HB

46

House of Representatives

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

TO: Legislative Affairs
FROM: Margaret W. Berck, Staff MWB
Date: February 5, 1980
RE: Request for (H) Judiciary Committee CS for HB 46 (Work Draft Form).

Please provide a House Judiciary Committee CS for HB 46 in accordance with the attached mark-up.

Additionally the drafter is requested to search the statutes for all advertising restrictions on professionals, but for those that prohibit misleading or false advertising, and include those provisions in the repealor section. Should any of those provisions fall into a questionable area, please advise the Committee in order that the Committee might make a determination on those.

Thank you.

Note, furthermore that AS 08.64.380(3)(D) was repealed SLA 1978 and for that reason should be deleted from the repealor section.

IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

HOUSE BILL NO. 46

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an act entitled: "An Act relating to advertising by businesses and professions."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 08.02 is amended by adding a new section to read:

Sec. 08.02.020. PROFESSIONAL ADVERTISING. After the effective date of this Act, it is unlawful for a professional association, trade association, occupational or professional licensing agency, or any other governmental agency to adopt, implement, or enforce, or attempt to adopt, implement, or enforce, any prohibition of truthful advertising ~~including publication of fees and prices. However, this section does not prohibit an association or agency to which licensing functions have been delegated by statute from setting reasonable standards or establishing reasonable requirements pertaining to advertising by an occupation or profession within its jurisdiction.~~

* Sec. 2. AS 08.36.310(8), (13), (14), (17), and 24); ~~AS 08.64.380(3)(D)~~; AS 08.71.170(5) and (6); and AS 08.80.420(b) are repealed.

(4) for biennial registration, $40;
(5) for each branch office biennial registration, $40;
(6) for a temporary permit, $25;
(7) Repealed by § 7 ch 94 SLA 1968.
(8) for re-instatement as provided in § 230 of this chapter a penalty of $10;
(9) for a specialty license, $30;
(10) for a duplicate license, $10. (§ 16 art III ch 186 SLA 1955; am § 7 ch 94 SLA 1968; am § 12 ch 155 SLA 1968)

For history of taxation of profession of dentistry, see United States v. Dasher, 9 Alaska 719 (1940).

C.J.S. references. — 53 C.J.S. Licenses § 34; 70 C.J.S. Physicians and Surgeons §§ 2 to 4, 6 to 8.

Sec. 08.36.300. Deposit of fees and payment of expenses. Repealed by § 3 ch 59 SLA 1966.

Article 3. Unlawful Acts.

Sec. 08.36.310. Grounds for revocation of license. A license and registration may be revoked, suspended, or annulled, or the licensee may be reprimanded, censured, or disciplined by the board after hearing when he

(1) secures a license through deceit, fraud, or wilful misrepresentation of a material fact;
(2) is convicted of a crime involving moral turpitude;
(3) has a chronic or persistent inebriety or addiction to habit-forming drugs which renders him incompetent to continue the practice of dentistry;
(4) commits wilful or gross malpractice or wilful or gross neglect in the practice of dentistry;
(5) hires, supervises, permits or aids unlicensed persons to practice dentistry;
(6) is insane or has a contagious or infectious disease making him an improper person to continue in the practice of dentistry;
(7) practices or offers to practice dentistry under a name other than the name in which the license is issued;
(8) uses the name of a company, association, corporation, trade name, dental clinic, or business name in connection with the practice of dentistry;
(9) knowingly practices in the employment of or in association with a person who is practicing in an unlawful manner;

(10) uses an advertising solicitor or free-publicity press agent;

(11) wilfully deceives or attempts to deceive the board with reference to any matter under investigation by it;

(12) advertises professional superiority;

(13) advertises free dental work or free examination;

(14) advertises prices for professional service;

(15) advertises to perform any dental operation painlessly,

(16) advertises by means of a large display, glaring light sign, or sign containing as a part of it the representation of a tooth, bridgework, or any portion of the human head;

(17) advertises by a medium other than the carrying or publishing of a modest professional card or the display of a modest window or street sign at the licensee's office containing the name, address, profession, office hours, telephone number and specialty;

(18). permits the use of his name as a dentist by others in the sale or advertisement of products;

(19) violates a provision of this chapter or a regulation of the board promulgated under authority of this chapter;

(20) advertises as a specialist in any branch of dentistry, unless he devotes a major portion of his practice to that branch;

(21) engages in the practice of fee-splitting;

(22) engages in unprofessional conduct;

(23) obtains a fee by fraud;

(24) directly or indirectly advertises or solicits for dental hygiene business;

(25) advertises as a specialist in a branch of dentistry without first obtaining a specialty license;

(26) fails to report a death that occurred on premises used for the practice of dentistry to the office of the secretary-treasurer of the board within 72 hours;

(27) administers a general anesthetic without a valid permit required by regulations of the dental board. (§ 1 art IV ch 186 SLA 1955; am §§ 13--15 ch 155 SLA 1968)

Cross reference. — As to malpractice actions, see AS 09.55.530—09.55.560.

ALR references. — Ground for revocation, 54 ALR 1504; 82 ALR 1184.

What amounts to conviction within statute making conviction ground for cancelling license, 113 ALR 1179.

Revocability of license for fraud or other misconduct before or at the time of its issuance, 165 ALR 1138.

Admissibility and necessity of expert evidence in proceeding for revocation of license, 6 ALR2d 675.

Sec. 08.36.320. Order of reprimand, suspension and revocation. The board may, by a majority vote, evidenced by the signatures of the members on the order, reprimand a licensee or revoke or suspend a license. (§ 5 art IV ch 186 SLA 1955)

Effect of amendment. — The 1974 amendment repealed paragraph (4).

Legislative committee report. — For report on ch. 127, SLA 1974 (SCSHB 817 am S), see 1974 House Journal, p. 657.

Sec. 08.64.380. Definitions. As used in this chapter

(1) "board" means the State Medical Board;

(2) "practice of medicine" or "practice of osteopathy" means

(A) maintaining an office or place of business for the purpose of treating the sick or injured for pay; or

(B) the public display of one's name and the letters "M.D.", "M.B." or "D.O." or the words "physician" or "osteopath" or "osteopathic physician", or "osteopathic surgeon", or "osteopathic physician and surgeon", or a specialist designation such as "surgeon" or "dermatologist", "psychiatrist", or the like; or

(C) the assumption or promulgation of a title which tends to show that the person is willing or qualified to diagnose or treat the sick or injured; or

(D) for a fee prescribing, directing or recommending for the use of a person, a drug or medicine for the treatment, cure or relief of a disease, infirmity, bodily inj or defect; or

(E) for a fee performing a surgical operation for the cure, relief or reduction of disease, bodily injury, deformity, or defect; or

(F) Repealed by § 1 ch 117 SLA 1971.

(3) "unprofessional or dishonorable conduct" means

(A) a violation of the provisions of AS 11.15.060 or regulations lawfully adopted by the State Medical Board concerning abortion procedures and practice;

(B) habitual overuse of alcoholic beverages or depressant, hallucinogenic or stimulant drugs, as defined in AS 17.12.150(3), or addiction to the use of narcotic drugs as defined in AS 17.10.230(13);

(C) conviction of an offense involving moral turpitude;

(D) advertising professional services to the public except for notice of opening, closing, or removing practice, and except for directories listing physicians in a community on a uniform and nondiscriminatory basis, containing only factual, truthful descriptions of physicians and their services;

(E) making untruthful or fraudulent statements in the application for examination, or deceiving or cheating during the examination for license, or procuring a license by deceit or fraud;

(F) violating the Controlled Substances Act (P.L. 91-513; 84 Stat. 1242) or any other federal law pertaining to medical practice and drugs;

(G) violating the principles of medical ethics of the American Medical Association and of the Alaska State Medical Association;

(4) Repealed by § 27 ch 148 SLA 1970.

(5) "department" means the Department of Commerce.

Sec. 08.64.312. Continuing education requirements.

Cross reference. — As to constitutionality of ch. 102, SLA 1976, see notes to AS 09.55.536 and Alas. Const., art. II, § 14.

Sec. 08.64.325. Limits or conditions on license; discipline.

Cross reference. — As to constitutionality of ch. 102, SLA 1976, see notes to AS 09.55.536 and Alas. Const., art. II, § 14.

Sec. 08.64.330. Grounds for revocation of license.

Unethical behavior. — A physician may be subject to loss of license, censure or reprimand for violating the state Medical Association declaration that publication of patients' names by board members in complying with AS 39.50 (Conflict of Interest law) is unethical. However, the possibility of professional discipline for unethical behavior is irrelevant because the statutory exemption applies only to legal privileges, not ethical mandates. Moreover, to equate ethical directives with legal privilege for purposes of AS 39.50, particularly where a relevant professional standard has been enacted subsequent to the passage of the Conflict of Interest law, would effectively allow an elite professional group to amend the law by declaring itself exempt. Falcon v. Alaska Pub. Offices Comm'n, Sup. Ct. Op. No. 1512 (File No. 3220), 570 P.2d 469 (1977).

Article 4. Miscellaneous Provisions.

Section
365. [Repealed]

Sec. 08.64.365. Physicians acting under emergency circumstances.

Repealed by § 46 ch 102 SLA 1976.

Article 5. General Provisions.

Section
380. Definitions

Sec. 08.64.380. Definitions.

As used in this chapter

(3) "unprofessional or dishonorable conduct" means

(A) a violation of the provisions of AS 18.16.010;

(B) habitual overuse of alcoholic beverages or depressant, hallucinogenic or stimulant drugs, as defined in AS 17.12.150(3), or addiction to the use of narcotic drugs as defined in AS 17.10.230(13);

(C) conviction of an offense involving moral turpitude;

(D) Repealed by § 41 ch 177 SLA 1978.

(E) making untruthful or fraudulent statements in the application for examination, or deceiving or cheating during the examination for license, or procuring a license by deceit or fraud;

(F) violating the Controlled Substances Act (P.L. 91-513; 84 Stat. 1242) or any other federal law pertaining to medical practice and drugs;

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(b) No more than two apprentices may be under the direct supervision of one licensed dispensing optician at the same time. (§ 1 ch 45 SLA 1973)

Article 3. Unlawful Acts.

Section
170. Grounds for revocation, suspension or denial of license
175. Limits or conditions on license; discipline
180. Practicing without a license

Sec. 08.71.170. Grounds for revocation, suspension or denial of license. The board, after compliance with the Administrative Procedure Act (AS 44.62), may revoke, suspend or deny the license of a person who

(1) has been convicted of a felony involving moral turpitude;

(2) is addicted to the use of alcohol or any other drug;

(3) has used advertising, whether printed, radio, display, or of any other nature, which is fraudulent, misleading or inaccurate in any material particular, or misrepresents in any way goods, services or credit terms, values, policies, services or the nature or form of the business conducted;

(4) has practiced fraud or deception in his application for or in his examination for a license;

(5) has used the word "licensed", "registered", or any of their synonyms publicly, except as provided in § 140 of this chapter;

(6) has displayed or published directly or indirectly by any means, a price, terms of payment, or a discount, or a policy or practice of generally underselling competitors, or any reference to the benefits available to the subscribers to any prepaid health plan;

(7) has participated in the division, assignment, rebate or refund of fees to a physician or optometrist in consideration of patient referrals;

(8) has bartered or given away as premiums in any manner either on his own account or as agent or representative for another person, firm or corporation, any eyeglasses, spectacles, lenses or frames;

(9) has advertised the "free examinations of eyes", "free consultation", "consultation without obligation", "free advice", or any words or phrases of similar import which convey the impression to the public that eyes are examined free or are of a character tending to deceive or mislead the public, or are in the nature of "bait advertising";

(10) has employed either directly or indirectly any person commonly known as a "capper" or a "steerer" to obtain business;

(11) has solicited or employed any person to solicit from house to house;

(12) has used advertising offering a service to the public for which he is not licensed under this chapter; however, nothing in this section prohibits the optician from advertising merchandise for which the license which is the subject of this chapter is not required;

sold under restrictions and regulations as the board may adopt. The board may include in shopkeeper permits permission to sell other remedies not prohibited by law. (§ 12 ch 194 SLA 1955; am § 22 ch 206 SLA 1972)

Sec. 08.80.390. Pharmacists required in hospitals and clinics. (a) A hospital, clinic, nursing home, infirmary or related facility which dispenses drugs for outpatient treatment shall have a licensed pharmacist in charge of the dispensary, except that prescriptions may be compounded and dispensed by or under the supervision of the prescribing physician.

(b) The board shall issue a license to a hospital drug room, nursing home drug room or related facility which dispenses drugs from bulk supply for inpatient treatment, providing the facility employs a licensed pharmacist on a continual or consultant basis. (§ 12 ch 194 SLA 1955; am § 23 ch 206 SLA 1972)

Sec. 08.80.400. Practice of medicine not affected. This chapter does not affect the practice of medicine by a licensed medical doctor, and does not limit him in supplying a patient with any medicinal preparation or article which he considers proper. (§ 12 ch 194 SLA 1955)

Sec. 08.80.410. Use of term "pharmacist" prohibited. It is unlawful for a person to assume or use the title "pharmacist," or any variation of the title, or to hold himself out to be a pharmacist, without being registered. (§ 13(a) ch 194 SLA 1955)

Sec. 08.80.420. Certain advertising prohibited. (a) It is unlawful for a person to use or exhibit the title "pharmacist," "assistant pharmacist," or "druggist," or the descriptive term "pharmacy," "drug store," "drug sundries," or other similar title or term containing the word "drug," in any business premises, or in an advertisement through the media of press, or publication, or by radio or television, unless the business has a licensed pharmacist in regular and continuous employment.

(b) A person may not advertise in any manner, prices, percentiles of prices or discounts for drugs requiring a prescription. (§ 13(b) ch 194 SLA 1955; am § 24 ch 206 SLA 1972)

Sec. 08.80.430. Use of pharmacy symbols prohibited. It is unlawful for a person to display in a place of business the characteristic pharmacy symbol of bottles, or globes, which are colored or contain colored liquids unless the business has a pharmacist licensed and registered under this chapter on duty under § 320 of this chapter. (§ 13(c) ch 194 SLA 1955; am § 25 ch 206 SLA 1972)

Sec. 08.80.440. Denial of examination or license. The board may deny an applicant the opportunity to be examined, may deny a license to an applicant who has successfully completed the prescribed examination, or may deny a license to an applicant for registration by

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM February 11, 1980

SUBJECT: Provisions relating to advertising by regulated businesses or professions (HB 46)

TO: House Judiciary Committee
Attn: Margaret W. Berck
Administrative Assistant

FROM: Kenneth M. Rosenstein
Legislative Counsel

After researching the appropriate statutes, I have found the following provisions relating to advertising by businesses or professions which the committee may want to consider with regard to its substitute for HB 46.

include repealer

(1) AS 08.18.111 prohibits a construction contractor from advertising "that he is bonded and insured simply because he has complied with the bond [AS 08.18.071] and insurance [AS 08.18.101] requirements" of AS 08.18.

While this restriction makes no apparent sense to me if the bonding and insurance requirements have, in fact, been met, it may make sense to the contractors or the commissioner of commerce.

do not include

(2) AS 08.36.310(12) provides that a dentist's license is subject to revocation or suspension if he "advertises professional superiority".

This provision should probably be retained since any such claims would merely be self-serving, and the public would be without any means of determining their truthfulness.

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(3) AS 08.36.310(15) provides that a dentist's license is subject to revocation or suspension if he "advertises to perform any dental operation painlessly".

This provision should also probably be retained since whether a dental operation is truly painless would depend on the tolerance of each patient and the type of anesthesia used. Even then it would seem that promises of painlessness may be difficult to keep.

include repealer

(4) AS 08.71.170(14) provides that a dispensing optician's license is subject to revocation or suspension if he "has advertised the services of any other segment of the healing arts."

This provision appears to be appropriate for inclusion in the repealer section of the bill since it does not relate to misleading or false advertising. Repeal of the provision would permit a dispensing optician to advertise the services of a doctor, optometrist, or other "healing artist." This is unlike advertising that the optician will provide such services, which is prohibited under AS 08.71.170(12).

KMR:ljb

Rosenstein

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 46

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to advertising by businesses and professions."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 08.02 is amended by adding a new section to read:

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* Sec. 2. AS 08.36.310(8), (10), (13), (14), (16), (17), (18), and (24); AS 08.71.170(5) and (6); and AS 08.80.420(b) are repealed.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
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KMR:ljb

STATE of ALASKA

MEMORANDUM

file copy
HB 4C
obtained Feb 4, 1980

TO:
The Honorable Jay S. Hammond
Governor
Office of the Governor

DATE : January 6, 1978

FROM: Langhorne A. Motley
Commissioner
Department of Commerce &
Economic Development

SUBJECT: An Act relating to advertising by businesses and professions

This Department requested that the above bill be introduced by the Governor. As discussed, we understand that there is reluctance to do so without adequate justification and the following brief is presented in support of our request.

Background: A brief introduction to licensing.

Licensing is one of the ways in which the state regulates business. It is a unique tool in that it first makes a perfectly lawful act into an unlawful act and then provides an avenue whereby certain persons may legally do what has been made illegal. In justification of this, the state asserts that there are some commercial areas where the consumer cannot be adequately protected by our free enterprise economic system or the existence of general law.

Licensing laws contain provisions concerned with the following five areas:

1. general provisions prohibiting engaging in the occupation unless licensed;

2. specific criteria for becoming licensed;

3. general and specific provisions concerned with the conduct of business after licensure;

4. disciplinary provisions providing for penalties; and

5. creation of an agency responsible for implementation, surveillance and enforcement.

In many instances, the agency created is composed of practitioners of the licensed occupation. The net effect is the creation of a governmental agency which has the identical attributes of the classic business cartel. Select members of an occupation group control entry into the occupation and professional conduct after entry. The power to define unprofessional conduct is couched in broad general language and unprofessional conduct may result in license revocation. This is an extremely severe civil penalty. The loss of the right to engage in one's chosen occupation cannot be regarded lightly.

There are approximately twelve occupational groups in Alaska which currently prohibit or severely restrict the use of advertising by individuals of the occupational group. These are:

1. Attorneys
2. Physicians
3. Opticians
4. Pharmacists
5. Dentists
6. Optometrists
7. Accountants
8. Chiropractors
9. Architects
10. Engineers
11. Land Surveyors
12. Veterinarians

Professional Arguments Against Advertising: price competition results in quality deterioration.

Proponents of the need for continued prohibition of advertising advance various arguments depending on the specific occupation, but these are reduceable to two basic concepts.

First advertising will result in price competition which will adversely effect the quality of services provided as the more conscientious members of the occupational group are forced into open price competition with the less scrupulous. Engineers foresee falling bridges and collapsing buildings; pharmacists envision the sale of sub-standard drugs and the elimination of monitoring; attorneys forecast poorly drafted contracts, wills and other legal instruments with ensuing legal complications; opticians and optometrists assert that corrective lenses will be improperly ground resulting in eye damage. Each of the affected occupational groups has its own specific arguments to advance.

In an amicus curiae brief of the Federal Trade Commission in Crown vs. Ohio State Board of Registration for Professional Engineers and Surveyors, arguments of this nature are characterized as "totally without substance." The FTC bases its conclusion on several studies cited in the brief, including The Effect of Advertising on The Price of Eyeglasses, L. Benham; Capitalism and Freedom, M. Friedman; Regulating through the Professions; A Perspective on Information Control, L. Benham and A. Benham, several FTC staff reports, and Business and Professional Licensing - California, A Representative Example, J. F. Barron.

"Benham states that there is no specific evidence to support the claim that systematic quality difference is a function of advertising regulation... (John F.) Cady's study of retail drug prices reports similar conclusions... The argument that quality is improved by price information restrictions has also been severely criticized by most commentators... In discussing the problem of alleged quality deteoriation, Barron stated:

> The belief that competition results in deterioration of a product is true only in the pure public utility case. In other situations competition tends to improve the 'quality' of the product. More importantly, competition widens the range of types of goods that are available to buyers.

"Friedman...believes the lack of competition serves only to limit the consumer's alternatives, impedes technological change, and force many to do without needed professional services." (FTC Amicus Curiae Brief)

Furthermore, the quality argument conveniently ignores other laws rules and regulations designed to insure the safety of consumers. Licensing laws require minimum competence; a showing of incompetence is grounds for revocation of the license. Many commentators believe general law is, in itself, sufficient to protect the public. According to Barron:

> What is often ignored or forgotten when the question of licensing arises is that we now have general law, not administered by sellers, dealing with safety, sanitation, weights and measures, purity of foods and their preparation, labeling, truth in advertising, use and sale of insecticides, use and storage of flammable materials, zoning, building codes and so on. In addition, there are laws against fraud, violence, breach of contract, and other injurious conduct, together with procedures for redress of wrongs inflicted in the market place.

"Professor Benham, in one study states that advertising restrictions increased the price of eyeglasses from 25% to more than 100%...In a later study exploring the effect of professional regulatory restraints, including advertising restrictions on the price of eyeglasses, Benham found that prices appear to be 20-40% higher in markets with greater professional control...The Benhams also state that these higher prices result in a significant reduction in the proportion of people obtaining eyeglasses." (FTC Amicus Curiae Brief.)

Although it is agreed by all researchers that advertising does contribute to price competition, no evidence is available to support the conclusion that this results in quality deterioration. On the contrary, most studies show that price competition not only results in lower costs to the consumer but encourages the improvement of quality by rewarding innovation and creativity. Anti-competitive restraints on business cannot be shown to provide any societal benefits, but their resultant societal costs are easily ascertainable.

Study after study shows the consumer pays a higher price for the same quality services or goods. Additionally, this results in lower utilization of needed goods and services, poor allocation of resources and inefficiency. Not only the poor are adversely effected although this is the most visible group. Governmental agencies are the largest single category of users of engineering services; the State directly, or indirectly through its health insurance program and various medical welfare programs, can probably be shown to be the largest single user of health care delivery services. The increased costs attributable to governmental anti-competitive regulation are borne, not once, but twice by the general taxpayer; first when acquiring needed goods and services on his own behalf and second when paying the bill for public programs.

Professional Arguments Against Advertising: advertising allows the unscrupulous to easily mislead the unwary consumer.

The second basic argument advanced in support of governmental restriction of advertising by select occupational groups is that price advertising allows the unscrupulous to deceive consumers by providing them with misleading information or engaging in bait and switch tactics. Consumer experience clearly shows that advertising abuses exist, but there are other less restrictive means of combating these practices.

Alaska already has laws dealing with misleading or untruthful advertising. We have State offices such as the Alaska Assistant Attorney General for Consumer Protection, the Office of the Ombudsman, and certainly, not the least of these, are the licensing agencies themselves. The proposed bill would not legalize misleading and untruthful advertising, nor would it preclude disciplinary action against a licensee shown to have engaged in such practices.

In its decision in Ritolz v. City of Salt Lake, 284 P. 2d 702 (Utah 1955) the court refused to uphold a regulatory statute restricting advertising.

> In respect to the argument that this advertising will deceive the unwary so that a certain percentage of people will be injured by their own folly, the answer is that this is true of all advertising. If the advertiser actually over-reaches or deceives, he is in violation of the law against such practice, and a remedy is available. It should be noted that the law cannot be made, nor could one be enforced, which would entirely protect the completely naive and gullible. In any event, if a customer desires to use ordinary care, adequate protection is afforded so that there would seem to be little or no danger to his eyes from the use of glasses furnished at an advertised price. Indeed, the customer may benefit therefrom.

Allowing a licensee to engage in competitive practices including advertising does not relieve the licensee of his obligations to practice his occupation both ethically and competently. These are statutorily mandated obligations; failure to fulfill them makes the licensee in violation of the law and both civil and criminal remedies are available.

The argument that the unwary will fall prey to the unscrupulous has little merit, however, recognizing some validity, it is still necessary to weigh the costs. If it can be shown that the social benefits to be gained out weigh the societal costs, this form of governmental interference can be justified.

Societal Costs of Anti-Competitive Regulation: a poorly informed public.

Advertising has been proven many times over to be an extremely effective means of dessimating information on a broad scale. Very few people are unaware of the term "biodegradable." Why? Because not too many years ago, reports of studies were published which clearly showed that non-biodegradable products were creating monumental water pollution problems. Responding to critical onslaughts from environmentalists,

manufacturers geared up to produce biodegradable products and flooded the advertising media with copy explaining its superiority. The manufacturers objective was to sell their product, and in doing so caused two beneficial side-effects; an improved product and improved public awareness of water pollutant factors. Had these manufacturers been prevented from advertising, the consumer would have been forced into uneconomically feasible methods of product search.

This may not be too dificult when determining which soap to buy. The consumer can always read the label and if the ingredients are listed, and if the consumer knows biodegradable is superior to non-biodegradable, and if the consumer knows how to tell the difference, he can make an informed choice from the products available to him on the supermarket's shelf.

But on what basis does he determine which attorney to engage to assist him with the distribution of his possessions? How does he find out that the identical prescription drug is available from XYZ Pharmacy at one half the price of ABC? It is argued that advertising a specialty or publishing fee structures will not assure informed decisions on the part of the buying public, because that is not sufficient information upon which to base a decision. It is further argued that decisions based on this information may be even less in the best interests of the consumer than decisions based on the total absence of information.

What is conveniently ignored is the fact that when XYZ quotes a price that ABC can't match, ABC will in all liklihood take action to justify its price. The result is a better informed consumer. Just as manufactures had to explain the issues involved in "biodegradable" in order to show product superiority, ABC will be required, by the effects of a competitive market system, to demonstrate why its higher price is a better buy.

The argument that ignorance is a better basis for decision-making than knowledge of reasonable alternatives is an absurdity wholly unsupportable by any factual evidence.

Societal Costs of Anti-Competitive Regulation: increased costs to the consumer.

Several studies which examine the direct effects of advertising restraints have been reviewed. They are unanimous in concluding that these restraints always result in higher dollar costs to the consumer. It has been shown that the cost of a single prescription drug varies up to 1000% between pharmacies located within a few blocks of each other in states which prohibit prescription drug price advertising.

In a speech delivered to the 1972 Pharmaceutical Conference of the National Association of Chain Drug Stores, Inc., Virginia Knauer, Director and Special Assistant to the President for Consumer Affairs, quoted a survey conducted by Consumers Union which found the price for the same amount of one drug ranged from $.79 to $7.45 and for another drug from $1.25 to $11.50. In the prescription drug industry, where retail sales exceeded $5 billion in 1975, the enormity of the additional cost to consumers is readily apparent. Mrs. Knauer went on

to say, "One of the most striking denials of the consumer's right to choice and to information is in the pharmacy departments of many of our nation's drug stores. Too often the consumer cannot obtain price information until his purchase is made and his dollar is committed to a particular store. It would be inconceivable to deny the consumer price information in any other section of a drug store. Who would ever insist that the consumer buy shampoo or a sandwich without knowing the price? Price is one of the most basic elements of information on which the consumer makes his buying decision.""

She concluded her remarks by noting that Pennsylvania's and Florida's Supreme Courts have invalidated drug price advertising bans. Since that time, the FTC has proposed a Trade Regulation Rule that would end prohibitions against advertising prescription drug prices.

In its amicus curiae brief presented in Eckerd Optical Centers, Inc. v. Florida State Board of Dispensing Opticians, the FTC makes the following argument:

> Statutorily imposed price advertising prohibitions increase prices because the consumer is not able to compare prices without incurring excessive search costs, thereby destroying any incentive for the seller to reduce costs. Indeed, defendants here have conceded that the statutory restrictions in question have had and will continue to have the effect of increasing prices for corrective lenses.
>
> Additionally, the lack of price information also causes price dispersion, a wide variation between the high and low price for the same product and the absence of any central tendency of prices to cluster around an average price.
>
> Price comparisons between states which restrain price information and states which do not demonstrate the effect of advertising restrictions on prices. Professor Lee Bhnham of Washington University in St. Louis has done extensive work on the effects of price advertising on the price of perscription eyeglasses. In his first article, he compared the prices of eyeglasses in states with advertising restrictions to those in states without restrictions. In 1963, the year for which he obtained his data, approximately three-fourths (3/4) of the states had some sort of advertising restrictions. Professor Benham found for eyeglasses alone that prices appear to be 25% to 100% higher in states restricting advertising. Professor Benham also testified about a survey he conducted in Texas (nonrestrictive) and New Mexico (restrictive). Inspite of the absence of differences in quality and manufacturer's cost, Professor Benham found the differences in price to be positively correlated to the presence or absence of price advertising...
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> The argument has been advanced that the mean price of eyeglasses in restrictive states is higher because a larger proportion of individuals in those states are receiving the services of optometrists and ophthalmologists that are of higher quality and, therefore, more expensive. Professor

Benham examined this possibility when he compared the prices of eyeglasses in restrictive and nonrestrictive states according to source of care. He found that for each source (ophthalomologists, optometrists and commercial suppliers) prices were higher in restrictive than non-restrictive states. Therefore it appears that the lower prices in non-restrictive states result from competition fostered by price advertising rather than by lower standards of care.

Additionally, Benham indicated that prices were disproportionately high for poor people. Persons of low or moderate income levels in need of visual services did not secure such services because they were denied access to price information. This finding is supported by a 1969 Public Health Service Report. In 1969 the Public Health Service (PHS) published a comprehensive report on the characteristics of persons likely to receive eye care services and to purchase eyeglasses and contact lenses. The PHS report found that family income had a bearing on the number of persons who obtained corrective lenses. In all age categories, low income families purchased fewer eyeglasses or contact lenses despite the fact that no evidence exists to show that the need for vision correction was smaller. This finding demonstrates the enormous demand for corrective lenses in the U.S. market today. It also indicates that certain groups in the population have greater demands for vision improvement and lack the financial resources to purchase the services required.

Finally, in estimating costs of state restrictions, one must consider the fact that higher prices may discourage consumption. Professor Benham found that the higher prices in the restrictive states resulted in a gradual drop in the number of eyeglasses purchased. This inhibition on the purchase of a necessary commodity can be viewed as a societal cost.

Current Trends: the Federal Trade Commission's role in anti-competitive regulation of commerce.

In January 1975, Public Law 93-637 was enacted. Short-titled the "Magnuson-Moss Warranty-Federal Trade Commission Improvement Act," it strikes out the phrase "in commerce" wherever it appears in Section 5, subsections (a) and (b) of Section 6, and Section 12. In Section 5, the phrase "in or affecting commerce" is substituted for the old language; subsections (a) and (b) of Section 6 now read "in or whose business affects commerce", and Section 12 is oreworded in subsection (a) as "in or having an effect upon commerce" and in subsection (b) as "in or affecting commerce".

The August 7, 1975, Wall Street Journal quoted FTC lawyers as saying that these changes permit FTC regulation of even the smallest pharmacy, optical shop or law office. Regardless of the ultimate court decisions, it is obvious that these small changes in phrase structure will play an enormous role in broadening the FTC's authority to overturn state actions.

Their assault on anti-competitive restrictions is two-fold. First the FTC is proposing and adopting new rules concerning business practices at an increasing rate. Rules concerning the funeral industry and retail prescription drug sales have already been proposed and testimony presented. In the hopper is a rule that would pre-empt state laws and professional codes of ethics that prohibit the advertising of retail prices of eyeglasses.

Second the FTC is entering the judicial arena by filing actions on its own and by intervening in judicial proceedings as an amicus curiae. December 22, 1975, the FTC filed a complaint naming the Connecticut State Medical Society, the New Haven, Connecticut County Medical Association and the American Medical Association as defendants. FTC officials claim that the AMA illegally prohibits its 170,000 members from advertising their services, qualifications and prices and that the Connecticut groups were named as representatives of all state and local groups that use the AMA code of ethics.

As amicus curiae, the FTC staff has filed briefs in various actions brought by individuals, consumer groups and state agencies such as those quoted earlier.

Current Trends: the Justice Department's role in anti-competitive regulation.

The Justice Department's anti-trust lawyers are waging their own compaign on anti-competitive pricing structures. Already on record are consent agreements or court decisions that erase the prohibitions on competitive bidding from the codes of ethical conduct of the American Society of Professional Engineers, the American Institute of Architects and the American Institute of Certified Public Accountants. According to the Wall Street Journal, August 7, 1975, Department officials are now suggesting that prohibitions on advertising the price of professional services be struck down. Bruce B. Wilson who the Journal characterizes as being "the Department's No. 2 anti-trust stratigist" is quoted as stating to a joint meeting of the Idaho State Bar and the Alaska Bar Association that:

> "The ability...independently to price lawyer's services is of little value to either the lawyer or the consumer of legal services if there is no way for different prices to be communicated from the former to the latter."

On November 24, 1975, the Antitrust Division of the Department of Justice filed a civil antitrust suit against the American Pharmaceutical Association and Michigan State Pharmaceutical Association in U.S. District Court. In the news release made that day, Assistant Attorney General Thomas E. Kauper, in charge of the Antitrust Division, said this was the first antitrust suit filed by the federal government challenging advertising restrictions adopted by a national association.

> The suit alleged that the two pharmaceutical associations and their members had conspired to prohibit advertising of prescription drugs by adopting, publishing and distributing a code of ethics containing a provision which prohibited pharmacist members of both associations from advertising the retail

prices of prescription drugs.

The suit charged that as a result of the conspiracy, price competition among pharmacist members of the associations had been suppressed and eliminated, and that purchasers of prescription drugs have been deprived of the benefits of free and open competition in the advertising and sale of prescription drugs.

The complaint asked that the court order the defendants be required to cancel all price advertising prohibitions from their codes of ethics. The complaint further requested that the defendant be ordered to cancel any rule, by-law, resolution, or statement of policy of either association which has as its purpose or effect the suppression of price competition among member pharmacists of either association.

Additionally, the Justice Department has recently filed antitrust suits which are designed to eliminate price-fixing in the real estate and veterinary medicine industries, according to a December 29, 1975 Wall Street Journal article.

Current Trends: the courts' view anti-competitive regulation.

"State action" of an anti-competitive nature can be exempt from the Sherman Act. The strongest arguments for exemption have been based on the Supreme Court's decision in Parker v. Brown 317 U.S. 341 (1943). This is a decision which has been severely critized and the landmark decision in Goldfarb v. Virginia State Bar has served to narrow the scope of the Parker decision. In Parker, a California raisin producer and packer challenged on antitrust grounds the prorate regulations of a state board established and operating under the California Agricultural Prorate Act. The Supreme Court held the prorate programs permissible through "state action," even if the programs would have violated antitrust laws had they been adopted by private individuals.

In Goldfarb, the U.S. Supreme Court has decided:

> Respondents activities are not exempt from the Sherman Act as "state action" within the meaning of Parker V. Brown, supra. Neither the Virginia Supreme Court nor any Virginia statute required such activities, and although the State Bar has the power to issue ethical opinions, it does not appear that the Supreme Court approves them. It is not enough that the anti-competitive conduct is "prompted" by state action; to be exempt, such conduct must be compelled by direction of the State acting as sovereign.

Even under these circumstances, the exemption from the Sherman Act may not exceed that necessary to achieve a legitimate state purpose when there is no less restrictive alternative available.

Several lower courts have addressed the specific issue of price advertising prohibitions.

In its decision in Stadnik v. Shell's City, Inc., the Florida Supreme Court stated:

> The rule proceeds on the notion that the advertisement of a prescription drug will subject physicians to some sort of irresistible pressures that will force them to prescribe drugs for their patients simply on the basis of patient demand and without regard to the physical well-being of the patient. This concept disregards completely the professional and ethical integrity of the medical profession in prescribing remedies for patients. Furthermore, it actually suggests the probability of unethical conduct. In actuality, the rule has more resemblance to an economic regulation prohibiting price competition in the prescription drug business than it does to a regulation guarding the public health...There is simply no reasonable justification for such an intrusion on private rights when the regulation is so completely lacking in public benefit".

It has been argued that there is a "learned profession" exemption from antitrust regulation which would place the issue of professional or state restrictions on advertising by professionals outside the sphere of the Sherman Act. In actuality there is not. In Goldfarb, the U.S. Supreme Court specifically addressed the "learned profession" issue and in its decision stated:

> The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, Associated Press v. United States, 326 U.S. 1, 7 (1945), nor is the public service aspect of professional practice controlling in determining whether sec. 1 includes professions. United States v. National Association of Real Estate Boards, supra, 339 U.S. at 489. Congress intended to strike as broadly as it could in Section 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

Interpreting the Sherman Act, the courts have clearly established that price-fixing and other pricing restraints are per se violations of the Sherman Act. The Supreme Court held that any conduct which "tampers with price structures" is price fixing in United States v. Socony-Vacuum Oil Company. And in United States v. Container Corporation of America, the Court established that it was not necessary to show that the alleged activity actually pegged prices at a particular level. It is only necessary to show that it interfered with the setting of price by free market forces. It is obvious that severely restricting or prohibiting advertising interferes with free market forces.

Current Trends: bar associations.

Attorneys have long been subjected to one of the most restrictive advertising prohibitions. They are commonly not even allowed to show a specialty practice, nor may they publish notice of the opening or closing of law offices as most other professional groups may do. Recently the American Bar Association's Standing Committee on Ethics and Responsibility submitted a proposal for easing advertising restrictions.

According to the December 8, 1975 Wall Street Journal, this "proposal would allow lawyers and law firms to place certain advertisements in newspapers and on radio and television." It would also allow lawyers to state general consultation fees. "The California state bar has given tentative approval to a pilot program that would permit limited display ads by individual lawyers in the yellow pages of the telephone directory, and perhaps the inclusion of some fee information by legal directories".

The Anchorage Times in a December 10, 1975 article concerning the ABA proposal has this to say:

> The proposal was prompted, in part, because many consumer groups think legal costs would go down if lawyers had to submit to the marketplace.
>
> It was also prompted because of legal cases pending in Wisconsin, California, Virginia and New York accusing the ABA of violating the Sherman Antitrust Act and the 1st and 14th Amendments because of the ban (on advertising).

Current Trends'. the First Amendment right of free speech.

Restrictions on advertising or competitive bidding have generally been challenged under antitrust laws or the 14th amendment clauses concerning due process and equal protection of the law. In an unusual and surely land mark decision, however, a consumer group won a state court ruling overturning a Virginia law against drug price advertising on the grounds that the law violated their First Amendment rights. The U.S. Supreme Court has agreed to hear the case on appeal. Essential the lower court ruled that consumers have a fundamental right to receive drug price information and that the relevant section of Virginia's Code was unconstitutional as a violation of the consumers First Amendment rights and enjoined its enforcement.

The Supreme Court's decision will be of particular importance since this is the first such case involving First Amendment rights. The Court uses a two-part test to determine if a statute is to be upheld when First Amendment rights are involved and this scrutiny is far more stringent than those involved in other constitutional issues. First, the State must show that it has a compelling interest in achieving some legitimate end sought to be advanced by the statute. Secondly, the state must show that the statute is drawn as narrowly as possible and that no less restrictive means of regulation will suffice.

If the Supreme Court upholds the lower court's decision, it will have a broad impact on licensing agencies and professional associations which restrict advertising.

Current Trends: What do Alaskan members of certain professional groups say?

The Department wrote to nineteen select members of various professional associations and agencies. An in-depth survey was not conducted nor was a random sampling of the occupational groups attempted. The inquiries were directed to the chairman or president of the agency or association, on the assumption that these

individuals would be aware of their colleagues' opinions. It was assumed that while this would not result in a consensus of opinion, it would represent the majority interest.

A copy of the proposed draft was enclosed with the letter. The individuals were advised that the Department would call them for verbal comment and that written comments would be appreciated. Eight written replies have been received; six from persons contacted and two unsolicited, both dentists. Telephone contact has been made with six of those remaining.

The response has been, as predicted generally negative. The most frequently presented argument has been that the quality of service will deteriorate, which was examined earlier in this paper. It was noted by one person that there does not appear to be any impetus from within the profession for eliminating or relaxing the restrictions on advertising with the conclusion that the status quo is adequately serving the professional community.

Another individual commented that the restrictions on advertising were an effective means of policing the industry. The reasoning being that since client referrals are by word-of-mouth only, the less competent are soon weeded out.

This is essentially the argument which was examined under the subheading, advertising allows the unscrupulous to easily deceive the unwary consumer.

A Bar Association representative indicated that the Bar will make written comments which will probably be cautiously approving, at least in concept. It appeared that its membership is already considering relaxing advertising prohibitions, but is not ready to endorse or approve an "all or nothing proposal." The Board of Governors will prepare its comments when it meets later this month.

A similar response was made by a representative of the Board of Registration for Architects, Engineers and Land Surveyors. He cautioned that his remarks were his own opinion and that the Board would review the proposal at its February meeting and adopt a position. He indicated that he personally believed the current status is adequate but that federal action may have less desirable results than timely state action.

Conclusion

Consumer interests are being increasingly recognized. Nationally there is a strong current trend toward reducing or eliminating business regulation which cannot be precisely and soundly justified. The federal government has clearly indicated that in those instances where the states fail to initiate needed regulatory reform, it will step in and do so. Alaska's consumers are no less harmed than consumers in other states by unnecessary, inflationary governmental interference in free economic enterprise.

The issue of advertising by professionals is one which should be addressed in a public forum. The State has a very significant stake in both the substance of change, and in the way it is implemented. The proposed bill is not considered to be in "best final form". Many issues are involved which must be determined. The very language of the bill recognizes this in the phrase "truthful advertising". Obviously some types of advertising are not only undesirable but also contrary to the public good. These need to be defined in the best interests of both the professionals affected and the consuming public.