

1984 S.C. Op. Atty. Gen. 145 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-59, 1984 WL 159866

Office of the Attorney General

State of South Carolina

Opinion No. 84-59

May 24, 1984

*1 N. B. Heyward
Executive Director
South Carolina State Board of Dentistry
1315 Blanding Street
Columbia, South Carolina 29201

Dear Mr. Heyward:

You have asked the opinion of this Office regarding the legality of prohibiting the use of trade names in the practice of dentistry. You note Section 40–15–130, indicating that the South Carolina State Board of Dentistry has interpreted this provision as precluding the use of trade names. You advise that the Board, pursuant to this Section, now requires a dentist to practice under the name on one's dental license. In recent years, several significant cases have been decided regarding the use by professionals of trade names. This Opinion will discuss those cases and relate them to your specific inquiry.

Section 40–15–130 states in pertinent part:

[i]t shall be unlawful for any dentist or dental hygienist to participate in this State under any name except his own true name; to use the word 'company,' 'association,' or 'corporation' in connection with his dental practice other than in compliance with the South Carolina Professional Association Act.

By the clear language of this provision, the Act prohibits a dentist or dental hygienist from practicing 'under any name except his own true name.' This would seem to preclude the use of a trade name. A trade name is generally a 'name, word or phrase employed by one engaged in business as a means of identifying his products, business or services.' [Oldetowne Legal Clinic, P.A.](#), 400 A.2d 1111, 1114 (1979). For purposes of this Opinion, I will assume that a trade name refers to a 'name, word or phrase' other than one's own name. To the extent that a dentist's trade name is different from his own 'true name,' Section 40–15–130 precludes the use of a trade name. Indeed, Section 40–15–130 is not dissimilar to the Texas Optometry statute at issue in [Friedman v. Rogers](#), 440 U.S. 1 (1979), the key case on this subject. (For an extensive discussion of Section 40–15–130 regarding the corporate practice of dentistry, see Op. [Atty. Gen.](#) April 3, 1984.)

The most difficult question involved in your request relates to the constitutionality of a provision prohibiting practice under a trade name. The use of trade names by professionals was first addressed by the United States Supreme Court in [Friedman v. Rogers](#), *supra*. That case upheld the constitutionality of a Texas statute prohibiting the practice of optometry under a trade name. As the South Carolina State Board of Dentistry noted in its Opinion request, the issues involved are complex. Therefore, this Opinion will offer a detailed discussion of the [Friedman](#) case and its progeny.

In 1975, N. J. Rogers, a Texas optometrist, sued the Texas State Optometry Board to *inter alia* enjoin the enforcement of a provision of the Texas Optometry Act prohibiting the use of trade names by optometrists. Rogers contended that this provision violated his First Amendment rights and those of his associates in over one hundred optometry offices practicing under the trade names of 'Texas State Optical' or 'TSO.' Rogers also argued this provision violated the constitutional right of consumers to obtain valuable commercial information. The Texas Optometry Board argued that trade names allowed optometrists to conceal their identity from consumers, increasing the possibility of deception and misrepresentation. For these reasons, the Texas Board asserted that trade names could be prohibited.

*2 The United States Supreme Court rejected Dr. Rogers' claim and upheld the constitutionality of the Texas statute. The Court acknowledged that the use of a trade name is a form of commercial speech. It also conceded that commercial speech is entitled to some form of protection based on [Bates v. State Board of Arizona](#), 433 U.S. 350 (1977) and [Virginia Pharmacy Board v. Virginia Citizens Consumer Council](#), 425 U.S. 748 (1976). While [Virginia Pharmacy Board](#), *supra*, and [Bates](#), *supra*, extended First Amendment protection to truthful advertising by pharmacists and lawyers, the Court found that these decisions have not deprived the states of all power to regulate commercial speech. Quoting from [Virginia Pharmacy Board](#), *supra*, the Court stated, in [Friedman](#), *supra*, that,

Restrictions on the time, place or manner of expression are permissible provided that they are [imposed] without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication and the information. 440 U.S. at 9.

The Court also recognized that it was equally permissible for the states to impose restrictions on a false, deceptive or misleading commercial speech since they have a legitimate interest in ensuring 'that the stream of commercial information flows cleanly as well as freely.' 440 U.S. at 10.

In an important distinction, the Court noted that trade names are a significantly different form of commercial speech than the speech considered in [Bates](#), *supra*, and [Virginia Pharmacy Board](#), *supra*. Those cases involved the attempted prohibition of advertising by pharmacists and lawyers regarding products or services offered and prices. Unlike price or product information, a trade name was not readily susceptible to empirical truthfulness. And, perhaps most importantly, for determining the extent of First Amendment protection, trade names have potential for deception and abuse. As the Court stated,

Here we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys to information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by association formed in the minds of the public between the name and some standard of price and quality (Footnote omitted). Because these ill-defined associations of trade names with the price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.

The possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. 400 U.S. at 12–13.

*3 The Court, then, suggested a number of ways in which a professional might misuse a trade name to deceive the public. First, the professional could manipulate a trade name to distort the relationship between the name and the underlying service. For example, a trade name could change while the optometrists remained the same, the optometrists could change while the trade name remained the same, and a single owner of several clinics could use different trade names for each one and thus give the false appearance of competition between different clinics. Secondly, the Court implied that a fundamental deception exists when a business uses his trade name to describe professional services that necessarily vary with the skill of each individual professional.

In [Friedman](#), *supra*, the concerns of the Texas Legislature about deceptive use of trade names were not hypothetical or speculative. These were based on history of deception and abuse in Texas. See, [Texas Board of Examiners in Optometry v. Carp](#), 412 S.W.2d 307 (1967). The Supreme Court concluded that 'the state's interest in protecting the public from the deceptive and misleading use of optometrical trade names is substantial and well demonstrated,' and that the statutory prohibition was 'a constitutionally permissible state regulation in furtherance of this interest.' 440 U.S. at 15. In reaching this holding, the Court emphasized the restriction on the use of trade names had only the most incidental effect on the content of commercial speech. The Texas statute did not proscribe or limit the type of information or advertising held to be protected by [Bates](#), *supra*, and [Virginia Pharmacy Board](#), *supra*. Optometrists were not prevented from communicating to the public any factual information that may

be associated with a particular trade name, such as the type and price of services offered or the nature of their professional practices. See also, In the [Matter of R.M.J.](#), 455 U.S. 191 (1982).

Some three years after the [Friedman](#) decision, a similar challenge arose to a provision of the Oklahoma Dental Act prohibiting the use of trade names in Oklahoma. [Baker v. Registered Dentists of Oklahoma](#), 543 F.Supp. 1177 (W.D. Okl. 1983). In this case, Dr. Baker operated seven clinics, using the trade name 'The Denture Clinic.' As in [Friedman](#), *supra*, Dr. Baker argued that use of a trade name was constitutionally protected. Dr. Baker, however, attempted to distinguish his claim from the [Friedman](#) decision. Baker argued that in Oklahoma, unlike Texas, there was no specific history of the abuse of trade names. The Court dismissed this argument and upheld the Oklahoma statute. While noting that there was no specific history of abuse in Oklahoma the Court stated that, 'Oklahoma should not be forced to relieve the evils endured by a sister state.' [Baker](#), *supra*, at 1183. The Court found that the term 'The Denture Clinic' had potential to be misleading. Therefore, because of this potential for abuse, the Court found that Baker had no protected constitutional right to use a trade name.

*4 The [Friedman](#) authority case has been extended beyond the health care professions. The Court of Appeals of Maryland, in [Oldetowne Legal Clinic, P.A.](#), *supra*, upheld the constitutionality of provision of the Code of Professional Responsibility prohibiting the practice of law under a trade name.

We have not attempted to determine whether there is a specific history of trade name abuse in South Carolina. However, whether or not there is a lack of a specific history of abuse should not preclude the South Carolina State Board of Dentistry from prohibiting trade names. First, it is well settled in Federal Court litigation under the Federal Trade Commission Act that trade names have substantial potential for deception. See, [Weavers Guild v. F.T.C.](#), 244 F.2d 584 (1957), [Macher v. F.T.C.](#), 126 F.2d 420 (1942). Secondly, our Supreme Court has held that the states need not show actual deception by a business in order to prohibit a practice which has the capacity to deceive. See, [State of South Carolina, ex rel McLeod v. Brown](#), 294 S.E.2d 781 (1982). Finally, it is permissible for the South Carolina State Board of Dentistry to take notice of the substantial potential for abuse of trade names as indicated in Federal Court litigation and [Friedman v. Rogers](#), *supra*, and act to ensure that South Carolina 'not be forced to relive the evils endured by a sister state.' [Baker](#), *supra*, at 1183.

For all the above reasons, it is the opinion of this Office that the provision of Section 40–15–130 discussed in this Opinion is constitutional and that a prohibition on the use of trade names in the practice of dentistry is lawful.

Yours truly,

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Assistant Attorney General

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