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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 25, 1977

Representative Richard A. Spencer
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Spencer:

This is in response to your request for an opinion on the constitutionality of those provisions of 32 M.R.S.A. § 1091(H)(1) and (2) which prohibits most forms of advertising by dentists.

Section 1091(H)(1) and (2) of Title 32 of the Maine Revised Statutes provides that a dentist's license may be revoked if he engages in:

> "H. Unprofessional or immoral conduct, which includes, but is not limited to, the following acts:
>
> > "1. Advertising for dental patronage by means of circulars, handbills, posters, cards, stationery, stereopticon slides, radio, newspapers, telephone directory, television, motion pictures or public address systems; making use of any advertising statements of a character tending to deceive or mislead the public; advertising professional superiority or the performance of professional service in a superior manner; advertising to use drugs, patents, nostrums or proprietary medicines; placing the name of his dental hygienist on his door, cards or letterheads; advertising prices for professional services; advertising credit or terms of credit; advertising by means of electric signs, illuminated sign, sign that sets forth more than the name, profession, title, such as D.M.D. or D.D.S.; and office hours of the dentist, signs where lettering is more than 7 inches in height, or whose signs altogether total more than 600

> square inches; use of signs located other than within the professional office or offices, or upon the doors or windows thereof, or on the door or within or upon the building or premises in or on which such office or offices are located; advertising by means of a sign or display that contains or is a representation or reproduction of a tooth, bridgework or any portion of the human head; advertising free dental work or free examination; or advertising to guarantee any dental service or to perform any dental operation or act painlessly; or free publicity press agents.
>
> "2. Using the telephone directory for more than 2 listings, one in the 'white' and one in the 'yellow' section; using other than regularly used small type, no large or bold-face type or multicolored, or set in a border of any kind; using more than the name, title, address and telephone number in the yellow section; when practice is limited, using terms other than 'Practice limited to (the one specialty)'; using or permitting the listing of his name or address under any separate limitation of practice or speciality heading."

Under these provisions, a dentist is restricted from disseminating nearly all biographical, specialty or price information about himself and his practice. For example, the statute prevents a dentist from advertising for "dental patronage" in any mass media and most other means of public announcement, such as cards, stationary, telephone directory, and signs.[1/] The effect of this prohibition is to prevent disclosure of information which might encourage business or attract patients as well as information that allows people to make an informed choice as to who will best satisfy their needs.

In those few types of media where the statute does not prohibit a dentist from advertising, such as a directory, a dentist is prohibited from disclosing prices for professional services, even though some of these services are standardized, and the

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1/ The only signs allowed must be located inside the office or on the windows or doors of the office, cannot be larger than 600 square inches, cannot have letters larger than 7 inches in height and may contain only the name, profession, title and office hours of the dentist. The effect of these restrictions is to prohibit advertising by signs.

dentist cannot disclose credit terms or advertise free examinations. The overall effect of 32 M.R.S.A. § 1091(H)(1) and (2), although arguably a time, place or manner restriction, is to preclude the consumer from obtaining information or making comparisons. Because nearly all means of disseminating the information are prohibited and because the type of information that can be disclosed is negligible, it is our opinion that 1091(H)(1) and (2) constitute a nearly total ban on advertising by a dentist.2/

Examining the impact of § 1091(H)(1) and (2) on First Amendment constitutional rights, we must begin with the well accepted legal premise that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms" NAACP v. Button, 371 U.S. 415, 438 (1963)

Recently, the courts have considered First Amendment challenges to various state statutes which declare advertising by doctors, lawyers and pharmacists to be a basis for revoking or suspending a license. In Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) the United States Supreme Court held unconstitutional a state statute which defined unprofessional conduct to include advertising of prices by pharmacists. The statute was challenged on the grounds that the First Amendment guaranteed consumers the right to receive price information and credit terms for prescription drugs.3/ The court decided that the consumer's need for price information concerning prescription drugs outweighs the state's regulatory justification.

2/ This opinion considers the constitutionality of the general prohibitions on advertising quoted herein. It is not intended to deal with whether or not some part of the statute would constitute a permissible time, place, or manner restriction on advertising if reviewed without the other general prohibitions. Also, restrictions on deceptive advertising are clearly constitutional, but this opinion does not attempt to decide whether some of the statutory restrictions prohibit inherently misleading conduct.

3/ The challenges were based on the consumers right to receive information, rather than the professional's right to speech, because the challenge was brought by consumers.

In reaching its decision the Court rejected claims by the pharmacists that advertising restrictions were necessary to maintain a high degree of professionalism and to thereby protect citizens. The Court said that "[t]he advertising ban does not directly affect professional standards one way or the other. . . . [H]igh professional standards, to a substantial extent, are guaranteed by the close regulation. . ." of the state, and the state is "free to require whatever professional standards it wishes of its pharmacists. . ." But the Court said that a state may not keep the public in ignorance of prices that competing pharmacists are offering.

Although the issues in the Virginia Pharmacy Board case involved pharmacists and prescription drugs, its holding has been applied to First Amendment challenges to statutes banning advertising by other professions. For example, in Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine, 424 F. Supp. 267 (1976) a health planning agency had intended to publish physicians fees in a directory of factual information to help persons select physicians. The agencies could not obtain the information, however, because of a Virginia statute preventing physicians from advertising their professional services, fees, credit terms, or quality. The United States District Court held that the statute abridged the health planning agency's First Amendment right to gather, publish and receive information about physicians' services. That Court also held that a Virginia State Bar Code provision subjecting attorneys to disciplinary action for publicizing both non-fee and price information in a directory was an unconstitutional restriction on speech protected by the First Amendment. Consumers Union of U.S., Inc. v. American Bar Association, 45 LW 2310 (1976)

In addition, one Court has held that a state statute prohibiting advertising of prices and places to buy eyeglasses infringes upon consumers' First Amendment rights to receive such information. Terminal-Hudson Electronics v. Department of Consumer Affairs, 407 F. Supp. 1075 (S.D. Cal. 1976), judgment vacated and case remanded to U.S. District Court for further consideration in light of Virginia Pharmacy Board, supra. See also opinions of the Attorney General August 18, 1976, relating to drug advertising, and March 3, 1977 relating to advertising of ophthalmic goods.

We have also reviewed cases holding that statutes banning advertisements relating to prices for professional health care services were not unconstitutional. The majority of these cases, however, sustained the statutes against due process challenges and not on First Amendment grounds.

Only the opinion of a divided Arizona Supreme Court in In Re Bates, 555 P2d 640 (1976) prob. juris. noted sub. nom., Bates v. Arizona State Bar, 97 S. Ct. 53 (1976) holds that a professional disciplinary rule prohibiting the advertisement of fees would not violate the First Amendment where two attorneys had advertised the price of their services in a newspaper. We also note that the United States Supreme Court in Virginia Pharmacy Board, supra at footnote 25 mentions that physicians and lawyers "render professional services of almost infinite variety and nature, with the consequent enchanced propensity for confusion and deception if they were to undertake certain kinds of advertising". The concern of the United States Supreme Court expressed in that footnote was with "certain kinds of advertising" not all types of advertising. We need not reach the question of whether a prohibition of certain kinds of advertising is permissible in rendering this opinion on 32 M.R.S.A. § 1091(H)(1) and (2), because the statutory prohibitions are so broad and sweeping that they impose a nearly total ban on all advertising by dentists. Consequently, the statute prohibits the dissemination of non fee information such as biographies, credit terms, and whether the dentist is available on an emergency basis. In addition the statute prevents dissemination of price information for standardized services, such as teeth cleaning, in all media including a professional directory. It also prohibits advertising of products, such as dentures, which are the result of the dentists services.

Applying the rationale and holdings of the above referenced cases to the question you raise concerning the constitutionality of the Maine statute cited herein which prohibits advertising by dentists, it is my current advice that to the extent that 32 M.R.S.A. § 1091(H)(1) and (2) imposes a nearly total ban on the rights of consumers to receive truthful information about a dentists services and products it unconstitutionally restricts speech protected by the First Amendment.

This opinion does not mean, however, that advertising by dentists may never be regulated in any way. The Court decisions expressly state that deceptive advertising is not protected by the First Amendment and that certain time, place, or manner restrictions may be imposed where a compelling state interest can be shown. This Department has been and will continue to initiate legal action against anyone who engages in deceptive advertising. In addition

the statutes in question presently authorizes the Administrative Court to impose sanctions on any dentist who makes use of any advertising statements of a character tending to deceive or mislead the public. Those provisions of 32 M.R.S.A. § 1091(H) are not in question and remain in effect.

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

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