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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 18, 1996

Kenneth D'Vant Long, Director
State Reorganization Commission
1105 Pendleton Street, Suite 228
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Mr. Long:

You have asked for an opinion concerning the following situation:

> [i]n the course of a Sunrise Review of Senate Bill 1415, which proposes to regulate "psychologist-masters," a question has arisen regarding the distinction between a "title" act and a "practice" act. As I understand the issue, a title act regulates the use of professional titles while a practice act regulates the practice of a profession.
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> According to the State Board of Examiners in Psychology, the current South Carolina psychological statute, Section 44-55-70, is interpreted as being a title act, merely restricting the use of certain titles by unlicensed persons. However, there appears to be a strong argument that the statute is a practice act or a quasi-practice act. The section states that "nothing in this section shall be construed as permitting such persons to offer their services to the public or to accept remuneration for psychological services rendered to persons or organizations ... unless they have been licensed under this chapter." S.C. Code Annotated § 40-55-70 (1995 Cum. Supp.). This statement arguably prohibits unlicensed

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Request Letter

persons from freely practicing psychology except under certain recognized exceptions. The Commission requests an Attorney General's opinion on the issue of whether Section 40-55-70 of the South Carolina Code is solely a title act.

Also, the Sunrise Review of Psychologist-Masters involves a constitutional issue, similar to the one in Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992). The issue relates to the various levels of protection granted to different types of speech, such as commercial speech. In regards to this issue, the Commission requests Attorney General's advice as to what language should or could be included in a statute in order for a statutory limitation on speech to pass constitutional muster. (emphasis added).

Law / Analysis

S.C. Code Ann. Sec. 40-55-20 establishes the State Board of Examiners in Psychology. Section 40-55-50 defines the practice of psychology within the meaning of Chapter 55 as being when a person

(1) [h]olds himself out to be a psychologist or

(2) Renders to individuals or to the public for a fee, monetary or otherwise, any service involving the recognized principles, methods and procedures of the science and profession of psychology, such as: (a) assessment or measurement, through the use of psychological tests and interviews, of intelligence, aptitudes, skills, personality traits, behavior adjustment, attitudes and interests; (b) techniques of personality and behavior readjustment, such as group and individual psychotherapy remotivation and conditioning.

Specifically excluded from the psychological practice within the meaning of this chapter shall be all of the physical, chemical, and nonbehavioral aspects of Chapter 47 of Title 40. Nothing in this chapter shall prohibit or limit a licensed physician in the practice of his profession as provided by law.

Section 40-55-70 in pertinent part makes it unlawful

> ... for any person not licensed under this chapter to present himself or be presented to the public by any title incorporating the name "psychologist," "psychological," or "psychology," except that any psychological scientist employed by a recognized research laboratory, school, college, university, or governmental agency may represent himself by the academic or research title conferred by the administration of such firm, institution or agency; and except that a person may represent himself or have himself represented by a psychologist, providing he is a member of the American Psychological Association or of a regional association affiliated therewith or is eligible for such membership. Provided, nothing in this section shall be construed as permitting such persons to offer their services to the public or to accept remuneration for psychological services rendered to persons or organizations other than those firms, institutions or agencies from which they receive their salaries unless they have been licensed under this chapter. Provided, further, psychologists may receive fees for lectures presented outside their regular employment setting without being licensed. (emphasis added).

Several principles of statutory interpretation are relevant to your inquiry. First and foremost, in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. 304 S.C. 270, 403 S.E.2d 660 (1991). A construction of a statute by the agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986).

As you indicate, there is a marked difference between so-called "practice acts" and "title acts" in occupational licensing. One commentator has described the distinction this way:

> [p]ractice acts, the most restrictive form of licensing, statutorily grant authority to specified persons to engage in defined tasks set forth the in scope of practice provisions. This authority is granted only to persons who meet specifically defined qualifications, such as graduation from an approved institution and passing grades on an entry examination. Persons without licenses are prohibited from engaging in the specified tasks. These entry-to-practice requirements are not based solely on competence, but also include criteria such as age. A board composed entirely, or almost entirely of members of the regulated occupation, generally has the authority to enforce the statute. In addition, authorized persons are permitted to use particular occupational titles and persons not authorized are prohibited from doing so .... In some cases, the term "licensing" is used in a more restricted sense to refer to regulations of this kind.
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> ... Title acts permit more competition than practice acts because they do not restrict authority to particular tasks. Instead of restricting the practice of the occupation by persons without licenses, these acts restrict the use of occupational titles. Self regulating boards determine the qualifications necessary to use an occupational title and determine which individuals meet those qualifications. Entry examinations are often used to establish initial competency .... This form of regulation, also referred to as "certification," is illustrated by the Kansas Physical Therapy Act which provides for the certification of physical therapy assistants .... Under this act, individuals who meet the applicable age, education, and examination requirements "shall be known and designated as physical therapist assistant[s], and may designate or describe [themselves] as [...] physical therapist assistant[s], P.T.A., C.P.T.A. or P.T.Asst."

Bartra, "Reconsidering the Regulation of Health Professionals In Kansas," 5-SPG Kan. J. L. & Pub. Pol'y. 155 (Spring 1996).

In Op. Atty. Gen., Op. No. 93-72 (November 2, 1993), this Office examined the Psychologist Licensure statutes. There, we responded to the question whether the practice of psychology is regulated in South Carolina. Our response was as follows:

> [t]he laws concerning the State Board of Examiners in Psychology do not regulate the practice of psychology except as those statutes impose certain requirements upon licensed psychologists. Pursuant to § 40-55-60 (Supp. 1992), the Board has adopted a Code of Ethics which must be followed by licensed psychologists. 26 S.C. Code Ann. Regs. 100-4 (Supp. 1992). In addition, Reg. 100-6 provides guidelines for the practice of certain specialties in psychology which "are not meant to limit the ability of the licensed psychologist to provide services for which, through training, he/she has developed demonstrable special competencies and skills." In addition to these provisions, the Board may revoke, suspend or otherwise restrict the license of a psychologist or reprimand him or her for acts of misconduct including such matters as fraud, incompetence and violations of ethical rules. § 40-55-150.
>
> Although these laws define the practice of psychology and provide for the rendering of psychological services by unlicensed psychologically trained individuals ... (§ 40-55-70 and Reg. 100-8), they do not prohibit or regulate the practice of psychology by unlicensed persons except to the extent that they hold themselves out as psychologists under § 40-55-70. This statute prohibits unlicensed persons from using titles incorporating the name "psychologist" and related terms except as otherwise provided in that law for such matters as academic or research titles. (emphasis added).

I agree with the foregoing analysis contained in Op. No. 93-72 and I believe it answers your questions. While the statute defines the practice of psychology, it does not purport to prohibit such practice, except where individuals "hold themselves out as psychologists under § 40-55-70." Supra. I believe the proviso referred to by you and contained in § 40-55-70, is limited by the phrase "such persons". Thus, the statute provides, in essence, that nothing in Section 40-55-70 permits those who are excepted from the proscription against holding themselves out as a psychologist (academic and research titles) to "offer their services to the public or to accept remuneration for psychological services rendered to persons or organizations ...." Accordingly, following Op. No. 93-72, it is my opinion that the Act in question is a "title act."

You note also that this is the interpretation of the Board of Examiners in Psychology. As referenced above, such interpretation by the agency charged with the administration of the Act may not be overturned in the absence of a compelling reason. Here, I believe that the interpretation contained in Op. No. 93-72 is supportive of this agency interpretation. Accordingly, it is my opinion that, based upon the foregoing, § 40-55-10 et seq. is a title act.

You have also raised the question of the First Amendment implications of Section 40-55-70. You reference the case of Abramson v. Gonzalez, supra in this regard.

Abramson involved a constitutional challenge to Florida's statutory regulation of the practice of psychology. The state's Psychological Services Act was described by the Court as follows:

> [n]o laws in Florida prevent anyone from practicing psychology or one of the allied fields, but a person not licensed under either Chapter 490 or 491 is prohibited from holding himself or herself out by any title or description incorporating [certain enumerated words] .... In addition, the Act also prohibits anyone not licensed under Chapters 490 or 491 from describing any test or report that he or she may provide as psychological ... . The law does provide exemptions from the licensing requirements for students, employees of some schools and government agencies, and the clergy.

The Court recognized that "[c]ommercial speech now holds something of an intermediate position in first amendment jurisprudence. It is entitled to more protection than some types of speech such as libel or obscenity, but not as much as traditional expressive or political speech." 949 F.2d at 1575. Accordingly, said the Court,

> [a]s long as commercial speech describes lawful activity and is truthful and not fraudulent or misleading, it is entitled to the protections of the first amendment. To regulate or ban commercial speech, the government must (1) have a substantial governmental interest, (2) which is directly advanced by the restriction, and (3) must demonstrate that there is a reasonable fit between the legislature's ends and the narrowly tailored means chosen to accomplish those ends.

Florida had recently enacted a provision which made the practice of psychology without a valid license illegal, but until such provision took effect, "no statutory limits upon the practice of psychology or the allied fields exist in Florida ... ." In essence, then, "[u]nlicensed persons evidently can practice psychology in Florida as long as they do not say they are doing so." Id.

Therefore, held the Court, the First Amendment was contravened by the Florida law. The Eleventh Circuit Court of Appeals reasoned:

> [w]e hold that as long as Florida has not restricted the practice of psychology, the state may not prevent the plaintiffs from calling themselves psychologists in their commercial speech. If they are allowed to practice psychology, as they apparently are until October 1, 1995, when the law changes, they must be allowed to say truthful things about their work. As long as the plaintiffs do not hold themselves out as licensed professionals, they are not saying anything untruthful, for they are in fact psychologists and are permitted to practice that profession under current state law.
>
> The Supreme Court recently considered a similar case involving professional advertising and the first amendment. In Peel v. Attorney Registration and Disciplinary Comm. of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), the State of Illinois challenged an attorney's advertising practice of listing himself as a "Certified Civil Trial Specialist" on his letterhead after he received certification of his trial skills from the National Board of Trial Advocacy (NBTA), a private organization. Illinois only recognized as "specialists" those attorneys with active patent, trademark or admiralty practices. A majority of the justices agreed that although a state may prohibit misleading advertising entirely, it may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive. ... A majority of the justices rejected the "paternalistic assumption" that the "public would automatically mistake a claim of specialization for a claim of formal recognition by the State." ... While a majority of the justices found that particular advertising at issue in Peel was potentially misleading, five of

> the nine justices held that in general, the possibility that truthful advertising would be misleading to the public is insufficient to justify a categorical ban on all such speech.

Id. at 1576.

Applying the Supreme Court's rationale in Peel,[1] the Eleventh Circuit found the commercial speech prohibited by the Florida statute to be only "potentially" misleading, but not "inherently" so. Said the Court,

> [t]he plaintiffs clearly would enjoy no right falsely to hold themselves out as "licensed psychologists." But under the laws of Florida, they may practice psychology without licenses, and truthful advertising which conveys this message would be neither false nor inherently misleading. As they argue in their own brief before this court, plaintiffs ask not for the right to call themselves "licensed psychologists," but only for the right to call themselves psychologists.

Id.

The Eleventh Circuit made it quite clear, however, that the State was not without a variety of options to regulate false or misleading advertising as opposed to an outright ban on commercial speech which was only potentially misleading. Of course, the most obvious option was what Florida had already done -- to put into place a practice law which made it unlawful to practice psychology without a license; the problem, however, in the case before the court was that such laws had not yet taken effect. Moreover, referencing previous Supreme Court decisions such as Peel and Bates v. Arizona, 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977), the Court noted that the Court had previously "described various regulatory safeguards which the state may impose in place of the total ban on commercial speech now in effect." In Peel, the Court stated that "a State might consider ... requiring a disclaimer about ... the standards of a specialty." Bates had concluded that states would require "some limited supplementation, by way of warning or disclaimer or the like ... so as to assure that the consumer is not misled."

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[1] Peel was recently reaffirmed by the Court in Ibanez v. Fla. Dept. of Bus. and Professional Regulation, 512 U.S. 136, 129 L.E.2d 118, 62 USLW 4503 (1994).

Abramson also referenced the Sixth Circuit case of Parker v. Commonwealth of Ky., 818 F.2d 504 (6th Cir. 1987) where the Court had struck down a Kentucky statute which forbade general dentists from holding themselves out as specialists when they were allowed to perform special services in orthodontics, oral surgery, periodontics and other specialties. While Parker had held that the State's total ban upon the use of the specialty designation was constitutionally defective, the Court in Parker had, however, emphasized that the State need not allow potentially misleading information to go unregulated. The Court in Abramson noted that

> [i]n Parker the court said a general dentist's advertising could avoid the potential for misleading the public by indicating that while he specialized in orthodontics, he did not hold an orthodontia specialty license. "A disclaimer to such an effect would adequately address the state's concern." Parker, 818 F.2d at 510. Just as Parker noted that there were separate telephone listings for "Dentists" and "Dentists-Orthodontists," there could be separate listings in Florida for "Psychologists" and "Psychologists-Licensed." As the Supreme Court said in Peel, we must assume that the public can distinguish between a university degree on the wall and a license issued by the state.

949 F.2d at 1578.[2]

Of course, it bears repetition that any Act of the General Assembly must be presumed valid and constitutional. No statute will be deemed to infringe the Constitution unless its constitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). Every doubt regarding the constitutionality of an Act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than

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[2] The Tennessee Attorney General has reached the same conclusion in Tenn. Op. Atty. Gen. No. 95-004 (January 19, 1995) with respect to use of the term "interior designer". Noting that the Tennessee statute in question permitted anyone to perform interior design services, the Tennessee Attorney General ruled that the state could not ban the use of such title by arguing that it was likely to deceive. Said the Attorney General, "[a]s long as the person does not say he or she is a registered interior designer, the speech is not deceptive or inherently misleading."

anything else, only a court, and not this Office, may declare an Act to be void for unconstitutionality.

While I must presume that Section 40-55-70 is constitutionally valid, I must also advise that the foregoing cases indicate that the state has a "heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." Peel, supra. Such burden would be to show that the use of the terms specified therein by an unlicensed psychologist who is not entitled to the exemptions contained in the statute, is inherently misleading or deceptive. Such an attempt was not successful in Abramson, nor has it been in any other recent case of which I am aware. The courts which have reviewed the issue have found, in other words, the statute in question to be unconstitutional.

Specifically, you have asked "what language should or could be included in a statute in order for a statutory limitation on speech to pass constitutional muster." My reading of the present case law suggests the following options could be undertaken legislatively with a reasonable likelihood that the statute would be deemed constitutional.

1. Make the Act into a "practice act" rather than a "title act" -- in other words, make the practice of psychology without a license unlawful.

2. Legislation which required separate listings for "Psychologists" and "Psychologists-Licensed" such as is suggested in Abramson.

3. Legislation requiring a disclaimer by unlicensed practitioners that the individual is not licensed. Such as is at least suggested by Bates.

Of course, none of these general proposals can be a guarantee of what a court might say, if faced with a specific fact situation. Nor is the list intended to be exclusive. However, current case law does indicate that such requirements as are listed above would be most probably constitutional. In advising you as to what is or is not constitutional, this Office would not typically propose specific statutory language or a particular legislative change in a statute. Such is a policy matter for the General Assembly to determine. Nevertheless, the courts have strongly indicated in previous decisions that the three options listed above would be constitutional.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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