroversial and has elected to follow the procedures set forth in Minn. Stat. §§ 14.05 to 14.12 and 14.22 to 14.28 (1984), which provide for the adoption of noncontroversial rules without the holding of a public hearing. However, if during the 30-day comment period 25 or more people request a hearing, one must be held. In order to expedite the hearing should the requisite number of people request one, the hearing is being noticed at the same time and as part of the same notice by which the Board is announcing its intent to adopt the rules via the noncontroversial process. Therefore, the procedures for adopting rules after a hearing as specified in Minn. Stat. §§ 14.131 to 14.20 (1984) and in Minn. Rules pts. 1400.0200 to 1400.1200 (1983), as amended in 9 S.R. 2279 (April 8, 1985), will also be met. The hearing, of course, will be cancelled if the Board does not receive a request for one from 25 or more people.

Pursuant to Minn. Stat. §§ 14.131 and 14.23 (1984) and Minn. Rules pt. 1400.0500, the Board has prepared this Statement of Need and Reasonableness which is available to the public. It contains the verbatim affirmative presentation in support of the above-captioned rule amendments pursuant to Minn. Rules pt. 1400.0500, subp. 3 (1983) as amended in 9 S.R. 2279 (April 8, 1985). If a hearing is held, this Statement of Need and Reasonableness will be introduced into the record as an exhibit and copies will be available for review at the hearing. Because the Statement of Need and Reasonableness contains the Board's complete presentation, the Board will not call any

witnesses to testify on its behalf. Dr. Robert Hoover and Kathleen Lapham, RDA, the current and former chairpersons of the Board's rules committee, and Dale Forseth, the Board's Executive Secretary, will be present at the hearing to summarize all or portions of this Statement of Need and Reasonableness, if requested by the Administrative Law Judge, to answer questions, and to respond to concerns that may be raised. In addition, because of the Federal Trade Commission's (hereinafter "FTC") role in these amendments, as explained below, supra at 7, the Board will ask an FTC representative to appear at a hearing, if held, to discuss its view of the amendments and the need for them. As such, it the FTC does appear, it will not be as a Board witness but as an independent entity with an interest in the rules.

The Board will publish in the State Register the proposed amendments and notice of its intention to amend the rules without a public hearing in combination with its notice of intent to amend its rules with a public hearing if 25 or more persons request a hearing. The Board will also mail copies of the combined notices to persons registered with the Board pursuant to Minn. Stat. § 14.14 (1984), subd. 1a, as well as to others whom the Board believes will have an interest in the amendments.

These rules will become effective five work days after publication of a notice of adoption in the State Register pursuant to Minn. Stat. §§ 14.18 and 14.27 (1984).

B. Notice of Intent to Solicit Information From Non-Agency Sources

Minnesota Statute § 14.10 (1984) requires an agency, which seeks information or opinions from sources outside the agency in preparing to propose the amendment of rules, to publish a notice of its action in the State Register and afford all interested persons an opportunity to submit data or comments on the subject of concern in writing

or orally. In the State Register issue of Monday, December 31, 1984, at page 1516, the Board published a notice entitled "Outside Opinion Sought Concerning Proposed Amendments to Rules Governing Advertising of Dentists and Dental Services."

After publication of the Notice, the Board received two written comments which will become part of the record. In addition, the Board discussed the proposed amendments at its meeting of January 26, 1985, and received oral comment from interested parties.

IV. COMPLIANCE WITH OTHER RULEMAKING REQUIREMENTS

A. Miscellaneous Requirements

These rules do not incorporate by reference text from any other law, rule, or available text or book. See, Minn. Stat. § 14.07, subd. 4 (1984). These rules minimize the duplication of statutory language. See Minn. Stat. § 14.07, subd. 3(1) (1984). The adoption of these rules will not require the expenditure of public money by local public bodies of greater than $100,000 in either of the two years following promulgation, nor do the rules have any impact on agricultural land. See Minn. Stat. § 14.11 (1984). Finally, a fiscal note referenced in Minn. Laws 1985, Ex. Sess., ch. 10, §§ 34 to 36 and 38, is not required because these rules do not mandate that a local agency or school district take an action which would force them to incur costs.

No other statute sets forth requirements for the promulgation of rules; however, there is one other action which the Board has taken. Except for the amendments to part 3100.6400, the fact that the rules are being changed is the direct result of questions raised about their validity by the FTC. (Although the FTC also challenged part 3100.6400, the Board had already decided to propose amendment of it before the FTC inquiry was received.) In developing the amendments, the Board sought and obtained comments and advice from the FTC as well as from the Antitrust Division

of the Office of the Attorney General. Indeed, the proposals being set forth are consistent with the Board's understanding of the guidance received from those two offices. Because the rule changes were initiated as a result of the FTC involvement, the Board has asked the FTC to make a written submission during the comment period. It is the Board's understanding that the FTC will make such a submission. If a hearing must be held, the Board will request that a representative of the FTC appear and speak in favor of the amendments.

B. Small Business Considerations

It is the position of the Board that Minn. Stat. § 14.115 (1984), relating to small business considerations in rulemaking, does not apply to the rules it promulgates. Minn. Stat. § 14.115, subd. 7(b) (1984), states that section 14.115 does not apply to "agency rules that do not affect small businesses directly." The Board's authority relates only to dentists and not to the dental businesses they operate. While someone cannot operate a dental business without being licensed as a dentist by the Board, the license runs primarily to the technical ability to provide dental services and not to the business aspects. This is graphically illustrated in recent dealings with nondentists who are involved with dental franchise offices. The Board has not taken the position that nondentists can have no involvement in operating a dental business. Instead, its position is that nondentists may not interfere with or have any control over the dentist when it comes to any aspect of the practice which could affect the providing of professional services to a patient. Thus the Board regulates the provision of dental services and not the dental business per se. As such, it is exempt under Minn. Stat. § 14.115, subd. 7(b) (1984).

The Board is also exempt from the provisions of section 14.115, pursuant to its subdivision 7(c) which states that section 14.115 does not apply to "service businesses

regulated by government bodies, for standards and costs, such as . . . providers of medical care." Dentists provide medical care and are regulated for standards and costs. The Board regulates dentists for standards and the Minnesota Department of Human Services for costs.

The question might be raised as to whether the same government body has to regulate the service business for standards and costs in order for the exemption to apply. The Board's position is that the question should be answered in the negative. First, the provision specifically refers to regulation by "government bodies." Second, and most significantly, some of the examples of service businesses given in the subdivision where the rules governing them would be exempt from the conditions of section 14.115 actually would not qualify for the exemption if the same government body had to regulate for standards and costs. For example, nursing homes and hospitals are regulated by different government bodies for standards and costs. The Minnesota Department of Health regulates them for standards and the Minnesota Department of Human Services for costs. If the legislature had intended to exempt from the scope of section 14.115 only those rules addressing services businesses regulated by one government body for standards and costs, then it could not have included in its list of examples nursing homes and hospitals.

Based on the foregoing, it is clear that section 14.115 is not intended to apply to rules promulgated by the Board. However, because there is no determination addressing the issue from a court, the Attorney General's Office, or Office of Administrative Hearings, the Board will briefly address the five methods listed in Minn. Stat. § 14.115, subd. 2 (1984) for reducing the impact of rules on small businesses.

The suggested methods are largely inapplicable to advertising rules, which do not contain reporting requirements, compliance schedules or deadlines, or design or

operational deadlines. The two methods which might arguably be applicable, the establishment of less stringent compliance requirements and the exemption of small businesses from any or all requirements of the rules, cannot be incorporated into the proposed amendments. To do so would be contrary to the statutory objectives that are the basis of the proposed rulemaking.

V. NEED FOR AND REASONABLENESS OF THE PROPOSED AMENDMENTS

A. General Need For Proposed Amendments

By letter dated November 15, 1984, the FTC advised the Minnesota Board of Dentistry that it believes that under current antitrust standards certain of the Board's rules could have the effect of unreasonably restraining the advertising of dentists and dental services. As a result, the FTC's Chicago Regional Office was beginning a preliminary nonpublic investigation of the rules. The investigation was specifically focused on the following: first, that portion of part 3100.6400 which prohibits the use of any name which incorporates the use of the name of a state, city, or other political subdivision in whole or in part; second, on part 3100.6500 C and D which prohibits the use of public communications containing claims and statements which are self-laudatory, or which imply unusual or superior dental ability; third, on part 3100.6600 which defines routine services, restricts fee advertising to fees for routine services only, and prohibits advertising a range of fees for a given service; and fourth, on part 3100.7100 A, B, C, D, and G which prohibits the use of qualitative representations or comparative claims, testimonials and endorsements, the use of celebrities, dramatization, or graphic illustrations to imply patient satisfaction, and indicating affiliation with any organization other than the dental practice being advertised. The FTC feels that these provisions may unjustifiably prevent dentists from effectively communicating to the public truthful information about the services they offer and the fees for those services.

Such restraints, it is argued, can lessen competition among dentists and harm consumers without achieving countervailing benefits. Such conduct may violate section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Upon review of the FTC's concerns, the Board noted that prior to receiving the letter from the FTC, it had initiated procedures to repeal the language at issue in part 3100.6400 which concerns incorporating the names of states, cities, or political subdivisions into the name of a dental practice. The Board further noted that for the past two years, the Board has ceased enforcement of the language at issue in part 3100.6400.

As stated above, the Board sought opinion from persons outside the Board concerning proposed amendents to the remaining rules at issue. After considering the comments and opinions received, and after consultation with the FTC and the Antitrust Division of the Office of the Attorney General, the Board concluded that the rules should be amended in order to remove any rules which might be construed as having an unlawful, anti-competitive affect. In doing so, the Board is not admitting or conceding that any of its rules violate the Federal Trade Commission's Act or of any other law. Instead, the Board is amending the rules to remove any questions that they may be too restrictive and in keeping with its goal of only prohibiting false, misleading, or deceptive advertising as is more fully explained below.

The need for each specific amendment is addressed in the rule-by-rule justification.

B. General Reasonableness of Proposed Amendments

In order to amend administrative rules, an agency must demonstrate that the proposed amendments are reasonable. The current rules were developed to promote the dissemination of truthful advertisements concerning dentists and dental services. Their

purpose was to prevent harm to consumers from deceptive and false advertisements as well as to provide a framework upon which consumers could utilize truthful and nonmisleading information in advertisements to choose between competing dentists and dental services.

The proposed amendments continue to enhance the consumer's ability to utilize dental advertising to make choices between competing dentists and dental services. The amendments, however, narrow the definitions of deceptive advertising to avoid inhibiting the dissemination of truthful and accurate information. The amendments have a rational basis in law and dentistry, and do not represent arbitrary or capricious policies.

C. Legal Background Justifying the Proposed Amendments

Traditionally, licensees in the health care and legal professions have been prohibited from directly advertising to the public, but have been allowed to solicit referrals in professional journals and other intra-professional advertising. In the 1930's, the United States Supreme Court, in Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1934), upheld what were then rather typical advertising restrictions of the Oregon State Board of Dental Examiners. The restrictions included bans on untruthful or misleading advertising, advertising professional superiority, price advertising, and advertising of free dental work. The Court held that such state-imposed restrictions did not violate the professional's rights under the due process or equal protection clauses of the Fourteenth Amendment, nor did they unconstitutionally impair contracts since the state regulation was a reasonable exercise of the state's police power. The court noted that the legislature was concerned not only with preventing deception and insuring competency of individual practitioners, but also with preventing practices which would tend to "demoralize the profession by forcing its members into an unseemly rivalry which

would enlarge the opportunities of the least scrupulous." Id. at 612. The Court stated that the truthfulness of the claim of "professional superiority" was no defense. Rather, the legislature was entitled to consider the general effects of the prohibited practices, and if these effects facilitated unwarranted or misleading claims, the legislature could enact a general rule of prohibition even though in particular instances there might be no actual deception or misstatement. Id. at 613.

Semler has never been specifically overruled or modified by the Supreme Court and still provides strong authority for the ability of a state to impose on its professions reasonable restrictions for the protection of the public. However, recent decisions in the area of advertising have questioned whether and to what extent advertising restrictions are reasonably necessary to protect the public or whether they are in fact injurious to the public. These cases have considered this issue in light of First Amendment freedom of speech guarantees and antitrust laws.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Court addressed the issue of whether the state bar's enforcement of a minimum fee schedule violated the antitrust provisions of section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits conspiracies in restraint of trade or commerce. The Court held that the practice of law was not exempt from this provision and that anti-competitive activities by lawyers could and in this case did exert a restraint on commerce. Although the Court held that certain anti-competitive conduct by lawyers fell within the Sherman Act, the Court specifically noted that it intended no diminution of the state's authority to regulate its professions. Id. at 793.

The issue of whether commercial speech was protected by the First Amendment was addressed in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748 (1976). The Court held that a statute which prohibited

drug price advertising and which was enforced by the Virginia State Board of Pharmacy was unconstitutional. The statute made a pharmacist guilty of unprofessional conduct if he published, advertised or promoted the amount, price, fee, premium, discount, rebate or credit term of any prescription drug. The Court held that the First Amendment protected this type of commercial speech and that the state's essential blanket prohibition on advertising of prices of prescription drugs was unconstitutional. The Court reasoned that the free flow of commercial information in a free enterprise system is indispensable to consumer decision making. The Court suggested, however, that false or misleading advertising of drugs by pharmacists could be regulated.

In Virginia Pharmacy Board, the Court stressed that it was considering only commercial advertising by pharmacists and not other professionals such as physicians or lawyers who may render a professional service rather than dispense a standardized product. It suggested that certain kinds of advertising of professional services might enhance the possibility of confusion and deception. Id. at 773 n. 25.

In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Court considered the issue of whether the First Amendment protection of commercial speech which was announced in Virginia Pharmacy Board applied to the advertising of routine services by lawyers. Although the Court was faced with the argument that the advertising restrictions in the Arizona Supreme Court's disciplinary rules violated the Sherman Act, it determined that the state in this case was exempt from the Sherman Act under a doctrine known as the state action exemption. However, the Court found that lawyer advertising was a form of commercial speech protected by the First Amendment and that advertising by lawyers may not be subjected to blanket suppression. Specifically, the Court held that advertising prices for routine legal services deserved First Amendment protection. The Court emphasized, however, that false, deceptive, or

misleading advertising was subject to restraint. The Court also noted that although it was not addressing the issue of whether claims of quality of services could be restricted, such claims may not be susceptible to measurement or verification and may be so likely to mislead as to warrant restriction. Id. at 383-84.

The issue of in-person solicitation was addressed in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). The Court held that the state bar could discipline a lawyer for in-person solicitation for pecuniary gain under circumstances which were likely to pose a danger that the state had a right to prevent. In this case, protection of the public from solicitation that involved fraud, undue influence, intimidation, and overreaching were legitimate and important state interests. Thus, the state bar's application of its disciplinary rule in this case did not violate the First and Fourteenth Amendments.

In contrast, the Court in In re Primus, 436 U.S. 412 (1978) held that prohibitions against the offering of free legal services by mail by a civil rights attorney violated the First Amendment's protection of freedom of expression and association. In this case, the Court emphasized that there was no evidence that the solicitation was misleading, overbearing, or involved any feature of deception or improper influence.

In National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978), the Court considered the issue of whether a professional society's cannon of ethics which prohibited competitive bidding by its members violated section 1 of the Sherman Act. Using antitrust analysis, the Court considered whether the prohibition on competitive bidding promoted or suppressed competition. The Court noted that the Sherman Act reflects a legislative determination that competition will produce not only lower prices but also better goods and services. In this case, the Court determined that the ban on

competitive bidding prevented customers from making price comparisons and thus constituted a restraint on trade. Although the Court noted that professional services may differ significantly from other business services, and thus the nature of the competition in the services may vary, ethical norms may serve to regulate and promote competition and thus fall within antitrust analysis. Id. at 695-696.

Another Supreme Court articulation of the permissible scope of professional advertising and solicitation is in In re R.M.J., 455 U.S. 191 (1982). In this case, an attorney had listed areas of practice that deviated from the language that was required by a bar advisory committee. The attorney's advertisements stated that he was licensed to practice in two states and was admitted to practice before the United States Supreme Court. The ads were distributed in the form of announcement cards in a general mailing. The Court held that the state bar's restrictions were unconstitutional since the advertisements were neither misleading nor outweighed by a substantial state interest. The Court applied a four-prong test that it had set forth in Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980), a public utility advertisement case.[1/] The Court noted that only truthful advertisements relating to lawful activity would be protected by the First Amendment while misleading advertisements could be prohibited entirely. However, the Court warned that states could not absolutely prohibit potentially misleading information if the information could be presented in a non-deceptive manner. Although the states retain the authority to regulate non-deceptive advertising, the Central Hudson test must be satisfied.

1/ "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine [1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest."

Id at 566.

The question of whether a professional association's ethical restrictions on advertising and solicitation violated section 5 of the Federal Trade Commission Act was at issue in American Medical Association v. FTC, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd 455 U.S. 676 (1982). The FTC found that the American Medical Association (AMA) code of ethics which prohibited certain types of advertising had the effect and purpose of severely inhibiting competition among health care providers. Using a "rule of reason" analysis,2/ the FTC found that the advertising restrictions were by their very nature anti-competitive and had the effect and purpose of being anti-competitive. In balancing the pro-competitive virtues against the anti-competitive evils to determine whether the restrictions were reasonable or unreasonable, the FTC rejected the AMA's justification that the restrictions on advertising were a means of preventing fraud and deception. The FTC concluded that the restraints bore no reasonable relationship to legitimate, pro-competitive concern and, because they unreasonably impeded competition, the restrictions were an unfair method of competition in violation of section 5 of the Federal Trade Commission Act. The FTC did note, however, that advertising prohibitions which were narrowly directed toward false or deceptive advertising were permissible since such restrictions could enhance competition by ensuring the communication of accurate information. However, the FTC cautioned that prohibitions must be drawn with specificity and that a total ban on advertising is too broad.

2/ Under a rule of reason analysis, the court will examine whether the imposed restraint merely regulates and thereby promotes competition or whether it suppresses or destroys competition. The court will examine the nature and purpose of the restriction and the effect the restriction has on competition. The court will then balance the pro-competitive virtues of the restraint against the anti-competitive evils. In order to withstand scrutiny, the pro-competitive virtues will be considered a valid justification only if they are not overly broad and if they promote competition, rather than merely foster other social goals. The court will also consider whether there are less restrictive alternatives available that can be substituted for the imposed restraint. See FTC v. American Medical Association, 94 F.T.C. 701, 1004-1010 (1979), citing Chicago Board of Trade v. U.S., 246 U.S. 231 (1918) and National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978).

In general, it is the Board's view that the foregoing cases indicate that any restrictions on professional advertising which are not facially false, misleading or related to an unlawful activity are suspect on both constitutional and antitrust grounds. Further, a substantial burden rests with the state to demonstrate that the restrictions are not overly broad or anti-competitive.

In light of the case law discussed above, it is evident that the amendments proposed by the Board are reasonable and legally supported. The following rule-by-rule justification will further demonstrate that the amendments are in keeping with these recent judicial pronouncements.

C. Rule-by-Rule Justification.

1. Part 3100.6400 Improper and Unjustified Names (formerly 7 MCAR § 3.044)

Under the existing rule, any name of a dental practice that includes the name of a state, city, or other political subdivision, in whole or in part, is deemed to be a violation of Minn. Stat. §§ 150A.11 and 319A.07 (1984). The Board proposed to amend this rule because it is doubtful that the use of the name of a political subdivision in the name of a dental practice would deceive the public or imply superiority. In fact, the medical profession has used the names of political subdivisions in their practice names for years, seemingly without harm to the public. As a result, many dental offices use the name of a political subdivision as part of the name of their practices. The Board has not, however, received any consumer complaints indicating that these names of dental offices have been misleading, deceptive, or otherwise troublesome. Given these two factors, it has become apparent to the Board that it is unrealistic to enforce the rule. To continue the restriction on the use of the name of political subdivisions would be unnecessary and unjustified. The rule needs to be brought into conformity with the Board's enforcement practices.

2. Part 3100.6500 Communicating Deceptive Statement or Claim (formerly 7 MCAR § 3.045A).

Current part 3100.6500 prohibits the use of any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim. Included within the definition of false, fraudulent, misleading, or deceptive statements or claims are statements which are self-laudatory or which imply unusual or superior dental ability. The prohibition against these types of statements may prohibit the dissemination of truthful information as well as untruthful information. Restraints on the dissemination of truthful information are not only objectionable under FTC standards but may also violate first amendment protections of commercial speech. See Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2791 (1977).[3/] Therefore, the amendment to part 3100.6500, item C will delete the language "self-laudatory statements" and item D will be deleted entirely. The changes are being made because the Board believes that they may sweep too broadly in prohibiting all claims regarding a licensee's skills.

The foregoing deletions, however, should be read in view of other amendments to part 3100.6500. These amendments add three items which expand the definition of false, fraudulent, misleading, or deceptive statements or claims. These additions to the list of prohibitive types of advertising are: first, statements that appeal to an individual's anxiety in an excessive or unfair way; second, statements that contain material claims of

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3/ The United States Supreme Court has not directly addressed the issue of what restrictions may be placed on claims of professional superiority. In Bates v. State Bar of Arizona, supra, the Court specifically noted that it was not addressing the issue of claims of quality of services and whether such claims could be restricted. As has been discussed, however, it did note that claims of quality of services may not be susceptible to measurement or verification and may be so likely to mislead as to warrant restriction. Although this dicta suggests sympathy with a prohibition on such advertising, claims of quality may encompass a wide range of types of advertising. Thus, stating that a dentist is "the best in town" could probably be prohibited since such a claim is probably incapable of verification. However, factual information capable of being verified even if it implies quality would appear to be arguably permissible under the standards the Court has used to evaluate commercial speech.

superiority that cannot be substantiated; and third, statements that misrepresent a dentist's credentials, training, experience or ability. These provisions, which elaborate on the rules of general prohibition of false or deceptive communication, were approved in a recent advisory opinion by the FTC on behalf of the American Academy of Ophthalmology. 1983 Trade Reg. Rep. (CCH) paragraph 22, 037 (June 24, 1983). In the FTC's review of the Academy's proposed code of ethics, the FTC accepted the Academy's assurance that the prohibitions would be enforced reasonably and objectively to avoid discouraging the dissemination of valuable information to consumers. For example, the rule aimed at communications which appeal to an individual's anxiety was aimed at those communications that unfairly or oppressively cause anxiety. The ban on material claims of superiority that cannot be substantiated was not aimed at language that was merely self-laudatory or self-aggrandizing. Bans on communications that create unjustified expectations of results would prohibit only deceptive representations regarding the likely results of treatment. The Board, in proposing these three amendments, makes the same assurances.

Thus, the amendments to part 3100.6500 eliminate advertising restrictions which are overbroad in that they may prohibit truthful as well as deceptive advertising and add more narrowly drawn restrictions which prohibit only false advertising.

3. Part 3100.6600 Advertising Dental Fees (formerly 7 MCAR § 3.045 D, E, and F)

The amendments to part 3100.6600 are designed to eliminate from the rules as they now exist any possible anti-competitive and first amendment concerns. It is the Board's purpose, through the proposed changes, to continue to enhance consumers' opportunities to compare various dentists and dental services while at the same time still enable the Board to deal with false, fraudulent, misleading, and deceptive advertising.

a. Subpart 1. Current part 3100.6600, subpart 1, provides a general definition of "routine service," provides example definitions of common routine services, and restricts advertisements of fees to routine services only. The FTC felt that

subpart 1 may seriously limit price advertising and may go beyond what is reasonably necessary to prevent deception. For example, by permitting price advertising only for routine services, part 3100.6600 apparently proscribes price advertising for any service where the appropriate technique may vary from patient to patient, even if a dentist intends to charge a standard price for the service.

The primary remedy for this problem, as addressed within this subpart, is to eliminate the provision which allows advertising of routine services only. Amendments to other subparts of part 3100.6600, discussed below, are designed to permit advertising of nonroutine services in a way which will protect the consumer from fraud and deceipt.

The definition of routine services, and the example definitions of common routine services, also raise several concerns with the Board. The first concern is that the rules may inadvertently restrict practitioners in their use of innovative or cost-efficient treatments. The Board has responded to this concern by proposing definitions which are result oriented rather than methods oriented. The definition of a routine prophylaxis in part 3100.6600, subpart 1C, is an example. The current rule defines a prophylaxis as "removal of calculus, tarter, and stains from the exposed and unexposed surfaces of the teeth by scaling and polishing." The last phrase, "by scaling and polishing" is methods oriented and may prevent a practitioner from using innovative methods. A restriction on methods is unnecessary because it is the Board's intent to standardize the definition of prophylaxis as a service that results in the removal of calculus and strain from exposed and unexposed surfaces of the teeth and not to govern through its advertising rules how that service must be performed.

The Board is appropriately concerned with the methods practitioners use to achieve a given result, and recognizes that innovative methods may raise concerns about their merit and legitimacy in the community as well as with the Board. However, the Board has ample regulatory authority over the clinical practice of licensees in other portions of the rules. See, e.g., part 3100.6200 B and E. Both the FTC and the United States Supreme Court have indicated that suppressing commercial speech is not an

appropriate way for Boards to carry out their obligation to protect consumers from the risk of sham treatments propounded by practitioners as innovations. Indeed, the Court has pointed out that prohibiting advertisements has no effect on preventing shoddy work. See Bates, supra.

The Board's second concern with standardizing definitions is that practitioners may be inadvertently restricted from how they hold themselves out to the public in their business communications. For example, if an examination fee is advertised, part 3100.6600, subpart 1A(1) requires that the same advertisement include three additional diagnostic procedures and their fees, including one or two possible sets of X rays which must be offered. Thus, the rule requires dentists not only to hold themselves out as providing X rays as one of the diagnostic procedures in an examination, but to hold themselves out as providing a specific number and type of X rays (a panographic and four bitewings or 14 periapicals and 4 bitewings). The rule apparently would prohibit advertising any group or combination of X rays for examination or diagnostic purposes that would vary either in number or combination from those in the rule.

The Board has responded to this concern by recognizing that the primary purpose of the definitions is to standardize terms which are already familiar to the lay community. That is, consumers recognize and use words such as "examination," "diagnosis," and "denture." Creating a standardized definition of a term commonly used by consumers insures that the language a dentist uses in his advertisements conforms to the consumer's understanding.

Using X rays taken for diagnostic purposes as an example, if a dentist advertises "examinations" for a stated fee, and the same advertisement states that X rays are either "included" or "extra," the reasonable consumer assumes the number and type of X rays offered are those needed for an examination. The consumer relys on the dentist's expertise and judgment as to the number and type of X rays needed for a complete examination and, for the purposes of regulating advertising, so will the Board.

If a dentist takes less X rays than professional standards require for a complete examination and diagnosis in order to be able to advertise a price that is lower than the competition, that is a disciplinary matter under Minn. Stat. § 150A.08 (1984), and Minn. Rules, pt. 3100.6200 (1983).

Therefore, part 3100.6600, subpart 1, has been amended to reflect the Board's purpose in standardizing the definition of terms commonly used by consumers so that their use in advertisements comports with the consumer's understanding. The definitions are result oriented to avoid restricting a practitioner's use of innovative methods or the manner in which the practitioner holds himself out to the public. The amendments to the remaining subparts are intended to reflect the basic change in direction made by the modifications to subpart 1 and address related issues.

b. Subpart 2. This subpart is being repealed as now unnecessary. Subpart 2 placed the burden on dental service advertisers of proving that any advertised service was "routine." The rule was a logical extension to subpart 1 which only permitted advertising of fees for "routine dental services." Now that subpart 1 is being changed to remove that limitation, there is no need to place a special focus on routine services as subpart 2 did. It can thus be repealed.

c. Subpart 2a. Subpart 2a is being added. Its addition is a corollary to the removal of the subpart 1 prohibition against the advertising of fees except for routine services. Subpart 2a proposes to permit the advertising of a set fee for any dental service when the dentist intends to charge a standard price for the service. (This provision goes hand in hand with the amendments proposed for subpart 4, which are discussed below in paragraph 3e, infra at 21.)

Most fees for any given service will vary depending upon a number of factors, such as the severity of the problem and time it will take to complete treatment. Because of these various factors, which would be unknown to a consumer, the consumer patient would not have any way of determining what fee pertained to him/her. This is the reason that advertising fees for other than routine dental services was prohibited up

until now. But the Board has come to realized that there is a middle ground which would allow advertising of fees for non-routine services in a way that will gave the patient information s/he can understand. One way is to advertise one set fee for the service as proposed in subpart 2a. In other words, this will now allow a dentist to set one fee for a non-routine service that will not vary regardless of the individual patient differences and to advertise that fee for the dental service in question. (The other way of addressing the issue of varying fees for nonroutine dental services is covered in subpart 4.)

Given that the goal of the Board is to permit any truthful advertising, subpart 2a is a reasonable method of obtaining that goal and a necessary addition to the rules of the Board.

d. Subpart 3. The only change to this subpart is in the caption which is not really a part of the rule. The caption modification is designed merely to reflect the full scope of the already existing rule which is not being amended.

e. Subpart 4. Part 3100.6600, subpart 4 of the current rules prohibits advertising a range of fees for a given service. The FTC's problem with this prohibition is that it prevents a dentist from advertising a range of fees for a service even if the advertisement discloses the factors upon which the actual fee will be determined. Thus the restriction might prevent the dissemination of truthful information about fees and limit the effectiveness with which dentists can communicate fee information. Consumers may be deprived of useful information, and competition in the provision of dental services may be lessened unreasonably. Further, the restrictions on the advertisements of fees also implicate first amendment protections of commercial speech.

The remedy of this situation is simple. The Board is proposing to repeal the prohibition on the advertisment of a range of fees but add the requirement that a range of fees must be accompanied by a listing of the basic factors which the dentist will use to determine the actual fee.

The adjective "basic" is important in this context. It is intended to communicate that the type of factors which must be listed are those which are meaningful to a lay person so that the patient will not be led to conclude that s/he will always be eligible for the lowest fee. "Basic" factors also means that the dentist will not have to list a dental text Board description of every conceivable variant that might be encountered in performing a dental service which could in some way affect the fee charged. Such a listing would more than likely discourage advertising and not be meaningful to a patient. The key to the rule is the recognition that the advertisement is for the patient. The rule must thus be applied in the light of whether the advertisement gives the patient a realization that what s/he will be charged for the service may very well be something other than the lowest fee listed in the advertisement.

As noted in paragraph 3c above, supra at 20, this rule is the other side of the same coin to subpart 2a. Subpart 2a gives the dentist who wants to advertise fees for nonroutine dental services the option of setting a single fee for the service rather than to vary the fee based upon patient differences. Here, in subpart 4, the dentist may continue to charge a range of fees and advertise that range. It is a reasonable step to take to allow for all truthful advertising and yet the limitation of requiring a listing of the basic factors which will govern what the actual fees will be is a necessary provision to prevent patients from being misled.

4. Part 3100.7100 Prohibited Advertisements (formerly 7 MCAR § 3.045H)

Current rule 3100.7100 prohibits advertisements that include descriptive words or phrases which are qualitative representations or comparative claims, testimonials and endorsements, that use celebrities, dramatization or graphic illustrations to imply patient satisfaction, or that indicate or imply affiliation with any organization other than the dental practice being advertised. The FTC feels that these provisions may unjustifiably prevent dentists from effectively communicating truthful information to the public. In addition, the Board feels that these prohibitions rise out of notions that the use of testimonials, endorsements, celebrities, and so forth, are not

appropriate to the advertisement of professional services. However, the Board belives that protecting the status of a profession in the eyes of the consuming public is not a compelling enough reason to impose restrictions or prohibitions on commercial speech. See Bates, supra.

As a result, the amendments proposed by the Board would remove all the restrictions contained in part 3100.7100, items A, B, C, D, and G. In addition, current item E, which prohibits advertisements that reveal a patient's identity or personally identifiable facts, data, or information obtained in a professional capacity, will now include the following proviso: "without having first obtained a written waiver of patient confidentiality." Amended item E would thus allow the use of patient testimonials or endorsement after a waiver has been obtained by the dentist.

Thus, the amendments to part 3100.7100 remove those anti-competitive and first amendment concerns of the FTC and Board. The amendment to current item E is a reasonable restriction on the use of patients for testimonials and endorsements in that it is in keeping with current law on patient confidentiality and privacy rights.

Dated: August 6, 1985

STATE OF MINNESOTA

BOARD OF DENTISTRY

DALE J. FORSETH
Executive Secretary
Board of Dentistry