The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 22, 1999

The Honorable Charles R. Sharpe
Member, House of Representatives
411-A Blatt Building
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Representative Sharpe:

Attorney General Condon has forwarded your opinion request to me for reply. You have asked for an opinion regarding the constitutionality of proposed Regulation 35-24. This proposed regulation would amend existing continuing education criteria for individuals falling under the authority of the State Board of Cosmetology.

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. This presumption also applies to administrative regulations. Ops. Atty. Gen. dated March 24, 1989 and February 15, 1989. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1938); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

If an individual were to challenge the constitutionality of the proposed regulation, the individual may attempt to argue that the proposed regulation creates a classification (the requirement that only state-wide organizations, groups or associations may conduct courses)

which violates the equal protection clause. The proposed regulation reads in part as follows:

> A. Continuing Education Programs–shall be approved by the Board, having met the specified criteria established by the Board.
>
> > (1) Each course shall be conducted and monitored by a Board approved state wide organization, group or association in conjunction with the Division of Continuing Education, University of South Carolina.
> >
> > (2) Any board approved organization, group or association who can present a satisfactory program to the Board may be eligible to conduct such a program, provided they can demonstrate proper control procedures. For this purpose, a statewide organization, group or association is defined as one which normally does business in or has members who reside in at least 3/5th of the counties in the state provided that the three most populous counties are included in that makeup.

If there is no suspect or quasi-suspect class and no fundamental right is involved, a legislative act is tested under the "rational basis" standard. Bibco Corporation v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). The determination of whether a classification is rational is initially one for the legislative body and will be upheld if it is not plainly arbitrary and there is a reasonable hypothesis to support it. People Program for Endangered Species v. Sexton, 323 S.C. 526, 476 S.E.2d 477 (1996). Great deference must be given to the classification passed by the legislation. Id. No statute is subject to an equal protection challenge as long as the classification drawn by the legislation bears a rational relationship to a legitimate governmental policy. Id.

A legislative act satisfies the requirement of equal protection under this test if: (1) the classification created by the statute is rationally related to its legislative purpose; (2) the members of the class are treated like those similarly situated; and (3) the classification rests on some rational basis. Jenkins v. Meares, 302 S.C. 142, 394 S.E.2d 317 (1990).

As previously stated, a classification will be upheld if it is not plainly arbitrary and there is a reasonable hypothesis to support it. While I am not aware of the specific reasons for the classification contained in the proposed regulation, I would imagine that the General Assembly had rational reasons for its inclusion. The General Assembly may have concluded

that this was necessary to ensure the quality of the programs offered. Therefore, since the proposed regulation is presumed to be constitutional, it is not plainly arbitrary and there may very well be a reasonable hypothesis to support it, I cannot, at this time, conclude that it is constitutionally suspect.

An individual may also attempt to argue that the proposed regulation unlawfully delegates the performance of governmental functions to private groups as the proposed regulation provides that each course shall be conducted and monitored by a Board approved state wide organization, group or association in conjunction with University of South Carolina's Division of Continuing Education. Courts have held that the delegation of administrative and ministerial duties is not unconstitutional. State ex rel. Medlock v. South Carolina State Farm Development Authority, 279 S.C. 316, 306 S.E.2d 605 (1983). Given the proposed regulation's presumption of constitutionality, a court may find that the proposed regulation is constitutional for the above stated reason.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General