

MAINE STATE LEGISLATURE

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Optometric Advertising
32 MR) AD 2433
" " " 2445

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March 3, 1977

Representative Frank P. Wood
State of Maine
House of Representatives
Augusta, Maine 04333

Dear Representative Wood:

This is in response to your letter dated January 14, 1977 asking this office to review the Maine statutes prohibiting the advertisement of eyeglasses and to advise you of the constitutionality of the statutory prohibitions in view of recent Court decisions. As I construe your request, you are concerned with the constitutionality of statutory prohibition on advertising of ophthalmic goods and not just eyeglasses.

In reviewing the provisions of the Maine statutes dealing with the practice of optometry, we noticed that sections of the statutes either expressly prohibit the advertisement of ophthalmic products or impose a total ban on all advertising. Section 2433 of Title 32 of the Maine Revised Statutes provides that an optometrist's license may be revoked or suspended if he engages in certain solicitation or advertising. More specifically, section 2433 (3) and (4) states:

"The sanctions of section 2431 may be imposed for any of the following conduct, deemed unprofessional on the part of a holder of a certificate of registration to practice optometry:

* * *

3. Solicitation. The employment of solicitors for, or the solicitation of practice directly or indirectly, but the following shall nevertheless be considered lawful;

Telephone listings that use no bold type or display form; professional cards that contain only the optometrist's name, title, address, telephone number, practice limited to a specialty or office hours; announcements in newspapers or direct mail of opening or closing a practice provided same be in keeping with size, style, frequency and duration deemed ethical by other health practices of the community; and informational lettering on doors, windows and signs that conforms to size and style used by other health practices of the community;

4. Advertising. The advertisement of prices, free services, credit terms or superior professional skills or services or the making of any form of specific guarantee;

In addition, section 2445 of Title 32 makes it a crime ...for any person, firm, partnership, company or corporation to solicit eye examinations or visual services, or to advertise the sale of eyeglasses, spectacles, lenses, frames, mountings, prisms or any other optical appliances or devices commonly included in the prescription of optometrists or physicians by newspaper, radio, window display, television, telephone directory display advertisement or any other means of advertisement; or to use any method or means of baiting, persuading or enticing the public into buying eyeglasses, spectacles, lenses, frames, mountings, prisms or other optical appliances or devices for visual correction....

It is our view that the above wording of these statutes imposes a total ban on all advertisements containing price information of ophthalmic goods.

Recently, the United States Supreme Court in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976) held unconstitutional a state statute which defined "unprofessional conduct" to include advertising of prices by pharmacists. The statute was challenged on the grounds that the First Amendment guaranteed consumers the right to receive price information. The Court decided that the consumer's need for price information outweighed the state's regulatory justification. In reaching its decision the Court rejected claims by the pharmacists that advertising restrictions were necessary to maintain a high degree of professionalism and to thereby protect citizens. The Court said that "[t]he advertising ban does not directly affect professional standards one way of the other. ...[H]igh professional standards, to a substantial extent, are guaranteed by the close regulation.." of the state, and the state is "free to require whatever professional standards it wishes of its pharmacists..." But the Court said that a state may not keep the public in ignorance of prices that competing pharmacists are offering.

Although the issues in the Virginia Pharmacy case involved pharmacists and prescription drugs, its holding has been applied to First Amendment challenges to statutes banning advertising by other professions. For example, in Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine, 45 LW 2254 (1976), the United States District Court held that a Virginia statute preventing physicians from advertising their professional services, fees, credit terms or quality abridged a health planning agency's First Amendment right to gather, publish and receive information about physicians' services. That Court also held that a Virginia State Bar Code provision subjecting attorneys to disciplinary action for publicizing both non-fee and price information was an unconstitutional restriction on speech protected by the First Amendment. Consumers Union of U. S., Inc. v. American Bar Association, 45 LW 2310 (1976). In addition, at least one Court has held that a state statute prohibiting advertising of prices and places to buy eyeglasses infringes upon consumers' First Amendment rights to receive such information. Terminal-Hudson Electronics v. Department of Consumer Affairs, 407 F. Supp. 1075 (S.D. Cal. 1976). Judgment vacated and case remanded to U. S. District Court for further consideration in light of Virginia Pharmacy Board v. Virginia Consumer Council, supra.

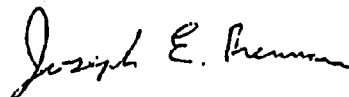
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Applying the rationale and holdings of the above referenced cases to the question you raise concerning the constitutionality of the Maine statutes cited herein which prohibit advertising of ophthalmic goods, it is apparent that consumers of ophthalmic products have the right to receive information under the First Amendment. Therefore, it is my opinion, based on these recent Court decisions, that since 32 M.R.S.A. § 2445 imposes a total ban on the advertisement of truthful information by optometrists and by other sellers of ophthalmic goods, this section of the Maine statutes unconstitutionally restricts speech protected by the First Amendment.* It is also my opinion, based on these Court decisions, that to the extent that 32 M.R.S.A. § 2433(3) and (4) impose a total ban on all advertisement of truthful information regarding ophthalmic goods, those sections too, are violative of the First Amendment guarantee of free speech. In rendering this opinion, I have considered the rule that acts of the legislature are presumed constitutional. But, it is my opinion that this presumption must give way in light of the Court decisions to which I have referred in this letter.

This opinion does not mean, however, that advertising of ophthalmic goods may never be regulated in any way. The Court decisions expressly state that deceptive advertising is not protected by the First Amendment. The Consumer Fraud Division of this Department has been and will continue to initiate legal action against anyone who engages in deceptive advertising to protect consumers. In addition the statutes may be amended to give the Board of Optometry and the Administrative Hearing Officer explicit authority to impose sanctions for deceptive, misleading, and false advertising of ophthalmic goods by optometrists.

Very truly yours,



JOSEPH E. BRENNAN
Attorney General

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* In a letter dated May 19, 1976 to Representative Thomas LaPointe, we stated that 32 M.R.S.A. § 2445 was constitutional. This decision was based upon an U. S. Supreme Court decision rejecting constitutional challenges to statutes similar to

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32 M.R.S.A. § 2445 on due process and equal protection grounds. We did point out, however, that an appeal from the Virginia Pharmacy Board case was currently pending before the U. S. Supreme Court raising First Amendment issues and that this constitutional challenge might be upheld by the Court in light of recent trends toward greater recognition and protection of consumer rights.