DISSENTING OPINION OF COMMISSIONER MARY L. AZCUENAGA
in California Dental Association, D. 9259

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

supports finding such a pattern. This is particularly true given the strong indications in the record that CDA's enforcement did not have the sweeping impact suggested by the majority.

With respect to restraints on price advertising, I question whether CDA in fact imposed such a clear ban as to bring its conduct within the per se rule, and the prudent course would be to remand for additional findings of fact. Restraints on price advertising that do not constitute such a ban, such as disclosure

[1] "Restrictions on price advertising are unlawful because they are aimed at 'affecting the market price.'" Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 606 (1988) quoting United States v. Gasoline Retailers Ass'n, 285 F.2d 688, 691 (7th Cir. 1961).

to suggest that the Commission has significantly relaxed its standard for establishing that entry is difficult. A quick look analysis based on a limited record has much to recommend it, but only if that record is held to the same standards of analysis as in a more extensive review. No anticompetitive effects having been shown, the complaint should be dismissed with respect to the conduct judged under the rule of reason.

I.

The opinion of the majority implicitly overrules the method of analysis set forth in Massachusetts Board of Registration in Optometry, 110 F.T.C. 549, 602-04 (1988). Whatever the reason for failing to use the word "overrule," it will be clear to any reasonable lawyer that that is what the majority has done. Instead of adhering to Mass. Board, the Commission endorses the traditional dichotomy between per se and rule of reason analysis. Slip Op. at 16.

It will be unfortunate if the Commission's decision signals a return to the analysis of old in which the significance of competitive effects and efficiencies was sometimes obscured by efforts to fit conduct in either the per se or rule of reason pigeonhole. In 1988, when the Commission decided Mass. Board, Supreme Court decisions had opened the door to an antitrust analysis that focuses more on competitive effects and efficiencies than on labels. [2] Mass. Board was a considered attempt to further that trend. Because there have been few opportunities for the Commission to explain Mass. Board in the context of a fully developed record, no body of precedent implementing its focus on competitive effects and efficiencies has evolved. [3]

The analytical framework set forth in Mass. Board, properly applied, has much to recommend it. This case presents an

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[2] See NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).

[3] Perhaps not surprisingly, Mass. Board, a precedent-setting case in terms of the Commission's analytical approach, created a number of analytical difficulties that were left for resolution in future cases. See, e.g., Azcuenaga, "Market Power as a Screen in Evaluating Horizontal Restraints," 60 Antitrust L.J. 935, 939 (1992).

excellent opportunity to clarify and build on Mass. Board .[4] One particularly disappointing aspect of the opinion of the majority is the absence of a satisfactory discussion of efficiencies, the omission of which would have been more glaring if the Commission had used a Mass. Board analysis.[5] The decision of the majority to cast Mass. Board aside before exploring its potential is cavalier and premature and sends the wrong signal about the importance of careful economic analysis, particularly the consideration of efficiencies.[6]

II.

At this point in an administrative proceeding, the nature and extent of CDA's restrictions on advertising should be well defined and substantiated, but they remain remarkably murky in this case. One difficulty in reviewing the record is that complaint counsel evidently assumed that actions by local dental societies are attributable to CDA, although the complaint did not name the local dental societies and the record does not establish that the local societies acted under the direction and control of CDA. Although complaint counsel submitted numerous exhibits relating to enforcement over a period of many years, most of those exhibits relate to enforcement by local dental societies, not by CDA. Some of the exhibits, which go back to the early 1980's, apparently do not reflect current or even recent CDA practice. Tr. 851. The majority seems to agree with CDA's argument that it cannot be condemned on the basis of acts by local societies without some evidence linking CDA to the

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[4] The Administrative Law Judge misapplied the Mass. Board analysis in his Initial Decision, and the opinion has been widely misconstrued elsewhere.

[5] One source of confusion under Mass. Board is that the term “efficiencies” as used in that opinion and in antitrust analysis generally encompasses much more than simple savings in terms of dollars and cents. In the antitrust lexicon, “efficiencies” includes valid business justifications such as explanations of why a particular product or service could not be brought to market absent the conduct that is subject to examination, the need to differentiate a product, or other circumstances consistent with a procompetitive rationale.

[6] Although I do not join Commissioner Starek’s separate opinion, his discussion of the virtues of the analytical approach in Mass. Board over that employed by the majority has a good deal of merit.

challenged conduct.

The majority does not adopt the findings of fact in the Initial Decision and, disclaiming reliance on those findings, relies instead on its "independent review of the record." Slip Op. at 10 n.6. [7] The majority characterizes the CDA's actions, but despite its independent review, offers little in the way of findings of fact to resolve important disagreements between the parties. [8]

The opinion of the majority fails to reconcile, or otherwise dispose of, conflicting evidence on a number of significant issues. A fundamental question is whether and to what extent CDA has restricted advertising by California dentists. On this record, it is difficult to find that CDA's restrictions adversely affected dentists who want to advertise or that the restrictions caused anticompetitive effects. Although CDA discouraged specific advertisements (usually advertisements that violated

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[7] On appeal, the Commission conducts a de novo review. 16 C.F.R. § 3.54(a)("Upon appeal from or review of an initial decision, the Commission * * * will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."); The Coca Cola Bottling Co. of the Southwest, 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,405 (FTC 1994)("Our review of this matter is de novo.").

[8] To rebut this dissent, the majority offers note 6 at page 10, a footnote of impressive length, that cites CDA actions relating to sixty-two dentists. On examination, the examples cited fail to match the promise of rebuttal presaged by the length of the note. Thirty-eight of the sixty-two examples support a finding of the majority with which I agree, i.e., "[t]he record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners." See text accompanying note 16, infra. Eleven examples of claims related to fees are not inconsistent with my view that the broad characterizations of the majority regarding restraints on fees cannot stand in light of probative, conflicting evidence. See note 15, infra. Seven more examples of superiority claims based on sterilization practices fail to answer the fundamental question I have raised whether this particular interpretation may be justified. See note 23 and accompanying text, infra. The same can be said for four examples of CDA actions based on a theory of unjustified expectations. See note 21, infra. Other examples cited in note 6 are discussed in the text of the majority opinion and in the text of this dissent.

state statutes or regulations defining and prohibiting deception), there is no empirical evidence in the record that CDA members advertise less frequently than dentists in California who are not members of CDA or that dentists in California advertise less than dentists in other states.

In fact, the preponderance of the evidence suggests that some advertising by dentists is flourishing in California. CDA, in a very graphic demonstration, filed a one and one-half inch thick appendix of telephone yellow pages advertising by California dentists. Mr. Christensen, a witness called by complaint counsel, who owns an advertising agency in Corte

It is possible, however, that the association in effect prohibits price advertising by the manner in which it interprets and enforces facially legitimate rules. Does CDA do so? The evidence is conflicting. CDA officials testified that its standard for evaluating advertisements is whether the advertisement is false or misleading, but a few CDA actions cited by the majority, particularly letters by CDA's membership application review committee, are not easily reconciled with the testimony. On balance, I question whether the record provides a sufficient basis to find that CDA prohibits price advertising.

Members of CDA must agree to abide by the association's constitution, bylaws and Code of Ethics. Slip Op. at 3. Section 10 of CDA's Code of Ethics provides:

> Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect. (CX-1484-Z-49.)

On its face, Section 10 of the CDA Code seems unobjectionable,[9] and the majority fails to identify specific language in Section 10 that explicitly or implicitly prohibits truthful advertising.

The majority also refers to several CDA advisory opinions. Advisory opinions are not part of the Code of Ethics, and a dentist does not necessarily subscribe to the advice by joining CDA, although he or she agrees to abide by the official rulings of the organization.[10] The only prohibition in the CDA's ethical

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[9] The first and third sentences of Section 10 merely prohibit false and misleading advertising. The second sentence relating to "the esteem of the public" is somewhat ambiguous, but the CDA enforcement actions cited in the opinion of the majority do not rely on this sentence.

[10] The preamble to the Code of Ethics states:

> The CDA Judicial Council may, from time to time, issue advisory opinions setting forth the council's interpretations of the principles set forth in this Code. Such advisory opinions are 'advisory' only and are not binding interpretations and do not become a

code is against false and misleading advertising. The difficult question is whether CDA in effect prohibited price advertising.

Advisory Opinions 2(b), 2(d), 3 and 4 are singled out by the majority for particular attention. [11] Slip Op. at 17.

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part of this Code, but they may be considered as persuasive by the trial body and any disciplinary proceedings under the CDA Bylaws.(CX-1484-Z-47.)

[11] They provide:

2. A statement or claim is false or misleading in any material respect when it:

(b) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
. . .

(d) Relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors; . . .

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. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity. (CX-1484-Z-49-50).

[12] Section III(A)(2) of the order requires CDA to remove Advisory Opinions 2(c), 2(d), 3, 4, and 8. Opinion 2(c) states

The language of the CDA advisory opinions is very close, but not identical, to that of the statutes. Opinion 2(b) defines as false and misleading a statement that "[i]s likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts," and Section 651(b)(2) of the statute covers a statement that "[i]s likely to mislead or deceive because of a failure to disclose material facts." Opinion 2(d) defines as false and misleading a statement that "[r]elates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors," and Section 651(b)(4) includes a statement that "[r]elates to fees, other than a standard consultation fee or a range of fees for specific types of services, without fully and specifically disclosing all variables and other material factors."

Opinion 3 provides that price advertisements "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." Section 651(c) provides that price advertising "shall be exact, without the use of phrases as 'as low as,' 'and up,' 'lowest prices' or words or phrases of similar import," and also that "[t]he price for each product or service shall be clearly identifiable."

Advisory Opinion 4 provides "[a]ny 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. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity." Section 651(c) provides that "[a]ny advertisement which refers to services, or costs for services, and which uses words of comparison must be based on verifiable data substantiating the comparison. Any person so advertising shall be prepared to provide information sufficient to establish the accuracy of that comparison."

The close parallel between the CDA advisory opinions and the statute strongly suggests that the association simply followed

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for any related professional services, including dispensing and fitting services, unless the advertisement specifically and clearly indicates otherwise. (1 Deering's Business and Professions Code Annotated of the State of California § 651 (1995 Supp.).)

the California statutory definition of false and misleading advertising by health professionals. A side-by-side comparison

[14] Some local dental societies may not have gotten word of the 1991 action. See CX-391 (October 19, 1993, letter from the Tri-County Dental Society); CX-778 (May 27, 1993, letter from the Tri-County Dental Society). Abandonment does not moot the case, but it may be relevant in assessing whether the evidence establishes a pattern of conduct.

pattern of conduct that effectively prohibited fee advertising. [15]

The record supports the majority's finding that CDA enforces the disclosure requirements imposed by the California State Board of Dental Examiners. [16] The objective of a disclosure requirement is to place more information in the hands of consumers. A

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[15] In footnote 6 at page 10, the majority cites thirteen additional CDA letters related to price advertising. Ten of the letters relate to claims that fees are "affordable." CX-335 (Dr. Dubin 1991); CX-32 (Dr. Bales 1991); CX514 (Dr. Stygar 1991); CX-866 (Dr. Rosenson); CX-50 (Dr. Jung 1990); CX-602 (Dr. Leizerovitz 1991); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-957 (Dr. Skinner 1992); and CX-949 (Dr. Singhal 1990). One relates to the use of the word "reasonable." CX-1042 (Dr. Bales 1991). It certainly would be questionable for an association to prohibit all such claims, but the evidence is conflicting, and CDA may prohibit only unsubstantiated claims. A number of CDA ethics officials testified that CDA's Code prohibits only unsubstantiated claims. Tr. 865-66 (Dr. Abrahams testified that the claim is "meaningless" and does not violate the Code of Ethics and is "so prevalent that we would spend a lot of time enforcing it . . . ."); Tr. 1347 (Dr. Kinney testified that claims of reasonable or affordable prices are acceptable if verifiable); Tr.1479 (Dr. Nakashima testified that such a claim is acceptable "if it can be substantiated"); Tr. 1574 (Dr. Cowan); Tr. 1044-45 (Dr. Lee testified that a claim of reasonable or affordable fees is acceptable if verifiable).

[16] Footnote 6 at page 10 of the majority opinion provides additional examples. CX-18 (Dr. Asher 1993); CX-444 (Dr. Hiatt 1993); CX-387 (Dr. Ghadimi 1992); CX-366 (Dr. Foroosh 1993); CX-333 (Dr. Dorotheo 1993); CX-126 (Dr. Butt 1991); CX-51 (Dr. Beheshti 1991); CX-49 (Dr. Beheshti 1990); CX-27 (Dr. Azarmi 1993); CX-4 (Dr. Aguilera 1990); CX-297 (Dr. Davtian 1991); CX-258 (Dr. Daher); CX-248 (Dr. Crowley); CX-206 (Dr. Choi 1992); CX-151 (Dr. Casteen 1993); CX-516 (Dr.Kachele); CX-514 (Dr. Stygar 1991); CX-497 (Dr. Johnston 1993); CX-474 (Dr. Jeffs 1990); CX-602 (Dr. Leizerovitz 1991); CX-557 (Dr. Kita 1992); CX-668 (Dr. Massa 1992); CX-661 (Dr. Mardirossian 1990); CX-646 (Dr. Maiden 1992); CX-830 (Dr. Paulsen 1990); CX-828 (Dr.Patel 1990); CX-780 (Dr. Norzagaray 1992); CX-775 (Dr. Nicholl 1993); CX-772 (Dr. Nguyen 1991); CX-755 (Dr. Moy 1992); CX-745 (Dr. Moran 1991); CX-1000 (Dr. Stuki 1992); CX-957 (Dr. Skinner 1992); CX-913 (Dr.Schleuniger 1992); CX-865 (Dr. Rosenkranz 1993); CX-856 (Dr. Rocha 1993); CX-855 (Dr. Rocha 1993); CX-843 (Dr. Ramalingam 1993).

disclosure requirement is not a prohibition on price advertising, although required disclosures may in some circumstances be so extensive and burdensome that price advertising is effectively prohibited. Although the majority hypothesizes about the burden of the state Board's regulation, a witness with broad experience in advertising by California dentists, called by complaint counsel, testified that the disclosure rules did not burden price advertising. Tr. 628, 648-50.

The majority quotes the disclosure requirements as they appear in the 1988 "Advertising Guidelines" issued by the CDA, but without identifying the source of the disclosure requirement. CX-1262. Slip Op. at 17. The disclosure requirements were promulgated by the California Board of Dental Examiners, not CDA. Preceding the disclosure requirements quoted by the majority, CDA's Advertising Guidelines make this clear by stating that "the Rules and Regulations of the State Board of Dental Examiners require you to list all of the following in your advertisement(s)" and then listing the disclosures quoted at page 17 of the majority opinion. CX-1262-I. The CDA Advertising Guidelines appear accurately to recite Section 1051 of the rules of the California Board of Dental Examiners. 16 Barclays California Code of Regulations § 1051, RX-136-E.

The majority concludes that the disclosures required by the California Board of Dental Examiners stifle discount advertising. The disclosures required by the Board include the nondiscounted fee, the discount in dollars or percentage terms, the duration of the discount offer, and the group that qualifies for the discount, plus any other conditions or restrictions on the offer. CX-1262-I.

The record shows that, as a practical matter, these disclosure requirements do not preclude discount advertising. For example, the Advertising Guidelines illustrate the disclosures required for a discount on a cleaning: "$10 off (regularly $25.00) Good through June 1, 1985." CX-1262-I. The disclosures in this illustration do not make the offer unmanageable or ineffective and, indeed, the majority does not articulate a concern about such discount advertising. Rather, the majority is concerned about the possibility that a dentist might want to advertise an across-the-board discount on fees for many or all services. Slip Op. at 18.

The majority relies on the testimony of Dr. Barry Kinney, a member of CDA's Judicial Council, to infer that CDA might require an advertising dentist to include disclosures that would fill two pages in a telephone book. Slip Op. at 18, quoting Tr. 1372.

Dr. Kinney testified that if a dentist wanted to offer an across-the-board discount, then "you would have to be a little flexible" and not require disclosure of every fee. Slip Op. at 19, quoting Tr. 1373. Indeed, Dr. Kinney indicated that CDA interpreted the California Board of Dentistry rules to avoid oppressive disclosure requirements. He said that in the event of an across-the-board discount advertisement, the CDA Judicial Council would verify that the dentist was, in fact, doing what he advertised and that "I don't think that we would hold somebody to these restrictions if in fact they were going to do across-the-board advertising." Tr. 1375.

It is unclear whether CDA has adopted Dr. Kinney's flexible view. The majority finds that CDA insisted on a "full panoply of disclosures," citing several exhibits. For example, Exhibit CX-206-A, a September 3, 1992, letter from CDA's MARS to the San Gabriel Valley Dental Society, recommends denial of a dentist's membership application because her advertisement, "20% off New Patients with this Ad," violated Section 1051 of the rules of the Board of Dental Examiners "by failing to list the dollar amount of the nondiscounted fee for each service." [17] This 1992 letter seems inconsistent with the flexible view of Dr. Kinney. The majority also cites a 1991 instance in which the MARS committee recommended that a dentist be admitted but counseled about advertising a "10% senior citizen discount" without disclosing the nondiscounted fee and the duration of the offer. CX-585-A. Given the testimony of two CDA officials that advertising senior citizen discount would be acceptable, Tr. 872, 1351, it is unclear whether the association's view has changed since 1991. Overall, the evidence appears to be conflicting on the manner in which CDA approaches this Board rule.

The record does not establish that the disclosures required under Section 1051 and derivatively by CDA constituted a prohibition of discount advertising. Indeed, complaint counsel's own witness seriously undercut the theory that CDA's enforcement of Section 1051 of the Board rules suppressed discount advertising. Although Mr. Christensen, whose experience in the market is described above, said in response to hypothetical questions by complaint counsel that excessive disclosures might reduce the effectiveness of a discount advertisement, Tr. 598-600, he testified on cross-examination that as a matter of

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[17] The record contains little explanation of the factual background or the reasons for the conclusion in the MARS letter. It is unclear whether the 20% discount was for all dental work needed by new patients or just for the initial consultation.

marketing strategy, his agency recommends that specific discount advertisements be directed to a limited number of people for a limited time and that the ads show the usual and customary charge from which the discount is taken. Tr. 625-26, 648. The disclosures recommended by Mr. Christensen's advertising agency appear to coincide with the disclosures required by the California Board, but his reason for the recommendation was based on the marketplace not the rule. He recommends disclosure because "[w]e don't want to mislead anyone." Tr. 628. Mr. Christensen also recommended against advertisements of across-the-board discounts because an across-the-board discount might be construed as a price reduction, and an insurance company might reduce the "usual and customary rate" to the lower rate for the purposes of reimbursement. Tr. 629.

Mr. Cristensen testified that "there is no burden whatsoever" in disclosing the UCR charges (usual and customary rate), an expiration date and the discounted offer price in an advertisement. Tr. 628, 648-50. Mr. Christensen also offered explanations of the relative scarcity of across-the-board discount advertisements in the yellow pages or elsewhere. As to the yellow pages, he said that PacBell generally does not allow across-the-board discount advertisements. Tr. 645. With respect to the marketplace in general, he said that across-the-board discounts "won't work as a marketing tool." Tr. 645. In his opinion, such advertisements ae ie ie

rule of reason should address benefits to consumers, if any, of its requirements for price advertising and the extent to which the disclosures impose a burden on advertisers. Additional factual findings on these issues would be helpful in that analysis.

Under the per se rule, all we need find for liability to attach is that the conduct occurred. On this record, I cannot reach that threshold and ultimate finding of fact. The per se rule is a harsh rule. The Commission would be well advised not only to exercise caution in extending the rule to new forms of condu bes of°8 ricthsiohiirePoitsnsTD al liF0 0 TfuF0 v.41804zmm4.2ET30n tacddi

[18] Their testimony also is consistent with the Commission's policy on deception. See Commission Policy Statement on

Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984)(Appendix, at 176).

[19] Section 1052 of the Regulations issued by the California Board of Dental Examiners provides:

> Any advertisement must be capable of substantiation, particularly that the services offered are actually

[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. CX-387-B.

[21] In footnote 6 at page 10, the majority cites four other CDA actions based on this provision, all of which raise the same substantiation questions. Indeed, one of the letters is much like a Commission deceptive advertising decision, and it demonstrates that preventing unsubstantiated, indeed, in this case, false claims was precisely CDA's concern. Exhibit CX-478, cited by the majority, reflects a decision of the CDA Judicial Council that the claim "laser dentistry is revolutionizing dental care" was false because "laser dentistry is not revolutionary" and created unjustified expectations. See also CX-932(claim of "the latest techniques"); CX-115(claim of "lots of" experience); CX-963(claim of "highest infection control standards").

[22] In footnote 25 at page 36, the majority suggests that my interest in further factual inquiry is misplaced, citing six examples to show that "MARS was not concerned with any surrounding circumstances" when it wrote to the individuals. The record as a whole contains enough evidence of CDA's concern with surrounding circumstances to justify further factual inquiry. I do not quarrel with the evidence the majority cites, only with their failure to weigh explanatory and probative conflicting testimony and with their failure to consider the possible benefits of CDA's conduct. I have identified a number of such instances, observing, for example, in the discussion below that an implied claim of more effective sterilization may be deceptive. See, e.g., CX-394 (claim of "highest standards in sterilization"); CX-780 (claim of "modern sterilization"); and CX-557 (claim that "we guarantee all dental work for 1 year"). Common sense and the Commission's policy regarding deceptive

[23] In footnote 6 at page 10, the majority note a number of additional claims of the same sort. See CX-394 (Dr. Go, 1993); CX-360 (Foroosh 1986); CX-43 (Dr. Baron 1993);CX-780 (Dr. Norzagaray 1992); CX-718 (Mickiewicz and Rye, 1992); CX-1026 (Dr. Tracy 1992); CX-605 (Dr. Lerian 1993).

[24] See FTC Statement of Policy in Regard to Comparative Advertising, FTC News Summary No. 38 (August 3,1979)("Comparative advertising encourages product improvement and innovation, and can lead to lower price in the marketplace.").

[25] The Commission has held that truthful statements regarding the attributes of a product or the nature of services may convey implied claims. See Commission Policy Statement on Deception, Cliffdale Associates, Inc., 103 F.T.C. 110 (1984) (Appendix, at 176).

Similar interpretations appear in Commission cases. For

depth.

Section 1680(l) of the California Code defines unprofessional conduct by dentists to include the following:

> The advertising to guarantee any dental service, or to perform any dental operation painlessly. This subdivision shall not prohibit advertising permitted by Section 651. [28]

CDA has enforced this statutory prohibition against guarantees. See CX-668-C and CX-557-C (claim that "we guarantee all dental work for 1 year" said to violate Section 1680(l)); CX-497-C (claim of "crowns and bridges that last" said to imply guarantee in violation of Section 1680(l)). The claim that "[w]e guarantee all dental work for 1 year" appears to violate Section 1680(l) of the Dental Practice Act, which defines "unprofessional conduct" to include "the advertising to guarantee any dental service." CX-668. It is not clear whether the claim was a money-back offer if the dental work failed within one year, which might be true, or whether the claim was that all dental work will be perfect for at least one year, which seems unlikely. If the claim is limited to a money-back offer, then prohibiting such advertising may be anticompetitive. The majority does not discuss whether there might be a reason to require disclosure of the nature or terms of the guarantee.

The majority suggests that CDA has restricted advertising claims such as an offer of "gentle" care, although its restriction may be less sweeping than those of local societies. CDA witnesses said that CDA does not restrict claims such as "gentle" dentistry. Tr. 1343-46 (Dr. Kinney, member of CDA Judicial Council). Indeed, in 1993, CDA advised the local

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deceptive. See e.g., Kraft, Inc., 114 F.T.C. 40, 121, 128-32 (1991), aff'd sub nom., Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992); Bristol-Myers Co., 102 F.T.C. 21, 328-48 (1983), aff'd sub nom., Bristol-Myers Co. v. FTC, 738 F.2d 554 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); see also, e.g., United States v. Egglands Best, Inc., (E.D. Pa. Mar. 12, 1996)(consent decree); Archer-Daniels-Midland, Docket C-3492 (Apr. 20, 1994) (final decision and order).

[28] Someone more flippant than I might suggest that prohibiting claims of painless dental operation is clearly justified because such claims are so obviously deceptive. To its credit, the majority does not challenge this provision.

societies that the state Board regarded "gentle" as acceptable advertising. Tr. 1466 (Mr. Nakashima); RX-56. Because local societies were not charged in the complaint and because their conduct cannot be attributed to CDA, the reliance by the Administrative Law Judge and by the majority on those actions is misplaced.

Finally, the majority finds that in 1984, CDA adopted a resolution 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. My initial reaction to the CDA resolution is to question whether it expresses a point of view over which the majority really wants to quibble. [29] Second, in adopting the resolution, CDA cited and relied on Section 51520 of the California Education Code, which prohibits teachers or others from soliciting contributions from school children for organizations not under the school's control. [30] Perhaps CDA has enforced the resolution in a manner that is overly broad, but the evidence to that effect is also thin.

After considering the evidence, I cannot join the majority's broad characterizations of CDA's actions. CDA's Code of Ethics on its face prohibits only false and deceptive advertising, and the case turns on how CDA has applied this legitimate principle. In evaluating CDA's actions, I would explore more fully the benefits to consumers, if any, of each of CDA's requirements and weigh the countervailing burden on advertisers. In turn, I do not offer a blanket endorsement of CDA's actions, the competitive effects of which merit examination, but rather suggest that the analysis of those actions should be based on a recognition that

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[29] Even assuming the resolution refers only to solicitation of dental business, to join the majority's implicit endorsement of such behavior would not be a decision I would like to explain to my mother.

[30] Section 51520 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 by teachers or others 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, [excluding charitable organizations approved by the school board] . . . .

prevention of deceptive advertising may benefit consumers.

III.

CDA's restrictions on advertising appear to be parallel to and no broader than restrictions imposed by the California legislature by statute. The majority does not compare CDA's

[31] According to the testimony of Dr. Abrahams, who served on CDA's Judicial Council, the CDA amended its code of ethics frequently to keep it consistent with the state dental practice act. Tr. 851.

summarizing its enforcement position on several issues, revised as of March 8, 1993. RX-56A,B. That 1993 summary does not support the view of the majority that the 1989 memorandum caused the Board of Dental Examiners to refrain from enforcement. In addition, Dr. Nakashima testified that he called Dr. Yuen, the president of the California State Board of Dental Examiners, the night before his testimony and confirmed that the Board considers its rules to be valid and enforceable, but that it operates under tight budgetary constraints. Tr. 1468-69. Of course, this is hearsay, but no objection was made to Dr. Nakashima's testimony, which appears on point and probative. Nor did complaint counsel introduce testimony or other evidence contradicting the hearsay.

I agree with the majority that CDA is not protected by the state action doctrine. Quite apart from the state action doctrine, however, a factual question arises that deserves at least to be addressed regarding what effect CDA actions, as distinct from state law, had on competition in the market for dental services. The majority states that in the absence of state enforcement of state statutes, it was "CDA, not California, that tampered with the workings of the market for dental services." Slip Op. at 46. [32]

The record, however, does not establish that CDA, as opposed to the state of California, influenced the advertising of dentists. Some dentists who advertised were told by CDA that their advertisements violated state law. The record simply does not reflect whether those dentists changed their advertising and, if so, whether it was because they did not want to offend CDA or because they did not want to violate state law.

State laws may have had an in terrorem effect even in the absence of vigorous state enforcement. Section 652 of the California Code provides that violations are punishable by

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[32] The Commission cites Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc., 17 F.3d 295 (9th Cir.), cert. denied, 115 S.Ct. 66 (1994). In that case, the court found that the only anticompetitive injuries resulted from government action and hence that a private party could not be held liable. That factual conclusion on causation of injury does nothing to establish that CDA was the source of the advertising restriction here. The second case the Commission cites, Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612 (6th Cir. 1982), held that the actions of a state dental board were protected by the state action doctrine. Again, that holding provides little insight into the resolution of this case.

revocation of the violator's professional license by the relevant licensing board, and Section 652.5 provides that any violation is a misdemeanor and is punishable by "imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both the imprisonment and fine." 1 Deerings California Code § 652.5 (1995 Supp.). A 1994 amendment makes clear that punishment can include both imprisonment and fine, which suggests that this was not some long forgotten law. Id.

Respect for the law and a willingness to conduct oneself in accordance with the law can be powerful incentives regardless of the resources devoted to law enforcement. In the absence of evidence regarding the relative impact of state law versus CDA, it seems questionable to infer that dentists feared the CDA instead of the state of California.

Arguably, the majority could find liability under Section 5 of the FTC Act based on conclusions that the California law has anticompetitive effects and that CDA has encouraged compliance with California law, without finding that CDA's conduct alone had anticompetitive effects. The majority has not so held or even suggested such a theory of liability. In view of the absence in the record of evidence showing adverse effects on competition, I do not address the merits of such a theory either.

IV.

Even assuming that the preponderance of the evidence establishes that CDA engaged in each and every variation of an advertising restraint analyzed under the rule of reason and that each such restraint is unjustified, I still would dissent from the opinion of the majority because of the even greater weaknesses in the remaining elements of the case. The Commission reverses the finding of the Administrative Law Judge that CDA has no market power and concludes instead that CDA has market power. The fundamental difficulty with this conclusion is that it is not supported by evidence. Complaint counsel made no effort to try the case on a rule of reason theory and did not introduce testimony or documents to establish the elements of a rule of reason case. To put the matter in perspective, complaint counsel proposed 949 findings of fact and conclusions of law with respect to this proceeding, but they proposed only one finding, Proposed Finding 570, relating to market power. [33] The Administrative Law

[33] Complaint Counsel's Proposed findings 540 to 578 purport to set forth Complaint Counsel's full economic analysis

Judge correctly rejected this proposed finding. I agree with the finding of the Administrative Law Judge that CDA lacks market power.[34]

Complaint counsel's Proposed Finding 570 ("CDA has market power") is based entirely on the testimony of Dr. Knox, CDA's expert economist. According to Proposed Finding 570, because CDA members as a group face a downward sloping demand curve for dental services and assuming hypothetically that CDA members act together, they could exercise some degree of market power.[35] Complaint counsel's hypothetical does not suffice to rebut Dr. Knox's economic testimony that CDA's enforcement of its Code of Ethics "has no impact on competition in any dental market in California." Tr. 1633.

The ALJ found that dental patients are relatively price sensitive because patients pay for their own care, and most dental care is not urgent. IDF 321. To demonstrate that CDA members profitably could impose a price increase, it would be necessary to show that other dentists could not increase their output and that new dentists could not enter in sufficient numbers to defeat such a price increase. Complaint counsel made no such showing, and the proposed finding was correctly rejected.

To establish market power, relevant antitrust product and

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of the case.

[34] The conclusion of the Administrative Law Judge that CDA lacks market power rests on the finding that there are no barriers to entry. ID at 76. The Administrative Law Judge also concluded that complaint counsel failed to introduce evidence sufficient to show that CDA members could act together to raise prices or reduce output and failed to introduce evidence of relevant geographic markets. ID at 76.

[35] Dr. Knox testified that market power is the ability to raise prices above the competitive level. Tr. 1689. He suggested that with a downward sloping demand curve, by definition, a group of suppliers with market power could raise prices above a competitive level. Tr. 1690. Complaint counsel elicited from him the statement that dentists individually and collectively face a downward sloping demand curve. Tr. 1691. In response to a hypothetical question by complaint counsel, he said that assuming that CDA members collectively raised the price of their services, the total quantity of services provided by CDA members would decline. Tr. 1694.

geographic markets must be identified. Respondent's expert

any geographic area as a relevant market. Complaint counsel's failure to prove a relevant antitrust market alone is sufficient to dispose of the allegations of market power. [36] See Adventist Health System/West , 5 Trade Reg. Rep. (CCH) ¶ 23, 591 (April 1, 1994); Capital Imaging Associates v. Mohawk Valley Medical Ass'n , 996 F.2d 537, 547 (2d Cir.), cert. denied , 114 S.Ct. 388 (1993)(defining local radiology market in rule of reason analysis).

The majority concludes that "where there are significant barriers to entry," market share alone may be relied on as an indicator of market power. Slip Op. at 31. Since no geographic markets have been defined, it is not possible to develop any market share data or other pertinent concentration statistics. Nonetheless, I agree with the general proposition that the presence or absence of impediments or barriers to entry is important to, and may be dispositive of, the competitive analysis. See, e.g. , United States v. Baker Hughes, Inc. , 908 F.2d 981, 987 (D.C. Cir. 1990); United States v. Waste Management, Inc. , 743 F.2d 976, 983 (2d Cir. 1984); United States v. Gillette Co. , 828 F. Supp. 78 (D.D.C. 1993).

Dr. Knox, the respondent's economic expert, testified that the basis for his opinion that CDA's enforcement activities have no impact on competition in any dental market in California is that "CDA cannot erect any barrier to entry to any dental market in the state of California." Tr. 1633-34. He said that in his view, the only barrier to entry in this market is the need to acquire a license issued by the California Board of Dental Examiners. Tr. 1634. In his opinion, the facts that a dentist must attend dental school to sit for the exam or that he or she must acquire or lease an office and equipment do not amount to entry barriers. Tr. 1636-40. [37] The Administrative Law Judge

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[36] It is even more elementary that once a market has been established, some conduct affecting competition in that market must be identified before liability can attach. Even assuming that the evidence is sufficient to show that the area served by the Mid-Peninsula Dental Society is a relevant geographic market, none of the alleged restraints on nonprice advertising discussed in the opinion of the majority (Slip Op. at 25-27) was directed to dentists in this area.

[37] A dentist opening a practice must buy equipment, and Dr. Hamann pointed out that it is possible to equip an operatory with used equipment for as little as $2500. A dental school graduate with access to significant capital, such as Dr. Hamann, may

purchase two established practices at the start of a career, but nothing in the record suggests that every graduate needs to take that high-cost approach to entry. Used equipment or rental equipment is available. Office space can be leased.

[38] The majority criticizes the Administrative Law Judge for his finding that there are no "insurmountable" barriers to entry in dental services. Slip Op. at 31-32. Although the rhetorical flourish of the Administrative Law Judge is an overstatement of the elements necessary for liability, the Initial Decision does not appear to state or rely on a novel entry standard. Rather, it appears appropriately to focus on whether CDA dentists

equipment. Tr. 297-98. He said that a dental equipment supplier "was helpful in teaching me some of the ropes" and that the cost to equip an office was $15,000. Tr. 297-99. He estimated that it takes at least 18 months to break even. Tr. 300. Dr. John Miley, another witness called by complaint counsel, thought that entry was difficult because in his opinion the state was "over supplied with dentists." Tr. 329. He said that many young dentists graduate from school with debts of $50,000 to $100,000 and that it costs an additional $50,000 to $75,000 to establish a practice. Tr. 330-331. A third witness called by complaint counsel, Dr. Hamann, testified that he and his wife borrowed $400,000 for her to acquire two established dental practices and to provide the "working capital" to operate them. Tr. 760. He testified that he acquired used dental equipment to furnish six operatories for the practice, at a cost of $2500 to $4000 per operatory (although new equipment might cost $15,000 to $20,000 per operatory). Tr. 761.

Drs. Harder, Miley and Hamann all testified that they (or in Dr. Hamann's case, his wife) successfully entered the California dental services market. Their experiences suggest that entry is not difficult. None of the three witnesses provided even one anecdote about a licensed dentist who wanted to practice in California but was deterred by the difficulty of entry.

Dr. Hamann's testimony indicates that entry is not only possible, but also that it can be highly lucrative. Dr. Hamann is a physician who managed the practice for his wife, Dr. Hamann, who is a dentist. After purchasing two dental practices for about $400,000, they undertook an “aggressive” marketing program. Tr. 806. Although Dr. Hamann did not use price or comparative advertising in her practice, her husband said that her marketing campaign was the "[m]ost aggressive I've ever seen." Tr. 790. The Hamanns sold the practice after eight years, by which time it was earning $1,500,000 per year in gross revenues. Tr. 808. Dr. Hamann testified that after the fifth and sixth year, his wife was earning from $300,000 to $500,000 in profits after paying him $100,000 per year to manage the practice. Tr. 808. It should be observed that this marketing success story apparently was achieved well within the bounds of CDA's rules. Dr. Hamann was an active member of the CDA and the Tri-County Dental Society and served as a delegate to the CDA. Tr. 765-66.

Dr. Harder graduated from dental school in 1979 and worked as an associate dentist for Dr. Senise in Glendora, California. Tr. 245. Because of the long commute, he left that practice in 1981 to establish his own practice in Laguna Hills. Tr. 247. In 1986, he stopped practicing in Laguna Hills and opened an office

in Irvine, California. Tr. 250. Dr. Harder's success in opening and subsequently moving a practice provides evidence that the cost of opening an office is not a barrier to entry.

Dr. Miley's concern was that students graduate from dental school with debts. That alone does not prevent entry. If anything, the availability of credit to dental students suggests that a steady flow of new entrants into the profession will continue. Dr. Miley's testimony that California is oversupplied with dentists supports the conclusion that the cost of education has not choked off the flow of potential entrants. If anything, it supports the view that entry is easy. No doubt, entry into the dental services market takes talent, hard work and perserverance. But that is not the kind of difficulty cognizable in an antitrust analysis.

The majority suggests that there is "little doubt" that CDA can enforce its rules because advertising is observable and because dentists place a high value on CDA membership. Slip Op. at 30. The majority states that there is no need to "quantify this benefit econometrically," because when faced with the choice of membership or advertising, dentists "overwhelmingly chose the former." Slip Op. at 30.

Econometrics is not necessary to establish anticompetitive effects; simple evidence would do. The majority's rhetoric glosses over the absence of evidence concerning the actual competitive effect of CDA's activities. The phrasing of the choice as one between membership and advertising assumes, without supporting evidence, that dentists in California, including members of CDA, do not advertise. It further assumes, again without benefit of evidence, that the cause of any reluctance to advertise is CDA. The testimony of Dr. Hamann that his wife undertook the "most aggressive" marketing campaign that he had ever seen, while remaining a member in good standing of CDA, and the testimony of Mr. Christensen about advertising by clients of his advertising agency raise a question whether dentists do face a choice between advertising and membership. The hypothesis that some or even many dentists do not advertise, even if true, does not establish a link between lack of advertising and membership in CDA.[40]

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[40] The majority responds to my questioning on this point with more citations to CDA documents. See Slip Op. 30 n.21. Even if a dentist agrees to comply with a letter suggesting that an advertisement violates state law, the CDA documents do not show what motivated the change of heart. For that, we must look

CDA membership is not essential to a successful dental practice in California. CDA offers benefits to its members, but those benefits are readily available from other sources. The Initial Decision identifies CDA's two annual scientific sessions as the "most visible and tangible membership benefit." IDF 101. These sessions are a convenient way for dentists to satisfy their state-imposed continuing education requirement. IDF 105. CDA members attend for free; nonmembers must pay a registration fee to attend. IDF 104. Continuing education also is available from other sources. Tr. 803. CDA members receive CDA publications at a lower subscription rate than nonmembers. IDF. 107.

CDA lobbies the California legislature. IDF 70-85. To the extent that CDA lobbies the state successfully on behalf of dentists, the benefits apparently would flow to members and nonmembers alike. Some other benefits of CDA membership include a marketing program to enhance the image of CDA and dentists, a program promoting direct reimbursement instead of insurance company plans, twice-a-year seminars on the non-clinical aspects of dental practice, and a peer review program as an alternative to litigation to resolve customer complaints. IDF 106, 89, 92, 98.

CDA operates several for-profit subsidiaries. One subsidiary offers professional liability insurance to CDA

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to documents or testimony from the dentist. The majority cites one such letter. Exhibit CX-480 is a letter from Dr. Jenkins agreeing to change an advertisement that the CDA Judicial Council found to be misleading, stating his disagreement with that position. The letter does not illuminate why he decided to comply.

benefits that CDA offers to its members are significant enough to persuade them to pay their dues and perhaps to participate in the association's activities. None of the benefits offered by CDA appears to be uniquely available from the association, and none appears to be essential to the successful practice of dentistry. One telling point about the commercial importance of CDA membership is how infrequently it is used in dentists' advertisements. The CDA filed a one and one-half inch thick appendix of dentists' ads in the yellow pages, very few of which announce CDA membership.

The evidence does not support the conclusion that CDA can control the price and output of dental services in California. The majority relies on the single fact that approximately 75 percent of California dentists are members of CDA to support its finding of market power. Almost certainly, the state of California is not a relevant geographic market for dental services. But even hypothesizing a relevant geographic market with membership similar to that statewide, entry could undercut any claimed ability to exercise market power, and the evidence suggests that entry is, in fact, easy.

The weakness of the majority's anticompetitive effects story is reflected in the majority's final observation that it is "implausible at best" that dentists would move to California to advertise. Slip Op. at 32. If CDA has successfully restrained competition in California by limiting advertising, why would not the usual economic incentives of the free market work in this market? If CDA had successfully controlled its members to halt advertising, why would not the other 25 percent of dentists in California who are not CDA members expand their practices by advertising, and why would not newly licensed dentists or dentists from other areas step in to take advantage of the fact that CDA members had voluntarily tied their own hands in competition to attract patients? The Commission finds it "implausible at best" that this would happen. A better conclusion is that it is "implausible at best" that CDA has had any significant adverse effect on competition.

substantiation requirements for price as well as nonprice advertising to ascertain whether those requirements are reasonable efforts to cure deception. The majority's failure seriously to attend to the possible justifications for CDA's requirements may operate to the detriment of consumers. As recognized in the analytical approach embodied in the Commission's late opinion in Mass. Board, consideration of efficiencies is vital to good antitrust analysis. The per se rule, which dispenses with consideration of efficiencies, should be circumscribed accordingly.

Even assuming that CDA's advertising policies are broader or more burdensome than necessary to prevent deceptive advertising, the majority's rule of reason analysis is troubling. The startling failure to identify a geographic market before finding liability is one cause for concern. The majority's treatment of the entry issue is another. The case can be disposed of on ease of entry alone. Not only is the evidence offered to suggest barriers to entry minute, but more importantly, the analysis the majority employs implicitly suggests the adoption of a new standard for evaluating barriers to entry. Unless the analysis of entry in this case is treated as an aberration, we reasonably can assume that the majority would find barriers to entry in almost any market we might imagine. It seems unlikely that the majority would apply the same loose test to barriers to entry in all cases, including merger cases under Section 7 of the Clayton Act, but only time will tell.

I dissent.