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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 31, 1997

The Honorable Joe Wilson
Senator, District No. 23
Box 5709
West Columbia, South Carolina 29171

Re: Informal Opinion

Dear Senator Wilson:

You have submitted a letter from Gale Bell of the South Carolina Association of Public Accountants regarding the S.C. Accountancy Law. Such letter seeks an opinion clarifying S.C. Code Ann. Sec. [40-2-50(C)] of the Accountancy statute. It states as follows:

> I am Licensed under Article 3 of the S.C. Accountancy Law as an Accounting Practitioner and under this Article, I am allowed to perform accounting services to include preparation of financial statements without any restrictive wording, yet, under Paragraph [40-2-50(C)], I am required to add "by law", I am prohibited from expressing an opinion or any other form of assurance on them.
>
> I am confused by the language of [40-2-50(C)] and don't feel Accounting Practitioners should be included in this paragraph because it deals with unlicensed practice.

Law / Analysis

S.C. Code Ann. Sec. 40-2-50(C) is part of the Act regulating certified public accountants and public accountants. Subsection -50 prohibits certain acts by persons not

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registered or licensed pursuant to Article I, Chapter 2 of Title 40. Such Subsection states as follows:

> [n]o person, partnership, or professional association not registered or licensed under this article may permit his or its name to be associated with statements purporting to show financial position or results of operations in regard to a person or organization in a manner as to imply that he has, or it is composed of, persons having expert knowledge in accounting or auditing, or in a manner as to state or imply that he or it is licensed under Article 3 unless he or it declaims an opinion on the statements and in connection with the statements indicates clearly that the statements were not audited by him or it and that he or it is prohibited by law from expressing an opinion on the statements. This subsection does not require an officer, employee, partner, or principal of an organization affixing his signature to a statement or report in reference to the financial affairs of the organization with wording designating the position, title, or office which holds the organization to state a disclaimer, and this subsection does not apply to an act of a public official or public employee in the performance of his duties.

In an opinion of this Office, dated August 2, 1984, we addressed the question of the applicability of § 40-1-50(C) [now, § 40-2-50(C)] to Accounting Practitioners as well as the First Amendment implications thereof. We first reviewed the Practice of Accounting Act and concluded that the requirements of § 40-1-50(C) were applicable to Accounting Practitioners:

> [i]n South Carolina there are three types of accountants: Certified Public Accountants (C.P.A.'s), Public Accountants (P.A.'s), and Accounting Practitioners (A.P.'s). The P.A. classification is not relevant to the present question.
>
> C.P.A.'s are regulated under Article 1 of the South Carolina Accountancy Law (§§ 40-1-10 through 40-1-380). Before a person can be licensed as a C.P.A., he must, among other requirements, have a certain amount of experience in both accounting and auditing, and he must pass examinations

> on both accounting and auditing. A C.P.A. is then licensed to perform both functions -- accounting and auditing.
>
> An A.P. is regulated under Article 3 (§§ 40-1-510 through 40-1-600). He is not required to have any experience in auditing, nor is he tested on auditing. Thus, while an A.P. may perform accounting functions, such as compiling a financial statement, he is not licensed to perform an audit. Since he cannot audit a financial statement, he cannot express an opinion as to one. The ability to express an opinion is known as the 'attest function,' and is the principal distinction between a C.P.A. and an A.P.

The Opinion then went on to conclude that § 40-1-50(C) [now, § 40-2-50(C)] is constitutionally valid as applied to an A.P. and is not in violation of the First Amendment. The reasoning of the Opinion in this regard was as follows:

> [a]lthough commercial speech is protected under the First Amendment, it is entitled to less protection than political speech. The United States Supreme Court is reluctant to sustain First Amendment challenges to economic legislation that serves legitimate regulatory interests. The safeguards extended to political speech do not automatically extend to commercial speech. Restrictions on false, deceptive, and misleading commercial speech are constitutionally permissible. Friedman v. Rogers, 440 U.S. 1 (1979).
>
> While in Bates v. Arizona, 433 U.S. 350 (1977), the United States Supreme Court recognized that advertising by attorneys is a form of commercial speech protected by the First Amendment, the Court nevertheless emphasized that such advertising by attorneys could be regulated. The Court particularly noted that false or deceptive advertising was subject to restraint. Furthermore, in examining the types of advertising permitted, the Court recognized that a warning or disclaimer may be required so as to dissipate the possibility of consumer confusion or deception. See also: In the Matter of R.M.J., 455 U.S. 191 (1982).

> Section 40-1-50(C) [now, § 40-2-50(C)] appears to be generally analogous to the issue presented in Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466 (9th Cir. 1983). In California, Doctors of Medicine (M.D.'s) and Doctors of Osteopathy (D.O.'s) receive somewhat different training and are licensed by different boards. State law requires a D.O. to identify himself as such and forbids him from using the title M.D.
>
> Dr. Brandwein asserted the state regulatory scheme violates the First Amendment by forcing him to identify as a D.O. even though his philosophy of medicine is more like that of an M.D. The court upheld the regulatory scheme, stating that Dr. Brandwein's First Amendment rights are not violated by the state's refusal to allow him to hold himself out to the public under a degree which he has not earned. See also McEluh v. Wysong, 680 F.2d 1062 (5th Cir. 1982).
>
> The public practice of accountancy is a highly skilled and technical profession. A state may regulate the profession in order to protect the public against fraud, deception, and lack of ability. [citation omitted] ... Section 40-1-50(C) [now § 40-2-50(C)], which requires a non-C.P.A. who publishes a financial statement to indicate on the statement that he has not audited it and is not licensed to express an opinion on it, would seem to be a proper exercise of the State's police power to eliminate public confusion. Any effect on freedom of speech would seem to be minor in relation to the State's legitimate interest in insuring that non-C.P.A.'s do not conduct audits, and that the public is not falsely led to believe that a non-C.P.A. may conduct an audit. ...

Thus, the 1984 opinion construed § 40-1-50(C) as applicable to A.P.'s and constitutionally valid. Such 1984 Opinion has not been modified or overruled and thus remains the Opinion of this Office.

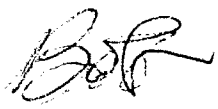
Other case law supports the conclusion of the 1984 Opinion. For example, in Accountants' Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988), the Fourth Circuit Court of Appeals held that a state law restriction upon the use of the title "public accountant" or its abbreviation "PA" by noncertified public accountants was a valid

regulation of commercial speech to prevent the public from being misled. There, the Court noted that "[t]he state has an interest in assuring the public that only persons who have demonstrated their qualifications as certified public accountants and received a license can hold themselves out as certified public accountants." See also, Op. Atty. Gen. October 28, 1997 (cases cited therein re inherently or potentially misleading commercial speech). Accordingly, the 1984 Opinion, referenced above, which concludes that § 40-2-50(C) is applicable to Accounting Practitioners and is constitutionally valid, remains the Opinion of this Office.

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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