IN THE MATTER OF

CALIFORNIA DENTAL ASSOCIATION

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9259. Complaint, July 9, 1993--Final Order, March 25, 1996

This final order prohibits the 19,000 member professional association from restricting, regulating, impeding, declaring unethical, or interfering with the advertising or publishing of the prices, terms or conditions of sale of dentists' services and the solicitation of patients, patronage or contracts to supply dentists' services. In addition, the final order requires, among other things, the respondent to update its Code of Ethics to comply with the provisions of the Commission's order and to publish the Commission's order and complaint, as well as an announcement describing the order's effect, in the California Dental Association Journal.

Appearances

For the Commission: *Sally L. Maxwell, Markus Meier, Gary H. Schorr, Linda B. Blumenreich, George R. Bellack, Elizabeth R. Hilder, David R. Pender* and *Robert Leibenluft.*

For the respondent: *Peter Sfikas* and *Tamra S. Kempf, Bell, Boyd & Lloyd,* Chicago, IL.

OPINION OF THE COMMISSION

BY PITOFSKY, *Chairman*:

This is a case in which a large percentage of dentists located in California, operating through their trade association, the California Dental Association ("CDA"), placed unreasonable restrictions on members' truthful and nondeceptive advertising of the price, quality, and availability of their services. We find such restrictions on competition through regulation of advertising to be a violation of Section 5 of the Federal Trade Commission Act. In reaching that conclusion, we find that CDA is not a "not for profit" organization beyond the reach of FTC authority, that its actions affect interstate commerce, and that CDA and its members are capable of conspiracy and have conspired to impose these advertising restrictions.

The order that we impose leaves CDA free to regulate false and misleading forms of marketing and advertising by its members, but does not allow it to impose broad categorical bans on truthful and nondeceptive advertising of the price, quality, or availability of dental services.

I. BACKGROUND

The complaint in this case, issued on July 9, 1993, charges respondent with restraining competition among dentists in California in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (1995) ("FTC Act" or "Act"), by placing unreasonable restrictions on its members' truthful and nondeceptive advertising of the price, quality, and availability of their services. After extensive pretrial discovery, a three-week trial, and post-trial motions, the record was closed on April 20, 1995, and a decision and final order were entered by the administrative law judge ("ALJ"), Lewis F. Parker, on July 17, 1995.

The ALJ first rejected CDA's arguments that the Commission lacks jurisdiction because CDA is not "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44, and that its activities do not restrain or affect interstate commerce within the meaning of Sections 4 and 5 of the Act, 15 U.S.C. 44 and 45. The ALJ found that CDA's

actions affect interstate commerce, ID at 65-67,[1] and that, notwithstanding CDA's status as a nonprofit corporation, the association confers a substantial pecuniary benefit on its members so as to place it within the Commission's jurisdiction under *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969), and *American Medical Association*, 94 FTC 701 (1979), aff'd as modified, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982) ("AMA"), ID at 67-71. The ALJ next rejected CDA's contention that, just as a corporation cannot legally conspire with its wholly owned subsidiary, CDA could not, as a matter of law, conspire with its members and local components. The ALJ determined that unlike a corporation whose economic interests are fused with those of its wholly owned subsidiary, CDA is an association of competing dentists who are legally capable of conspiracy and who, by agreeing to abide by the Code of Ethics, have conspired with one another and with CDA and its local component societies to restrict advertising. ID at 71-72.

Turning to the legality of the individual restraints, the ALJ concluded that the members of CDA by agreement had unreasonably withheld from the public information regarding the prices, discounts, quality, superiority, guarantees, and availability of services of member dentists, as well as information about their use of procedures to diminish patients' anxiety. ID at 74-75. The complaint did not challenge the right of members of CDA through their association to suppress advertising that was misleading or deceptive or otherwise caused unavoidable and unreasonable harm to consumers. Accordingly, the ALJ enjoined CDA from further interference with advertising by member dentists, except insofar as CDA has a reasonable basis for concluding, *i.e.*, reasonably believes, that such advertising is false or deceptive within the meaning of Section 5 of the FTC Act, or with respect to the solicitation of patients who may be particularly vulnerable to undue influence. ID at 80-82.

CDA appeals from the Initial Decision on the grounds that the ALJ erred in concluding that CDA is a corporation within the meaning of Section 4 of the FTC Act, that CDA is capable of

[1] The following abbreviations are used in this opinion:

ID - Initial Decision of the ALJ
IDF - Numbered Findings in the ALJ's Initial Decision
CX - Complaint Counsel's Exhibit
RX - Respondent's Exhibit
T - Transcript of Trial before the ALJ

conspiring with its members and its component societies, and that CDA's actions were unlawful under Section 5 of the Act.[2] Our analysis of the liability issues and assessment of certain facts differ from the ALJ's but we nonetheless reach the same conclusion on liability and, accordingly, affirm the Initial Decision as modified below and adopt the ALJ's findings of fact except insofar as they are inconsistent with this opinion.[3]

II. RESPONDENT

CDA is a professional association, organized under California law as a non-profit corporation, with its principal place of business in Sacramento, California. CDA is composed of 32 local component societies, and is itself a constituent member of the American Dental Association ("ADA") (which is not a party to this suit). IDF 3-4. To qualify for membership at the state level, CDA requires a dentist to be a member of the local component society in the jurisdiction where the dentist practices. Similarly, a California dentist is not eligible for membership in the ADA without membership in CDA. IDF 3-4. Each CDA member must abide by the codes of ethics of the local component to which the dentist belongs, the CDA, and the ADA, CX 1450-Y; IDF 5, and expressly promises to do so in his or her application by signing the following statement:

> "I CERTIFY that I have read the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association and upon submission of this application I will comply with the Constitution, Bylaws, Code of Ethics and the Principles of Ethics of the dental society, the California Dental Association, and the American Dental Association, and I further agree that I will recognize the authorized officers of said society and said associations as the proper and sole authorities to interpret all areas of professional conduct and will at all times abide by and be governed by their interpretations." CX 1258-E.

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[2] CDA does not appear to challenge the ALJ's conclusion that its activities had the requisite nexus to interstate commerce, and, in any event, we affirm the ALJ's conclusion on this score without further elaboration.

[3] Complaint counsel's Motion To Correct The Record And To Supplement A Response Given At The Oral Argument (filed on December 6, 1995), and respondent's Motion For Leave To File CDA's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed on March 7, 1996) are hereby granted. Respondent's Response To Questions Posed During Oral Argument Regarding Whether CDA Is Responsible For The Actions Of The Components (filed as an attachment to the March 7, 1996 motion), and complaint counsel's Reply To CDA's Response To Certain Questions Posed During Oral Argument (filed on March 18, 1996), have been considered by the Commission, and are disposed of by the Final Order and Opinion of the Commission.

Each organization's code and bylaws must not conflict with those of the association of which it is a part. CX 1450-I; IDF 4.

The CDA has more than 19,000 members. Between 13,500 and 13,700 are in active practice, representing around 75% of the practicing dentists in California. IDF 2. In some communities, CDA may represent an even larger share of the practicing dentists. For example, in 1994 the Mid-Peninsula Dental Society, whose region included Palo Alto, claimed to represent over 90% of practicing dentists in its area. CX 1433.

CDA is run on the principle of parliamentary supremacy. Its House of Delegates, composed of about 200 CDA members, chosen mainly by the components, has the power to amend CDA's articles of incorporation, adopt and amend its Code of Ethics, determine and assess dues, adopt an annual budget, grant or revoke the charters of its component societies, and elect its officers, Council members, and delegates to the ADA House of Delegates. IDF 9; CX 1450-K; CX 1472-A. Aside from a managing Board of Trustees and a number of standing committees, the CDA operates ten Councils, one of which is the Judicial Council, which is charged with interpreting and enforcing CDA's Code of Ethics. IDF 10-23. The Judicial Council's Membership Application Review Subcommittee ("MARS"), in turn, examines whether applicants have complied with the Code of Ethics. IDF 14; IDF 157.

III. JURISDICTION

CDA challenges the ALJ's conclusion that it is a corporation "organized to carry on business for its own profit or that of its members," within the meaning of Section 4 of the FTC Act, 15 U.S.C. 44. First, it maintains that the ALJ applied the wrong legal standard, arguing that the ALJ ignored the two-pronged approach set forth in College Football Association, 5 Trade Reg. Rep. (CCH) ¶ 23,631 (July 8, 1994) ("CFA"), by applying the test laid out in the Commission's earlier decision in *American Medical Association*, 94 FTC 701. Second, CDA argues that dentists do not in fact derive any pecuniary benefit from their membership in CDA and that any activity that might be characterized as for profit is ancillary to its nonprofit mission and therefore does not suffice to confer jurisdiction upon the FTC. We disagree.

Under Section 5, as amended, the Commission is authorized to "prevent persons, partnerships, or corporations," with certain exceptions not relevant here, "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4, as amended, in turn, defines the term "corporation":

> "'Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44.

The statute does not further specify the boundary of the for-profit limit to our jurisdiction (or nonprofit exemption as it is alternatively known), and the test we apply was first articulated in *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969). In that case, the Eighth Circuit rejected the notion that a corporation's nonprofit organizational form places it beyond the Commission's jurisdiction. An examination of the legislative history of the Act led the court to conclude that "Congress did not intend to provide a blanket exclusion of all non-profit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." 405 F.2d at 1017. *See also FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 487-88 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976). The Eighth Circuit explained that the nonprofit exemption extends only to corporations that are "in law and in fact charitable," 405 F.2d at 1019, and concluded:

> "[U]nder Section 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital which are organized for and actually engaged in business for only charitable purposes, and do not derive any 'profit' for themselves or their members within the meaning of the word 'profit' as attributed to corporations having shares of capital." *Id.* at 1022.

We applied this standard in *AMA*, 94 FTC 701, where we ultimately found that the American Medical Association had violated

Section 5 of the FTC Act by restricting advertising and solicitation by its members. In finding jurisdiction we rejected the AMA's claim that the statutory term "profit" was limited to direct gains distributed to its members. Nor did we accept the organization's claim that the mere existence of substantial, eleemosynary activities would place it beyond the purview of the statute. We agreed, instead, with the ALJ, who had decided that the Commission can "assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if [those] activit[ies are] a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." *Id.* at 983 (citation omitted). We have since adhered to that formulation of the reach of our jurisdiction over nonprofit organizations. *See, e.g., Michigan State Medical Society,* 101 FTC 191, 283-84 (1983).

As the ALJ correctly observed, our subsequent decision in CFA is consistent with AMA. *See ID at 68.* CFA addressed the question whether a nonprofit organization, all of whose members are not for-profit entities, is subject to the Commission's jurisdiction when it engages in commercial activity and distributes the income earned from that activity to its members. As we noted in CFA, our jurisdictional analysis in that case did not call AMA into question. We reiterated that "a finding that a substantial part of an association's activities engender[s] pecuniary benefits for profit-seeking members is sufficient to establish that the association is organized to carry on business 'for the profit' of its members." *Id.* at 23,362. AMA proved insufficient, however, to decide the jurisdictional question in CFA, since "a finding that such activities engender pecuniary benefits for entities that are not for-profit is not [a sufficient basis to establish jurisdiction]." *Id.* We were thus compelled to press on in CFA to ensure that no other aspect of the organization's activities could serve as a jurisdictional predicate.

Drawing on Community Blood Bank and our review of federal tax law, we concluded that Section 4 imposes a two-pronged test that looks to both the source and destination of an organization's income. "The not-for-profit jurisdictional exemption under Section 4," we held, "requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests." *Id.* at 23,357. Because CFA's activities bore a sufficient nexus to its charitable purposes and because its income was

distributed entirely to members who were not for-profit entities, we concluded that it met both prongs and, accordingly, was exempt from our jurisdiction.

As is plain from the opinion, an organization that falls short on either prong comes within our jurisdiction. Therefore, rather than undermine our decision in AMA, CFA simply adds an additional step of analysis when an organization satisfies the prong enunciated in AMA.

CDA falls within our jurisdiction for the same reasons the AMA did, and, as a result, we need not examine the nature of its activities in addition to the substantial pecuniary benefits it generates for its members. CDA, like the AMA, is organized as a nonprofit corporation under state law and is exempt from federal income taxes under Internal Revenue Code 501(c)(6), 26 U.S.C. 501(c)(6) (1995), which applies to "business leagues, chambers of commerce, real estate boards and boards of trade" consisting of members that share common business interests. *See* 26 CFR 1.501(c)(6)-1 (1995). It thus apparently does not qualify for exemption under I.R.C. 501(c)(3), 26 U.S.C. 501(c)(3), which exempts organizations that are "organized and operated exclusively for [eleemosynary purposes]... no part of the net earnings of which inures to the benefit of any private . . . individual." This status is pertinent to our jurisdictional analysis, but in applying the AMA test, we nonetheless review for ourselves whether CDA confers pecuniary benefits upon its members as a substantial part of its activities. *See* 94 FTC at 990 n.17.[4]

In deciding that the AMA's activities engendered pecuniary benefits to its members, the Commission pointed to founding documents and promotional literature indicating that one of the AMA's goals was to serve the "material interests" of the medical profession and provide "tangible benefits and services to its members," such as insurance programs, a retirement plan, a physician placement service, publications, authoritative legal information, and practice management programs. *See* 94 FTC at 986-87 (citations omitted). The Commission also cited the AMA's legislative and lobbying efforts on behalf of physicians as an important tangible benefit provided by the organization to its members. *Id.* at 987; *see also Michigan State Medical Society*, 101 FTC at 283-84.

[4] We find no reason at this time to adopt, as complaint counsel urges, a rebuttable presumption "that any trade or professional association with a 501(c)(6) tax classification . . . operate[s] in substantial part for the economic benefit of its members, and therefore [is] subject to Commission jurisdiction." Brief for complaint counsel at 17-18.

CDA offers many similar benefits and bills itself as an organization that "represent[s] dentists in all matters that affect the profession," CX 1546-A; IDF 63, and that "offers far more services to its members than any other state [dental] association," CX 1544; IDF 67. For instance, CDA engages in lobbying activities that have been repeatedly described by CDA's president as saving members significant amounts of money, IDF 72, 74, provides practice management seminars, IDF 92, marketing and public relations services, IDF 86-88, and, through for-profit subsidiaries, offers its members professional liability insurance, business and personal insurance, and financial services, IDF 109-18. Indeed, the last time CDA made a comprehensive accounting of the allocation of its resources, only 7 percent was spent on "[s]ervices to the [p]ublic," while 65 percent funded "[d]irect [m]ember [s]ervices," 20 percent was used for "[a]ssociation [a]dministration & [i]ndirect [m]ember [s]ervices," and 8 percent went to defray the costs of "[m]embership [m]aintenance." CX 1448-C; IDF 69. In sum, without questioning whether CDA engages in activities that benefit the public, we agree with the ALJ that the services CDA provides to its members satisfy the jurisdictional threshold of the Act. *See* ID at 69-71.

IV. CONSPIRACY

CDA next challenges the legal and factual basis of the ALJ's finding that it conspired or combined with its members and component societies to restrict unreasonably the dissemination of information and thereby restrain competition. First, CDA argues that it is legally incapable of conspiring with its members or its component societies, because they form a single economic unit much like a corporation and its wholly owned subsidiary, which generally cannot conspire with one another. Brief for respondent 68-69 (citing *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)). Second, it maintains that there exists no requisite, conspiratorial unity of purpose among the component societies or between CDA and its components to restrict advertising or restrain competition, and that each component has instead prohibited what it independently perceived to be false and misleading advertising. *Id.* at 47-53. We disagree with both assertions.

Section 1 of the Sherman Act does not reach the unilateral acts of a single firm, but only restraints of trade achieved by "'contract,

combination . . . or conspiracy' between separate entities." *Copperweld*, 467 U.S. at 768 (emphasis in original).[5] In Copperweld, the Court considered whether a parent company and its wholly owned subsidiary could provide the requisite plurality of actors under Section 1, and it held that they could not:

> "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for Section 1 scrutiny." *Id.* at 771.

In other words, where a group of persons or corporations do not pursue independent economic motives, they are viewed as a single economic entity, akin to a firm and its executives, and are thus deemed incapable of entering into a conspiracy within the meaning of Section 1. This principle is inapposite here, however.

Unlike firms that are acquired by a parent corporation, dentists do not shed their economic identities as competitors in the dental services market upon joining the association. Thus, in contrast to the strategies of a single firm, or a parent and its wholly owned subsidiary, CDA's policies and decisions regarding the market activities of its member dentists embody a continuing agreement among competitors. Indeed, were we to conclude otherwise, a cartel would evade liability under Section 1 simply by organizing itself as a trade association.

Quite properly, then, professional associations are "routinely treated as continuing conspiracies of their members," as Professor Areeda has pointed out. VII Phillip E. Areeda, Antitrust Law ¶ 1477, p. 343 (1986); *see Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (citing same). For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), the Court declared a professional association's ethics rule prohibiting competitive bidding by its members to be in violation of Section 1, noting in passing that "[i]n this case we are presented with

[5] Although the FTC has no independent authority to enforce the Sherman Act, its authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). While the reach of Section 5 is broader than that of the Sherman Act, we need not lay out the precise scope of Section 5 in this case because, as we indicate below, *see infra* Section V, the instant practice makes out a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454-55 (1986).

an agreement among competitors." Similarly, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 455 (1986), the Supreme Court found that there was "no serious dispute" that members of the respondent organization had "conspired among themselves" by promulgating a policy restricting the information its members would provide insurance companies. And in one of its more explicit statements on the subject, the Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) ("*NCAA*"), expressly rejected a single entity defense when it examined a rule promulgated by an association composed of institutions who were otherwise competitors in the market for "television revenues, . . . fans and athletes," noting that "[b]y participating in an association which prevents member institutions from competing against each other . . . member institutions have created a horizontal restraint." As we said in *Michigan State Medical Society*, 101 FTC at 286 (citations omitted), "[t]here is ample precedent for finding that individual professionals, acting through their organizations, can conspire or combine to violate the antitrust laws."

We also reject CDA's factual contention that complaint counsel has failed to prove that the alleged conspirators shared "'a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" Brief for respondent at 48 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)). *See also Monsanto Co. v. Spray-Rite Serv. Corp*, 465 U.S. 752, 764 (1984). CDA clearly promulgated the Code of Ethics, which, as noted in AMA, by itself "implies agreement among the members of [the] organization to adhere to the norms of conduct set forth in the code." *AMA*, 94 FTC at 998 n.33. As part of their application to CDA, members expressly pledge to abide by the Code of Ethics as interpreted by the association's authorized officers. *See* CX 1258-E. And the Judicial Council (together with its Membership Application Review Subcommittee) interprets and enforces the Code of Ethics. IDF 14, 157. Therefore, despite CDA's attempt to portray the resulting restrictions as the product of independent, and often inconsistent, activities on the part of CDA and each component society, there is ample evidence in the record that the restrictions at the heart of this case were promulgated and enforced directly by, or at the direction of, CDA itself.

CDA's Code of Ethics and accompanying Advertising Guidelines require that all price advertising be exact and that discount advertising list the regular fee for each discounted service, the percentage of the discount, the length of time that the discount will be available, verifiable fees, and the specific groups who are eligible for the discount as well as any other limitation. CX 1484-Z-49 to 50; CX 1262-I. In enforcing these provisions, CDA has routinely cited members for using phrases such as "low," "reasonable," or "inexpensive" fees, *see, e.g.*, CX 301-B & -D; CX 118 B, and for failing to include the regular fees for each service covered by across-the-board senior citizen discounts, or coupon discounts for new customers, *see, e.g.*, CX 843-B, CX 585-A. *See* generally IDF 168-82.

CDA restricts nonprice advertising as well. *See* generally IDF 183-216, 294-317. CDA forbids "[a]dvertising claims as to the quality of services," CX 1484-Z-50, which include claims such as "quality dentistry," *see, e.g.*, CX 1083-A; CX 387-C, prohibits dentists from advertising that their services are superior to those of their competitors, *see, e.g.*, CX 671-A; CX 43-B; CX 1026-A, bans the advertising of guarantees, *see, e.g.*, CX 668-C; CX 557-C; CX 497-C, and has, on occasion, imposed burdens on dentists who have advertised their efforts to alleviate patient anxiety, *see* CX 70-A. Finally, CDA prohibits dentists from including information about their practice on forms distributed in connection with public or private school screenings. *See, e.g.*, CX 1115-A; CX 1167-A.[6]

[6] Although the Initial Decision, IDF 168-216, 294-317, relies on statements and enforcement activities by both CDA and its local component societies, our independent review of the record reveals that CDA was specifically involved in numerous enforcement actions so as to make the challenged restraints its own, rather than only unrelated incidents of restrictions by local components. We do not address CDA's specific concerns regarding the ALJ's reliance on complaint counsel's summary document CX 1659, since our own review of the record does not rely on the challenged document.

Since 1990 alone, there have been scores of cases in which CDA actively participated in the enforcement of the various restrictions identified in the text. To name a few examples, in recent years CDA was consulted, issued an opinion, or required that action be taken with regard to the advertising of Dr. Hansa Asher (senior citizen discount, CX 18 A, CX 18 B (1993)), Dr. Walter Rosenkranz (new customer special, CX 865 E, CX 865 C (1993)), Dr. Noel Dorotheo (senior citizen discount, CX 333 F, CX 333 A (1993)), Dr. Joseph Foroosh (representations of superiority, CX 360 A (1986); discounts, CX 366 A (1993); state of the art dentistry, CX 66 A (1993)), Dr. John Baron (superiority claim, CX 43 B (1993)), Dr. Coulter Crowley (new patient discount, CX 248 B (1993)), Dr. Richard Casteen (senior citizen discount, CX 151 B (1993)), Dr. Henry Lerian (affordable costs, superiority claims, CX 605 A (1993)), Drs. Angelique and Katherine Skoulas (infection control standards, CX 963 A (1993)), Dr. Kumar Ramalingam (discount, CX 843 A (1993)), Dr. Russell Coser (pleasant dentistry, CX 232 (1993)), Dr. Gerald Brown (experience, CX 115 A (1993)), Dr. Darral Hiatt (discount, CX 444 A (1993)), Dr. Mark Rocha (discount, CX 855 A, CX 856 (1993)), Dr. Cheryl Johnston (experience, guarantees and discounts, CX 497 A-D (1993)), Dr. Brent Maiden (senior citizen discount, CX 646 C (1992)), Dr. Corey Nicholl (discounts, CX 775 A (1993)), Dr. Steven Williams (superiority and quality of care, CX 1083 A (1992)), Dr. Edward Norzagaray (superiority and senior discount, CX 780 A,

We conclude that the policies adopted and enforced by CDA evidence a horizontal restraint among its members, and therefore constitute an agreement among competitors. We turn, then, to the legality of this agreement.

V. LEGALITY OF RESTRAINTS ON TRADE

Before we examine the specific restrictions on various types of advertising imposed by CDA, it will be useful to say a few words about the role of advertising in a competitive system. Truthful and nondeceptive advertising serves the important function of informing the consumer about "who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy*

CX 780 B (1992)), Dr. Roxanne Schleuniger (seniors discounts, CX 913 A (1992)), Dr. Eugene Kita (discounts for cash patients, guarantees, CX 557 B, CX 557 C (1992)), Dr. Gregory Skinner (senior citizen discount, affordable dentistry, and caring dentistry, CX 957 B, CX 957 C, CX 957 D-E (1992)), Dr. Phillip Jenkins (gentle, comfortable and affordable dentistry, CX 478 A (1992)), Dr. Howard Moy (discounts and affordable prices, CX 755 A, CX 755 B (1992)), Dr. Parto Ghadimi (discount for all new patients, sterilized environment, quality of care, CX 387 A, CX 387 C (1992)), Dr. Donald Reid (superiority, CX 848 C (1991)), Mickiewicz & Rye Dental Group (claim of superiority, CX 718 B (1992)), Dr. James Tracy (superiority claim, CX 1026 A (1992)), Drs. Grant and Randall Stucki (senior discount, guarantee, CX 1000 C (1992)), Dr. Christopher Go (superiority claim, CX 394 B (1993)), Dr. Leslie Latner (discount, experience, superiority, CX 583 (1991)), Dr. Farida Butt (discounts, experience, CX 126 A (1991)), Dr. Pargev Davtian (senior citizen discounts, CX 297 B (1991)), Dr. Nazameddin Beheshti (senior citizens discount, CX 49 A (1990); discounts, CX 51 A (1991)), Dr. Jack Dubin (affordable dentistry, CX 335 A (1991)), Dr. Gerald VanderAhe (endorsement and low prices, CX 1042 A, CX 1042 B (1991)), Dr. Thomas Bales (affordable financing, CX 32 A (1991)), Dr. Sean Moran (offer of discount, CX 745 D, E (1991)), Dr. Paige Jeffs (discount, special offer, CX 474 A-B (1990)), Dr. Michael Leizerovitz (quality for less, offers of discounts, special offer for x-rays, CX 602 A, CX 602 C, CX 602 D (1991)), Drs. William Kachele & Andrew Stygar (affordable dentistry, discounts, CX 514 A, CX 516 A, CX 516 C (1991)), Dr. Jack Rosenson (affordable dentistry, fair fees, representations of superiority, CX 866 A, CX 866 C (1991)), Dr. Indravadan Patel (discount, CX 828 D (1990)), Dr. Tarsem Singhal (affordable prices, CX 949 C (1990)), Dr. Daniel Tucker (reasonable fees, CX 1032 A (1990)), Dr. Greg Mardirossian (seniors discount, discount, CX 661 A (1990)), Dr. Mark A. Aguilera (expertise claims, discount, CX 4 A, B, C, (1990)), Dr. Leland Jung (affordable prices, CX 501 B (1990)), and Dr. Joseph Paulsen (low fees, CX 830, CX 830 G (1990)). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

A cross-section of CDA's involvement is provided by its actions with respect to the advertising of Dr. Kent Buckwalter (reasonable fees, and major savings, CX 118 B (1993)), Dr. Soodabeh Azarmi (coupon discount, CX 27 F (1993)), Dr. Dexter Massa (discounts and guarantee, CX 668 B, CX 668 C (1992)), Dr. Tony Daher (discount, CX 258 C (1993)), Dr. Christine Choi (percentage discount for new patients, CX 206 A (1992)), Valley Presbyterian Hospital (superiority, CX 354 (1992)), Dr. Trang Nguyen (discount, affordable price, CX 772 A, CX 772 C (1992)), and Dr. Eric Debbane (quality, low cost, CX 306 A, CX 306 C (1990)). *Id.* Beyond these numerous incidents, which establish CDA's involvement in the conspiracy to restrict members' advertising, there are hundreds of related enforcement actions by the local component societies, which exacerbates the impact of the restraints on competition. *See id.*

Contrary to the charge made in Commissioner Azcuenaga's dissent, then, our decision in this case does not rest on "a handful" of questionable actions, *see, e.g.*, *post*, at 12, but on ample evidence of pervasive CDA enforcement. CDA stood knee deep in actions restraining the advertising of its members, and the examples noted here and in the text are intended to serve only as illustrations of that practice.

v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). *See* generally, *AMA*, 94 FTC at 1005. By apprising consumers of the "availability, nature, and prices of products and services," such advertising "performs an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

We believe in the basic premise, as does the Supreme Court, that by providing information advertising serves predominantly to foster and sustain competition, facilitating consumers' efforts to identify the product or provider of their choice and lowering entry barriers for new competitors. *See* generally, R. McAuliffe, Advertising, Competition, and Public Policy (1987); P. Nelson, Advertising as Information, 82 Journal of Pol. Econ. 729 (1974); J. Langenfeld and J. Morris, Analyzing Agreements among Competitors, 1991 Antitrust Bulletin 651, 667 and n.21; C. Cox and S. Foster, The Costs and Benefits of Occupational Regulation 29-36 (Bureau of Economics: Federal Trade Commission 1990).

Restrictions on truthful and nondeceptive price advertising, on the other hand, "increase the difficulty of discovering the lowest cost seller of acceptable ability[,] . . . [reduce] the incentive to price competitively," and "serv[e] to perpetuate the market position of established [market participants]." *Bates*, 433 U.S. at 377-78. *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (quoting *Bates*, 433 U.S. at 377). As a result, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." *Bates*, 433 U.S. at 377. The importance of advertising, however, attaches not only to price information, but to all material aspects of the transaction. As the Court has indicated, "all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Professional Engineers*, 435 U.S. at 695.

Restrictions on broad categories of truthful and nondeceptive advertising, therefore, do place restraints on trade, and our cases have recognized as much. For example, we held in AMA that "[g]iven the integral function of advertising and other forms of solicitation to the workings of competition in our society" the AMA's complete ban on advertising or solicitation "has, by its very essence, significant adverse effects on competition among [its] members," and that "the nature or character of these restrictions is sufficient alone to establish

their anticompetitive quality." 94 FTC at 1005. Subsequently, in *Massachusetts Board of Registration in Optometry*, 110 FTC 549, 605 (1988), we found that "[r]estraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects." Further, we determined that the services at issue in that case were cheaper in states that permitted certain advertising than in states that did not. *Id.* at 606 (citation omitted); *see also id.* at 563 (Initial Decision). And we have entered into a number of consent agreements with associations on the theory that consumers are harmed by restrictions on advertising of the price, quality, or convenience of professional services. *See, e.g., Association of Independent Dentists,* 100 FTC 518 (1982); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990). Since it is apparent from the record that advertising is important to consumers of dental services and plays a significant role in the market for dental services, IDF 265-67, 321, the general proposition regarding the importance of advertising to competition carries over to the instant situation.

Restraints on trade have been held unlawful under Section 1 of the Sherman Act either when they fall within the class of restraints that have been held to be unreasonable *per se*, or when they are found to be unreasonable after a case-specific application of the rule of reason. Other "restraints" have been upheld because they enhance competition or create no significant anticompetitive effect. In each situation, however, the ultimate question is whether the challenged restraint hinders, enhances, or has no significant effect on competition. *See NCAA*, 468 U.S. at 104; *Professional Engineers*, 435 U.S. at 691.

Under the rule of reason, a challenged practice is examined in light of all the facts relevant to the particular case at hand. A court will examine the restraint in the totality of the material circumstances in which it is presented in order to assess whether it impairs competition unreasonably. Although many courts have elaborated on the details of this test, Justice Brandeis's classic formulation remains the touchstone for this rule-of-reason analysis:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint,

the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectional regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

This enquiry need not be conducted in great depth and elaborate detail in every case, for sometimes a court may be able to determine the anticompetitive character of a restraint easily and quickly by what has come to be known as a "quick look" review. *See Indiana Federation of Dentists*, 476 U.S. at 459-61; *NCAA*, 468 U.S. at 106-10, 109 n.39.

A *per se* category of violation may emerge as courts gain familiarity with the almost invariably untoward effects of a particular practice across economic actors and circumstances. As the Court said in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982), "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Per se* categories of unlawful economic activities, in other words, consist of agreements or practices that are almost always harmful to competition and rarely, if ever, accompanied by substantial redeeming virtues. The general conclusion that they are illegal without further analysis of the particular circumstances under which they arise in a given case is thereby justified. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985). Examples of such practices are horizontal price fixing, *see United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), territorial divisions among competitors, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and certain group boycotts, *see, e.g., Northwest Wholesale Stationers, supra. See also Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

When an activity falls into a *per se* category, the individual agreement or practice at issue is thought beyond justification in the sense that any argument as to the harmlessness of the restraint, or any proffer of procompetitive justifications for the practice, will generally not be considered. For example, the "reasonableness" of a fixed price will not excuse the attendant interference with the free flow of

competition. *United States v. Addyston Pipe & Steel*, 85 F. 271, 291 (6th Cir. 1898) (dictum), *aff'd as modified* 175 U.S. 211 (1899); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927). *See also Superior Court Trial Lawyers*, 493 U.S. at 421 ("We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants.") Nor will a court listen to the argument that the parties lacked the necessary market power to render the agreement effectual. *Superior Court Trial Lawyers*, 493 U.S. at 430-31; *Socony-Vacuum*, 310 U.S. at 224 n.59. The *per se* approach, therefore, condemns certain agreements even in those rare instances in which they may have proved reasonable or harmless under an extended, individualized rule-of-reason analysis, but this occasional injustice is outweighed by the rule's promotion of administrative and judicial economy and its creation of clear guidelines for market actors. *Maricopa*, 457 U.S. at 344 & n.16, 351 (citation omitted).

It is true that there is a converging of the *per se* category (including possible adjustments under the decision in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979)) and a full blown rule of reason (which can take place expeditiously under a "quick look" approach) so that at times the two antitrust approaches do not differ significantly. Phillip E. Areeda, VII Antitrust Law ¶ 1508, p.408 (1986). Although there have been some oblique suggestions in Supreme Court cases that perhaps the categories had merged, the Court later returned to distinguishing between *per se* and rule of reason categories. *See, e.g., FTC v. Superior Court Trial Lawyers, supra; Palmer v. B.R.G. of Georgia*, 498 U.S. 46 (1990) (*per curiam*).[7] We believe these separate categories continue to serve valid enforcement purposes and, in any event, authoritative Supreme Court decisions continue to recognize the distinction. We therefore turn to a discussion of the particular restraints imposed by CDA and consider the proper antitrust treatment that is to be accorded to each.

[7] Commissioner Starek notes in his concurrence that Massachusetts Board of Optometry "set out a 'structure for evaluating horizontal restraints' that is both consistent with the Supreme Court's teaching and, as the Commission observed in that case, 'more useful than the traditional use of the *per se* or rule of reason labels.'" Post, at 2-3 (quoting *Massachusetts Board of Optometry*, 110 FTC at 603-604). Useful or not, however, we believe that it is for the Supreme Court to say whether its traditional analysis is to be abandoned. As recent cases indicate, the Court has not done so.

A. Per Se Illegality -- Restraints on Price Advertising

Although it is well established that a horizontal agreement to eliminate price competition is a *per se* violation of the antitrust laws, *see e.g.*, *Maricopa*, 457 U.S. at 344-48; *Trenton Potteries*, 273 U.S. at 397, the price-related restrictions in this case differ from the classic price fixing conspiracy in that the agreement between CDA and its members burdens only members' advertising, as opposed to prohibiting specific sales transactions. That, however, does not save the restrictions from *per se* condemnation. CDA's restrictions on advertising "low" or "reasonable" fees, and its extensive disclosure requirement for discount advertising, effectively preclude its members from making low fee or across-the-board discount claims regardless of their truthfulness. Such a ban on significant forms of price competition is illegal *per se* regardless of the manner in which it is achieved. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

1. Effective Prohibition of Advertising

Section 10 of CDA's Code of Ethics prohibits advertising that is "false or misleading in any material respect," which, in turn, is defined to include any statement that is "likely to mislead because in context it makes only a partial disclosure of relevant facts" or "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors." CDA Code of Ethics, Section 10, Adv. Ops. 2(b) and (d); CX 1484-Z-49. Further Advisory Opinions provide:

> "3. Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.
>
> "4. Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity." *Id.*, Adv. Ops. 3 and 4; CX 1484-Z-49 to Z-50.

CDA has also separately issued detailed Advertising Guidelines, which purport to permit the advertising of "[d]iscounts on regular

fees," CX 1262-D, but explain that any advertisement for discounted dental services must "list all of the following":

(1) "[t]he dollar amount of the nondiscounted fee,"
(2) "[e]ither the dollar amount of the discount fee or the percentage of the discount for the specific service,"
(3) "[t]he length of time, if any, that the discount will be offered,"
(4) "[v]erifiable fees", and
(5) "[s]pecific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." CX-1262-I (emphasis in original).

Although this may sound like an innocuous regulation that does no more than enhance the truthfulness of the information conveyed, in its enforcement CDA effectively precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable, as well as advertising of across-the-board discounts.

The silencing effect of CDA's enforcement of the restrictions on advertising of low fees is evident from the record. For example, respondent recommended denial of membership to one dentist because he advertised, among other things, references to "cost that is reasonable," "affordable, quality dental care," "making teeth cleaning . . . inexpensive," and "very reasonable rates," which were objectionable because "fee advertising must be exact." *See* CX 301-B to D. Although CDA ostensibly changed course in 1991 (based on a rediscovered decision of the Judicial Council in 1978 which had approved use of the phrase "reasonable fees"), this alleged retraction does not appear to have been communicated to CDA's components nor did it terminate CDA's practice of citing members for use of that term. *See* IDF 255-57; CX 391; CX 778. Thus, on November 4, 1993, CDA recommended denial of membership to a dentist because, among other things, his employer's advertising included the offers "reasonable fees quoted in advance" and "major savings," and in respondent's view "the above referenced phrases are misleading and would cause an ordinarily prudent person to misunderstand or be deceived." CX 118-B. As occurred frequently in CDA's enforcement actions, the citation gives no indication that the conclusion regarding the misleading nature of the phrases was based upon an allegation that the advertising claim was false or that the advertising dentist

lacked a reasonable basis for the fee representations made. *See also* T. 361-78 (Dr. Miley).[8]

CDA's discount disclosure standards turns out to have been equally prohibitive. The Supreme Court's warning that "'[r]equiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive,'" *Morales*, 504 U.S. at 388 (quoting letter from FTC to Christopher Ames, Deputy Attorney General of California, dated Mar. 11, 1988), applies in this case. As even a member of CDA's Judicial Council, Dr. Kinney, acknowledged at trial, across-the-board discount advertising in literal compliance with the requirements "would probably take two pages in the telephone book" and "[n]obody is going to really advertise in that fashion." T. 1372. Although dentists can comply with the disclosure requirement when advertising a discount for a small number of services, the record bears out the conclusion that dentists do not advertise across-the-board discounts that include a complete itemization of the regular fee for each discounted service. *See, e.g.*, Appendix to Brief for Respondent; IDF 179. Dr. Kinney purported to agree that "if they are offering a discount to senior citizens and this is an across the board discount for everything ... you would have to be a little flexible and ... not ... require that ... every single fee [be listed]," T. 1373, but CDA did not ever compromise its demand for full compliance with the panoply of disclosures. For example, it recommended denial of membership to one dentist because she advertised, among other things, "20% off new patients with this ad" without including the dollar amount of the nondiscounted fee for each service. *See* CX 206-A; T. 1063-65. Another was advised that his advertisement of "25% discount for new patients on exam x-ray & cleaning/ 1 coupon per patient/ offer expires 1-30-94/ not good with any other offer" was unacceptable since it did not include the customary fee. CX 843-44. A third was admonished for having offered a "10% senior citizen discount" without the disclosures required by respondent. *See* CX 585-A, 586-E, 588-B.

Thus, regardless of the formal codification of its policy, CDA in fact imposed a broad ban on these forms of price advertising by its members.

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[8] *See* FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1984), (appended to *Thompson Medical Co., Inc.*) (advertisers must have "a reasonable basis for advertising claims before they are disseminated"). *Cf. infra* note 25.

2. *Per Se* Illegality

This effective prohibition on truthful and nondeceptive advertising of low fees and across-the-board discounts constitutes a naked attempt to eliminate price competition and must be judged unlawful *per se*. That it does so by the indirect means of suppressing advertising does not change that result. Nor is it of consequence that we are faced with a restriction among professionals.

Conspiracies to eliminate price competition come in various forms. For example, in Socony-Vacuum, *supra*, the Supreme Court struck down as *per se* unlawful an agreement among competing oil companies to purchase large amounts of gasoline on the spot market and store it for later sale in an effort to stabilize prices. In *United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966), the Court examined concerted activity aimed at preventing discounters from doing business with car dealers and found this practice also to be a *per se* violation of the Sherman Act. And *Catalano*, 446 U.S. 643, held that an agreement among wholesalers to eliminate short-term credit formerly granted to retailers made out a *per se* violation as well. More recently, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the Seventh Circuit held an association of marine dealers to have engaged in a *per se* violation of the Act when it refused to admit a dealer to its annual boat show because of that dealer's publicized policy to "meet or beat" competitors' prices at the shows. And in *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), another case invoking *per se* analysis, the Seventh Circuit held that an agreement among competitors not to advertise in specified territories was tantamount to an outright allocation of markets and thus illegal *per se*. "To fit under the *per se* rule," the court reasoned, "an agreement need not foreclose all possible avenues of competition." *Id.* at 827. The restrictions on advertising sufficed to bring the agreement under the rule.

Indeed, in AMA, we had already noted that "restraints on the advertising of prices have previously been considered *per se* illegal by some courts." 94 FTC at 1003 (citing *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688 (7th Cir. 1961), and *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 (S.D. Fla. 1965)). In the cited Seventh Circuit decision, the court had reviewed a horizontal agreement among gasoline retailers to refrain from advertising or giving premiums, and from advertising the price

of their product in locations other than the gasoline pumps, and the court declared this conspiracy to be a *per se* violation of the Sherman Act. 285 F.2d at 691. Although the agreement was thus coupled with outright price maintenance, the conspiracy in restraint of advertising was no less singled out for *per se* condemnation. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), is also instructive. In that case, the Court held that Parke Davis had gone beyond the limits of permissible vertical arrangements by enlisting wholesalers in a conspiracy to deny its products to retailers who sold below the suggested minimum retail price. This conspiracy, which had a distinctive horizontal flavor, was illegal under the Sherman Act. *Id.* at 45-46. Important for our purposes is that the Court went on to address how Parke Davis had similarly brokered a horizontal agreement among retailers to suspend advertising of discounts, concluding that these actions were directed at creating a *per se* unlawful agreement to eliminate price competition. *Id.* at 46-47. Applying Parke Davis, the District Court in Seagram expressly held that horizontal "[a]greements by retailers . . . to discontinue advertising . . . are tantamount to agreements not to compete and constitute *per se* violations . . . of Section 1 of the Sherman Act." 1965 Trade Cas. (CCH) ¶ 71,517 at p.81,275. Finally, the Seventh Circuit confirmed the view that a prohibition on advertising discounts "is functionally a price restriction," *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 724 (7th Cir. 1986), and refrained from applying the *per se* rule only because, as the court noted in a subsequent appeal in that case, "the *per se* rule against this practice does not apply when the vendor is an agent," 889 F.2d 751, 752 (1989), *cert. denied*, 495 U.S. 919 (1990).[9]

Horizontal agreements suppressing broad categories of truthful and nondeceptive price advertising, then, effectively suspend a significant form of price competition. Indeed, such an agreement to eliminate price advertising can be more threatening to competition than a ban on discount sales, since, as Judge Easterbrook noted in Illinois Corporate Travel, a "no-advertising rule . . . is easily enforceable because advertising of discounts is observable." 806 F.2d at 727.

[9] In a case in which automobile dealers conspired to oppose invoice advertising (which is advertising the price as a fixed percentage or sum above the dealer's invoice), the Justice Department recently reached the conclusion that "an agreement by a trade association or its members not to engage in certain types of advertising is a *per se* violation of the antitrust laws." Competitive Impact Statement regarding proposed Final Judgment in *United States v. National Automobile Dealers Ass'n*, Civ. Action No. 95-1804 (D.D.C. filed Sep. 20, 1995) at 6, reprinted in 60 Fed. Reg. 51,491, 51,498 (Oct. 2, 1995).

The professional context of this restraint does not lead to a different conclusion. In AMA, we ultimately refrained from classifying the price advertising restraints as *per se* illegal largely due to our hesitation to speak categorically about restrictions by professional associations, which at the time had "not previously been subject to extensive scrutiny under the antitrust laws." 94 FTC at 1003. *See also White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) ("We do not know enough of the economic and business stuff out of which these arrangements emerge to . . . decide whether they . . . should be classified as *per se* violations."); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n.17 (1975) ("It would be unrealistic to view the practice of professions as interchangeable with other business activities."). The Supreme Court had just decided Professional Engineers under a truncated analysis, but without expressly declaring that it was subjecting the association's prohibition against competitive bidding to *per se* treatment. Since then, however, it has become clear that the Court in that case did essentially apply a *per se* rule to the agreement. *See Catalano*, 446 U.S. 643; *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457, 471 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992); *Michigan State Medical Society*, 101 FTC at 290.[10] And both the Commission and the courts have in the interim gained considerable exposure to anticompetitive activities by professional associations.[11]

[10] Although in Professional Engineers the Supreme Court did not expressly identify the approach it used as *per se*, this now appears to have been merely a matter of terminology, rather than analytical significance. The Court's opinion in Professional Engineers placed both the abbreviated, categorical approach as well as the individualized, contextual examination under the umbrella label "rule of reason." *See* 435 U.S. at 691-692. It explained that the first applies to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*,'" whereas the second encompasses "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." *Id.* at 692. It then termed the ban on competitive bidding "illegal on its face," noting that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* Finally, it noted: "Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position." *Id.* at 696.

Since that case, the Court has returned to applying the label "rule of reason" to the second approach only, as a means to distinguish it from the *per se* category. Although the Court has at times quoted from Professional Engineers as though the case had applied the individualized rule of reason, *see, e.g., Indiana Federation of Dentists*, 476 U.S. at 459, the Court has elsewhere indicated that the approach it used in *Professional Engineers* was indeed what we generally would term *per se*, *see Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). We use the term "rule of reason" when speaking about the individualized analysis, in contradistinction to the categorical, *per se* approach.

[11] *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988); *Michigan*

To be sure, the "'public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Maricopa*, 457 U.S. at 348-49 (quoting *Goldfarb*, 421 U.S. at 788 n.17). By the same token, however, in cases involving agreements not "premised on public service or ethical norms," the Supreme Court has repeatedly applied the *per se* rule. *Id.* at 349. *Cf. Wilk v. American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983) ("an agreement to fix prices will not escape *per se* treatment simply because it is entered into by professionals and accompanied by ethical protestations [, whereas] . . . a canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment"), *cert. denied*, 467 U.S. 1210 (1984). Recently, for example, in Superior Court Trial Lawyers, the Court had no trouble deciding that *per se* treatment was called for when lawyers entered into a horizontal agreement to fix prices, the professional context notwithstanding. 493 U.S. 411. Furthermore, our own decision in Michigan State Medical Society, which purportedly refrained from applying the *per se* rule, nonetheless noted that the *per se* standard can apply in the professional setting even where the conspiracy does not set specific prices or fees. 101 FTC at 290. And in Massachusetts Board of Optometry we found that even in the context of professional rules, restraints on truthful advertising "are inherently likely to produce anticompetitive effects," and that a ban on discount advertising for professional services impedes new entry and the efficient use of resources by eliminating a form of price competition. 110 FTC at 605. In that case, we summarily condemned the price advertising restraints. *Id.* at 607.[12] We therefore believe it to be well grounded in this experience and in precedent to strip CDA's price advertising restrictions of their professional garb and declare them *per se* unlawful as naked restraints on price competition.

The examination of a practice, however, does not inevitably come to rest after it has been identified as falling into the category of *per*

State Medical Society, 101 FTC 191 (1983); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued Dec. 16, 1992); *American Inst. of Certified Public Accountants*, 113 FTC 698 (1990) (consent); *Oklahoma Optometric Ass'n*, 106 FTC 556 (1985) (consent); *Association of Independent Dentists*, 100 FTC 518 (1982) (consent).

[12] *Cf. Detroit Auto Dealers*, 955 F.2d at 470-71 ("We believe that the inherently suspect conclusion arises from a *per se* approach by the Commission . . .").

se unlawful bans on price competition. Under *Broadcast Music*, 441 U.S. 1, and *NCAA*, 468 U.S. 85, respondent might attempt to argue that its practice is a restraint on price competition "in only a literal sense." *Maricopa*, 457 U.S. at 355. Arguments that might carry weight under *Broadcast Music*'s characterization approach, however, have not been advanced here.[13] Respondent urges only in the most general sense that its restrictions are procompetitive in that they are intended to protect consumers from unfair and deceptive advertising. But respondent has entirely failed to explain why it is unfair or deceptive to advertise an across-the-board discount without disclosure on the face of the advertisement of the regular fee of each service covered by the discount, or how consumers are harmed by an advertisement that announces with a reasonable basis for its truthfulness (let alone truthfully) that the prices charged are low as compared to other providers in the area.

CDA's restraints on price advertising are thus illegal *per se*. In the course of discussing the nonprice advertising restraints under the rule of reason in the next section, however, we will also reexamine the restraints on price advertising under that more elaborate analysis, but solely as a means of demonstrating that, assuming *arguendo* the restraints had escaped censure under the *per se* approach, they would nonetheless have been condemned under the rule of reason.

B. *Rule of Reason -- Restraints on Price & Non-Price Advertising*

Unlike price advertising restraints, which have in one form or another received ample consideration by the courts and fit squarely within the Sherman Act's core prohibition against the collusive suspension of price competition, CDA's restrictions on nonprice advertising are entitled to an examination under the rule of reason. With regard to these restraints, we cannot say with equal confidence that, as a facial matter, CDA's concerns are unrelated to the public service aspect of its profession, or that "the practice facially appears

[13] We agree with Commissioner Starek that it would be a grave error to chart a course on which "potential competitive benefits of agreements restricting price advertising need never trouble the Commission again." Post, at 2. The *per se* rule as articulated in recent cases by the Supreme Court and as applied by the Commission today, however, runs no such risk. To the contrary, we have been open to arguments that might carry weight under *Broadcast Music*, but CDA has simply failed to assert the requisite competitive benefits that might save it from *per se* condemnation. Commissioner Starek certainly is not suggesting that significant, pro-competitive benefits have been overlooked in this case. The view that the Commission's reasoning foreshadows summary condemnation for a vast array of future cases, *see, e.g.*, Post at 2, 7, therefore, overstates our conclusion here. Only cases involving equivalent conduct will be accorded similar treatment in the future.

to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Thus, mindful of the Court's general reluctance to adopt a *per se* approach in reviewing codes of conduct of professional associations, and heeding the Court's admonition not to expand the *per se* category "until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *Maricopa*, 457 U.S. at 349 n.19, we refrain from extending *per se* treatment to the restrictions on nonprice advertising and apply the default, rule-of-reason analysis instead.[14]

The Supreme Court has made clear that the rule of reason contemplates a flexible enquiry, examining a challenged restraint in the detail necessary to understand its competitive effect. *See, e.g.*, *NCAA*, 468 U.S. 103-110. As will be seen, here, application of the rule of reason is simple and short. The anticompetitive effects of CDA's advertising restrictions are sufficiently clear, and the claimed efficiencies sufficiently tenuous, that a detailed analysis of market power is unnecessary to reaching a sound conclusion, and, in any event, CDA clearly had sufficient power to inflict competitive harm.

1. The Likely Anticompetitive Effects of the Restraints

Although the ALJ did not examine the effects of CDA's rules in as much detail as he might have, the record demonstrates that each of the restraints, not only those on price advertising, has anticompetitive effects. The nonprice advertising CDA proscribes is vast. In addition to making general prohibitions against false or deceptive advertising, CDA forbids quality claims. Advisory Opinion 8 to Section 10 of CDA's Code of Ethics urges against quality claims:

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading." CX 1484-Z-50.[15]

In practice, CDA prohibits all quality claims. For example, CDA recommended denial of membership to one dentist because her advertising included the phrase "quality dentistry," which CDA maintained was not susceptible of verification, CX 387-C,

[14] We do not decide, however, whether, as a general matter, restrictions on nonprice advertising will always escape condemnation under the *per se* rule of illegality.

[15] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 (prohibiting advertising that is "false or misleading in any material respect").

recommended denial of membership to another because he included in his advertising the phrase "we are dedicated to maintaining the highest quality of endodontic care," which CDA cited as being unverifiable, CX 1083-C, and initially denied membership to yet another dentist because his advertisement of "improved results with the latest techniques" and "latest in cosmetic dentistry," was allegedly likely to create false or unjustified expectations of favorable results as to the quality of service and was not subject to verification, CX-306.

Furthermore, albeit without coextensive written regulations, CDA suppresses claims of superiority and the issuance of guarantees.[16] For example, in 1993, when a dentist reapplied for membership, CDA recommended that he be counseled regarding his advertising because of a representation of superiority, *i.e.*, the claim that "all of our handpieces (drills) are individually autoclaved for each and every patient." *See* CX 671-A. CDA also routinely cited applicants or members for implying superiority by use of the phrase "state of art," as in one dentist's advertisement of "state-of-art sterilization," CX 43-B. *See also, e.g.*, CX 1026-A ("state of the art dental services"); CX 394-B ("highest standards in sterilization"). In 1992, CDA found an advertisement containing the phrase "we can provide the uncompromised standards of excellence you demand" to be an impermissible representation of superiority. CX 354. With respect to guarantees, CDA prohibited such claims as "we guarantee all dental work for 1 year," CX 668-C; CX 557-C, or "crowns and bridges that last," CX 497-C.

CDA has also, on occasion, imposed special burdens on dentists claiming that they offer "gentle" care, CX 70-A, although its activities on that score appear to be less sweeping in recent years than those of CDA's component societies. *See* IDF 208-15. And finally, CDA passed a resolution in 1984 (to which the organization still adheres today), providing:

"[I]t is the position of the Judicial Council that solicitation of school children on any private or public school ground(s) is deemed not to elevate the esteem of the dental profession." CX 1115-A.[17]

[16] CDA does have a provision that may be read to address superiority claims, *i.e.* Section 22 of its Code of Ethics which provides that "[t]he dentist has the further obligation of not holding out as exclusive any agent, method or technique." CX 1484-Z-53. CDA's enforcement record, however, reveals a complete prohibition of superiority claims.

[17] *Cf.* CDA Code of Ethics, Section 10, CX 1484-Z-49 ("In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public.").

In the course of enforcing that policy statement, CDA informed a component in 1993 that when dentists participate in school screenings and include their name and address on the screening document sent home to the parents, such activity "can be construed to be a form of [prohibited] solicitation . . . ." CX 1167-A.

In addition to the findings in earlier cases regarding the anticompetitive effects of broad restrictions on the truthful and nondeceptive advertising of a service, *see, supra*, discussion at the beginning of Part V, in this case there is substantial evidence that the restrictions imposed by CDA prevented the dissemination of information important to consumers and the advertising of aspects of a dental practice that form a significant basis of competition among California's dentists. For example, the ALJ found that information not only about price of service, but also about quality and sensitivity to fears is important to consumers and determines, in part, a patient's selection of a particular dentist. IDF 265-67. He also credited the testimony of the owner of an advertising agency that specializes in serving dental practices, who testified that advertising the comfort of services will "absolutely" bring in more patients, and that, conversely, restraints on advertising of the quality or discount of dental services would decrease the number of patients a dentist could attract. IDF 265. In one case, the elimination of the phrase "gentle dentistry in a caring environment" meant sacrificing an advertisement that had attracted 300 new patients within six months. IDF 286. The ALJ also found that the prohibition on distributing identifying information during school screenings resulted in a loss of potential customers. IDF 302.[18]

The importance to consumers of advertising of various characteristics of dental services is confirmed by other witnesses as well. For example, Dr. Richard Harder, who closely monitored the results of his various advertising techniques, testified that generic advertising without comparative quality or price claims was rather ineffective, attracting only 15-20 new patients a month, but that a subsequent campaign based on advertising a special fee for new patients, as well as a dedication to quality of service and family dentistry, brought in between 75 and 100 new patients a month.

[18] The manner in which CDA impairs new entry of competitors is particularly well illustrated by price advertising restraints, such as citations for advertising "Grand Opening Special $5 exam x-ray, $15 polishing and 40% off dental treatment," CX 828-D, "as a get acquainted offer, an initial consultation, complete exam, any x-rays and tooth cleaning will be done for only $5 (applies to all members of your family)," CX 657, and "we guarantee all dental work for 1 year," CX 668-C.

After being contacted by the local society and threatened with discipline, Dr. Harder eliminated all references to quality and family, which contributed to an observed reduction in the number of new patients coming into his practice. T. 262-74. Dr. John Miley's practice experienced a similar surge in new customers through advertising that included references to the quality and superiority of his services, as well as to the fact that he offered discounts and low prices. T. 316-457; CX 723.

As is therefore evident from the record, the restraints hamper dentists in their ability to attract patients to their practice and thereby are likely to reduce output. More important for our purposes, the restrictions thus deprive consumers of information they value and of healthy competition for their patronage. Even without quantifying the increase in price or reduction in output occasioned by these restraints, we find the anticompetitive nature of these restraints to be plain. *See AMA*, 94 FTC at 1006.

2. Market Power

Although the ALJ found that the suppression of advertising "has injured those consumers who rely on advertising to choose dentists," he spelled out a second conclusion, rather in tension with the first, that CDA lacked market power. ID at 76. The ALJ concluded that complaint counsel had failed to establish the relevant product and geographic markets, and decided, on the ground that there was no "insurmountable obstacle to entry" into the dental market, that "CDA could not exercise market power in any relevant geographic market, whether statewide, regional, or local." ID at 76. We reject that conclusion.

Market power is part of a rule of reason analysis, but it is important to remember why market power is examined.[19] We consider market power to help inform our understanding of the competitive effect of a restraint. Where the consequences of a restraint are ambiguous, or where substantial efficiencies flow from a restraint, a more detailed examination of market power may be needed. Here, in contrast, the ALJ found, and we agree, that the suppression of advertising "has injured those consumers who rely on

[19] The Supreme Court has indicated that when a court finds actual anticompetitive effects, no detailed examination of market power is necessary to judge the practice unlawful. *See NCAA*, 468 U.S. at 109-10; *Indiana Federation of Dentists*, 476 U.S. at 461.

advertising to choose dentists" (the record indicates that significant numbers of such consumers indeed exist), and none of the practices can rely for support on a valid efficiency justification. To the extent that market power is relevant, it suffices that the association has the power to withhold from consumers the relevant information that they seek.[20] And as we shall explain presently in further detail, CDA has the ability to identify violators of the agreement and the necessary market power to enforce this ban over sufficiently large segments of the market to deprive consumers of valuable information.

When examining the market power of an association's restriction on members who are the primary economic actors, we confront two closely related questions. First, whether viewed as a question of market power or of the existence of an agreement, we must determine whether the association has the ability successfully to impose the restriction on its members. If the association is unable to gain its members' adherence to the rule such that the market continues to function as it had before, the restraint will become an irrelevant formality of little concern to antitrust regulators. If, however, the association is able to induce its current members to follow the rule, and is not reduced significantly by attrition, we must turn to the second question, which asks whether the association has the necessary power to cause harm to consumers by imposing the rule on its members. For if alternative sources for the service offered by the association's members are so prevalent as to permit consumers easily to switch to providers who are unfettered by the rule, even a well-enforced restraint should cause no harm to the efficient functioning of the market. Members will simply lose business, nonmembers' business will surge, and the market will eventually cure itself. If, on the other hand, consumers' abilities to turn elsewhere are limited, the association is in a position to harm consumers by adopting restrictive rules. This turns out to be the case here.

[20] In *Indiana Federation of Dentists*, 476 U.S. at 459, the Court examined "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," and concluded:

"'While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' National Society of Professional Engineers, *supra*, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies . . . such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' National Society of Professional Engineers, *supra*, at 692, cannot be sustained under the Rule of Reason."

There is little doubt that CDA has the ability to police, and entice its members to adhere to, the restrictions on advertising. Unlike an individual sales transaction, advertising is a public, conspicuous event that is easily monitored. *Cf. Illinois Corporate Travel*, 806 F.2d at 727 (finding no-advertising rule "easily enforceable" because advertising "is observable"). Many components review the Yellow Pages phone listings at the behest of CDA, IDF 146, and CDA investigates complaints about dentists' advertising. There is no evidence in the record of rampant advertising that has failed to come to CDA's attention. Next, it is clear that dentists place a high value on the benefits of membership in CDA, whether because of its insurance and educational programs or the reputational advantage that membership may confer. IDF 268-74; *see also, e.g.*, T. 376-92. We need not quantify this benefit econometrically, since in this case the record speaks for itself. When faced with a choice between membership and advertising, dentists overwhelmingly choose the former. Several component Ethics Committee officials testified that their members were in perfect or near-perfect compliance with the advertising code and that they knew of not a single instance in which a member dentist had refused to modify or discontinue the challenged advertising. IDF 275-86. Numerous applicants had, of course, already changed their advertising in order to gain admission to CDA in the first place. *See, e.g.*, CX 670-71, CX 365-66, CX 249.[21] Moreover, this stranglehold on the profession extends well beyond actual members to include employers, employees, and business referral services of members, since these are equally prohibited by CDA from engaging in advertising that violates CDA's Code of Ethics (whenever such advertising indirectly benefits the member). IDF 287-93; *see* CX 1358-B.

[21] Quite contrary to Commissioner Azcuenaga's suggestion that "it seems questionable to infer that dentists feared the CDA instead of the state of California," Post, at 27, the record bears out just that. For example, Dr. Jenkins' capitulation when he "disagree[d] with [CDA's] findings" but decided to "disagree agreeably" and promise that "[t]he statements in question will no longer be used in any mailings from this office," CX 480, evidences that it was this dentist's desire to become a member of CDA, not a concern about state law, that drove him to comply with CDA's Code of Ethics. Similarly, Dr. Foroosh's seven-year battle for admission to CDA, CX 360-366, was clearly motivated by a desire to gain admission to the Association, not to seek continual guidance from CDA about state law. *See also* CX 302-398 (Dr. Eric Debbane, gaining membership with fourth application). Indeed, two dentists who had apparently cleared their advertisement with the Board of Dental Examiners, nonetheless eliminated all references to "uncompromised standards or outstanding success rates" after they were contacted by respondent and informed that respondent is a separate entity from the Board. CX 355, 357, 358. The record thus contains ample confirmation of the importance of membership and its power to compel the alteration of dentists' advertising practices. *See also, e.g.*, IDF 285 (disagreement with CDA's conclusion but promise to cure advertising); IDF 268-274 (members' statements regarding value of membership).

Here, this kind of power goes hand in glove with the second, that is the ability successfully to withhold information from consumers. Without much theoretical analysis, it can be readily concluded from the record, common sense, and the California Business and Professions Code that the services offered by licensed dentists have few close substitutes and that the market for such services is a local one. *See* Cal. Bus. & Prof. Code Sections 1625-1626 (defining dental services that can be performed only by licensed dentists); T. 637 & 655 (Christensen) (testifying that dental market is local); *see also Indiana Federation of Dentists*, 476 U.S. at 461 (noting that "markets for dental services tend to be relatively localized"). Even respondent's expert witness agreed that the provision of dental services "could be" a relevant product market, *see* T. 1689 (Prof. Knox), and his view on the relevant geographic market was that California consists of numerous markets, each "smaller than the [entire] State," since "dental services are bought and sold . . . in a more disaggregated market," T. 1642 (Prof. Knox). CDA commands more than a substantial share of these markets. Around 75 percent of the practicing dentists in California belong to CDA, IDF 2, and, according to one component society, the figure exceeds 90 % in at least one region, CX 1433. Given CDA's success in enforcing its rules, and the extended reach of its prohibition to various associates of member dentists, we can only assume that even these numbers understate CDA's real market share.

While market share alone might not always be a sufficient indicator of market power, it may nonetheless be relied upon at least where there are significant barriers to entry. For example, in *Michigan State Medical Society*, 101 FTC at 292 n.29, we explained that "there is little need for an elaborate market definition analysis in this case, since MSMS' members account for roughly 80% of the physicians in Michigan." We concluded in that case that, as a result, "no matter how the relevant product or geographic markets might be characterized, the potential impact of the agreements in question is substantial." *Id.* The Seventh Circuit has similarly indicated that reliance on market share can be appropriate, and is "especially so where there are barriers to entry and no substitutes from the consumer's perspective." *Wilk v. American Medical Ass'n*, 895 F.2d 352, 360 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990) (citation omitted). In addition to the absence of substitutes, however, in the present case there are entry barriers as well.

Barriers to entry figure prominently in California's market for dental services. As an initial matter, we note that it has never been held, as the ALJ appears to believe, that barriers to entry are cognizable in antitrust analysis only when they are "insurmountable," ID at 76, or, as respondent's expert witness thought, only if they are created by the association accused of engaging in anticompetitive practices, IDF 322. And we disagree with respondent's expert witness that costs incurred to enter the market are irrelevant whenever similar costs were borne by current market participants when they first entered the market. *See* T. 1636-1640.[22]

In our view, the record bears out the conclusion that entry into the California dental market is difficult. In addition to facing the substantial educational requirements, which according to one witness leave students coming out of dental school with between $50,000 and $100,000 of debt, a dentist who seeks to establish a practice must either lease or purchase the necessary space and equipment and hire appropriate personnel, or must purchase an existing practice (the costs of which according to one witness range between $75,000 and $100,000). After setting up the practice, and provided a dentist is able to attract a sufficient clientele, it can take from 18 months to 2 years for a practice to meet current expenses, and between 5 and 10 years to amortize the debt. *See* IDF 329-31; T. 297-300 (Dr. Harder); T. 329-31 (Dr. Miley); T. 756-64 (Dr. Hamann). Thus, new entry into the dental profession in California is difficult. And given these startup costs, a good deal of which even an active dentist who seeks to relocate to California would face, the idea that fully licensed dentists from other states would move in significant numbers to California to take advantage of the opportunity to advertise in competition with members of CDA is implausible at best.

Even easy entry at the level of opening a dental practice would not necessarily mean that the Association could not exercise market power. If the Association membership confers a real economic benefit that cannot be easily replicated, then exclusion from the Association may impose a real economic cost on potential entrants. Here, CDA membership entails significant benefits for the dentist as demonstrated by the fact that no one gives up membership in order

[22] A combination of these three beliefs led the ALJ to credit the testimony by respondent's expert witness that CDA's activities had "no impact on competition in any market in the State of California." IDF 322, 326. As indicated in the text, we reject that conclusion.

to gain the freedom to advertise -- including those inclined to advertise but directed not to by CDA.

We therefore conclude that CDA possesses the necessary market power to impose the costs of its anticompetitive restrictions on California consumers of dental services.

3. Efficiencies

As the third step in our quick look, we examine the efficiency justifications proffered by respondent together with any others that might be raised in support of CDA's restraints on advertising. Respondent contends that insofar as its advertising restraints are not harmless, they are procompetitive because CDA challenges only advertising that is false or misleading. Although the prevention of false and misleading advertising is indeed a laudable purpose, the record will not support the claim that CDA's actions are limited to advancing that goal.

Under Section 5 of the FTC Act, an advertisement is deceptive "if it is likely to mislead consumers acting reasonably under the circumstances in a material respect." *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (citation omitted); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435-36 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *Thompson Medical Co.*, 104 FTC 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). A practice is not considered "unfair" under the Act unless it engenders substantial consumer injury that is not reasonably avoidable by the consumer and not outweighed by countervailing benefits to consumers or competition. *See* FTC Act Amendments of 1994, Section 9, 108 Stat. 1691, 1695, to be codified at 15 U.S.C. 45; Letter from FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation (Dec. 17, 1980), reprinted in Appendix to *International Harvester Co.*, 104 FTC 1070 (1984). Without a significant additional proffer, which CDA has not made, the types of advertising claims categorically prohibited by CDA's stated policies and enforcement efforts could not reasonably be thought to be either deceptive or unfair under Section 5.

First, CDA prohibits even truthful offers of discounts by dentists unless the advertisement states the regular price of the discounted service. Where the discount applies to numerous services (for

example, a senior citizens discount on all services), the practical effect of this requirement has been to forbid the advertising entirely. However, the truthful offer of a discount from the price ordinarily charged by a dentist for services is not deceptive. The offer of a discount can, of course, be misleading if the advertiser selectively inflates the price from which the discount is computed or offers "discounts" to everyone from a fictitious "regular" price. *See, e.g., Encyclopedia Britannica, Inc.*, 100 FTC 500, 505 (1982) (order modifying consent order); *Diener's, Inc.*, 81 FTC 945, 976-78, 980-81 (1972), *modified*, 494 F.2d 1132 (D.C. Cir. 1974); *Paul Bruseloff*, 82 FTC 1090, 1095-96 (1973) (consent). But there is no suggestion here that CDA merely prohibited discount claims by dentists found individually to have engaged in such chicanery, or that CDA had evidence of significant abuse of discount claims that might provide support for a prophylactic ban. Instead, CDA effectively prohibited across-the-board discount offers, whether truthful or not. No purported policy of preventing deception can justify that approach.[23]

Similarly, the law of deception does not prohibit broadly all representations that a seller's prices are "low" or a "bargain" in relation to others, and certainly not where the representations are accurate or can be substantiated. *See Tashof v. FTC,* 437 F.2d 707, 710-11 (D.C. Cir. 1970) (comparing discount offers to prevailing prices). Once again, CDA's policy is to condemn categorically all representations regarding "low" or "affordable" prices, without any enquiry as to how those terms might be construed by consumers and whether, as construed, they are true of the particular practitioner making the claim.

CDA's condemnation of guarantees is likewise overbroad. While a guarantee of a specified medical outcome may well be misleading, a truthful promise to refund money (or to honor scheduled appointments) is certainly not. Commission guidelines identify the obligations of those who advertise guarantees. *See* Guides for the Advertising of Warranties and Guarantees, 16 CFR Part 239 (1985). Barring some information that an advertiser has misrepresented or

[23] CDA suggests that its approach to discount advertising may be justified by reference to the Supreme Court's stated preference for "more disclosure, not less" in dealing with the regulation of deceptive speech under the First Amendment. Brief for respondent 37-38 (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). But the Court has expressed its preference for affirmative disclosures only as an alternative to prohibiting otherwise deceptive speech. Moreover, where, as here, speech is truthful and not misleading, the Supreme Court has shown great skepticism towards disclosure mandates that so burden the speech as to preclude it. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992).

failed to honor a guarantee, such advertising cannot presumptively be condemned as deceptive.

In the same vein, CDA's broad prohibition on claims relating to the absolute or comparative quality of service finds no support in the law governing deception. Some general claims of quality, of course, are so recognizably statements of personal opinion that no substantiation is either possible or expected by reasonable consumers. Such "mere puffing" deceives no one and has never been subject to regulation. *See* Federal Trade Commission Policy Statement on Deception, 103 FTC 174, 181 (1984) (appended to *Cliffdale Associates*); *Bristol-Myers Co.*, 102 FTC 21, 321 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *Pfizer, Inc.*, 81 FTC 23, 64 (1972).

Respondent refers to the Supreme Court's suggestion in *Bates*, 433 U.S. at 383-84, that "'advertising claims as to the quality of [legal] services . . . are not susceptible of measurement or verification; accordingly such claims may be so likely to be misleading as to warrant restriction.'" Brief for respondent 44 (quoting Bates, *supra*). We do not understand this language, however, to justify broad categorical prohibitions on quality claims of all sorts, without some effort to determine their accuracy or effect upon consumers. As the Court has more recently observed:

> "Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 646 (1985)).

Insofar as claims of absolute or comparative professional quality (including claims made to alleviate patient anxiety) do implicate objective standards for which consumers would reasonably expect an advertiser to have proof, they may, of course, be proscribed upon a showing that particular claims are false or unsubstantiated. In our view, the requisite showing requires proof that specified claims are untrue or that advertisers lack "a reasonable basis for advertising claims before they are disseminated." FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 648, 839 (1983) (appended to *Thompson Medical Co., Inc.*). Likewise, even assuming *arguendo* that claims of quality and efficacy may so readily be

equated with claims of superiority as many of CDA's interpretations appear to suggest, *see* IDF 194-204, the Commission "evaluates comparative advertising in the same manner as it evaluates all other advertising techniques," and "industry codes and interpretations that impose a higher standard of substantiation for comparative claims than for unilateral claims are inappropriate." Statement in Regard to Comparative Advertising, 16 CFR 14.15(c)(2).

Departing from its deception rationale, CDA seeks to justify its prohibition against dentists' provision of identifying information in school screening programs as a means of preventing exploitation of youthful consumers. This defense is inapt. While efforts to exploit youthful consumers and other particularly vulnerable groups have been challenged and condemned as deceptive and unfair in a variety of contexts,[24] that rationale is misplaced here, given that the only apparent commercial effect of furnishing the prohibited identifying information to children could be to provide their parents with the means of contacting the dentist.

We do not mean to deny that advertising that would otherwise be permissible might be harmful in the context of promoting dental services. *See, e.g., AMA*, 94 FTC at 1026 ("[W]hat may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context."); *National Ass'n of Social Workers*, 58 Fed. Reg. 17,411 (April 2, 1993) (consent order issued March 3, 1993) (prohibiting NASW from restricting advertising and solicitation, except insofar as it adopts reasonable principles regarding, *inter alia*, solicitation of testimonial endorsements from current psychotherapy patients); *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992) (same). The advertising that a service is "painless," for example, may be inherently deceptive and harmful when used by a practicing dentist, whereas a similar claim by, say, an institution offering evening courses toward completion of a college diploma probably would not. But CDA has offered no convincing argument, let alone evidence, that consumers of dental services have been, or

[24] *See, e.g., ITT Continental Baking Co., Inc.*, 83 FTC 865, 872 (1973), *aff'd*, 532 F.2d 207 (2d Cir. 1976) (finding advertisements tended to exploit emotional concerns of parents for children); *In re Travel King, Inc.*, 86 FTC 715, 774 (1975) (holding deceptive the sale of "psychic surgery" to terminally ill patients); *Phillip Morris, Inc.*, 82 FTC 16 (1973) (consent) (prohibiting distribution of unsolicited razor blades); *H.W. Kirchner*, 63 FTC 1282, 1290 (1963) ("If, however, advertising is aimed at a specially susceptible group of people (*e.g.* children), its truthfulness must be measured by the impact it will make on them, not others to whom it is not primarily directed.").

are likely to be, harmed by the broad categories of advertising it restricts. *See* ID at 74-75. Indeed, as far as we can tell, advertising complaints typically came from fellow dentists, not from disappointed patients. *See, e.g.*, T. 849 (Dr. Abrahams), T. 926 (Dr. Yee).

We thus see no basis in this case for concluding that the advertising swept aside by CDA with broad strokes is categorically false, deceptive, or unfair.[25]

4. Rule of Reason -- Conclusion

As our quick look under the rule of reason reveals, the advertising restrictions are likely to have anticompetitive effects, CDA has the necessary market power to harm competition by adopting the restraints, and there are no countervailing efficiencies or other business justifications that would justify the imposition of this kind

[25] In the light of CDA's practice, therefore, Commissioner Azcuenaga's insistence on further illumination of the "factual background" of "many of the letters" reprimanding dentists for their advertising is simply misplaced. *See, e.g.*, Post, at 19. The citations discussed in the text do not provide further detail regarding the surrounding circumstances of the reprimand because the factual background against which the advertising claim was made was generally of little concern to CDA when it admonished the dentist involved.

For example, MARS was not concerned with any surrounding factual circumstances when it noted that "use of the words 'Affordable Prices,' is an inexact reference to fees, and therefore, violates . . . the CDA Code and Dental Practice Act," CX 772-A (1991), that "by using the phrase 'High Standards in Sterilization,' [dentists] are advertising in violation [of state law and the CDA Code of Ethics for] advertising the performance of services in a superior manner," CX 394-B (1993), that a dentist "should avoid any statements that imply superiority in any future advertisements published on his behalf," CX 780-A (1992) (emphasis added), that "the phrase ['We Guarantee All Dental Work For 1 Year] is a guarantee of dental services and, therefore, violates [state law and may subject the advertising dentist to disciplinary action by the association]," CX 557-C (1992), that "use of the phrase '10% Senior Citizen Discount,' violates [state law and CDA's Code of Ethics] by failing to list the dollar amount of the nondiscounted fee for each service, and inform the public of the length of time, if any, the discount will be honored," CX 585-A-B (1991), or that an advertisement, "'Call our office before December 31, 1992 and our gift to you and your family will be a Complete Consultation, Exam and X-rays (if needed) ... [for only] a $1.00 charge to you and your entire family with this coupon,'" violated state law and CDA's Code of Ethics because it "fails to list the dollar amount of the non-discounted fee for each service," CX 444-A-B (1993). *See* generally Complaint Counsel's Proposed Findings of Fact, Volume III, Proposed Findings 580-949, and exhibits cited therein.

Furthermore, contrary to the suggestion by the dissent, it is immaterial that any given CDA censure was, perhaps, only one among a series of criticisms CDA issued with regard to that particular dentist. *Cf.* Post, at note 20 ("The reference to 'quality dentistry' is one of several claims discussed in the MARS letter, and it appears that the committee's action was based partly on a finding that the dentist in question advertised that she was a member of the ADA when she was not.") (discussing CX 387-B); *see also, e.g., Id.*, at note 21 (discussing CX 478 and noting Judicial Council's objection to dentist's claim that laser surgery is revolutionary, while neglecting to note that dentist was also discouraged from advertising "gentle, comfortable and affordable" dentistry). The point of our reference to one of the restrictions that are at the heart of this case is that such advertising was held incompatible with membership in CDA. That message, regardless of whether it was coupled with citations for other (truly deceptive, unsubstantiated, false, or unfair) advertising as well, was clearly conveyed by CDA in each letter discussed in this opinion and in numerous others in the record.

of ban on broad categories of truthful and nondeceptive advertising. In short, CDA's advertising restrictions are unreasonable, make out a violation of Section 1 of the Sherman Act, and therefore violate Section 5 of the FTC Act. *See supra* note 5.

The result reached herein is not inconsistent with our earlier decisions in *Massachusetts Board of Registration in Optometry*, 110 FTC 549 (1988), and *Detroit Auto Dealers Ass'n, Inc.*, 111 FTC 417 (1989), *aff'd*, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992), which our holding today does not disturb.[26] In Massachusetts Board of Optometry we viewed the law of horizontal restraints after NCAA and Broadcast Music as presenting a series of questions, beginning with whether the restraint is "inherently suspect," that is, "the practice [is of] the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output,'" and, if so, whether the agreement is supported by a plausible and valid efficiency justification. *See* 110 FTC at 604. In that case we found the various advertising bans on discount advertising, affiliation advertising, use of testimonials, and sensational or flamboyant advertising to be inherently suspect, without a plausible efficiency justification, and, therefore, unlawful. *Id.* at 606-08. Following the same analytical steps in Detroit Auto Dealers, we likened an agreement among automobile dealers to limit showroom hours to a restriction on a form of output, found it inherently suspect and without a plausible efficiency justification, and thus declared it unlawful. 111 FTC at 494-99.

If the instant case had been analyzed under the framework of those cases, we would have reached the same conclusion as we do here since, following Massachusetts Board of Optometry, we would find the restraints inherently suspect and without plausible or valid efficiency justification. Conversely, Massachusetts Board of Optometry and Detroit Auto Dealers would have arrived at the same result, had they been analyzed under the more traditional rule of reason/*per se* approach we employ here, since the restrictions in those cases either would have been found *per se* unlawful, such as the ban on discount advertising in Massachusetts Board of Optometry, or

[26] With respect to Commissioner Azcuenaga's assertion that the majority opinion overrules the earlier Commission opinion in *Massachusetts Board of Optometry, see,* Post, at 1, 37, it is true that the majority recognizes the existence of *per se* and rule-of-reason categories -- an approach to antitrust analysis that may have been blurred in the earlier decision. As to the remaining analysis in Massachusetts Board of Optometry, the assertion that we directly or indirectly overrule that decision is not correct.

would have otherwise been shown to be unlawful under the rule of reason. A quick look at Massachusetts Board of Optometry, for example, would have demonstrated that the Board commanded sufficient market power since optometrists could not practice in the State without its approval, 110 FTC at 605, that restraints, such as those on affiliation advertising, were likely to have an anticompetitive effect (and had, in part, a proven effect of raising prices), *id.* at 605-06, and that there was no efficiency or other legitimate business justification for the practice, *id.* at 606-08. In Detroit Auto Dealers, in turn, the Sixth Circuit indeed rejected the Commission's use of the "inherently suspect" approach on the grounds that it appeared to "aris[e] from a *per se* approach," 955 F.2d at 471, but affirmed the Commission's decision nonetheless after satisfying itself that the agreement had actual or potential anticompetitive effects, that the automobile dealers possessed market power, and that there was no valid justification for the practice, see 955 F.2d at 469-72. In this case, then, we have simply applied what we repeatedly recognized as the more "traditional antitrust analysis," *Massachusetts Board of Optometry*, 110 FTC at 604 n.12, which does "not lead to different results" in the cases discussed, *Detroit Auto Dealers*, 111 FTC at 494 n.18.

VI. STATE LAW DEFENSE

Finally, we turn to CDA's argument that its actions are lawful due to the existence of similar restrictions imposed on advertising by the State of California. Ordinarily, a private party may properly invoke the "state action" defense only if first, the State has clearly articulated a policy to permit the allegedly anticompetitive practice, and second, the State is actively supervising the conduct at issue. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 631 (1992) (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). CDA loses under this and any other offered version of a defense based on state law.

CDA originally raised an affirmative defense that "[t]o the extent [the] restrictions alleged . . . [in] the complaint [amount to] conduct which is prohibited by state law, such restrictions are lawful," and CDA expressly disavowed that this contention amounted to assertion of a traditional "state action" defense. *See* Order Striking Affirmative

Defense at 1; Opposition to Motion to Strike Affirmative Defense at 3-4; Answer at 12. Presumably, and wisely we think, it declined to raise the traditional state action defense because CDA could present no argument that its activities were even remotely authorized or supervised by the State. CDA maintained, instead, that antitrust law should yield since California Business and Professions Code Sections 17,200 and 17,204 "authorize CDA to file a private right of action to prohibit violations of the Code,"[27] and more generally, "no anticompetitive effect results if an association's code of ethics incorporates state law, and one who violates state law is deemed to have violated the association's code of ethics." Opposition to Motion at 4. The ALJ struck the defense since, in the ALJ's view, it amounted in substance to a state action defense, which, as a facial matter, was unavailing in this case.

CDA has not entirely abandoned its attempt to find shelter under state law, maintaining this time around:

> "CDA reasonably believes that its interpretation of the Code of Ethics deters fraudulent advertising and advertising which is false or misleading in a material respect. The fact that during the relevant time period the State of California has also regulated advertising along the same lines as CDA in order to protect consumers from advertising that is false or misleading in a material respect further confirms the reasonableness of CDA's belief." Brief for respondent 38.

This argument is less than clear but, indulging respondent for the moment, we will break it down into the following formulations, which at one point or another during the course of this litigation have been advanced by CDA: (1) CDA's actions are immune under the state action doctrine; (2) CDA has a defense under the antitrust laws because its prohibitions are the result of good faith reliance on parallel strictures of California law; (3) CDA's actions are efficient or otherwise reasonable since it is following state law; and (4) CDA's restrictions cannot harm competition because state law already imposes identical (or substantially similar) burdens on advertising for dental services.

Both the California Code and the regulations promulgated by the State Board of Dental examiners do, on their face, impose restrictions

[27] Section 17,200 of the California Business and Professions Code simply defines the term "unfair competition," and Section 17,204 provides that actions for injunctions under that chapter may be prosecuted by, among others, "any person acting for the interest of itself, its members or of the general public." There is no intimation that the statute authorizes prosecutions for unlawful actions before private tribunals.

on advertising. *See* Cal. Bus. & Prof. Code Sections 651, 1680 (1994); Cal. Educ. Code Section 51,520; 16 Cal. Code of Reg. Sections 1050-1053 (1993). Some of these, such as, for example, the Board's regulation regarding discount advertising, mirror the restriction imposed by CDA.[28] Others, as, for example, the State's prohibitions on soliciting public school children, or on making superiority and guarantee claims, are clearly narrower in scope than CDA's policy.[29] CDA's defense, however, is inapt in either case.

The first version of CDA's state action defense comes up strikingly short on the grounds that the law never contemplated

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[28] Title 16, Section 1051 of the California Code of Regulations, promulgated by the Board of Dental Examiners, provides:

"An advertisement of a discount must:
(a) List the dollar amount of the non-discounted fee for the service; and
(b) List either the dollar amount of the discount fee or the percentage of the discount for the specific service; and
(c) Inform the public of length of time, if any, the discount will be honored; and
(d) List verifiable fees pursuant to Section 651 of the Code; and
(e) Identify specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." 16 Cal. Code of Reg. Section 1051.

Although the ALJ appears to have concluded that the Board rescinded its elaborate disclosure requirement around 1985, IDF 237 (citing CX 1622), we are less convinced that the undated document on which the ALJ relied was issued in 1985. In light of the document's summary of Section 1680 of the California Business and Professions Code, we surmise instead that it dates from sometime between 1974 and 1978, and, since it appears that in 1975 the Board had not yet promulgated regulations regarding discount advertising, the document cited by the ALJ could just as well represent an articulation of the Board's view prior to promulgation of the more extensive disclosure standards. If that is indeed the case the document is simply superseded by Section 1051 of the Board's regulations.

In any event, we do not express an opinion on the potential conflict between Section 1051 of the regulations and subsection 651(i) of the California Business Code, which provides a counterbalance to demands for specificity:

"A board or committee shall not, by regulation, unreasonably prevent truthful, nondeceptive price or otherwise lawful forms of advertising of services or commodities, by either outright prohibition or imposition of onerous disclosure requirements."

[29] California Education Code Section 51,520 does not prohibit all distribution of identifying information to public and private students, but more narrowly provides:

"During school hours, and within one hour before the time of opening and within one hour after the time of closing of school, pupils of the public school shall not be solicited on school premises . . . to subscribe or contribute to the funds of, to become members of, or to work for, any organization not directly under the control of the school authorities [with certain exceptions not relevant here]."

Similarly, Section 1680 of the California Business and Professions Code appears on its face to cover some of what CDA prohibits, but it does not prohibit all quality claims, instead defining "unprofessional" conduct to include in relevant part:

"(i) The advertising of either professional superiority or the advertising of performance of professional services in a superior manner. . . .

. . . .

"(l) The advertising to guarantee any dental service, . . . This subdivision shall not prohibit advertising permitted by Section 651."

private enforcement of its standards and that the State does not supervise CDA's enforcement of advertising restrictions. Respondent admitted that it is neither an agent of the State, nor authorized to interpret or enforce state laws on behalf of the State, Answer at 12, and our own review of the law finds no hint that CDA or any private association should be permitted to interpret or enforce these laws on its own. *Cf. Parker*, 317 U.S. at 350. But even mere authorization would not be enough, since, as the Court emphasized in Parker, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351 (citation omitted). Without active supervision of the enforcement, there can be "no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101-02 (1988). *See also Ticor*, 504 U.S. at 637-640; *Indiana Federation of Dentists*, 476 U.S. at 465; *Bates*, 433 U.S. at 359-63; *American Medical Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).[30] Here, there is absolutely no evidence of active state supervision of CDA's disciplinary actions or of the content of its substantive advertising restrictions. CDA's ethical review of applicants' and members' advertising is thus entirely insulated from state supervision, and thus beyond any traditional state action immunity to the antitrust laws.

This case epitomizes the danger of imputing to the State a policy choice when its implementation is not being actively supervised by the State itself. In 1985, and apparently again in 1988, a Deputy Attorney General of California addressed a memorandum to the Board of Dental Examiners, advising it of recent Supreme Court decisions in the First Amendment area and asking the Board to ensure that enforcement of the law be consistent with the Constitution. *See* CX 1425; CX 1621-A. In response, the Legal Services Unit of the Department of Consumer Affairs[31] prepared a discussion paper analyzing the constitutionality and wisdom of limits placed on dentists' advertising. CX 1621.[32] The paper concludes, among other

[30] The question of state action immunity, decided in *American Medical Association v. United States*, by the Court of Appeals, was apparently not raised in the Supreme Court. *See* 317 U.S. at 527-28.

[31] The Board of Dental Examiners is part of the Department of Consumer Affairs. *See* Cal. Bus. and Prof. Code Section 101.

[32] As indicated in the memorandum, it addresses these issues in the context of the Board's investigation of CDA's own advertising practices. Thus, the memorandum also provides the only documented instance in which the Board initiated enforcement of the laws. We do not know whether this enforcement action was abandoned after issuance of the discussion paper.

things, that recent United States Supreme Court decisions "probably invalidate the present California statutes and regulations prohibiting dentists from advertising 'superiority,'" since "[l]ike price and other facts of importance to the consumer, [truthful and nondeceptive] expressions regarding the quality of the advertiser's services are protected by the First Amendment." CX 1621-D. *See also* CX 1621-z-2. The paper also recognizes that to be consistent with the First Amendment, a State ought not to prohibit dentists from making claims that amount to "puffery," CX 1621-E, advertising that their prices are "very reasonable," CX 1621-V, or promoting their services by truthful and nondeceptive guarantees, CX 1621-z-4. Ultimately, it recommends:

> "The statutes and regulations that limit advertising by dentists should probably be amended to eliminate patent conflicts with the federal constitutional provisions. At present, except in the telephone yellow pages, there seems to be relatively little advertising by dentists. . . . It is possible that the California statutes and regulations have made the risk of truthful and non-deceptive advertising too great for most dentists to freely tell the public about the services they provide and the prices they charge. It is also possible that the relative absence of dental advertising has harmed these segments of the public who do not use dental services because they are not conscious of their availability or cost. In any event, any California statutes and regulations that patently conflict with the federal Constitution should be repealed or amended so as to eliminate any disparity between the two sources of law." CX 1621-E. *See also* CX 1621-z-13 to z-15.

To be sure, the discussion paper cannot supersede codified law, and, conversely, its relevance is not limited to the sections that signal a retreat from the written code.[33] But the document provides a rather dramatic indication of the perils of private enforcement in the absence of active state supervision. Behind the scenes, officials were reexamining the legality and wisdom of the previously charted course. This might even explain the lack of enforcement. Holding that CDA's restrictions are shielded by the state action doctrine in this case would amount to imposing a continued policy choice upon the State when it has rarely, if ever, pursued it actively.[34]

Beyond the traditional state action defense, antitrust law does not, to our knowledge, recognize a "good faith" defense for a private

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[33] Indeed the document took the position that the disclosure requirements for discount advertising were consistent with recent Supreme Court decisions. *See* CX 1621-z-7.

[34] Due to the lack of Board enforcement, state judicial review has been limited as well. *See Ticor*, 504 U.S. at 638-39 ("[b]ecause of the state agencies' limited role and participation, state judicial review was likewise limited").

conspiracy formed to enforce state law. It might be unobjectionable if CDA were to exclude members who had been found by the state Board to have violated the state statute or Board rules. That is not what CDA did. Instead, CDA appointed itself as an extra-judicial administrator of the law. We have long rejected the argument that "Congress intended for federal antitrust laws to give way when private parties, by conduct that would otherwise violate the antitrust laws, take it upon themselves to enforce their interpretation of the provisions of any state law." *Indiana Federation of Dentists*, 101 FTC 57, 181 (1983), *rev'd on other grounds*, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 476 U.S. 447 (1986). As we indicated in that case, "[n]o Supreme Court decision articulating the state action doctrine can be read to endorse such an interpretation of congressional intent." *Id.* at 181-82.

In the 1942 case involving the AMA, for example, the Justice Department challenged the association's attempt to prevent physicians from affiliating with a prepaid health plan. The Court of Appeals rejected the AMA's argument that its conduct was not in violation of the antitrust laws because such affiliations were illegal:

"Appellants are not law enforcement agencies; they are charged with no duties of investigating or prosecuting, to say nothing of convicting and punishing. . . . Except for their size, their prestige and their otherwise commendable activities, their conduct in the present case differs not at all from that of any other extra-governmental agency which assumes power to challenge alleged wrongdoing by taking the law into its own hands." *American Medical Ass'n*, 130 F.2d at 249.

In *Indiana Federation of Dentists*, the Supreme Court was even more explicit. The state law appeared to prevent the lay screening of dental x-rays by lay employees of insurers, and the Court held that, even assuming the association's boycott was consonant with the state law, it was not protected:

"That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it. *See Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 468 (1941). Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985). There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy

of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation." 476 U.S. at 465.

In short, absent active state supervision, private enforcement by CDA cannot be protected from antitrust challenge.

Even entertaining the theoretical viability of the weaker claim that the state law furnishes corroboration for CDA's belief that its practice is pro-competitive, such an argument fails on the facts of this case. Although CDA urges that it enforced what it reasonably perceived to be state law, it does not point to a single instance in which the State enforced its advertising proscriptions against a dentist. To the contrary, CDA was acutely aware that the Board had virtually abandoned its advertising regulations; indeed, CDA perceived itself as filling an enforcement void. *See* IDF 231-33. Moreover, CDA did not seriously attempt to ascertain the Board's views of the proper scope of state law. *See, e.g.*, T. 1034, 1046 (Dr. Lee); T. 1537 (Dr. Nakashima); *see* generally, IDF 241-42. As a result, CDA lacks any real basis for understanding the true extent of the restrictions imposed by the State and cannot realistically claim that it is furthering the State's current policy choice.

Finally, and for much the same reason, we reject the argument that respondent's advertising restrictions were harmless because of the existence of similar, or even identical, state laws. Given the absence of state enforcement, it was CDA, not California, that tampered with the workings of the market for dental services. *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 17 F.3d 295 (9th Cir.), *cert. denied*, 115 S. Ct. 66 (1994), illustrates the point. In *Sessions*, the defendant had caused a private standard setting association to change its model fire code so as to disapprove of plaintiff's method of renovating leaking storage tanks for hazardous fluids. As a result, many fire officials refused to issue the necessary permit for plaintiff to perform its services. The court ruled for defendant on the theory that the harm was not caused by defendant's anticompetitive activity, but by the refusal of the fire officials to issue the permits, that is, by valid governmental action. The Ninth Circuit found:

"[Plaintiff] has never proved that it sustained injuries from anything other than the actions of municipal authorities. . . . [Plaintiff] has not shown that any potential . . . customer in jurisdictions that were not enforcing the . . . [model fire code] decided not to engage [plaintiff]'s services because of the [association]'s adoption

of [the provision in dispute]. Nor has [plaintiff] adduced any evidence that [defendant]'s actions caused independent marketplace harm in jurisdictions that continued to permit [the procedure offered by plaintiff]. . . . The injuries for which [plaintiff] seeks recovery flowed directly from government action." 17 F.3d at 299.

CDA would not be protected even by this broad view of the state action shield. For in our case, in contrast to Sessions, California apparently did not independently enforce the written law, and certainly was not alleged to have done so with regard to any of the individual dentists censured by CDA. In other words, here the sole source of enforcement was CDA, not the State. The anticompetitive harm is thus not the result of government action, but that of the private conspiracy alone.

Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), further illuminates how the instant case differs from one in which dentists are merely following the law as authoritatively and actively interpreted and enforced by state authorities. In Gambrel, consumers filed an action against the Kentucky Board of Dentistry, the Kentucky Dental Association, and individual dentists alleging a conspiracy to withhold denture prescriptions from patients with the result that patients were precluded from shopping around to find the least expensive means of filling the order. Respondent Board of Dentistry argued that state law prohibited dentists from handing work orders over to patients. The court found that the Board's view was the right interpretation of state law and that the dentists were compelled by state law to deliver work orders directly to dental technicians. *Id.* at 619. In explaining that this policy was actively supervised by the State, the court noted:

"First, the policy emanates directly from the language of a state statute and not from any agreements by private individuals . . . . Secondly, the powers of enforcement are expressly conferred upon the Board of Dentistry, and it appears that historically the Board has indeed acted to uphold and enforce the regulatory scheme. In fact, the enforcement of the statute by the Board against plaintiff Gambrel and others has been one of the impelling reasons for the commencement of this action." 689 F.2d at 620.

CDA has done more than transcribe applicable state law into its Code of Ethics and urge its members to respect the law. First, the state law upon which it relied was, to its knowledge, not being actively enforced by state authorities, and second, CDA was itself

actively policing its version of state law. We are aware of no antitrust exemption that would shield such activity.

VII. FINAL ORDER

An order prohibiting respondent from continuing to restrict truthful and nondeceptive advertising and, in particular, from further enforcing its current unreasonable restraints is necessary and in the public interest. The order we impose is similar to those entered in other cases in which we had found unlawful interference with advertising by professional associations, but crafted to reflect the respondent's particular circumstances. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 632-35; *American Dental Ass'n*, 100 FTC 448, 449-53 (1982); *AMA*, 94 FTC at 1036-41. We believe this remedy to have a "reasonable relation to the unlawful practices found to exist," and therefore to be within our authority to impose. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946).

Our order that respondent cease and desist from interfering with such truthful and nondeceptive advertising, order Part II, leaves respondent free to act against member advertising that it reasonably believes would be false or misleading within the meaning of Section 5 of the Federal Trade Commission Act, and against its members' uninvited, in-person solicitation of actual or potential patients who, because of their particular circumstances, are vulnerable to undue influence. The order also leaves respondent free to encourage its members to obey state law and to discipline members who have been reprimanded, disciplined, or sentenced by any court or any state authority of competent jurisdiction.[35]

Respondent must, however, cease and desist from the unlawful suppression of advertising, and from urging others to engage in such actions, order Part II, as well as eliminate unlawful provisions from any policy statement and terminate affiliation with components that would continue to engage in behavior that would be contrary to the order if engaged in by respondent, order Part III. The disaffiliation provision, particularly with its grace period to permit continued

[35] The ALJ's order prohibited CDA from restricting representations that do not contribute to the public esteem of the profession. *See* ID at 81 (Order at II.A.8). Our order omits that provision. Although CDA cited the goal of protecting the public esteem of the profession in prohibiting dentists from distributing certain information during school screenings, *see, e.g.*, CX 1115-A, we find that our order adequately addresses CDA's unlawful activity and refrain from including the broader provision at this time. Of course, to the extent that respondent were to use this as an excuse to reinstitute any of the practices that we have found to violate Section 5, such actions would violate the order.

affiliation with components that will discontinue practices that, if engaged in by the respondent, would be unlawful, Part III.B., reflects the approach of the Commission order issued in *American Psychological Ass'n*, 57 Fed. Reg. 46,028 (Oct. 6, 1992) (consent order issued December 16, 1992). Part III.A.1, which contained an erroneous reference to Section 21 of CDA's Code of Ethics, has been changed to reflect the proper section of CDA's code (Section 22) that deals with claims of exclusivity.

To publicize its change in long-held policy, respondent must inform current members of this action and the resulting change in policy. Order Part IV.A. Notification requirements have long been recognized as falling within our remedial authority. *See, e.g., Massachusetts Board of Optometry*, 110 FTC at 619. Respondent asks that we not require it to distribute its Journal via first class mail. We see no reason to do so, and neither does complaint counsel. Accordingly, we have amended Judge Parker's order on this point to reflect unambiguously that we require only the complaint, order, and announcement, as well as any documents revised pursuant to Part III.A, but not the CDA Journal itself, to be distributed via first class mail. Respondent also objects to the requirement that it distribute the complaint on the grounds that complaint counsel failed to prove all the allegations therein. Since we find that complaint counsel has proved all the allegations in the complaint, respondent's objection on this point is denied.

Because respondent's restraints have been successfully imposed over an extended period of time dating back well over a decade, we find it necessary and reasonable to include further remedial provisions aimed at reversing the suppression of advertising (and, thereby, of competition) respondent has achieved over the years. Respondent must therefore inform persons, who are currently subject to disciplinary order or suspended from membership by reason of their or their employers' advertising or solicitation practices, of the complaint and order in the required manner, reconsider the disciplinary or other proceeding, and inform the person of its decision upon reconsideration. Part IV.B. Respondent has asked that we extend the time under Parts IV.B.2 and IV.B.3 to one hundred and twenty days, due to the alleged difficulty of locating and reviewing relevant old files. Although complaint counsel correctly notes that respondent's arguments regarding its need for time are rather conclusory, we do not see the public interest compromised in this

case by permitting respondent to conduct the review and final notification of this group of persons within one hundred and twenty days, provided the persons described in Part IV.B (*i.e.* those who are currently subject to discipline or suspension due to their advertising or solicitation practices) are notified and informed in the manner described in Part IV.B.1 within thirty days.

Next, respondent is to distribute similar information, including an application form for membership, to those whose membership over the last ten years was not approved or was discontinued as a result of CDA's objections to advertising or solicitation practices. Respondent is to review any application for membership received in response and inform persons of their acceptance or of the reasons for denial of their application. Part IV.C. Respondent has asked that we strike this provision, arguing that "applications are received, processed, and stored at the component level and the components are not respondents in this action; moreover, complete records covering a ten year period may not exist." Brief for respondent 82. In reviewing the record in this case, we have found significant cooperation between respondent and its component societies in the course of hundreds of disciplinary proceedings, leading us to believe that respondent can count on the usual and customary cooperation of its affiliated components in this matter. Finally, respondent has not even alleged, let alone provided any evidence, that complete records covering the last ten years do not, in fact, exist. We therefore see no reason, at this time, to alter Judge Parker's order on this point.

Respondent must also distribute certain information to every new applicant for the next five years, Part IV.D, keep, and file with the FTC, records of each action taken with respect to the advertising of the sale of dental services for three years, Part V, establish an internal compliance procedure for the next five years to ensure that the order is complied with at all levels of the organization and file progress reports at specified times, Part VI.A-C, maintain and make available for inspection records of specified actions relevant to this order, Part VI.D., and notify the FTC of specified organizational changes, Part VI.E. These record-keeping provisions are essential given respondent's continued assertion that the unreasonable restraints were imposed only in an effort to suppress untruthful or deceptive advertising, or such advertising that would cause unreasonable, unavoidable harm to consumers. In order to permit proper review of respondent's actions in the future, particularly in light of the safe

harbor carved out by the order, the record-keeping and reporting requirements are, in our view, reasonable and reflect similar requirements imposed in other cases. *See, e.g., American Psychological Ass'n*, 57 Fed. Reg. at 46,030; *Medical Staff of Memorial Medical Center*, 110 FTC 541, 547 (1988); *Tarrant County Medical Society*, 110 FTC 119, 123 (1987).

Finally, we have added to Judge Parker's order a sunset provision reflecting the Commission's recently adopted policy in that regard. Federal Trade Commission, Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 42,481 (Aug. 16, 1995).

VIII. CONCLUSION

The California Dental Association has declared itself the arbiter of good advertising by member dentists and, in so doing, has restrained competition among its members in violation of Section 5 of the FTC Act. Without impugning CDA's general efforts to serve the public, we find that the Association's core activities provide its members sufficient pecuniary benefits to bring it squarely within our jurisdiction. We find further that CDA is at the hub of an agreement among its members to restrict competition in the market for dental services, and it is legally quite capable of serving that role. The combination has suppressed advertising of the prices, quality, and availability of dental services in California, thereby impairing the dissemination of information that is important to consumers and forms a basis of rivalry among competing service providers. The attack on price competition, long recognized as the lifeblood of a free economy, is inexcusable in principle and must be categorically condemned even in the professional setting before us here. The restrictions on advertising of the quality and availability of professional services, on the other hand, are entitled to a quick look under an individualized examination of the competitive benefits and burdens they entail. Since CDA's restraints fall far short of being justified even under this approach, however, we find that they are unlawful as well.

DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA

As described in the opinion of the majority, the conduct at issue in this case carries a patina of unlawfulness that few could disregard.