



Department of Justice

DEREGULATION IN THE PROFESSIONS:
WHERE WE ARE AND WHERE WE ARE GOING

Remarks by
John H. Shenefield
Assistant Attorney General
Antitrust Division

Before the
National Optometric Society

Hyatt Regency Hotel
Washington, D.C.

July 20, 1979

I would like to talk to you today about the current trend toward deregulation in the professions. The Antitrust Division enthusiastically supports this trend, and we will do all we can to further it. During the next few minutes, I would like to share with you some of my thoughts on why we so fervently endorse this trend, where I think we are heading in this area, and what impact I think these developments will have on the individual professional and the idea of "professionalism".

The reason the Division wants to encourage deregulation is really very simple. We happen to believe that regulation should be the exception rather than the rule in our society. We have found time and time again that competition does a better job of satisfying consumer wants than pervasive regulation. Increased productivity and incentives for innovation seem to get lost in the shuffle when regulation rather than competition is the name of the game. In short, we are for deregulation in the professions because we think it gives more consumers better service at lower prices.

Citizens and responsible public officials from all around the nation now recognize that regulation in the professions should be reduced. Examples abound. A task force of the Council of State Governments recently stated "that market-place forces deemed beneficial in industry have benefit in

health care delivery as well, without sacrificing the present high quality of care." 1/ This task force also observed that the health and safety of the consuming public, the foundation upon which all health regulatory legislation should be based, should be accomplished with as little governmental interference in the free enterprise system as is possible. 2/ We think this hits the nail right on the head.

We realize that total deregulation is probably impossible in some of the professions because of the substantial harm that would arise from allowing the unqualified practitioner to practice. Still, we believe there are substantial areas in most professions where reliance on competition will significantly and immediately increase consumer welfare. Among these areas are pricing, choice of location and form of service delivery, use of truthful advertising, and use of auxiliaries and paraprofessionals.

I think one of the great myths in this area is that this emphasis on consumer welfare hurts the professions. I happen to believe that just the opposite is true. Let me give you two examples.

1/ Council of State Governments, State Regulatory Policies: Dentistry and the Health Professions (1979) at 5.

2/ Id. at vii & 4-5.

We frequently hear the argument that advertising, especially price advertising, will invariably harm a profession. This is simply not true. We have found that such advertising usually makes the public more aware of the profession's services and reaches many consumers who would otherwise not see a professional. This means that the profession is expanding its marketing base and is not merely redistributing a fixed and limited number of patients or clients among the members of the profession. What's so harmful about that?

We also frequently hear the argument that providing professional services in department stores or other non-traditional settings is "undignified" and "harmful" to a profession. Typical of this argument is an item appearing on the front page of Tuesday's Wall Street Journal--entitled "Filling teeth in department stores touches a sensitive nerve among dentists," the item notes that:

"Some dental associations and dentists view with concern the growth of department-store dental clinics springing up in California and New York and now moving into the Midwest."

It was further observed that "some dentists worry about possible service deterioration and a decline in the dentist-patient relationship" and that one New York dentist had complained that "if you have a brain tumor, you don't go to a discount neurosurgeon." The item also

noted that, "A California dental society executive attributes the trend to a glut of dentists looking for 'places to hang out their shingles.'"

I must say that I am skeptical about all this talk about "service deterioration" and a "decline in the dentist-patient relationship." It seems to me that what the alarmists are really concerned about is that these department-store dentists may be a little too successful at fulfilling consumer wants. The fact of the matter is that such settings make professional services available to many people who would otherwise not set foot into a professional's office. I doubt seriously if most people are going to stop going to dentists because some of them are affiliated with Sears.

The paring down of restrictions on the ways in which professionals may conduct themselves has particular significance to both professionals and consumers who are members of traditionally disadvantaged minorities. I expect that many people, and particularly those who are economically disadvantaged, are inhibited from seeking needed professional services by the lack of readily available information about where those services can be obtained and about what they cost. The other side of the coin is that professionals who are able to provide needed services are deterred from reaching those consumers by traditional limitations on

advertising and solicitation, and by the commercial settings in which one is permitted to set up an office. It seems obvious that consumers will be less inhibited from seeking professional services where information about their cost and availability is freely disseminated in newspapers, magazines, radio, television and other advertising media, and where those services are available in the familiar commercial settings to which people go to shop for other kinds of goods and services.

The elimination of traditional restrictions on the conduct of professionals should also enhance the ability of new entrants to make their way into the professions, and for small businesses to compete with larger, well-established firms. As advertising expands the market for professional services, there will be more room for new professionals to enter the field, and, by advertising, new professionals and small firms can more readily make themselves known and attract business that would otherwise go to those with already established reputations. New professionals and small firms often have great flexibility to attract business and service consumers by offering their services in new and innovative ways if not prevented by outmoded regulation.

Given our views toward deregulation, I would like to address myself to the question of where we are headed in this area. The short answer is that we've come a long way and have a long way to go.

It is useful to distinguish between two facets of the deregulation trend. The first of these is the disappearance of anticompetitive rules, often cast in the form of "codes of ethics", adopted by voluntary associations of professionals. The second is the somewhat more gradual, but accelerating, trend toward eliminating anticompetitive provisions found in state statutes and regulations that govern the conduct of professionals.

I think it is fair to say that the first of these trends began a little over four years ago when the United States Supreme Court handed down its decision in the famous Goldfarb case. As I am sure most of you know, the Court in that case laid to rest once and for all the argument that the professions have carte blanche immunity from the antitrust laws and held that a minimum-fee schedule published by a local bar association and enforced by the Virginia State Bar violated Section 1 of the Sherman Act. 3/

3/ Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

Goldfarb made clear that competition is to be the name of the game in the professions unless the state specifically orders otherwise, and subsequent cases show that courts really mean business in this area. For example, we sued the National Society of Professional Engineers over a provision in its canon of ethics banning competitive bidding. The Supreme Court ruled for us and used some very strong language in holding this provision to be illegal. 4/

The trend toward eliminating anticompetitive forms of state regulation, like that involving privately imposed restraints, has had its impetus in court decisions that have held such rules may be subject to attack on constitutional and antitrust grounds. Two recent Supreme Court cases have made it clear that commercial speech is constitutionally protected and cannot be restricted in the absence of a strong showing that the restriction is necessary to protect the public from harm. The Court recognized that truthful commercial speech, like other forms of speech, plays a vital role in conveying information that people need to make decisions about the purchase of needed goods and services.

4/ United States v. National Society of Professional Engineers, 435 U.S. 679 (1978).

I might add that I don't think the Supreme Court's recent Texas Optometrist decision 5/ foreshadows a retreat with respect to deregulation in the professions. Quite the contrary, I think this case shows that the Court is firmly committed to allowing professionals to advertise accurately their prices, types of services, and forms of product. 6/

These cases are, of course, very important, and I would never want to minimize the role of the courts in this historic reexamination of the role of competition in the professions. But I do not want to leave the impression that it is only the threat of legal action that has brought about this re-examination. Increasingly, elected state officials are coming to realize that competition is simply the best mechanism for regulating the markets for professional services, just as it is in other sectors of our economy--that it's good politics, as well as good policy. That is not to say that regulation is not appropriate where it is necessary to protect the public against the unscrupulous and the incompetent. But it is increasingly clear that far less pervasive regulation is required to achieve that aim than has traditionally been imposed in the professions.

5/ Friedman v. Rogers, ____ U.S. ____, 99 S.Ct. 887 (1979).

6/ Id. at 897.

Incidentally, I think it is important to understand why elected state officials are joining in the vanguard on deregulation. Deregulation has become a bread and butter issue with the folks back home. Consumers are tired of paying what they view as inflated prices in order to subsidize over-regulation. They want their doctors, lawyers, dentists, optometrists, and other professionals to supply the most appropriate goods and services at the least cost, and they won't be happy until they get them. This is the real cause of professional deregulation, and anyone who tells you that deregulation is the product of some Washington "do-gooder" is just whistling in the wind.

I can't overemphasize what a tremendous job the elected officials in most states have done in recent years in attempting to cut governmental regulation of the professions to the minimum necessary to protect the public from unqualified practitioners. Most states have enacted "Sunshine Acts" in order to be sure that important decisions are made in public and not behind closed doors. This tends to subject the interaction of the board and the professional association to more public scrutiny, and brings out into the open the tremendous costs and impact regulation can have on competition. Also many states now require at least

one public member on each regulatory board. Such provisions institutionalize the interests of the public and impress upon board members that their job is to protect the public and not the profession they are regulating.

There are plenty of examples of states taking the initiative in curbing over-regulation. Florida requires regulators to develop economic impact statements, assessing the costs and benefits of a proposed regulation, and paying particular attention to competition policy issues. The Florida legislature has also established mechanisms for systematic legislative review of all regulatory programs, with specific standards prescribed. In looking at regulatory programs, it is to look for unreasonably adverse effects on the competitive marketplace and it must seek to remove these impediments on competition.

Virginia since 1974 has had a mechanism for systematically reviewing proposals to regulate professions. Before recommending any new regulation, the Board of Commerce must consider as less restrictive alternatives changes in law, for instance, the granting of inspection and injunction procedures. Only if these approaches are

thought inadequate does the Board then consider mandatory licensing.

Since the screening approach was initiated in Virginia, 17 groups have filed formal applications. Only two have ultimately received legislative approval. Each year since 1974, fewer and fewer groups have managed to get through the screening process. In 1977 not a single group was recommended for licensure.

Finally, I am sure that this audience is familiar with the role that the Federal Trade Commission has played in this area. This has included both trade rules and substantial litigation concerning the propriety of private professional associations banning advertising.

The upshot of all this is twofold. First, we are rapidly approaching the day when all anticompetitive restraints imposed by private associations will be totally eliminated. The days when private associations could legally impose limitations on price competition, truthful advertising, competitive bidding, solicitation, form of business or delivery of services, use of auxiliaries and paraprofessionals, mobility, and scope of practice are already gone. After Professional Engineers, such anticompetitive restrictions by private organizations just can't

cut the mustard. I can assure you that we at the Division are most interested in complaints about such provisions, and we will challenge these provisions whenever they appear to curtail competitive market forces. If you are a member of an organization having such provisions, I would urge you to lobby for its abolition before it is too late.

Second, I think we are rapidly approaching the day when most governmental rules, statutes, practices, and procedures which are anticompetitive in this area will be eliminated. A lot of these provisions will be eliminated by state legislatures, attorney-generals, and agencies on their own volition as they become more attuned with the aims and purposes of the deregulation movement. Other provisions, especially those in the advertising area, will fall as consumers become increasingly assertive of their legal rights. Still other practices and provisions will fall as the result of private or federal antitrust enforcement actions.

Finally, I would like to give you some thoughts on what I think this trend means to the individual professional and the idea of "professionalism". We occasionally hear the argument that the current trend toward deregulation will turn professionals into nothing more than tradesmen. This argument is baloney.

First of all, I think this trend will impress upon the public that professional status is special and should be reserved for just those occupations which really have a direct and substantial impact upon public health and safety. Cosmetologists, auctioneers, weather control practitioners, taxidermists, junkyard operators, and weather vane installers have all obtained state licensure in the past, and many other comparable occupations are seeking licensure today. These may all be honorable occupations, but none of them deserve professional status.

Second, this trend will allow the individual professional more freedom to innovate and determine how best to serve the public. With the elimination of unnecessary governmental and private restrictions, he will be able to choose a method of delivery that he thinks best suits himself and the public. He'll be able to advertise and reach consumers who otherwise would not be utilizing services. He'll be able to innovate and develop new methods for increasing his productivity and efficiency. In short, he will have the freedom to decide how best to satisfy the needs of his patients or clients and the general public. It is the proper exercise of this judgment which, to my mind, distinguishes the true professional from a tradesman.

In conclusion, I think we have entered a major period of deregulation in the professional sector of the economy. I think this trend is here to stay, and I expect that it will lead to significant improvement in the performance of this sector. I believe this trend will allow the true professional to utilize his or her skills to provide the most appropriate service to clients or patients at the least cost. That, to me, is what "professionalism" is all about.