1983 WL 181833 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 5, 1983

***1 SUBJECT: Cosmetology Board, Rules and Regulations—Advertising**
Regulation of the Cosmetology Board forbidding advertising of any type by cosmetology schools or colleges except for students violates the First Amendment to the United States Constitution.

Executive Secretary
South Carolina State Board of Cosmetology

QUESTION:

1. Does a regulation of the Board of Cosmetology which prohibits a school or college of beauty culture from advertising in any way whatsoever except for students violate the First Amendment to the United States Constitution?

OPINION:

Yes. During the last few years the Supreme Court has issued several opinions clearly holding that commercial speech enjoys First Amendment protection. Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341; In the Matter of R.M.J., 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64. The Court has also made clear that the First Amendment protection of commercial speech is enjoyed not only by the advertiser but also by the recipients of the information. Virginia State Board of Pharmacy, supra. It was the interest of the consumers in obtaining price information for prescription drugs that the Supreme Court found to be specifically protected by the First Amendment in the Virginia Pharmacy Board case.

While these cases find commercial speech to be constitutionally guaranteed expression, it is extended less protection from government regulation than noncommercial speech. The test for determining when commercial speech is protected is succinctly stated as follows:
In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas v. Public Service Commission, supra, at 566.

It is this test, then, that must be applied to the regulation with which we are concerned. The regulation specifically provides as follows:
No school or college of beauty culture shall advertise in any way whatsoever except for students.

Students attending such schools are authorized pursuant to R. 34-7(c), Vol. 23, Code of Laws of South Carolina, 1976, to perform cosmetology services for members of the general public, however, the schools can charge only the cost of their supplies for such services. The regulation with which we are concerned has the effect of prohibiting any advertisement of the prices charged for student services by schools or colleges of beauty culture.

***2** The first question which must be asked in applying the four part analysis discussed above is whether the expression is protected by the First Amendment, i.e. whether it concerns lawful activity and is not misleading. The advertising of prices by beauty colleges and schools certainly does not involve illegal activity and there is nothing inherently misleading about it. The next inquiry is whether the governmental interest asserted is substantial. The Board's interest in strictly regulating the practices of schools and colleges of beauty culture is twofold. First, the Board seeks to insure that schools will operate as educational institutions rather than commercial salons. The Board also seeks to protect the public from mistakenly obtaining cosmetology services from a student rather than a licensed cosmetologist. These concerns are evident not only in this regulation but also in statutory provisions such as §§ 40-13-15 and 40-13-150, Code of Laws of South Carolina, 1976 (1982 Cum.Supp.), which prohibit a school from being affiliated with, operating in conjunction with, or being located at the same address as a salon operating for profit. The Board's concern for both students and the public represents a substantial governmental interest.

The next inquiry which must be made is whether the regulation directly advances the governmental interest asserted. This question is not easily answered. While a prohibition on advertising by a school or college of beauty culture may have the effect of furthering the state's interest in protecting students and the public by reducing the number of customers seeking student services and thereby reducing the opportunities for abuse, the effect appears more collateral than direct.

However, even if there were a direct link between the state's interest and the regulation, the fourth part of the test could not be met. The final inquiry is whether the regulation is more extensive than is necessary to serve the state's interest. It is the opinion of this Office that the regulation is more extensive than is necessary to serve the two asserted state interests. First, as to the state's interest in protecting students by insuring that schools operate as educational institutions rather than commercial salons, the state can accomplish this goal by better policing the schools' operators who may be charging more than his or her costs for student services. This could be done by requiring receipts to be given to each school customer, and these receipts and an accounting of expenses periodically submitted to the Board. Whatever method is chosen, it does appear that means other than depriving the public of price information can be utilized to reach the goal sought. As well, there are other means by which the Board could protect the public from being misled or mistaken as to the type of service, i.e. student professional, he or she was getting for the price advertised. This could be done by restricting the format and content of any advertising containing price information for student services so that the public is clearly apprised of the fact that the services advertised are rendered by students rather than licensed professionals. See, e.g., Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, supra, at 570-571. Again, there appear to be other methods of achieving the state's interest in protecting the public which do not offend the First Amendment to the United States Constitution.

***3** Since I am unaware of any reason why alternative methods could not be designed for achieving the state's goals in this area, or why a more limited advertising regulation would be ineffective, it is the opinion of this Office that the Board's regulation prohibiting all advertising by schools or colleges of beauty culture except for students is constitutionally offensive.

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