

1983 S.C. Op. Atty. Gen. 170 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-99, 1983 WL 142768

Office of the Attorney General

State of South Carolina

Opinion No. 83-99

December 20, 1983

***1 SUBJECT: Using an individual optometrist's name in a firm name when the individual is not a member of the firm.**

An optometrist may not use a firm name which includes the name of an optometrist who is not a member of the firm, except as provided by [Regulation 95-1\(0\)](#).

TO: Dr. Henry V. Sawyer

QUESTIONS:

1. The Board of Examiners in Optometry has asked whether a practitioner can continue to use a firm name which includes the name of a deceased practitioner with whom he was associated. Also, the Board asked whether its [Regulation 95-1\(0\)](#) can be enforced in this situation.

STATUTES AND CASES:

[Section 40-37-260, CODE OF LAWS OF SOUTH CAROLINA \(1976\)](#); [Section 40-37-10, et seq., CODE](#); [Section 40-37-180, CODE](#); [Section 40-37-220\(10\), CODE](#); [Section 40-37-220\(14\), CODE](#); [Section 40-37-240, CODE](#); [R95-1\(0\), Rules of Practice, South Carolina Board of Examiners in Optometry](#); [Federal Trade Commission Act, 15 USC 45\(a\)\(1\)](#); [FTC v. Bradley, 31 F2d 569 \(1929\)](#); [Weavers Guild v. FTC, 244 F2d 584 \(1957\)](#); [Macher v. FTC, 126 F2d 420 \(1942\)](#); [S. C. Board of Examiners in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 \(1971\)](#); [Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 \(1938\)](#).

DISCUSSION:

Whereas, [Section 40-37-260, CODE OF LAWS OF SOUTH CAROLINA \(1976\)](#) provided that 'All licensed optometrists or dispensing opticians shall operate under the names under which they are licensed' and that [Section 40-37-10 et seq., CODE \(1976 as amended\)](#) has deleted this provision, it is presumed that the Legislature intended to allow optometrists to use trade names. It is well established in federal court cases brought under [15 USC 45\(a\)\(1\)](#), the Federal Trade Commission Act, however, that a trade name can be deceptive. [FTC v. Bradley, 31 F2d 569 \(1929\)](#); [Weavers Guild v. FTC, 244 F.2d 584 \(1957\)](#); and [Macher v. FTC, 126 F2d 420 \(1942\)](#).

It is unlawful 'to disseminate by any means whatsoever . . . (any) misleading or deceptive advertisement or representation concerning . . . the practice of optometry.' See [Section 40-37-180, CODE](#). Furthermore, the Board may revoke or restrict the license of an optometrist who engages 'in conduct that is deceptive, fraudulent, or harmful to the public' or who 'has violated any provision of this chapter regulating the practice of optometry.' [Section 40-37-220\(10\)](#) and [40-37-220\(14\), CODE](#). It is also a misdemeanor crime to violate the laws governing optometry. See [Section 40-37-240, CODE](#).

The regulations promulgated under the Board's authority state in part that 'It shall be permissible to use the phrase, 'successor to Dr. . . .' for one year, but no longer.' [S. C. Reg. 95-1\(0\)](#). This regulation is permissive and provides a means whereby a practitioner can hold out to the public that he is the successor to another practitioner. While the regulation does not necessarily

forbid the use of other similar language to indicate the same thing, it is the clear intent of the regulation to limit such representations to a period not longer than a year.

*2 In an opinion dated August 12, 1981, to the Board, this Office noted that our Supreme Court has upheld a statute limiting an optician to only one branch office on the grounds that 'the Legislature found it desirable that people know the individual with whom they are doing business.' See S. C. Board of Examiners in Optometry v. Cohen, 256 S.C. 13, 180 S.E.2d 650 (1971). That opinion also noted that the practice of optometry involves the exercise of professional skill and judgment by trained and licensed individuals. See Ezell v. Ritholz, 188 S.C. 39, 198 S.E. 419 (1938).

In view of these holdings, we would advise that to indicate in a firm's name that a particular individual is practicing there when in fact the individual has left, would have the capacity to deceive unless more information is given. The State does not have to show that any individuals have been actually deceived by a business in order to prohibit a practice which has the capacity to deceive. See State of S. C. ex rel. McLeod v. Brown, et al., 278 SC 281, 294 SE2d 781 (1982).

The Board's regulation sets out an acceptable means of informing the public that one practitioner has taken over the practice of another. The regulation, also, provides a reasonable limitation on the period of time that this can be done. Finally, the regulation, by permitting the use of a predecessor's name for one year, implicitly prohibits the use of another's name in any other circumstances.

In conclusion, I would advise that it is a violation of [Section 40-37-180, CODE OF LAWS OF SOUTH CAROLINA \(1976\)](#), to use the name of an optometrist in a firm name when that optometrist is no longer with the firm unless some disclosure is made that the optometrist is no longer there and that even if such disclosure is made, [Regulation 95-1\(0\)](#) limits the use of the name to a period of no more than one year.

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