1984 WL 249694 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 2, 1984

***1 RE: Opinion Request of June 5, 1984**

The Honorable Robin Tallon
Member, Congress of the United States
House of Representatives
128 Cannon Building
Washington, DC 20515

Dear Congressman Tallon:
Your letter of June 5, 1984, has been referred to me by Attorney General Medlock for a response.

South Carolina Code Ann., § 40-1-50(c) (1976) requires anyone who is not a C.P.A. or a P.A. to state on any financial statement published by him that he has not audited the statement and is prohibited by law from expressing an opinion on the statement. It is the opinion of this Office that § 40-1-50(c) does not violate the constitutional right to freedom of speech.

In South Carolina there are three types of accountants: Certified Public Accountants (C.P.A.'s), Public Accountants (P.A.'s), and Accounting Practitioners (A.P.'s). The P.A. classification is not relevant to the present question.

C.P.A.'s are regulated under Article 1 of the South Carolina Accountancy Law (§§ 40-1-10 through 40-1-380). Before a person can be licensed as a C.P.A., he must, among other requirements, have a certain amount of experience in both accounting and auditing, and he must pass examinations on both accounting and auditing. A C.P.A. is then licensed to perform both functions —accounting and auditing.

An A.P. is regulated under Article 3 (§§ 40-1-510 through 40-1-600). He is not required to have any experience in auditing, nor is he tested on auditing. Thus, while an A.P. may perform accounting functions, such as compiling a financial statement, he is not licensed to perform an audit. Since he cannot audit a financial statement, he cannot express an opinion as to one. The ability to express an opinion is known as the ‘attest function,’ and is the principal distinction between a C.P.A. and an A.P.

The Legislature has full power to make any and all laws which it considers beneficial to the State and its people unless such laws are expressly prohibited by the Constitution. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). The General Assembly has the inherent power to regulate and license occupations engaged in within the State on behalf of the public interest and the general welfare. 53 C.J.S., Licenses, § 6(a)(1). This power includes the power to regulate professions such as accountancy. 53 C.J.S., Licenses, § 6(a)(2); Duggins v. N.C. Board of C.P.A. Examiners, 25 N.C. App. 131, 212 S.E.2d 657 (1957).

The right to freedom of speech, guaranteed in the First Amendment to the United States Constitution and in Article I, § 2 of the South Carolina Constitution, is not an absolute right. American Communications Assn. v. Douds, 339 U.S. 382 (1950); Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961). The existence of a chilling effect upon a First Amendment right has never been considered a sufficient basis, in and of itself, for prohibiting state action.
***2** Where a statute does not directly abridge free speech, but—while regulating a subject within the state's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on

speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. (Citations omitted).

Younger v. Harris, 401 U.S. 37, 51 (1971).

In Wooley v. Maynard, 430 U.S. 705 (1977), the United States Supreme Court overturned a state law requiring drivers to display the motto, 'Live Free or Die,' on their license plates. The Court held that an individual may not be required to participate in the dissemination of an ideological message when he objects to the message on moral and religious grounds. In the present issue, however, the State is not disseminating an ideology, but truth. In Wooley v. Maynard, the speech involved was of a political and moral nature. In the present issue, the speech is purely commercial. Thus, the rationale in Wooley v. Maynard, would not appear to apply to S. C. Code Ann., § 40-1-50(c).

Although commercial speech is protected under the First Amendment, it is entitled to less protection than political speech. The United States Supreme Court is reluctant to sustain First Amendment challenges to economic legislation that serves legitimate regulatory interests. The safeguards extended to political speech do not automatically extend to commercial speech. Restrictions on false, deceptive, and misleading commercial speech are constitutionally permissible. Friedman v. Rogers, 440 U.S. 1 (1979).

While in Bates v. Arizona, 433 U.S. 350 (1977), the United States Supreme Court recognized that advertising by attorneys is a form of commercial speech protected by the First Amendment, the Court nevertheless emphasized that such advertising by attorneys could be regulated. The Court particularly noted that false or deceptive advertising was subject to restraint. Furthermore, in examining the types of advertising permitted, the Court recognized that a warning or disclaimer may be required so as to dissipate the possibility of consumer confusion or deception See also: In the Matter of R.M.J., 455 U.S. 191 (1982).

Section 40-1-50(c) appears to be generally analogous to the issue presented in Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466 (9th Cir. 1983). In California, Doctors of Medicine (M.D.'s) and Doctors of Osteopathy (D.O.'s) receive somewhat different training and are licensed by different boards. State law requires a D.O. to identify himself as such and forbids him from using the title M.D.

Dr. Brandwein asserted the state regulatory scheme violates the First Amendment by forcing him to identify himself as a D.O. even though his philosophy of medicine is more like that of an M.D. The Court upheld the regulatory scheme, stating that Dr. Brandwein's First Amendment rights are not violated by the state's refusal to allow him to hold himself out to the public under a degree which he has not earned. See also Maceluh v. Wysong, 680 F.2d 1062 (5th Cir. 1982).

***3** The public practice of accountancy is a highly skilled and technical profession. A state may regulate the profession in order to protect the public against fraud, deception, and lack of ability. Duggins, supra. Section 40-1-50(c), which requires a non-C.P.A. who publishes a financial statement to indicate on the statement that he has not audited it and is not licensed to express an opinion on it, would seem to be a proper exercise of the State's police power to eliminate public confusion. Any effect on freedom of speech would seem to be minor in relation to the State's legitimate interest in insuring that non-C.P.A.'s do not conduct audits, and that the public is not falsely led to believe that a non-C.P.A. may conduct an audit. Thus, I do not believe § 40-1-50(c) to be unconstitutional.

Please do not hesitate to contact me if this Office can be of further assistance.
Sincerely,

Carlisle Roberts, Jr.
Staff Attorney

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