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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 28, 1997

Charles F. Reid, Chief of Staff and Counsel to Speaker
Office of the Speaker
South Carolina House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Mr. Reid:

You have asked for an opinion on behalf of Speaker Pro Tempore Terry Haskins, enclosing a letter from Dr. Patricia L. Pruitt. The letter of Dr. Pruitt references House Bill 3820, the proposed Psychology Practice Act. Therein, Section 40-55-90 is amended "to address exemptions from the psychology practice act." Dr. Pruitt's letter further states in this regard that

> [i]n this section, it says that there is an exemption for (1) a licensed member of another profession who is regulated by the Department of Labor, Licensing and Regulation and who is rendering services of a psychological nature, if the person: ... (c) does not represent himself to be a psychologist or his services to be psychological. The chairman of the Psychology Licensing Board has indicated that the above sentence would be used to prevent individuals who become Licensed Professional Counselors from revealing to the public that they are also State Certified School Psychologists. Wouldn't such a provision be a violation of first amendment rights? And, wouldn't it be in conflict with State Department of Education

Request Letter

regulations that require an individual; doing evaluations for special education placement be a certified school psychologist?

Law / Analysis

Our Supreme Court in Kale v. S.C. Dept. of Health and Environmental Control, 301 S.C. 277, 391 S.E.2d 573 (1990) has summarized the First Amendment protections of commercial speech as determined by the United States Supreme Court in the following way:

> [c]ommercial speech enjoys a limited measure of protection commensurate with its subordinate position in the scale of first amendment values. Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). While the first amendment affords such speech limited protection, the State does not lose its power to regulate commercial activity deemed harmful to the public merely because speech is a component of that activity. Id. Restrictions on false, deceptive or misleading commercial speech are permissible. Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). The United States Supreme Court has recently held that the first amendment does not require the State to employ the least restrictive means in regulating commercial speech. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The regulation must merely be "narrowly tailored to achieve the desired objective." Id. at ____,109 S.Ct. at 3035, 106 L.Ed.2d at 404.

Based upon the foregoing analysis, the Court upheld as valid under the First Amendment regulations prohibiting chiropractors from referring to their facilities as chiropractic "hospitals." On the other hand, the Court held that the chiropractor could validly refer to his facility as a "chiropractic inpatient facility." Thus, the Court concluded that the "restriction on commercial speech ... is a narrowly tailored one and we hold it does not violate the first amendment." Therefore, the Court concluded that the Regulation in question neither contravened the First Amendment nor the Equal Protection Clause. The Court summarized its reasoning as follows:

> ... (1) the classification of chiropractors is reasonably related to the legislative purpose that the public not be deceived in its expectation that a "hospital" is staffed by medical doctors

> licensed to perform surgery and prescribe drugs because chiropractors are not licensed medical doctors; (2) chiropractors are treated equally to all other health care providers who are not trained as medical doctors because none can maintain a facility called a "hospital"; and (3) the classification rests on a reasonable basis because chiropractors are public health care providers.

391 S.E.2d at 515.

Shortly after Kale was decided, the United States Supreme Court issued its opinion in Peel v. Atty. Registration and Disciplinary Commission of Illinois, 496 U.S. 91, 110 S.Ct. 2281 (1990). In Peel, petitioner was licensed to practice law in Illinois. He was censured for using a professional letterhead containing a title indicating his certification as a trial specialist by the National Board of Trial Advocacy (NBTA).

The United States Supreme Court framed the issue as "whether a lawyer has a constitutional right, under standards applicable to commercial speech, to advertise his or her certification as a trial specialist by NBTA." In a plurality opinion, the Court summarized its First Amendment analysis as follows:

> [t]he facts stated on petitioner's letterhead are true and verifiable. It is undisputed that NBTA has certified petitioner as a civil trial specialist and that three States have licensed him to practice law. There is no contention that any potential client or person was actually misled or deceived by petitioner's stationery. Neither the Commission nor the State Supreme Court made any factual finding of actual deception or misunderstanding, but rather concluded, as a matter of law, that petitioner's claims of being "certified" as a "specialist" were necessarily misleading absent an official state certification program. Notably, although petitioner was originally charged with a violation of Disciplinary Rule 2-101(b), which aims at misleading statements by an attorney, his letterhead was not found to violate this rule .... A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. ... we must assume that some consumers will infer from petitioner's statement that his qualifications in the area of civil trial advocacy exceed the general qualifications for admission to a state bar. Thus if the certification had been issued by an organization that had made no inquiry into

> petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading. In this case, there is no evidence that a claim of NBTA certification suggests any greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements. Much like a trademark, the strength of a certification is measured by the quality of the organization for which it stands. ... We find NBTA standards objectively clear, and, in any event, do not see why the degree of uncertainty identified by the State Supreme Court would make the letterhead inherently misleading to a consumer.

496 U.S. at 100.

In another decision of the United States Supreme Court, Ibanez v. Fla. Dept. of Bus. and Prof. Reg., Bd. of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994), Ibanez referred to the credentials "CPA" and "Certified Financial Planner" (CFP) in her advertising and other communication with the public. She was authorized to use the designation "Certified Financial Planner" by the Certified Financial Planner Board of Standards, a private organization. For the use of these terms, she was reprimanded by the Florida Board of Accountancy for "false, deceptive and misleading" advertising.

The United States Supreme Court, in another plurality opinion, concluded that the Board had "not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." Thus, in the Court's opinion, the Board's reprimand decision "is incompatible with First Amendment restraints on official action."

The Court, in elaborating upon Ibanez' use of the CFP designation, added the following analysis:

> [t]he Board concluded that the words used in the designation, particularly, the word "certified" -- so closely resemble "the terms protected by state licensure itself, that their use, when not approved by the Board, inherently mislead[s] the public into believing that state approval and recognition exists." Final Order, App. 193-194. This conclusion is difficult to maintain in light of Peel. We held in Peel that an attorney's use of the designation "Certified Civil Trial Specialist By the National Board of Trial Advocacy" was neither actually nor

> inherently misleading. See Peel, 496 U.S., at 106, 110 S.Ct. at 2290 (rejecting contention that use of NBTA certification on attorney's letterhead was "actually misleading"); id., at 110, 110 S.C. at 2292-2293 ("State may not ... completely ban statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA"); id., at 111, 110 S.Ct. at 2293 (Marshall, J., joined by Brennan, J., concurring in judgment) (agreeing that attorney's letterhead was "neither actually nor inherently misleading"). The Board offers nothing to support a different conclusion with respect to the CFP designation. Given "the complete absence of any evidence of deception," id., at 106, 110 S.Ct. at 2290, the Board's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." Id., at 111, 110 S.Ct. at 2293.

The Court also rejected the argument that the use of the CPP designation was "potentially misleading." Its reasoning in this regard was that

> [t]he concurring Justices in Peel, on whom the Board relies, did indeed find the "[NBTA] Certified Civil Trial Specialist" statement on a lawyer's letterhead "potentially misleading," but they stated no categorical rule applicable to all specialty designations. Thus, they recognized that "[t]he potential for misunderstanding might be less if the NBTA were a commonly recognized organization and the public had a general understanding of its requirements." Peel, supra, 496 U.S., at 115, 110 S.Ct. at 2295. In this regard, we stress again the failure of the Board to back up its alleged concern that the designation CFP would mislead rather than inform.

512 U.S. at 145.

Other authorities have also addressed the First Amendment implications of the use of professional designations for commercial purposes. These cases have also analyzed the issue of whether or not the particular designation in question was inherently or potentially misleading. See, Miller v. Stuart, 117 F.3d 1376 (11th Cir. 1997); Acct's Soc. v. Bowman, 860 F.2d 602 (4th Cir. 1988); Parker v. Commonwealth, 818 F.2d 504 (6th Cir. 1987); Tsatos v. Zollar, 943 F.Supp. 945 (N.D. Ill. East. Div. 1996); Gandee v. Glaser, 785 F.Supp. 684 (S.D. Ohio E.D. 1992); Carberry v. St. Bd. of Accountancy, 33 Cal.

Reptr.2d 788 (1994); Douglas v. State, 921 S.W.2d 180 (Tenn. 1996); Steelman v. Oklahoma State Bd. of Med. Licensure, 824 P.2d 1142 (Okl. Ct. App. 1992).

In Miller, the 11th Circuit upheld the District Court's finding that the State of Florida "failed to produce any empirical evidence showing consumers will be misled in the manner the State suggests." The Court recognized that to justify its restrictions on commercial speech, the state must show either that the speech concerns unlawful activity or is misleading, that the state has a substantial interest in proscribing the speech, that the regulation advances an asserted state interest in a direct and material way, and that the extent of the restriction is in reasonable proportion to the interest served. In essence, according to the Court, "[t]he State of Florida relied solely on 'speculation and conjecture' to support its assertion that Miller's holding out while performing accounting and tax services would mislead the public into believing that he is providing regulated public accounting services."

In Tsatos, the Court declared that a limitation of advertising by podiatric physicians to only board certification approved by the Council on Podiatric Medical Evaluation (CPME) was a violation of the First Amendment. The podiatrist truthfully and accurately advertised on his letterhead his certification by a board other than the one approved by the CPME. Again, the Court pointed to the sparsity of the factual record verifying that the letterhead was misleading. Said the Court,

> [t]he State of the record in this case is such that the question as to whether the subject advertising is actually or potentially misleading is found to be purposely conceded by defendant in favor of plaintiffs. Thus, since defendant is seen as failing totally to carry her burden under the "Peel" two-prong test to sustain the state's restrictions placed upon commercial speech, judgment must be rendered for plaintiffs once they establish that the certification was issued by a bona fide Board.

Applying the test recognized in Ibanez and Peel, the Court concluded that

> the record in this case established a complete absence of any triable fact tending to show that plaintiff Board "made no inquiry into ... fitness or had issued certificates indiscriminately for a price."

943 F.Supp. at 950.

Likewise, Parker rejected the argument that the state could prevent dentists "from using particular terminology unless they are licensed as a specialist in the branch of dentistry associated with such terminology." The Court noted that

> [i]t is argued that such words as "orthodontics," "brackets," and "braces" are either inherently or potentially misleading in that the general public will believe that such a dentist is a "specialist" in the area of orthodontics. We cannot agree that such terms are inherently misleading. Such terms are not false, but actually describe procedures which a general practicing dentist is permitted to perform under state law. If a state permits a dentist to perform orthodontic procedures, we do not believe a state can justify an outright ban on the use of particular terms on the theory that such terms inherently mislead the public. To the contrary, by suppressing such speech, the public will possibly be misled into believing that only orthodontists can perform orthodontic procedures. Since this information is truthful and relates to a lawful activity, it is entitled to First Amendment protection. In re R.M.J., 455 at 203, 102 S.Ct. at 937.

818 F.2d at 509.

On the other hand, there are cases which have found advertising to be inherently or potentially misleading and thus not entitled to First Amendment protection. In Carberry, for example, the Court concluded that the Board of Accountancy could validly prohibit the title "Citizens Accounting and Tax Service, accompanied by the individual's name and designation "EA" (meaning "enrolled agent") because such did not serve to clearly signify that the person was not a CPA. The Court held that

> [t]he disclaimer needed to permit the use of the term 'accounting' by an unlicensed person is one that serves to "dispel any possibility of confusion." ... The mere insertion of the designation "EA" does not adequately eliminate potential confusion from the term "accounting." It does not alert the consuming public that the advertiser is not a licensed accountant.

Moreover, the Fourth Circuit has upheld the State's prohibition against non-CPA's using titles such as "certified public accountant, CPA, public accountant, PA, certified accountant, CA, chartered accountant, licensed accountant, LA, registered accountant, RA,

independent auditor or auditor." In Accountant's Society of Virginia v. Bowman, supra, the Court summarized its conclusion thusly:

> [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. The Supreme Court has held that "advertising for professional services" may be prohibited "when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse." RMJ, 455 U.S. at 203, 102 S.Ct. at 937. We believe that use of the title "public accountant" by a non-CPA fairly could be characterized as inherently misleading, given the possibility, accurately stated by the district court, that "some members of the public would believe the title ... has the state's imprimatur.

In Steelman, the Oklahoma State Board of Medical Licensure and Supervision's decision to deny permission to a doctor to hold himself out as board certified by the American Board of Bariatric Medicine was upheld by the Court. The Court quoted the United States Supreme Court's decision in Peel which had recognized that

> "[a] lawyers truthful statement that 'xyz board' has 'certified' him as a 'specialist in admiralty law' would not necessarily be entitled to First Amendment protection if the certification is a sham. States can require an attorney who advertises 'xyz certification' to demonstrate that such certification is available to all lawyers who meet objective and consistently applied standards relevant to practice in a particular area of law. There has been no showing -- indeed no suggestion -- that the burden of distinguishing between certifying boards that are bona fide and those that are bogus would be significant or that bar associations and official disciplinary committees cannot police deceptive practices effectively." 496 U.S. at ____, 110 S.Ct. at 2292, 110 L.Ed.[2d] at 100.

Finally, the case of Gandee v. Glaser, 785 F.Supp. 684 (S.D. Ohio, E.D. 1992) is especially instructive. In Gandee, the Court held that the State could preclude licensed hearing aid fitters and dealers from using certain professional titles or descriptions unless they were licensed audiologists because such term was inherently misleading. The

particular term in question was "certified hearing aid audiologist." Such term was properly prohibited, according to the court, because

> ... the Court does agree ... that the use of the term "certified hearing aid audiologist" by a hearing aid fitter or dealer who is not licensed by the State of Ohio as an audiologist is inherently misleading. The most obvious deception is that which was pointed out by the Trademark Trial and Appeal Board: the significant disparity in educational levels between licensed audiologists and licensed hearing aid fitters and dealers. In Ohio, there are no educational requirements whatsoever for becoming a licensed hearing aid dealer. In Ohio, there are no educational requirements whosoever for becoming a licensed hearing aid dealer. The only requirements are that one be at least 18 years old, of good moral character, free of contagious or infectious diseases, and that one pass an examination specified and administered by the hearing aid dealers and fitters licensing board. ... The requirements for licensure as an audiologist, on the other hand, are quite rigorous. (emphasis added).

785 F.Supp. at 689.

Of course, if the proposed Bill which you reference is enacted, this Office must presume that it is constitutionally valid. 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 Co., 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 anything else, only a court, and not this Office, may declare an Act to be void for unconstitutionality.

Still, as the United States Supreme Court emphasized in Peel, the state has a "heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." As we recognized in an Informal Opinion dated October 18, 1996, regarding this same subject matter, the State must, in order to justify a blanket prohibition upon commercial speech, show by factual evidence that the speech in question is misleading or deceptive. Thus, the issue here is whether the State can demonstrate that the Board's prohibition upon school psychologists using the term "State certified school psychologists" is misleading.

The question of whether or not a particular prohibition upon commercial speech is inherently or potentially misleading is primarily one of fact. Many of the cases which have found such bans to be violative of the First Amendment have focused largely upon the lack of a factual record demonstrating that prohibition is misleading. Of course, this Office cannot make factual findings in an Attorney General's opinion. Op. Atty. Gen., December 12, 1983.

Recognizing that the issue of whether a particular designation is misleading is largely factual, it is my opinion, based upon the foregoing authorities, that a school psychologist who is certified by the South Carolina Department of Education would have a First Amendment right to convey truthfully and accurately, the fact of such certification to the public. Section 40-55-90(6) as proposed specifically states that a person certified as a school psychologist by the South Carolina Department of Education who provides contract services of a psychological nature to the public schools is exempt from the Psychology Practice Act, but that this "person may not describe himself or his services by any title or description which states or implies that the person holds a license as otherwise required by this chapter ... ." Moreover, it is clear from Peel and Ibanez, as well as the other cases referenced, that where the commercial activity is not otherwise illegal and where it is truthful and accurate, it is constitutionally protected by the First Amendment. See also, Abramson v. Gonzalez, 949 F.2d 1567 (11th Cir. 1992) [proscribing use of certain terms related to psychology violate First Amendment]; 66 Md. Op. Atty. Gen. 93 (July 7, 1981) [prohibition against certain recognized professions using certain terms to describe psychological services performed is unconstitutional].

The principal issue in this regard is how such title might be conveyed to the public without being inherently or potentially misleading. If the Psychology Board proscribes the designation "State Certified School Psychologists" or "Certified School Psychologists", it will have to demonstrate in court with a factual record that such titles are inherently or potentially misleading in order to overcome First Amendment protection. While it could be argued that the foregoing designations might be confused with licensure by the Board as psychologists, the burden will clearly be on the Board to demonstrate such. One alternative might be for school psychologists to use the title "school psychologist certified by the South Carolina Department of Education." It would appear to me, at least, that this title would accurately convey exactly what agency has certified the school psychologist much in the same way as certification was exactly specified in the Peel and Ibanez cases. There could thus be no mistake by the public that "state certification" had been made by the Psychology Examiners Board rather than by the State Department of Education.

Again, I must emphasize that the question of whether a particular title or designation is misleading and thus its use not protected by the First Amendment is largely factual. Moreover, this Office must defer to the constitutionality of any Act of the

General Assembly as well as to the interpretation thereof by the agency charged with its enforcement -- in this case the Board of Psychology Examiners. Ultimately, the issue of whether use of a particular designation is constitutionally protected will have to be decided in the courts. However, based upon the foregoing case authorities, it is my opinion that a court would conclude that the use of the title "school psychologist certified by the South Carolina Department of Education" is accurate, truthful and constitutionally protected.

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

RDC/an