



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 18, 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 written on behalf of Speaker Pro Tempore, Terry Haskins, to request an expedited Opinion of this Office. You note that Representative Haskins is sponsoring, in some form, draft legislation which you have enclosed. Such legislation is entitled "A Bill to Amend Title 40, Code of Laws of South Carolina, 1976 Relating to Professions and Occupations, By Amending Chapter 75 So As To Provide For The Licensure and Regulation of Specialists In School Psychology." You have also attached a letter from Ms. Patricia Pruitt, President-Elect of the South Carolina Association of School Psychologists. Ms. Pruitt's letter poses the question of whether current South Carolina law prohibits "the use of the words 'psychology' or 'psychological' in a title?" Your letter, as well as Ms. Pruitt's, notes that there is a controversy over the use of the professional title of "Licensed Specialists in School Psychology." Your letter indicates that the "Board of Examiners in Psychology opposes any professional title which uses the words "psychology" or "psychological." You state that "Rep. Haskins would like an Attorney General's Opinion concerning the legality of using the words 'psychology' or 'psychological' in the professional title of 'Licensed Specialist in School Psychology.'"

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 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 prohibits the use of certain titles by a person who is not licensed to practice psychology. Such provision states that it is 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 as 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.

Visiting lecturers from other states may also employ their academic or research titles or the designation "psychologist" providing that they are members of or eligible for membership in professional associations as stated in this section. Students of psychology, psychology interns and other persons preparing for the profession of psychologist in recognized training institutions or facilities may be designated by titles such as "psychological trainee," "psychological intern," and other terms clearly indicating their training status. Psychologically trained individuals who do not meet requirements for licensing as provided in s 40-55-80 are permitted to render psychological services when under the direct supervision of a licensed psychologist who assumes professional responsibility for the competence of services rendered and who keeps the Board informed of the nature and extent of such services under his supervision.

Section 40-55-90 also enumerates a number of exceptions to the Act. Such Section provides that

[n]othing in this chapter shall be construed: (a) To prevent qualified members of other professional groups, such as physicians, clergymen, lawyers, and social workers, from doing work of a psychological nature consistent with their training and with the codes of ethics of their respective professions; (b) as restricting the use of the term "social psychologist" by any person (1) who has been graduated with a doctoral degree in sociology from an institution whose credits are accepted by the University of South Carolina and (2) who has passed comprehensive examinations in the field

of social psychology as part of the requirement for the doctoral degree or has had equivalent specialized training in social psychology and (3) who has filed with the Board a statement of the facts demonstrating his compliance with conditions (1) and (2); (c) to exclude or prevent psychologists certified by the South Carolina Department of Education from performing services in connection with schools as authorized by such certification; (d) to exclude or prevent school counselors, reading specialists and other educators certified by the South Carolina Department of Education from performing services of a psychological nature consistent with their competency and certification, or college student personnel counselors in accredited colleges and universities from performing services consistent with their competency and occupational roles in such institutions; and (e) to exclude or prevent any person certified by the Department of Education from providing psychological services on a contractual basis with any public or private school or any federal or state agency as authorized by such certification.

Several opinions of this Office have applied the foregoing provisions. For example, in an Opinion dated September 3, 1976, written by the Honorable Karen Henderson (now United States Court of Appeals Judge) construed Section 40-55-90 (c) [relating to persons certified by the South Carolina Department of Education], concluding that

[t]his language precludes the application of the provisions of Chapter 27.1 [now 55] of Title 56 [now 40] to those psychologists who are certified by the Department to provide school psychological services; it does not expressly limit such an excepted psychologist to one who is employed by the Department. That is, if a psychologist is certified by that Department to provide school psychological services and if his performance as a school psychologist conforms with his certification, then the fact that he is not employed by that Department does not, in my opinion, disqualify him from exemption from the other requirements of Chapter 27.1 of Title 56 [Chapter 55 of Title 40].

In another Opinion, again, written by the Honorable Karen Henderson, dated September 19, 1979, we addressed the application of the Psychology Practice statute to "certain

Mr. Reid
Page 5
September 18, 1997

practices of a pastoral counselor" We noted that Section 40-55-90 (a) did not prevent "qualified members of other professional groups, such as ... clergymen ... from doing work of a psychological nature consistent with their training and with the codes of ethics of their respective professions;" Thus, we concluded that a "pastoral counselor can continue to practice as such and, at the same time, display his degree in clinical psychotherapy in his office." Also, we referenced Section 40-55-70, and concluded that "[i]nasmuch as the term 'clerical psychotherapist' does not incorporate any of the names which the law does not permit unlicensed persons to use, a pastoral counselor who has a degree as a clinical psychotherapist may refer to himself as such." (emphasis added).

And in Op.No. 93-72 (Nov. 2, 1993), we concluded that Section 40-55-70 "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." Thus, on its face, Section 40-55-70 prohibits the use of the titles "psychologist," "psychological" or "psychology" except as otherwise permitted in Chapter 55 of Title 40.

There is case law which has pointed out the First Amendment implications of a statute such as Section 40-55-70. See, e.g. Abramson v. Gonzalez, 994 F.2d 1567 (11th Cir. 1992); Parker v. Commonwealth of Ky., 818 F.2d 504 (6th Cir. 1987). In Abramson, the Court noted that in Florida "[n]o laws ... 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]" Thus, the Abramson Court analyzed the First Amendment's impact upon Florida statutes as follows:

[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 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. (emphasis added).

Likewise, in Ibanez v. Fla. Dept. of Bus. and Profess. Regulation, Board of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994) the United States Supreme Court concluded that Florida's Accountancy Act, which was a "Title Act",

Mr. Reid
Page 6
September 18, 1997

(because with the exception of a prohibition upon attesting as an expert in accountancy, "activities performed by CPA's can lawfully be performed by non-CPA's") could not be constitutionally applied to discipline an attorney for "false, deceptive and misleading" advertising. The Court noted that the attorney "perform work reserved for lawyers but nothing that only CPA's may do ..." and that "the designation CFP is considered in all respects appropriate by the Florida Bar." Thus, the Court concluded that "[t]o approve the Board's reprimand of Ibanez would be to risk toleration of commercial speech restraints in the service of objectives that could not themselves justify a burden on commercial expression." 114 S.Ct. at 2091.

In an earlier Informal Opinion dated October 18, 1996, I concluded, based upon prior opinions of this Office, that the Psychology Practice Act is a "title act" because, there, the Act contains no express provisions making the practice of psychology unlawful. In part, I based this conclusion upon information that the State Board of Examiners in Psychology interpreted the Act as a "title act" merely restricting the use of certain titles by unlicensed persons. Since that Informal Opinion was written, however, the Office has been subsequently informed that "[t]he Board has interpreted and enforced its regulatory statute as restricting the practice of psychology, not merely the title 'psychologist.'" See, Letter of John A. Birgeron, Staff Counsel of S.C. Dept. of Labor, Licensing and Regulation, Feb. 4, 1997. Mr. Birgeron states that he has "examined complaint records from 1992 to the present and they demonstrate that the Board has been consistent in applying the reading of the Act to unlicensed persons." The Staff Counsel argues that "the Act contains numerous provisions which suggest that the practice of psychology is restricted to licensees, through individually - examined parts of the statutory language never say so in precise, explicit terms." He also points to a 1996 statutory provision, S.C. Code Ann. Sec. 40-1-30, which states that

[i]t is unlawful for a person to engage in a profession or occupation regulated by a Board or Commission administered by the Department of Labor, Licensing and Regulation without holding a valid authorization to practice as required by statute or regulation.

As I pointed out in the October 18, 1996 Informal Opinion, the 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). Admittedly, the Psychology Act is ambiguous. As Mr. Birgeron states, nowhere in the statute is there an express prohibition upon the "practice" of psychology without a license, although there are a number of implications to that effect. Moreover, § 40-1-30 does appear to prohibit the practice of

Mr. Reid
Page 7
September 18, 1997

any profession regulated by LLR without a license. I continue to be of the opinion that the Act is a "title act," and that the First Amendment cases referenced above may ultimately have a significant impact upon this licensing law as written but only a court can resolve these issues with finality.

Accordingly, notwithstanding any debate over whether the South Carolina act is a "practice" or a "title" act as I noted in the earlier Informal Opinion, the prohibition contained in § 40-55-70 must be presumed to be constitutional unless set aside by a court. As stated there, "[m]ore than anything else, only a court, and not this Office, may declare an Act to be void for unconstitutionality." This is particularly true in view of the fact that the Fourth Circuit Court of Appeals has held that the "similarity of the title 'public accountant' to 'certified public accountant' is self-evident." Accountant's Society of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988).

Conclusion

Under present law, which this Office must presume is constitutionally valid until a court rules otherwise, a person not licensed by the Board of Examiners in Psychology may not present himself or be presented to the public by any title incorporating the name "psychologist," "psychological," or "psychology" except as otherwise permitted by Chapter 55 of Title 40.¹ These exceptions are specified in the provisions of the Act, referenced above. See, Op. Atty. Gen., September 19, 1979. For example, under current law, a person may not use the term "school psychologist" or a related term "to offer ... 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

¹ Apparently, the substantive portions of the Psychology Examiners Act remain intact even after enactment of Act No. 453 of 1996. Again, the effect of § 40-1-30 (which is part of such Act, and provides that it is unlawful to engage in a profession or occupation regulated by a Board administered by LLR) upon whether the Psychology Licensure Act is a "title" act or "practice" act is, as stated above, not free from doubt. Generally, however, enactment of a later general statute does not repeal or impliedly modify or affect an earlier specific statute. Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors Division of Unidynamics, 319 S.C. 556, 462 S.E.2d 858 (1995). Moreover, while a statute designed to protect the general welfare is to be liberally construed to advance that purpose, such rule of construction does not justify a construction which would include conduct not clearly proscribed by the statute. Rush v. Dept. of Regulation, Bd. of Podiatry, 448 So.2d 26 (Fla. 1984).

Mr. Reid
Page 8
September 18, 1997

salaries unless they have been licensed" pursuant to Chapter 55 of Title 40. Conversely, § 40-55-70 does not purport to limit the representation of one's self through the use of an "academic or research title" conferred upon the individual by the administration of a recognized research laboratory, school, college, university or governmental agency where an offering of services to the public or an acceptance of remuneration for psychological services (other than from those from whom they receive their salaries) is not present. The legality of each particular situation under current law is, of course, dependent upon the facts, a matter primarily for determination by the Board of Examiners in Psychology and the courts.

Of course, the General Assembly is free to alter or modify the present law as it sees fit, including through its enactment of the proposed Bill providing for licensing specialists in school psychology, which you have enclosed. Indeed, your proposed Bill would specifically authorize use of the term "Licensed Specialist in School Psychology" or LSSP. Also authorized by the proposed Bill would be use of the titles "Nationally Certified School Psychologist" or "State Certified School Psychologist." The authority of the General Assembly is plenary unless limited by some provision of the Constitution. Thus, the Legislature may enact any law not prohibited, expressly or by clear implication by the State or Federal Constitutions. Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 287 S.E.2d 476 (1982).

Obviously, this Office takes no position as to the policy considerations concerning whether the proposed legislation concerning Licensed Specialists in School Psychology should be enacted as opposed to whether it is within the authority of the General Assembly to do so. I would make one additional point, however. While legislation later in time is ordinarily controlling, in order to avoid potential overlapping authorities and jurisdictions between the Board referenced in the proposed Bill and the Board of Psychology Examiners, it may be prudent to have Legislative Council make it explicit that the Psychology Act also excepts and authorizes the proposed activities and titles which are anticipated by your proposed legislation. Such would obviate any question of statutory interpretation between competing authorities.

In short, while the First Amendment questions concerning the current law and the use of particular titles may ultimately prevail, this Office must presume the statute to be valid until a court tells us otherwise. Thus, it would be a matter for the General Assembly to resolve whether current law is modified to authorize the use of titles or designations beyond those presently permitted.

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

Mr. Reid
Page 9
September 18, 1997

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/ph