

1981 WL 157780 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 13, 1981

\*1 Mr. George L. Schroeder  
Director  
Legislative Audit Council  
620 Bankers Trust Tower  
Columbia, South Carolina 29201

Dear Mr. Schroeder:

You have asked this office whether certain subparts of R95-1, Rules of Practice of the Board of Examiners in Optometry violate the First Amendment. States may validly regulate some forms of commercial speech [advertisements] by professionals.<sup>1</sup> Each of the questioned subparts is hereinafter discussed.

#### I. R95-1E.

No licensed optometrist shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other optometrists.

States may prohibit false, deceptive and misleading commercial speech. [Bates v. State Bar of Arizona](#), 433 U.S. 350. The First Amendment does not prohibit a state from ensuring that ‘the stream of commercial information flow cleanly as well as freely.’ [Friedman v. Rogers](#), 440 U.S. 1, 10.

Claims of quality of professional services are not susceptible to precise measurement or verification and as such may tend to mislead or deceive. [Bates](#), *supra*. As the District Court in [Bolton v. State Board of Healing Arts](#), 473 F.Supp. 728 (D.Ka, 1979) noted:

The practice of puffery—well established in nonprofessional advertising—has no place in the advertising of healing arts professionals. The well-being of people who may be unsophisticated in health care matters is a compelling interest to the state. The licensor of healing arts professionals has the right and duty to demand strict adherence to truthful advertising—advertisement that is verifiable. At 734.

Accordingly, it is the opinion of this Office that R95-1E is not violative of the First Amendment.

#### II. R95-1F.

No licensed optometrist holding an official position in any optometric organization shall use such position for advertising purposes or self-aggrandizement.

Subpart (F) is intended to prohibit an optometrist from soliciting business through advertisement of his official positions in any optometric organization.

The purpose behind such prohibition is the same as that in R95-1E. That is, to prevent statements and claims of superior quality of a particular licensed practitioner. For similar reasons as discussed above, subpart (F) is not violative of the First Amendment.

### III. R95-1D.

No licensed optometrist shall display his license, diplomas, or certificates in such manner as to be seen and read from outside his office.

In South Carolina, all optometrists must meet the same high standards of licensure. See, footnote 1. No additional certifications, degrees or licenses are recognized by the state as ensuring higher quality of professional service or particular expertise in a specialized area. Accordingly, display of diplomas and certificates, other than the optometric license issued pursuant to §§ 40-37-10 et seq., of the Code, is capable of misleading or deceiving the unsuspecting public as being an indication of a particular specialized skill or expertise superior to other licensed professionals. See, e.g. [Durham v. Brock](#), 498 F.Supp 213 (M.D. Tenn., 1980). As noted in [Friedman v. Rogers](#), *supra*, a state may appropriately require commercial speech to ‘appear in such a form . . . as [is] necessary to prevent its being deceptive.’ At 10.

\*2 Although it is certainly not free from doubt, it is the opinion of this Office that R95-1D does not contravene the First Amendment.

### IV. R95-1I.

Professional cards in newspapers or in any other publication are prohibited. Provided, when announcing the opening of a permanent office, a two-inch double column space is permissible but can only be used for a total of four insertions. Educational material may be published only when it has been specifically approved by the South Carolina Board of Examiners in Optometry. (As amended filed May 19, 1960.)

Restrictions as to time, place or manner of commercial advertisements are permitted provided ‘they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.’ [Friedman v. Rogers](#), *supra*, at 9; see also, [Allston v. Lewis](#), 480 F.Supp 328 (D.S.C. 1979). However, the absolute prohibition of professional cards in newspapers cannot be sustained absent a showing of significant governmental interest. No such significant interest is apparent. Further, the size and number limitations upon office opening announcements cannot be sustained, since there does not appear to be any significant governmental interest upon such limitations.<sup>2</sup> Accordingly, the advertising portions of R95-1 are violative of the First Amendment.

### V. R95-1J.

No licensed optometrist shall use bold-faced type or in any other manner attempt to attract special attention to himself in any telephone or other public directory; however listing themselves, their professional designations, their address and telephone number in other than bold-faced type is permitted. The following is an example of a permitted listing:  
Doe, John J. Dr.

124 Fifth Street 678-9999

For reasons similar to those discussed in number IV the size, manner and place restrictions of R95-1J are unconstitutional restrictions upon commercial advertisements of optometrists. The regulations prohibit the content of the advertisement and in so doing restrict the flow of truthful information concerning services offered and prices.

VI. R95-1H.

No licensed optometrist shall display eyeglass signs or painted or decalcomania eyes anywhere.

To the extent that subpart (H) prohibits the advertising of eyeglass signs or logo for the purposes of identification of a particular optometric practice, it serves a legitimate purpose. In Friedman v. Rogers, *supra*, the United States Supreme Court held that the prohibition of optometrists practicing under a trade name was a valid restriction of commercial speech. The Court in so holding noted that the use of a trade name enhances the opportunity for misleading practices. The use of eyeglass signs or logo to identify a practice would similarly enhance the opportunity for misleading the public.

Eyeglass logo used to identify optometric practices presents many possibilities for deception. For example, the identification logo may remain unchanged even though the professionals involved in the practice leave. In addition, the public's perception of an identifiable eyeglass logo may reflect the reputation of an optometrist no longer with the practice. These, among others, are examples noted by the Supreme Court in Friedman v. Rogers, *supra*.

\*3 It may also be noted that the restrictions upon the use of eyeball and eyeglass displays have only the most incidental affect on the content of commercial speech. An optometrist may advertise truthful, factual information concerning price, services, hours of operation, etc., without the presence of identifying eyeglass logo or painted eyes. See, R95-2, Rules of Practice of Optometry.

To the extent that subpart (H) proscribes the use of eyeglass depictions as identifying logo of an optometric practice, it is not violative of the First Amendment.

If this Office can be of further assistance, please call upon us.

Very truly yours,

Edwin E. Evans  
Assistant Attorney General

Footnotes

- 1 In South Carolina, the practice of optometry is regulated by statute. §§ 40-37-10 *et seq.*, Code of Laws of South Carolina, 1976, as amended. All persons practicing optometry are required to meet the educational and examination requirements. § 40-37-120. The practice of optometry has been recognized in South Carolina as being on parity with other professions with important duties affecting the public. Ezell v. Ritholz, 188 S.C. 30, 198 S.E. 419.
- 2 Apparently R95-1I & J, were promulgated during a period of time when advertising by optometrists was generally prohibited. Presently, these rules are inconsistent with the amended Code and rules which generally permit newspaper and telephone directory advertisements.

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