1984 WL 249991 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 11, 1984

***1** Fred Vallejo, RPT
President
South Carolina State Board of Physical Therapy Examiners
Post Office Box 11594
Columbia, South Carolina 29211

Dear Mr. Vallejo:
By your letter of July 27, 1984, you have requested an opinion as to whether a chiropractor can advertise and hold himself out to the public as an individual who administers physical therapy. You have referred to instances in which chiropractors have placed, in newspapers and telephone books, advertisements to the effect that they provide physical therapy treatments. This Office advises that while a court would have to make a final determination, a person (chiropractor or other individual) who expressly or impliedly holds himself out to be a physical therapist could be found to be in violation of Section 40-45-210, Code of Laws of South Carolina (1983 Cum. Supp.); furthermore, mere use of the words 'physical therapy' may also be deemed violative of Section 40-45-210 by a court.

While the professions of physical therapy and chiropractic are similar in some respects, overall the professions have different requirements for training and licensure, different allowable practices, and different treatment goals. Physical therapy is defined by Section 40-45-20(1) of the Code to be
the evaluation and treatment of any bodily or mental condition of any person by the use of physical, chemical, or mechanical agents, the properties of heat, light, water, electricity, massage, sound, and therapeutic exercises, including rehabilitation procedures, all under the prescription of a licensed doctor of medicine or dentistry. . . .

Qualifications and licensure requirements are specified in Section 40-45-100 et seq. Section 40-45-100(a), in particular, provides that '[n]o person shall practice, nor hold himself out to be able to practice, physical therapy in this State unless he is registered in accordance with the provisions of this chapter. . . .' [1] As you state in your letter, physical therapists and chiropractors may use some of the same modalities, but physical therapy also encompasses many other areas such as stroke rehabilitation, rehabilitation of developmentally disabled patients, and treatment of burn patients.

The profession of chiropractic is defined by Section 40-9-10(a) to be
that science and art which utilizes the inherent recuperative powers of the body and deals with the relationship between the nervous system and the spinal column, including its immediate articulations and the role of this relationship in the restoration and maintenance of health.

Further, 'chiropractic practice,' by Section 40-9-10(b) is
the spinal analysis of any interference with normal nerve transmission and expression, and by adjustment to the articulations of the vertebral column and its immediate articulations for the restoration and maintenance of health and the normal regimen and rehabilitation of the patient without the use of drugs or surgery.

***2** Qualifications and licensure requirements are specified in Section 40-9-40 et seq. Limitations of practice are specified by Regulation 25-8 of the Code:

Persons licensed by the Board [of Chiropractic Examiners] shall be limited in their practice to the care and performance of therapeutic treatment of patients, the performance of such procedures as are normally followed in giving chiropractic physical examinations, the X-ray of patients and such other procedures as are generally used in the practice of chiropractic. Such other procedures as are generally used in the practice of chiropractic shall be limited, however, to the use of diagnostic and therapeutic procedures, the adjustment and manipulation of articulations and treatment of intersegmental disorders for alleviation of related neurological aberrations. . . .

A comparison of the above-cited statutes and regulations shows that both professions emphasize rehabilitation and therapy. Chiropractic may employ certain of the same techniques as would be employed in physical therapy, and thus the two professions overlap to some degree without members of one profession being or becoming members of the other profession. The General Assembly apparently recognized this overlapping of professions in enacting Section 40-45-240:

Nothing in this chapter [the Physical Therapists Practice Act] shall be construed to restrict, inhibit or limit the practice of chiropractic as now practiced in this State and as taught by accredited schools or colleges of chiropractic.

The overlap in practice or technique of chiropractic with physical therapy or other medical professions has been recognized by courts in Kelley v. Atwell, 59 Mich. App. 219, 229 N.W.2d 387 (1975); Williams v. Capital Life and Health Insurance Company, 209 S.C. 512, 41 S.E.2d 208 (1947); Matter of Stockwell, 28 Wash. App. 295, 622 P.2d 910 (1981); Ison v. McFall, 400 S.W.2d 243 (Tenn. App. 1964); Sutton v. Cook, 254 Or. 116, 458 P.2d 402 (1969); Caldwell v. Knight, 92 Ga. App. 747, 89 S.E.2d 900 (1955); State v. Grayson, 5 Wis.2d 203, 92 N.W.2d 272 (1958); Coty v. Baughman, 50 S.D. 372, 210 N.W. 348 (1976).

While it is apparent that chiropractors and physical therapists may use similar practices or techniques, the question arises whether a chiropractor may hold himself out as practicing physical therapy or as being a physical therapist. Section 40-45-210 of the Code provides:

Any person who practices as a physical therapist . . . without being registered under this chapter as a physical therapist . . ., who uses in connection with his name the words or letters 'R.P.T.', 'Registered Physical Therapist', 'Physical Therapist', 'Physio Therapist', . . . 'Physical Therapy Technician' or 'P.T.T.', or any other letters, words or insignia indicating or implying that he is a physical therapist . . ., or who in any other way, orally or in writing or in print or by sign directly or by implication, represents himself as a therapist physical [sic] . . . without being registered by the Board, shall be guilty of a misdemeanor, and for each offense upon conviction of any court of competent jurisdiction, shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for a period of not less than thirty nor more than ninety days, or both, at the discretion of the court, and each day of such violation shall constitute a separate offense. . . .

***3** This statute is remedial in nature and must be broadly construed to effectuate its purposes. South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Section 40-45-210 has not yet been construed by the courts of this State, but similar statutes have been construed elsewhere.

The decision in Kelley v. Atwell, supra, discussing a similar situation, suggests an approach taken by one court. The defendant, a chiropractor, obtained telephone directory listings under the heading, inter alia, 'physical therapists,' though he was not a licensed physical therapist. The Court of Appeals of Michigan affirmed the lower court's order permanently enjoining the defendant from

advertising by using in connection with his name the words or letters 'physical therapist, physiotherapist, registered physical therapist, licensed physical therapist, physical therapy technician, P.T., R.P.T., L.P.T., P.T.T.', or any other letters, words or insignia indicating or implying that he is a physical therapist, or in any other way, orally, in print, by sign, directly or by

implication, representing himself as a physical therapist, in publications, including the Yellow Pages issued by Michigan Bell Telephone directory placed before this public.

229 N.W.2d at 388. Michigan's statute is substantially similar in substance to Section 40-45-210 concerning unlawful practices. The Court of Appeals based its affirmation on the avoidance of deceptive or misleading advertising and stated:
It is obvious that: (1) defendant was not licensed as a physical therapist and (2) the telephone advertising implied, if not stated, that he or his agents were physical therapists. Thus, a prima facie case [of unlawful, deceptive or misleading advertising] has been made.

229 N.W.2d at 389. [2]

Based upon the applicable statutes and the decision in Kelley v. Atwell, if a person, including a chiropractor, either expressly or impliedly holds himself out as a physical therapist or as practicing physical therapy without proper licensure, a court could find that the provisions of Section 40-45-210 have been violated. A court could further find that merely using the words 'physical therapy' to be a violation of Section 40-45-210, as well. Please note that each fact situation would have to be reviewed to make such a determination, with the final determination being made by a court of competent jurisdiction. Certainly, sufficient evidence of such a violation would have to be presented to the court.

Furthermore, misleading or deceptive advertising is governed as to chiropractors by Regulation 25-12(5), as follows:
A Doctor of Chiropractic who advertises his services shall not use advertisements that are false, deceptive, or misleading, or that have the tendency to be false, deceptive or misleading. Advertising shall not compare Chiropractor with Chiropractor nor technique with technique in such a way that will deceive or mislead the public, or that will tend to deceive or mislead [sic] the public, concerning the skills, knowledge or abilities of the individual Chiropractor or groups of Chiropractors.

***4** Failure to follow this regulation could subject a chiropractor to discipline by the Board of Chiropractic Examiners pursuant to Section 40-9-90(6) or other pertinent provisions. Of course, any enforcement of the regulation or any disciplinary action against a chiropractor would be taken by the Board of Chiropractic Examiners upon a proper showing that the statutes or regulations had been violated.

We would advise that the response to your inquiry is not free from doubt; while courts in other jurisdictions have decided the issue, South Carolina courts have not yet done so. If a court in this State were to examine the issue, that court would certainly consider all relevant facts and circumstances while balancing the rights of each profession with the need to protect the public from being misled. Should the Board of Physical Therapy Examiners choose to pursue the matter, the Board will have the burden of proving that the relevant statutes have been violated or that the public has been misled.

Please be advised that this Office is offering, in this opinion, the results of our research, and it is not to be construed that this Office is advocating a particular position on the matter, for or against either profession. Furthermore, this Office does not comment upon the possible sufficiency of allegations or evidence presented in your request letter.

If you need additional assistance with this matter, please consult with Assistant Attorney General Carolyn Adams.
Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

1 One ‘holds himself out’ as a practitioner of a learned profession when he leads others (i.e., the public) to believe that he can lawfully engage in such practice. State v. Kelsey, 46 Wash.2d 617, 283 P.2d 982 (1955).

2 Whether South Carolina's statutes regulating such deceptive advertising, Section 39-5-10 et seq., would be applicable is not addressed herein.

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