1984 S.C. Op. Atty. Gen. 80 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-37, 1984 WL 159844

Office of the Attorney General

State of South Carolina
Opinion No. 84-37
April 3, 1984

***1** The Honorable Coleman G. Poag
Chairman
Subcommittee on Dental Issues
Senate Medical Affairs Committee
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Poag:
In letters dated December 1, 1983 and February 10, 1984, you have inquired with regard to proposed amendments to the Dental Practice Act, Section 40–15–10 et seq., Code of Laws of South Carolina (1976 and 1983 Cum. Supp.), and further as to the current status of the Dental Practice Act concerning the corporate practice of Dentistry. Each of your questions will be responded to individually, as follows.

1. Is the proposed amendment to Section 40–15–70(3) of the Code, restricting ownership of dental operations to licensed dentists, legal? And more broadly, to what extent can nonprofessionals own and control businesses that deliver health care services through licensed professionals?

The proposed amendment to Section 40–15–70 is as follows:
Any person shall be deemed to be practicing dentistry who: * * * (3) directly or indirectly owns, leases, operates, maintains, manages or conducts an office, clinic, facility or establishment of any kind in which dental services or dental operations of any kind are performed for any purpose; however, the provisions of this subsection shall not be construed to prevent a) owners or lessees of real estate from lawfully leasing premises to a licensed dentist; b) bona fide sales to a licensed dentist of dental equipment, material or office secured by chattel mortgage or retain title agreement; c) the disposition of the estate of a deceased licensed dentist by his or her heirs of their agent; or d) the direct or indirect ownership, lease, operation, maintenance management or conduction of a dental laboratory where dental technological services are performed by other than a licensed dentist.

In response to your first question, we believe that the proposed amendment would be legal. The General Assembly, under its plenary powers, may enact any law not specifically or impliedly prohibited by the Constitution. Duncan v. York County, 267 S.C. 327, 228 S.E.2d 92 (1976). Additionally, '[t]he General Assembly has a right to pass such legislation as in its judgment may seem beneficial to the state[.]' State ex rel. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980), quoting Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). An examination of the Constitution reveals no specific or implied prohibition of such a proposed amendment. Thus, if the General Assembly determines that such legislation would be beneficial to the state, then we believe the legislation would be legal.

We would point out that the Dental Practice Act, as it presently exists, does not authorize corporations to practice dentistry. Generally, in the absence of statutory authorization, corporations are not permitted to practice learned professions such as dentistry. Parker v. Panama City, 151 So.2d 469, 15 A.L.R. 3d 725 (Fla. 1963). The General Assembly has authorized the practice of certain learned professions by corporations; see Section 40–43–390, pertaining to pharmacies, and Section 40–6–110, pertaining to auctioneering. We do not believe that the proposed amendment would allow a corporation to engage in the

practice of dentistry, should it be enacted by the legislature. See Op. Atty. Gen., September 8, 1983, pages 1–3 for extensive discussion and authority on these points.

***2** As the Dental Practice Act now exists, there may be a 'safe harbor' for dentists practicing their profession as independent contractors. If such dentists can meet the 'direction and control' test specified in State Board of Optometry v. Sears, Roebuck and Company, 102 Ariz. 175, 427 P.2d 126 (1967), such an arrangement may be deemed permissible and not the unauthorized practice of a learned profession by a corporation. Such a determination must be made by the appropriate judicial or quasi-judicial body on a case by case basis, considering the factors specified in Op. Atty. Gen., September 8, 1982, pages 4–8 and the authority cited therein.

This Office has neither the authority nor the expertise, in rendering opinions, to make such a judgment and thus draws no conclusion concerning the facts relative to any dental practice by corporations or independent contractors in this state.

In response to your second question, we would point out that as the Dental Practice Act is presently codified, ownership or control of such businesses by non-professionals is not expressly prohibited. However, as discussed above, a corporation may not practice a learned profession unless expressly authorized. At first blush, the proposed amendment would appear to prohibit practice of dentistry by a corporation. Thus, the proposed amendment, if enacted, would appear to confirm the legislature's intent that a corporation not engage in the practice of dentistry. As to the extent to which non-professionals could own and control businesses that deliver health care services through licensed professionals, factual determinations by the appropiriate fact-finding bodies would be necessary; the proposed amendment would appear to prohibit any direct or indirect ownership or control of such a business by non-professionals.

2. Is the requirement as set forth in the proposed amendment to Section 40–15–130, for public communications to reasonably identify dentists practicing under firm or trade names, legal?

The proposed amendment to Section 40–15–130 is as follows:
It shall be unlawful for any dentist to practice or to continue to practice dentistry under any firm name that is false, deceptive, or misleading, or in any manner that attempts to create any impression of superior skills or qualifications of those who practice thereunder.

Every dentist practicing dentistry under a firm name or trade name, and every dentist practicing as an employee or another licensed dentist, or a partnership or of a professional association or business corporation shall cause his name to be conspicuously displayed in a conspicuous place at the entrance of the place where such practice shall be conducted.

In any public communication, names of dentists practicing under a firm or trade name shall be identified except where the Board has determined by rules and regulations that such requirement is unreasonable.

Your question concerning public communication appears to refer to the third paragraph of the proposed amendment. Thus, our response will examine the third paragraph; for a discussion of state regulation of trade names and deceptive or unfair trade practices, see Op. Atty. Gen., December 20, 1983; and also South Carolina Board of Examiners in Optometry v. Cohen, 256 S.C. 183, 180 S.E.2d 650 (1971) and Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979).

***3** As discussed above, the General Assembly may enact any law not specifically or impliedly prohibited by the Constitution if that body determines that the state will benefit thereby. Because we can find no prohibition on such a law in the Constitution, we feel such a law would probably be legal. Memoranda submitted to this Office by interested parties suggest that such a requirement may create antitrust problems. While we do not adopt such a position, we concur that the more prudent course would be for the General Assembly to retain control over situations wherein the names of the practicing dentists could be omitted in a public communication, rather than delegating that authority to the Dental Board, an executive agency of the State. State action,

or ‘a deliberate decision on state policy by [the state's] legislative branch,’ would most likely render the State immune from an antitrust suit, whereas such immunity may not be available to policy-making by an administrative body. Sullivan, Antitrust 739–740 (1977); see also Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

3. Under the Dental Practice Act, can a dentist contract to provide dental services with a private for-profit corporation which holds itself out to the public as furnishing dental care?

As has already been discussed, a corporation may not hold itself out as practicing dentistry, though there may be the ‘safe harbor’ for independent contractors who can meet the ‘direction and control’ test specified in State Board of Optometry v. Sears, supra. Whether such a dentist is an independent contractor or actually an employee of such a corporation would require consideration on a case by case basis of the factors noted in our prior opinion and cited cases.

4. Under the Dental Practice Act, can a stockholder-owned corporation which contracts with dentists hold itself out as providing dental care?

As previously stated, as the law presently exists, a corporation may not so hold itself out.

We trust that our responses will offer guidance to your committee in its consideration of the proposed legislation. Please advise if we may be of further assistance.
Sincerely,

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Senior Assistant Attorney General

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