

1980 WL 120800 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 29, 1980

***1 SUBJECT: State Agencies, General; Constitution; Civil Rights; Medicine; Occupations.**

[Regulation 95-1\(G\)](#) of the Rules of Practice for Optometry for the State of South Carolina is an unconstitutional restriction of the First Amendment.

President

South Carolina Board of Examiners in Optometry and Opticianary

QUESTION:

Is [Regulation 95-1\(G\)](#) of the Rules of Practice for Optometry for the State of South Carolina constitutional?

STATUTES AND CASES:

R95-1(G), Code of Laws of South Carolina (1976), as amended. [Bates v. State Bar of Arizona](#), 433 U.S. 350, 53 L.Ed2d 810, 97 S.Ct. 2691 (1977); [Friedman v. Rogers](#), 440 U.S. 1, 59 L.Ed2d 100, 99 S.Ct. 887 (1979); [Linmark Associates, Inc. v. Town of Willingboro](#), 431 U.S. 85, 52 L.Ed.2d 155, 97 S.Ct. 1614 (1977); [Virginia Pharmacy Board v. Virginia Citizens Consumer Council](#), 425 U.S. 748, 48 L.Ed2d 346, 96 S.Ct. 1817 (1976).

DISCUSSION:

[Regulation 95-1\(G\)](#) of the Rules of Practice for Optometry for the State of South Carolina applies certain restrictions to the display of signs by licensed optometrists in South Carolina. These restrictions apply to both the content of the signs [allowing display of only name, profession and office hours] and the form of the signs [specifying that sign size be no more than four inches in height at street level or six inches in height for offices above street level].

The use of signs to identify and advertise a business clearly is a form of commercial speech. Speech, in commercial form, is protected by the First Amendment of the United States Constitution. However, the United States Supreme Court in a recent key decision has upheld the right of the state to regulate some forms of commercial speech. [Friedman v. Rogers](#), 440 U.S. 1, 59 L.Ed2d 100, 99 S.Ct. 887 (1979). Permitted regulation of commercial speech includes restrictions upon time, place, or manner of expression provided these restrictions 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 information. [Virginia Pharmacy Board v. Virginia Citizens Consumer Council](#), 425 U.S. 748, 48 L.Ed.2d 346, 96 S.Ct. 1817 (1976). The regulation as promulgated by the Board does not meet these requirements and, thus, the restrictions of the regulation do not appear constitutional.

First, the severe restrictions on content which the regulation contains excludes such commercial speech as the advertising of prices on the signs. The size restriction also effectively limits the amount of commercial information which can be placed on a sign. Substantial interests lie in the free flow of commercial information. [Bates v. State Bar of Arizona](#), 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977). Secondly, the restrictions must serve a significant governmental interest. The only interest that appears to be served by the regulation is that of maintaining the image of professionalism among optometrists.¹ The same

interest of professionalism was brought forth in both the Virginia Pharmacy and Bates cases, supra. The Court acknowledged that the state had an interest in the maintenance of professionalism, but rejected this interest as insufficient to justify regulation of commercial speech in both cases. The Court pointed out that several professions advertise freely, and yet these professions are not regarded as undignified. Bates v. State Bar of Arizona, supra. Finally, although alternative channels for communication of commercial information are available, alternatives may not be as satisfactory as placing commercial information before the public at the place of business. This was a factor in the Court's overturning of a township's restrictions on the placement of 'for sale' signs in Linmark Associates, Inc. v. Town of Willingboro, 431 U.S. 85, 52 L.Ed.2d 155, 97 S.Ct. 1614 (1977). The regulation as written appears to fail to meet any of the Court's criteria to allow the state to restrict the time, place or manner of this form of commercial speech.

*2 In addition, commercial speech may be regulated if it is false, deceptive, or misleading. Friedman v. Rogers, supra. It is appropriate for the state to require that a commercial message appear in such a form as is necessary to prevent its being deceptive. However, there is no showing that the Board's interest in promulgating this regulation is founded on protecting the public from deceptive or misleading advertising. Thus, this avenue of justification for the Board's regulation seems closed.

CONCLUSION

Regulation 95-1(G) of the Rules of Practice of Optometry for the State of South Carolina is an unconstitutional restriction of the First Amendment.

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Footnotes

- 1 The Board of Examiners have articulated no justification for the restriction. Apparently Rule 95-1(G) was promulgated during a period when advertising by optometrists was generally prohibited and, thus, Rule 95-1(G) was intended to be a permissive exception to the general prohibition. Now that advertising by optometrists is generally permitted, the purpose of the rule is obsolete.

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