

# MAINE STATE LEGISLATURE

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79-108

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May 29, 1979

Thomas J. Joyce, Jr., O.D.  
President, Maine Board of Optometry  
784 Main Street  
Westbrook, Maine 04092

Dear Tom:

I am writing in response to your request for an opinion regarding the use of trade names by optometrists. Specifically, you have asked whether an optometrist registered in Maine may use on letterheads, office signs or advertisements a name other than that given in his or her Maine certificate of registration. You have also provided several specific examples and have noted that in each instance the name given in the optometrist's certificate of registration is included by the optometrist in some manner along with the trade name. It is our opinion that, regardless of whether the name given in the optometrist's certificate of registration is included in the letterhead, office sign or advertisement along with the trade name, the use of such a trade name is not permissible under the Maine statutes.

32 M.R.S.A. § 2432(2) provides in applicable part that the disciplinary sanctions of 32 M.R.S.A. § 2431<sup>1</sup> may be imposed upon a licensed optometrist "[i]f such person practices under a name other than that given in the certificate of registration." If, therefore, a licensed optometrist practiced solely under a trade name, he would clearly be violating the above provision. See, e.g. Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d 786 at 787, 792 (Me., 1972). Even if the optometrist were, in some manner, to include his own name along

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<sup>1</sup>/ The Board of Optometry may refuse to renew a certificate of registration; the Administrative Court may suspend or revoke a certificate of registration.

with the trade name under which he is practicing, that optometrist would still, at least in part, be practicing under a name (the trade name) other than that given in his certificate of registration. An optometrist may not avoid the statutory proscription by including his own name along with his trade name.<sup>2/</sup>

Furthermore, the United States Supreme Court recently addressed the issue of the use of a trade name<sup>3/</sup> in its decision in Friedman v. Rogers, 47 LW 4151 (February 21, 1979). In that case the Supreme

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- <sup>2/</sup> In addition, depending upon the particular factual situation involved, 32 M.R.S.A. § 2434 and § 2435 may also be applicable. 32 M.R.S.A. § 2434 provides in applicable part that:

"An optometrist shall practice only in an individual capacity under his own name or in association with a licensed practitioner of optometry or of another of the healing arts and sciences. The following shall be deemed unauthorized associations subject to the sanctions of section 2431:

(1) Association for the joint practice of optometry with any person, corporation or partnership not licensed to practice optometry or another of the healing arts;"

32 M.R.S.A. § 2435 provides in applicable part that:

"No registered optometrist, under this chapter, shall associate himself in any way with any person not a registered optometrist nor any copartnership, firm or corporation for the promotion of any commercial practice for profit or division of profit which enables any such person, copartnership, firm or corporation to engage, either directly or indirectly, in the practice of optometry in this State." (emphasis added)

- <sup>3/</sup> A second issue, regarding the membership of the Texas Optometry Board, was also before the Court. That issue, however, is not involved in this opinion.

Court examined a Texas optometric statute, quite similar to 32 M.R.S.A. § 2432(2), which prohibits the practice of optometry under a trade name. Section 5.13(d) of the Texas Optometry Act provides in applicable part that,

"No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas . . . ." (emphasis added)

A three-Judge Federal District Court held that "blanket suppression"<sup>4/</sup> of the use of a trade name is a violation of the First Amendment to the United States Constitution. Rogers v. Friedman, 438 F. Supp. 428, 431 (E.D. Texas, 1977). The United States Supreme Court reversed. It upheld, as against the First Amendment challenge, this ban on the use of trade names. In reaching its decision, the Supreme Court stated that,

"A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead the public.

"The possibilities for deception are numerous . . . .

"§ 5.13(d) ensures that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with a trade name."  
47 L.W. at 4154-55.

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<sup>4/</sup> That is to say, prohibiting practice under a trade name used either alone, or in connection with the name under which the optometrist is licensed to practice. See 438 F.Supp. 431 at footnote 3.

The Supreme Court, in a footnote, added that ". . . there is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." 47 L.W. at 4154. That the rationale of the Court applied regardless of whether or not an individual optometrist's name were included along with his trade name, see also concurring and dissenting opinion of Justice Blackmun, 47 L.W. at 4157-58.

It is reasonable to assume that the Legislature in Maine had at least similar concerns when it enacted 32 M.R.S.A. § 2432(2), a statute similar to § 5.13(d). Consequently, the reasoning utilized by the Court in Friedman v. Rogers, in upholding a ban on the use of trade names used alone or in connection with an optometrist's individual name, gives added support for the view that the Maine Legislature intended to proscribe the use of a trade name by an optometrist, whether or not it is utilized in connection with the individual name of the optometrist as contained on his certificate of registration.

Very truly yours,



DAVID ROSEMAN  
Assistant Attorney General

DR:mfe

cc: Norman Varnum, O.D., Secretary of the Board