

1980 WL 121228 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 15, 1980

***1 SUBJECT: Opticians, Advertising**

(1) An optician may not advertise a discount.

(2) Opticians may freely set and advertise individual prices for ophthalmic goods and services.

Jack S. Folline

Chairman

South Carolina Board of Examiners in Opticianry

QUESTION:

What restrictions upon optician's advertising of ophthalmic goods and services currently exist under South Carolina Statutes?

STATUTES AND CASES:

Sections 40-37-81, 40-37-240, 40-37-250, 40-37-345, Code of Laws of South Carolina (1976), as amended. [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.](#), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d (1976); [Pittsburgh Press Company v. Human Relations Commission](#), 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); [Adams v. Clarendon County School District Number 2](#), 270 S.C. 200, 241 S.E.2d 897 (1978); [Hartford Accident and Indemnity Company v. Lindsay](#), 273 S.C. 79, 254 S.E.2d 301 (1979); [S.P.S. Consultants, Inc., v. Lefkowitz](#), 333 F.Supp. 1373 (S.D. M.Y. 1971); [Head v. New Mexico Board of Examiners in Optometry](#), 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); [Williamson v. Lee Optical of Oklahoma](#), 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); [North Dakota State Board of Pharmacy v. Synder's Drug Stores](#), 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1972); [Friedman v. Rogers](#), 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979); [Wagner v. Ezell](#), 249 S.C. 421, 154 S.E.2d (1967).

DISCUSSION:

You have asked for guidance in the construction of [Section 40-37-240 of the Code of Laws of South Carolina \(1976\)](#). This section provides that:

'It shall be unlawful for any person to offer or give eyeglasses, spectacles or lenses as a premium with newspapers, books magazines or merchandise or in any other manner to induce trade or to give or offer to give any sum of money or other thing of value to any other person, the object of which is to induced the examination of the eye or the sale of spectacles, eyeglasses, lenses or any part used in connection therewith. Provided, however that the provisions of this section shall not prohibit the giving of a quantity discount on purchases or the giving of a special discount to persons over sixty-two years of age.'

The section contains two basic prohibitions. The first is that eyeglasses, spectacles or lenses shall not be given in order to induce trade in other merchandise. The second is that no sum of money or other thing of value shall be given in order to induce the examination of the eye or the sale of spectacles, eyeglasses or lenses. You have asked this office to provide you with guidelines which can be utilized by the Board of Examiners in Opticianry in enforcing the second basis prohibition outlined above.

Initially, it should be noted that advertising by Opticians of the prices for which they offer their goods and services is permissible. In fact, such advertising has Constitutional First Amendment protection. [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d (1976). However, the Constitution does permit reasonable time, place, and manner restrictions on advertising so long as they do not affect the content of the speech they regulate, they serve a significant governmental interest, and they have open ample alternative channels for communication of the information. [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), *supra*. Furthermore, regulation of the form or requirement of additional information to prevent false, deceptive or misleading advertising is permissible. [Section 40-37-81, Code of Laws of South Carolina \(1976\)](#), provides guidelines in this area. Also, there is no constitutional protection of advertising which promotes illegal transactions. [Pittsburgh Press Co. v. Human Relations Commission](#), 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), *supra*.

*2 It follows from these First Amendment considerations that the State cannot restrict mere advertising of the price of eyeglasses. Charging a price for eyeglasses is legally permissible, and the State may not suppress the dissemination of truthful information about entirely lawful activity. [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), *supra*. In other words, an advertising ban on a legal transaction is not permitted by the First Amendment to the U. S. Constitution. Section 40-37-81(1) appears to be in accord with these Constitutional guidelines. This section provides that the Board of Examiners in Opticianry shall

Have no authority to make rules, regulations, or restrictions prohibiting the advertising on any media by opticians in connection with the supplying or price of eyeglasses except those prohibiting such by untruthful, misleading or similar means; provided, however, that notwithstanding the above provisions of this section, the board shall permit the price advertising in any media by opticians provided the following disclosures are components of each such advertisement:

(3) Whether an advertised price for eyeglasses includes single vision or multifocal lenses;

(b) Whether an advertised price for contact lenses refers to hard or soft contact lenses;

(c) Whether an advertised price for ophthalmic materials includes all dispensing fees;

(d) Whether an advertised price for ophthalmic materials includes an eye examination;

(e) Whether an advertised price for eyeglasses includes both frames and lenses.

Subsection (2) of Section 40-37-81 provides that the Board of Examiners in Opticianry shall:

Have no authority to make rules or regulations governing the employment of opticians, the location of optical stores, the number of optical stores operated, the advertising of optical products or services, or the manner in which such products can be displayed. (Emphasis added.)

In addition to Section 40-37-81, Section 40-37-250 provides that:

It shall be lawful for any licensed optician to advertise the price of eyeglasses. Provided, however, it shall be unlawful to so advertise by the use of any untruthful, impossible, improbable or misleading statement.

It is therefore apparent that the only current restrictions upon the advertising of ophthalmic goods and services are the disclosures mandated by Section 40-37-81 and the prohibitions in that section and Section 40-37-250 against advertising by untruthful, impossible, or misleading statements.

Two other sections of the Code impact upon an optician desiring to advertise his goods and services and to quote prices in such advertisements. [Section 40-37-345 of the 1976 Code](#) provides that:

Nothing contained in Chapter 37 of Title 40, of the 1976 Code or any other provision of law shall be construed as restricting or setting the price that may be charged for eyeglasses.

Additionally, [Section 40-37-240](#) reads as follows:

***3** It shall be unlawful for any person to offer or give eyeglasses, spectacles or lenses as a premium with newspapers, books, magazines or merchandise or in any other manner to induce trade or to give any sum of money or other thing of value to any other person, the object of which is to induce the examination of the eye or the sale of spectacles, eyeglasses, lenses or any part used in connection therewith. Provided, however, that the provisions of this section shall not prohibit the giving of a quantity discount on purchases or the giving of a special discount to persons over sixty-two years of age.

Section 40-37-250 was enacted in Act Number 578 of the 1978 Acts and Joint Resolutions of the General Assembly of South Carolina. This is the same Act in which [Section 40-37-345](#) became law. Therefore, the two sections should be read together and reconciled. All parts and provisions of a legislative enactment should be given effect and conflict reconciled if reasonably and logically possible. [Adams v. Clarendon County School District Number 2](#), 270 S.C. 200, 241 S.E.2d 897 (1978); [Hartford Accident and Indemnity Company v. Lindsay](#), 273 S.C. 79, 254 S.E.2d 301 (1979). It follows that [Section 40-37-240](#) should not be construed as restricting or setting the price that may be charged for eyeglasses.

Therefore, opticians may set their price without restriction and advertise it. However, [Section 40-37-240](#) does appear to prohibit certain sales practices. The section prohibits offering or giving any sum of money or other thing of value, the object of which is to induce the sale of spectacles, eyeglasses, lenses or any part used in connection therewith. Keeping in mind that the section cannot be read as fixing a price for which the optician may sell his goods and services, it can be read as a restriction on certain trade practices. The State has the power to ban or restrict certain commercial practices provided the regulations do not contravene constitutional provisions. [S.P.S. Consultants, Inc., v. Lefkowitz](#), 333 F.Supp. 1373 (S.D. N.Y. 1971); See, also, [Head v. New Mexico Board of Examiners in Optometry](#), 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963); [Williamson v. Lee Optical of Oklahoma](#), 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955); [North Dakota State Board of Pharmacy v. Snyder's Drug Stores](#), 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed. 2d 379 (1973); [Friedman v. Rogers](#), 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979).

In [Wagner v. Ezell](#), 249 S.C. 421, 154 S.E.2d 731 (1967), the South Carolina Supreme Court, in interpreting the predecessor of [Section 40-37-240](#) which contained the identical language being discussed, held that a 'thing of value' included a discount. There, advertising under consideration included a catalogue which contained general claims of savings and the 'lowest possible prices.' Id. at 437, 154 S.E.2d at 739. Also considered was the fact that the store complex under which the optician worked advertised as a discount house and emphasized this characteristic as a drawing card. This advertising was held attributable to the individual optician.

***4** The [Wagner](#) case indicates that the offering of a discount contravenes the provisions of [Section 40-37-240](#). The proviso of the section gives further support to this interpretation. It permits quantity discounts. The implication is that other discounts are not permissible. As noted above, prohibition of the advertisement of illegal activities is valid.

CONCLUSION:

It is, therefore, the Opinion of this office that [Section 40-37-240](#) prohibits the advertising of a discount. Individual prices may be freely advertised in accordance with Sections 40-37-81, 40-37-250, and 40-37-345.

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