

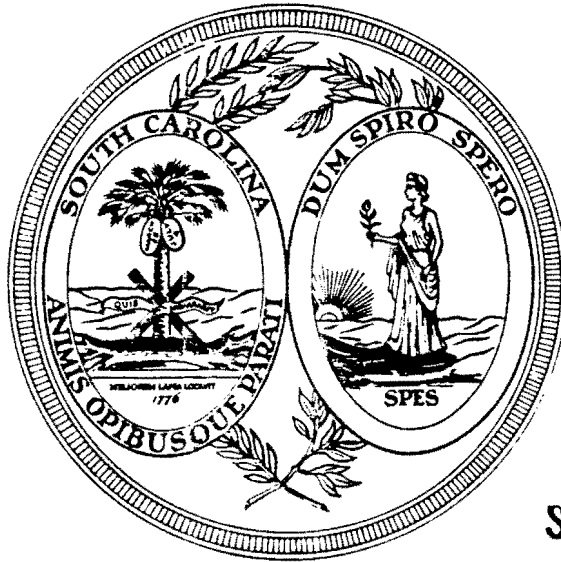
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Sunset Review of Board of
Examiners in Optometry, Board of
Examiners in Opticianry, Board of
Physical Therapy Examiners, Board
of Occupational Therapy, Board of
Podiatry Examiners, Board of
Examiners in Psychology, Board of
Examiners in Speech Pathology and
Audiology

South Carolina General Assembly



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STATE DOCUMENTS

Legislative Audit Council



The State of South Carolina
General Assembly
Legislative Audit Council
Sunset Review of:
Board of Examiners in Optometry
Board of Examiners in Opticianry
Board of Physical Therapy Examiners
Board of Occupational Therapy
Board of Podiatry Examiners
Board of Examiners in Psychology
Board of Examiners in Speech
Pathology and Audiology
June 26, 1987

THE STATE OF SOUTH CAROLINA

GENERAL ASSEMBLY

LEGISLATIVE AUDIT COUNCIL

SUNSET REVIEW OF:

BOARD OF EXAMINERS IN OPTOMETRY

BOARD OF EXAMINERS IN OPTICIANRY

BOARD OF PHYSICAL THERAPY EXAMINERS

BOARD OF OCCUPATIONAL THERAPY

BOARD OF PODIATRY EXAMINERS

BOARD OF EXAMINERS IN PSYCHOLOGY

BOARD OF EXAMINERS IN SPEECH PATHOLOGY AND AUDIOLOGY

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REPORT SUMMARY

Introduction

In 1978, the General Assembly passed Act 608, the "Sunset Act" (§1-20-10 et seq. of the South Carolina Code of Laws, as amended). This Act abolishes specific boards and commissions on predetermined dates unless these agencies demonstrate a public need to justify their continued existence. In passing the law, the Legislature's greatest concern was whether the regulation provided by these agencies was needed to protect the public interest and, if so, how well the boards and commissions were performing this function.

The Sunset Act requires the Legislative Audit Council to evaluate the performance of the agencies scheduled for termination. This report contains the reviews of seven boards scheduled to terminate on June 30, 1988:

Board of Examiners in Optometry
Board of Examiners in Opticianry
Board of Physical Therapy Examiners
Board of Occupational Therapy
Board of Podiatry Examiners
Board of Examiners in Psychology
Board of Examiners in Speech Pathology and Audiology

The Act requires that the Audit Council, at a minimum, address the following eight issues:

- (1) The amount of the increase or reduction of costs of goods and services caused by the administering of the programs or functions of the agency under review;
- (2) The economic, fiscal and other impacts that would occur in the absence of the administering of the programs or functions of the agency under review;
- (3) The overall cost, including manpower, of the agency under review;

- (4) The efficiency of the administration of the programs or functions of the agency under review;
- (5) The extent to which the agency under review has encouraged the participation of the public and, if applicable, the industry it regulates;
- (6) The extent to which the agency duplicates the services, functions and programs administered by any other state, federal or other agency or entity;
- (7) The efficiency with which formal public complaints, filed with the agency concerning persons or industries subject to the regulation and administration of the agency under review, have been processed; and,
- (8) The extent to which the agency under review has complied with all applicable state, federal and local statutes and regulations.

The review indicates that the seven boards fulfill a public need and meet the Sunset Act's criteria to justify their continued existence. The Audit Council, therefore, recommends that the General Assembly reauthorize these boards. However, the Council also recommends that a single board regulate physical therapy and occupational therapy.

The Audit Council also found that state laws restrict the types of business arrangements through which professional services can be offered to the public. While some professional services are being provided contrary to state law, changes are needed in these laws to provide more innovative forms of service, increased competition, and lower consumer prices. Furthermore, the boards reviewed in this report collectively would better serve the public and the professions they regulate if they shared office space and staff and renewed licenses biennially. Also, boards which regulate health-related professionals would better protect the public if their licensees were required to report to their respective boards all malpractice awards made against them.

This report is the first step in the Sunset process. The Audit Council asked the boards to respond in writing to

their audit reports and their comments are found in the appendix of each audit. In addition, each agency may testify in public hearings held by the State Reorganization Commission. Following this process, the General Assembly will decide whether to reauthorize these boards.

Legality of Innovations in Professional Practices

State law restricts the types of business arrangements through which professional services can be offered to the general public. By law, licensed professionals cannot be employed by corporations for the purpose of providing services to the general public. Professionals are allowed to gain some of the benefits of incorporation by forming professional associations (PAs). A PA is an unincorporated association organized to render one professional service such as medicine, physical therapy or psychology.¹ However, professionals who form PAs cannot provide more than one service.

The laws upon which these restrictions are based have not kept pace with innovations in business arrangements for professional practices. While it is illegal, some professionals are working for corporations and providing services to the general public, and some medical professional associations are offering more than one health care service.

Professionals Working for Corporations

Under state law, professionals cannot work for corporations for the purpose of providing services to the

¹Section 33-51-20 defines professional service as "...any type of professional service which may be legally performed only pursuant to a license from a State Examining Board pursuant to the provisions of Title 40...." All licensees of the seven boards examined in this report are licensed pursuant to the requirements of Title 40.

general public.² The reasoning for this is that when a corporation employs licensed professionals to provide services to the public, the corporation is itself practicing a learned profession. This practice would violate the statutes which allow only an individual to be licensed to practice a profession. A 1982 Attorney General's opinion, regarding occupational therapists working for a corporation and providing services to the general public, stated:

...the corporation...is incapable of being licensed itself; neither may it employ licensed occupational therapists in order to practice occupational therapy in South Carolina.

However, contrary to state law, professionals working for corporations are providing services to the general public. Members of the Boards of Pharmacy, Speech Pathology and Audiology, and Opticianry stated that pharmacists, speech pathologists, audiologists, and opticians are working for corporations and providing services to the general public. Furthermore, corporations, which own for-profit hospitals in South Carolina, employ on a salaried basis, doctors, pharmacists, physical therapists and occupational therapists.

By disallowing corporations from hiring professionals to provide services to the general public, the law may be raising costs to consumers without increasing the quality of care. Attorneys with the Federal Trade Commission, commenting on corporate practice restrictions on occupational therapists, stated the restrictions "...may also generate significant anticompetitive effects and

²Charitable and public hospitals are exempted from this restriction and can hire licensed professionals to provide services to the general public.

increase costs to consumers."³ Further, no evidence was found that licensed professionals working for corporations or for-profit hospitals provide inferior service, compared to these professionals working for organizations as allowed by state law.

Professional Associations Can Provide Only One Service

Professional Associations are prohibited by South Carolina law from providing more than one professional service.⁴ However, consumers might pay lower prices for health care if state law concerning PAs were less restrictive.

Section 33-51-30 of the South Carolina Code of Laws states:

...no professional association...shall render professional service in more than one type of professional service.

Section 33-51-50 also clearly prohibits PAs from offering more than one type of service.

The restriction on PAs providing multiple services is anti-competitive and may raise prices without providing an off-setting increase in the quality of care. The Bureau of Competition, Consumer Protection, and Economics of the Federal Trade Commission, commenting on a proposed Nevada regulation that would provide employment restrictions similar to South Carolina's for physical therapists and physicians, stated:

...the proposed rule would deny consumers the benefits of the full range of service, price, and quality options that a competitive market would provide.

³See page 134 for the April 1987 Federal Trade Commission letter to the Audit Council.

⁴However, §33-51-60 allows PAs to provide nursing services in addition to the professional service for which they were organized.

The proposed employment restrictions would hinder the development of more efficient practices that reduce costs through economies of scale or scope. In addition, providers would be limited in offering allied services at a single location, which may provide greater convenience and lower costs to consumers who would otherwise have to go to different locations to obtain these services.

By limiting PAs to providing only one service, the law prohibits innovative forms of service delivery which might be more cost efficient. For example, it is illegal for one PA to offer the services of physicians, physical therapists, occupational therapists, and pharmacists. Instead, a professional association of medical doctors must refer their patients to independent therapists and pharmacists. Professionals with independent practices may charge higher prices than PAs offering multiple services due to their inability to benefit from economies of scale.

In California, physicians are allowed to own other medically-related services, such as physical therapy or occupational therapy services.⁵ They are required, however, to clearly inform their patients, when making referrals, that they own these services. The California Medical Association has stated that by allowing physicians to own other medically-related services, costs to consumers can be decreased.

Additionally, in South Carolina, hospitals are taking advantage of the economies arising from offering multiple medical services. Many hospitals have their own pharmacists and salaried physicians, and many provide physical therapy and occupational therapy services.

⁵California does not allow physicians to own a pharmacy.

Furthermore, PAs in South Carolina are offering multiple services contrary to state law. For example, some physicians' PAs employ, on a salaried basis, both physical and occupational therapists, and a psychiatric association employs both physicians and psychologists.

Summary

State law now restricts the forms of practice through which professional services can be offered. Some professionals are providing services to the public which are contrary to state law, but which can result in increased competition and lower consumer prices. If the practice restrictions were removed, the public would benefit from the decreased costs of professional services with no decrease in quality.

RECOMMENDATIONS

THE GENERAL ASSEMBLY SHOULD CONSIDER AMENDING TITLE 33 OF THE SOUTH CAROLINA CODE OF LAWS TO ALLOW PROFESSIONALS TO WORK FOR CORPORATIONS TO PROVIDE SERVICES TO THE GENERAL PUBLIC.

THE GENERAL ASSEMBLY SHOULD CONSIDER REPEALING THE PROVISIONS IN TITLE 33, CHAPTER 51 OF THE SOUTH CAROLINA CODE OF LAWS WHICH PROHIBIT PROFESSIONAL ASSOCIATIONS FROM OFFERING MORE THAN ONE PROFESSIONAL SERVICE.

Central Administrative Office Needed

The seven medically-related boards reviewed in this report collectively would better serve the public and the professions they regulate if they shared office space and staff. Access to the boards by their licensees and the public is limited, and in some cases, response time for

correspondence and complaints is long. Further, records of five boards must be kept in individuals' homes or private offices. These boards' administrative duties have become more than can be expected of a board member or part-time secretary.

Six of the boards have part-time employees to handle administrative duties. The remaining board has no state-authorized positions. None of the boards have investigators for handling complaints. All of the boards rely on Board members to donate their time and often their personal resources to get the work done.

The boards are responsible for handling applications, examinations, licenses, license renewals, complaints and information requests. Specific administrative requirements of the state must also be fulfilled. These responsibilities have increased, and it is reasonable to expect that they will continue to do so.

The boards, primarily composed of professionals, often have little knowledge of state laws and procedures. In some instances, boards have taken actions contrary to state laws and procedures because they lack staff with experience in state requirements.

Also, public participation in the boards' activities is limited. Five of the boards have no office, and four do not have listed telephone numbers. This makes it difficult for members of the public to contact the boards for information or to file complaints.

In order for regulatory boards to protect the public, it is necessary for them to be accessible to the public, professionals and other state agencies. Individually, six of the seven boards are too small to generate the resources needed, without raising fees, for each to support an office and staff. In FY 85-86, the average number of licensees handled by the boards was 363 and the smallest board, Podiatry, had 55 licensees. The Physical Therapy Board,

with 769 licensees, is able to support an office and a staff person working 32 hours a week.

The State Reorganization Commission, the Governor's Productivity Council, and the organization for the state's Professional Occupational Licensing Agencies have all recommended that these and other small licensing boards share office space and staff. Also, other southeastern states allow their small regulatory boards to share offices and staff. Florida, Georgia, Kentucky and Tennessee have from two to 35 boards sharing offices and staff. Virginia's ten small medically-related boards share an office and other administrative costs.

A centrally-located office with shared administrative staff would benefit both the public and the professions regulated by the seven boards. It would allow these small boards to maintain a full-time office for processing licenses, handling complaints, transmitting information and fulfilling state requirements. Further, an office in the state capitol area would give the public and the professionals greater access to the boards.

A review of the boards' available resources indicates sharing an office and staff would be possible without significantly increasing individual boards' costs. In FY 85-86, the boards' revenues to the state General Fund exceeded their expenditures by more than \$28,000. Also, the Physical Therapy Board has an office for which it pays \$1,300 annually. Further, savings in staff time would result if six of the boards implement biennial licensure (see p. 10).

Members of four boards stated that they want to share an office and staff with other small boards. A member of the fifth board said that it was a good idea on the surface, but may result in a loss of control for the board. Members from the remaining two boards were in favor only of sharing investigators.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER ALLOWING THE BOARDS OF OCCUPATIONAL THERAPY, OPTICIANRY, OPTOMETRY, PHYSICAL THERAPY, PODIATRY, PSYCHOLOGY, AND SPEECH PATHOLOGY AND AUDIOLOGY TO SHARE STAFF AND AN OFFICE IN THE STATE CAPITOL AREA. THE GENERAL ASSEMBLY SHOULD ALSO CONSIDER INCLUDING OTHER SMALL LICENSING BOARDS WHICH WOULD BENEFIT FROM SHARING STAFF AND OFFICE SPACE WITH THESE SEVEN BOARDS.

Biennial Licensure

State law requires annual renewal of licenses for six of the seven boards reviewed in this report. The Boards of Occupational Therapy, Opticianry, Optometry, Physical Therapy, Podiatry, and Speech Pathology and Audiology would increase revenue from the interest earned on license fees and would save some operating costs if their licenses were renewed every two years. The Psychology Board already has biennial licensure.

The six boards spend a total of 739 hours, or 98 days, a year renewing licenses. This amount of staff time would be reduced by half with staggered biennial licensure, thereby freeing staff to work on other tasks, including complaint investigations and correspondence. Since the Audit Council is recommending that the seven boards share office space and staff (see p. 7), biennial licensure would help reduce any additional staff costs that may be incurred from such an administrative merger.

Furthermore, biennial licensure would create a gain to the state in interest earned on license fees and would result in a small savings to the boards. The two largest boards, Optometry and Physical Therapy, would earn

approximately \$1,200 and \$1,150 more a year in interest, respectively.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER AMENDING STATE LAW SO THAT THE BOARDS OF OCCUPATIONAL THERAPY, OPTICIANRY, OPTOMETRY, PHYSICAL THERAPY, PODIATRY, AND SPEECH PATHOLOGY AND AUDIOLOGY RENEW LICENSES BIENNIALY ON A STAGGERED BASIS.

Reporting of Malpractice Awards

The state boards which regulate health-related professionals could better protect the public if their licensees were required to report to their respective boards all malpractice awards made against them. Currently, 11 of the state's 13 health-related boards have no formal mechanism for being advised of malpractice awards involving their licensees.

The state's licensing boards were created to protect the public from incompetent practitioners. Receiving information concerning malpractice awards would allow the licensing boards to better track licensees for recurring problems involving their competence. Members of 10 of the 13 boards which regulate health professionals stated that their boards should be informed of all malpractice awards involving their licensees.⁶ Members of all 13 boards stated

⁶The president, chairman or secretary of the Boards of Medical Examiners, Nursing, Pharmacy, Veterinary Medical Examiners, Chiropractic Examiners, Psychology, Occupational Therapy, Physical Therapy, Opticianry, and Speech Pathology and Audiology stated that their boards should receive such information. The president or chairman of the Boards of Dentistry, Optometry, and Podiatry stated they did not

(Footnote Continued)

their boards should investigate a licensee with a pattern of malpractice awards.

The Federation of State Medical Boards recommends in its model medical practice act that:

Malpractice insurance carriers and affected licensees should be required to file with the Board a report of each final judgement, settlement, or award against...licensees.... Upon receiving reports concerning a licensee..., the Board should be permitted to investigate any evidence which appears to show a licensee is or may be medically incompetent, guilty of unprofessional conduct, or mentally or physically unable to engage safely in the practice of medicine.

Twenty-seven states have laws mandating insurance companies to report malpractice awards involving physicians to their state medical boards. Furthermore, the Federal Omnibus Health Act (Public Law 99-660) mandates liability companies to report malpractice awards involving physicians, dentists with hospital privileges, and osteopaths by 1989. Awards will be reported to a repository to be designated by the United States Secretary of Health and Human Services and to the state medical boards. Companies which fail to report awards face civil penalties up to \$10,000 per occurrence. In South Carolina, physicians are required to report on their license renewal forms any malpractice awards or judgments made against them in the previous year. Furthermore, occupational therapists are required to report on their license renewal forms any professional liability suits filed against them.

(Footnote Continued)

believe it was necessary for this information to be reported to them.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER
REQUIRING ALL LICENSED MEDICAL
PROFESSIONALS AND THEIR INSURANCE
COMPANIES TO PROMPTLY REPORT TO THE
RESPECTIVE REGULATORY BOARDS ALL
MALPRACTICE AWARDS MADE AGAINST THEM.

BOARD OF EXAMINERS IN OPTOMETRY

BOARD OF EXAMINERS IN OPTOMETRY

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INTRODUCTION

After reviewing its laws and operations, the Legislative Audit Council concludes that there is a public need for the regulation of optometry, and that the Optometry Board should be continued. In most areas, the Board has operated efficiently and effectively. However, the Audit Council has identified several laws and regulations which unnecessarily limit competition and may increase prices, while providing questionable protection of the public's health and welfare.

BACKGROUND

The South Carolina Board of Examiners in Optometry was created as an independent body by the General Assembly in 1978 to regulate the profession. Prior to 1978, this Board was combined with the Board of Examiners in Opticianry. Nationwide, all 50 states regulate optometry through licensure.

Optometrists are one of three types of professionals who provide eye care. They examine eyes for vision defects and diseases, and prescribe and dispense corrective lenses. Ophthalmologists are physicians who diagnose and treat vision defects and diseases, perform surgery, and prescribe and dispense corrective lenses. Opticians produce and dispense corrective lenses from the prescriptions of optometrists and ophthalmologists. The Optometry Board regulates optometrists only.

The Optometry Board is composed of five licensed optometrists and two public members having no connection with an optical profession. The Governor appoints the optometrist members upon nomination by all licensed optometrists in the state. He also appoints the public members who can be nominated by any individual or group. Board members may serve no more than two consecutive four-year terms.

The Optometry Board examines applicants for licensure, investigates complaints, and investigates and prosecutes violations of South Carolina optometry law. The Board also promulgates regulations governing the practice of optometry. In December 1986, there were 457 licensed optometrists, 188 of whom lived out-of-state. All licenses must be renewed annually by October 1.

SUNSET ISSUES AND FINDINGS

- (1) **DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The Optometry Board has no direct control over the prices charged by optometrists for their services. The Board does impose regulation costs on optometrists through examination fees, license fees, and continuing education requirements. However, it is not likely that these costs significantly affect the price of optometric services.

Consumer prices may be affected by some state laws and regulations administered by the Board. These are discussed below.

Limits on Competition

The Audit Council identified eight state laws and regulations which limit competition while providing questionable benefit to the public's health and welfare. The laws and regulations in question were identified with the assistance of the Bureaus of Consumer Protection, Competition and Economics of the Federal Trade Commission (FTC) upon the request of the Audit Council.¹ Laws which limit competition can result in higher consumer prices.

Price Discounts

Section 40-37-190 of the South Carolina Code of Laws states:

It shall be unlawful for any person to offer eye examinations at a discount

¹See page 33 for February 1987 FTC letter to the Audit Council, which includes several issues not addressed in this report.

price or as a premium, the object of which is to induce the sale of ophthalmic services or materials.

This law does not prohibit an optometrist from discounting, or giving free of charge, services to the public. Nor does it prohibit the advertising of individual prices for services. The law only prohibits optometrists from advertising to the public which prices are discount prices. It is questionable, however, as to how the public can be harmed or deceived by the advertising of discount prices. FTC analysts found "...no consumer benefit from such restrictions."

Office Location

State Regulation 95-1(n) states:

No licensed optometrist shall practice his profession in a space leased or rented in a business establishment such as a jewelry, department or other store: Provided, it is not unlawful to share a joint waiting room with a practitioner of another recognized profession. Provided, further, that this shall not be construed to prevent an optometrist now practicing optometry in a store owned and operated by himself from continuing to so operate.

It is questionable, however, as to how the public can be harmed or deceived solely because a licensed optometrist is practicing in space leased or rented within another store. An FTC study concludes that restrictions such as these "... harm consumers by increasing prices without providing any quality-related benefits."

Qualification Claims and Professional Affiliations

State Regulation 95-1(e) states:

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

State Regulation 95-1(f) states:

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

By prohibiting all ads with the "slightest intimation" of superior qualifications, state regulation limits competition by preventing optometrists from informing their customers of pertinent education and experience qualifications. In addition, FTC analysts note that, while it is possible for professional affiliations to "...be communicated in a deceptive manner, the mere possibility of deception does not justify a total ban." Advertising would be more informative to consumers if regulation prohibited only those claims of qualifications and professional affiliations which are deceptive.

Solicitors

Section 40-37-220(15) of the South Carolina Code of Laws permits the Board to discipline optometrists when "...the holder of a license has been guilty of using a solicitor, peddlers, cappers or steerers to obtain patronage." This statute could be used to prohibit optometrists from using third parties to assist in marketing their services and products in any manner. FTC analysts suggest only prohibiting third-party solicitation which involves:

...uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence.

Third-party solicitation which is truthful, nondeceptive, and noncoercive could provide beneficial information to consumers on the qualifications and services of optometrists.

Visual Displays

State Regulation 95-1(d) states:

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

Regulation 95-1(h) states:

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

Regulation 95-1(k) states:

No licensed optometrist shall display any lenses, spectacle frames or mountings, or any other ophthalmic material or advertising of any kind in the windows or in any room in his office for the purpose of inducing patronage.

It is questionable as to how the public can be harmed or deceived by the advertising displays prohibited by these regulations. FTC analysts found these restrictions "...provide no apparent consumer benefit."

Summary

When the truthful, nondeceptive advertising of optometric services is unnecessarily restricted, competition is reduced, and price and quality comparison becomes more time-consuming and inconvenient for consumers. Reduced competition often results in higher prices. Further, when optometrists are prohibited from locating in other stores, some will incur higher operating costs because a separate office must be maintained. These costs may be passed on to consumers.

RECOMMENDATIONS

THE GENERAL ASSEMBLY SHOULD CONSIDER
REPEALING THE PROHIBITION ON ADVERTISING
OF DISCOUNTS ON EYE EXAMINATIONS
CONTAINED IN §40-37-190 OF THE SOUTH

CAROLINA CODE OF LAWS. THE GENERAL ASSEMBLY SHOULD CONSIDER AMENDING §40-37-220(15) TO ALLOW TRUTHFUL, NONDECEPTIVE, NONCOERCIVE THIRD-PARTY SOLICITATION.

THE OPTOMETRY BOARD SHOULD REPEAL STATE REGULATIONS 95-1(D), (H), AND (K) WHICH RESTRICT ADVERTISING DISPLAYS, AND REGULATION 95-1(N) WHICH RESTRICTS THE OFFICE LOCATION OF OPTOMETRISTS. THE BOARD SHOULD ALSO AMEND REGULATIONS 95-1(E) AND (F) TO ALLOW TRUTHFUL, NONDECEPTIVE CLAIMS OF QUALIFICATIONS AND PROFESSIONAL AFFILIATIONS.

- (2) DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The complete deregulation of optometry would remove state laws and regulations which help ensure the quality of eye care optometrists provide to the public. Deregulation would eliminate entry requirements, including education and examination, which help ensure that optometrists are qualified to provide eye care. It would also eliminate a mechanism for suspending or revoking an unqualified optometrist's license.

As a result of deregulation, the number of unqualified optometrists might increase. Unqualified optometrists may issue inaccurate prescriptions and misdiagnose eye symptoms requiring medical attention. Although the price of eye care could decrease due to increased competition among optometrists, the public may be exposed to more untrained and potentially harmful practitioners, thus affecting public health, safety and welfare. Therefore, the Audit Council

recommends that the Board and regulation of the profession be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

To support its administrative costs, the Optometry Board collects revenue through examination and license fees (see p. 32). From FY 81-82 through FY 85-86, the Board's expenditures increased from \$24,821 to \$30,799, while revenues increased from \$29,075 to \$39,955 (see Table 1). In FY 85-86, expenditures were equal to 77% of the revenue collected. The remaining 23% was retained in the state General Fund.

A private firm performs the Board's administrative and clerical functions for a contracted fee of \$9,600 per year (FY 86-87). The Board also pays one of its members \$3,765 per year for part-time administrative duties.

TABLE 1
SOUTH CAROLINA BOARD OF EXAMINERS IN OPTOMETRY
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License & Examination Fees	\$ 29,075	\$ 32,928	\$ 39,080	\$ 40,809	\$ 39,955
TOTAL Revenues	\$ 29,075	\$ 32,928	\$ 39,080	\$ 40,809	\$ 39,955
 <u>Expenditures</u>					
Personal Service	\$ 8,152	\$ 8,408	\$ 9,600	\$ 8,112	\$ 8,455
Other Operating Expenses	16,187	13,320	19,252	17,010	21,704
Employee Benefits	482	564	611	523	640
Nonrecurring Appropriation	-	-	-	4,848	-
TOTAL Expenditures	\$ 24,821	\$ 22,292	\$ 29,463	\$ 30,493	\$ 30,799

Source: South Carolina Budget and Control Board Budget Documents, FY 83-84 through FY 87-88.

Board Employee

Since July 1, 1984, the Secretary-Treasurer of the Optometry Board has been a part-time employee of the Board.

This Board member has been paid \$3,765 per year but has no written job description. The member stated that this salary was in return for performing part-time administrative functions. Without a written job description, however, the public does not know which services have been purchased with its funds.

RECOMMENDATION

THE OPTOMETRY BOARD SHOULD ENSURE THAT ALL EMPLOYEES HAVE WRITTEN JOB DESCRIPTIONS.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

Since the Audit Council's 1981 review, the Optometry Board has made efforts to conduct its operations more efficiently. The Board has contracted with a private firm since 1985 to perform its administrative functions, and records reviewed by the Audit Council were well organized. However, the Board does not have written administrative procedures, and the laws regarding licensure of out-of-state optometrists need to be clarified.

Written Administrative Procedures

Although the Board is governed by state laws and regulations, they have not been implemented through written administrative procedures. Section 1-23-140 of the South Carolina Code of Laws requires that all state agencies adopt and make available to the public a written policy statement of all formal and informal procedures. This law allows more effective public oversight of agencies. Also, without written policies and procedures, government actions are less likely to be consistent. In addition, the Board could violate the constitutional guarantee of equal protection under the law.

RECOMMENDATION

THE OPTOMETRY BOARD SHOULD DEVELOP A
WRITTEN POLICIES AND PROCEDURES MANUAL.

Examination Process

The examination process for licensure consists of a national board exam and a state-administered practical exam. To ensure that its practical examination is a valid measure of optometry skills, the Board has contracted with a testing consultant from the University of South Carolina since 1984. The Audit Council commends the Board for using professional expertise. Although the examination process has been upgraded, the following area needs improvement.

Out-of-State Applicants

Qualifications in state law for South Carolina licensure of out-of-state optometrists are not clear. Further, requiring all out-of-state optometrists to pass South Carolina's practical exam may not be necessary to protect the public's health.

Two sections of the South Carolina Code of Laws appear to be contradictory. Section 40-37-90 states that an out-of-state optometrist is qualified to be licensed if he has practiced for five years in another state, is in good standing, and has passed the national board exam. Section 40-37-100 states that the Board may require a practical exam of applicants. However, since out-of-state licensure requirements in §40-37-90 do not refer to a practical exam, it is not clear whether out-of-state applicants can be required to pass a practical exam. In practice, the Board has required all applicants to pass a practical exam, but in 1985, a lawsuit was brought against the Board by an out-of-state plaintiff attempting to be licensed without passing the practical exam. The plaintiff initially won the lawsuit in Richland County Circuit Court

in 1986, but the decision was reversed by the South Carolina Supreme Court in 1987.

Requiring licensed out-of-state optometrists to pass South Carolina's practical exam may not be necessary to protect the public's health when they have passed equivalent tests in other states. Other health-related boards in South Carolina do not require further testing when out-of-state applicants meet certain criteria. For example, physicians from out-of-state may be licensed with no further testing based on approved education, postgraduate training, national test scores, years of experience, and letters of reference. If the credentials of an out-of-state physician are approved by the Board of Medical Examiners, licensure is granted without further testing.

When licensure of out-of-state optometrists who have passed equivalent tests in other states is unnecessarily restricted, the public may be denied the services of qualified individuals. Further, the public may not receive the price benefits from increased competition.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER CLARIFYING THE STATUTORY REQUIREMENTS FOR THE LICENSURE OF OUT-OF-STATE OPTOMETRISTS. IN CLARIFYING THE REQUIREMENTS, THE GENERAL ASSEMBLY SHOULD CONSIDER PERMITTING OUT-OF-STATE OPTOMETRISTS, WHO HAVE PASSED PRACTICAL EXAMS SUBSTANTIALLY EQUIVALENT TO SOUTH CAROLINA'S, TO BE EXEMPTED FROM THE SOUTH CAROLINA PRACTICAL EXAM.

- (5) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.**

To encourage public participation, state law requires that two of the seven Optometry Board members be public members, not associated with an eye care profession. The Board conducts public meetings approximately once a month, which are announced through written advertisements at the Board's office and in two Columbia newspapers. Also, the Board has listings in the state government and Columbia telephone directories.

The Board could improve its efforts in encouraging public participation through the process of setting fees. Because optometrist fees have not been enacted in regulation, the public has had inadequate input (see p. 29).

- (6) DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.**

The Audit Council found no evidence that the Optometry Board significantly duplicates the services, functions or programs of other state, federal, or local government agencies. Federal regulations (16 CFR 456) apply to advertising by the optometry profession, addressing practices by optometrists as well as state regulatory boards. However, the Optometry Board is the only government agency which issues licenses for optometrists to practice in South Carolina.

(7) EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.

In FY 85-86, the Optometry Board investigated 28 complaints filed against South Carolina optometrists. Two frequent areas of complaint involved inaccurate lens prescriptions and violations of state advertising restrictions. The Board requires all complaints to be in writing. Since 1985, complaints have been recorded in a log, which allows them to be monitored more efficiently.

Individual Board members conduct investigations on a rotating basis. Board members have stated that investigations could be improved if conducted by investigators who are not Board members. Due to the low volume of complaints, independent investigators would likely be more effective if shared with other small medically-related boards. The benefits of sharing staff, including investigators, are discussed in the Report Summary (see p. 7).

(8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.

The Optometry Board was created under and is subject to South Carolina laws and regulations. Federal regulations (16 CFR 456) regarding advertising practices also apply to the optometry profession.

The Audit Council found the Board has not sent minority business procurement plans to the Office of Small and Minority Business Assistance as required by the South Carolina Consolidated Procurement Code. This law's purpose is to ensure minority businesses access to the state government procurement process. In addition, the Board has

improperly set fees. Further, sales tax regulations require different sales tax charges on ophthalmic materials, depending on whether the materials are sold by an optometrist, ophthalmologist or optician.

Setting of Fees

The Optometry Board's examination, certificate and license renewal fees have not been enacted in regulation, as required by state law. As a result, the General Assembly, the public and optometrists have had inadequate input into the setting of fees.

Sections 40-37-80, 40-37-110, and 40-37-140 of the South Carolina Code of Laws require examination, certificate and license renewal fees to be established in regulation through a process set forth in the state Administrative Procedures Act (APA). This process allows the General Assembly, the public, and optometrists a specific period of time to review and comment on proposed regulations before they become law. The APA helps ensure that regulatory agencies are responsive to the citizens of South Carolina. The Optometry Board, however, has independently set fees without going through the APA process.

RECOMMENDATIONS

THE OPTOMETRY BOARD SHOULD COMPLY WITH
STATE MINORITY BUSINESS PROCUREMENT
LAWS.

THE OPTOMETRY BOARD SHOULD COMPLY WITH
STATE LAWS REQUIRING THAT FEES BE
ESTABLISHED IN STATE REGULATIONS.

Sales Tax

The state sales tax on eyeglasses, contact lenses and other ophthalmic materials is not equitable. The 5% tax

rate is applied to different bases, depending on who sells the ophthalmic materials. Ophthalmic materials sold to the public by ophthalmologists and optometrists are taxed at the wholesale price, according to state sales tax Regulation 117-167. However, this regulation requires that ophthalmic materials be taxed at retail price if sold to the public by opticians.

Sales tax charges vary, even though state and federal laws permit ophthalmologists and optometrists to sell ophthalmic materials in the same manner as opticians. A patient who receives a prescription for eyeglasses or contact lenses from an ophthalmologist or optometrist may have it filled by any ophthalmologist, optometrist or optician who sells the prescribed product.

By requiring different sales tax charges for the same product, depending on who sells the product, Regulation 117-167 is not equitable. Inequitable taxes can cause the public to lose confidence in the tax system. Also, the South Carolina Tax Commission estimates that an additional \$1 million per year would be generated by taxing all ophthalmic materials at retail price.

RECOMMENDATION

THE SOUTH CAROLINA TAX COMMISSION AND
THE GENERAL ASSEMBLY SHOULD CONSIDER
AMENDING REGULATION 117-167 SO THAT THE
SALES TAX ON EYEGLASSES, CONTACT LENSES
AND OTHER OPHTHALMIC MATERIALS IS
CONSISTENT, REGARDLESS OF THE PROFESSION
OF THE SELLER.

APPENDICES

APPENDIX A

BOARD OF EXAMINERS IN OPTOMETRY

SCHEDULE OF FEES

	<u>Fees</u>
Examination	\$150
Annual Renewal	
In-state	85
Out-of-state	60
Branch License	85
Printing of Certificate	25

Source: South Carolina Board of Examiners in Optometry.

APPENDIX B



BUREAU OF
CONSUMER PROTECTION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

February 19, 1987

Mr. George L. Schroeder, Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, South Carolina 28201

Dear Mr. Schroeder:

The staff of the Federal Trade Commission is pleased to respond to your invitation to participate in the sunset audits of the South Carolina Boards of Optometry and Opticianry ("Boards").¹ This letter states our views on the manner in which provisions in the Optometry and Opticianry Practice Acts ("Practice Acts") and regulations governing these Boards may affect competition for the delivery of eye care service within the markets served by South Carolina optometrists and opticians.

In this letter we focus primarily on the statutory and rule provisions restricting advertising and the use of third-party solicitors by optometrists and opticians. Nondeceptive advertising disseminates information about the individuals or firms offering services that consumers may wish to purchase. This process is beneficial to consumers because it facilitates purchase decisions that reflect true consumer preferences and it promotes the efficient delivery of services. We therefore urge the Council to seek the repeal of those rules that restrict the use of truthful, nondeceptive advertising. We also comment on a rule that unnecessarily restricts the commercial forms in which optometrists may practice. This rule limits competition among professionals and may tend to raise prices, and we therefore recommend that the Council seek its repeal as well.

The Federal Trade Commission is empowered under 15 U.S.C. §§ 41 et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to this statutory mandate, the Commission has attempted to

¹ This letter represents the views of the FTC's Bureaus of Consumer Protection, Competition, and Economics, and not necessarily those of the Commission. The Commission has, however, authorized submission of this letter.

encourage competition among members of licensed professions to the maximum extent compatible with other legitimate state and federal goals. For several years, the Commission has been investigating the competitive effects of restrictions on the business practices of state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others. The Commission's goal has been to identify and seek removal of restrictions that impede competition, increase costs, and harm consumers without providing significant countervailing benefits.

I. ADVERTISING RESTRICTIONS

As a part of the Commission's efforts to foster competition among licensed professionals, it has examined the effects of public and private restrictions that limit the ability of professionals to engage in nondeceptive advertising.² Empirical studies have shown that prices for professional goods and services are lower where advertising exists than where it is restricted or prohibited.³ Studies have also provided evidence

² See, e.g., American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). The thrust of the AMA decision -- "that broad bans on advertising and soliciting are inconsistent with the nation's public policy" (94 F.T.C. at 1011) -- is consistent with the reasoning of recent Supreme Court decisions involving professional regulations. See, e.g., Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (holding that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and regarding the legal rights of potential clients or using nondeceptive illustrations or pictures); Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding state supreme court prohibition on advertising invalid under the First Amendment and according great importance to the role of advertising in the efficient functioning of the market for professional services); and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (holding Virginia prohibition on advertising by pharmacists invalid).

³ Cleveland Regional Office and Bureau of Economics, Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising (1984); Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

that restrictions on advertising raise prices but do not increase the quality of goods and services.⁴ Therefore, to the extent that nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result.

The Federal Trade Commission has examined various justifications that have been offered for restrictions on advertising and has concluded that they do not warrant restrictions on truthful, nondeceptive advertising. For this reason, the Commission staff believes that only false or deceptive advertising should be prohibited. Any other standard is likely to suppress the dissemination of potentially useful information and contribute to an increase in prices.

Discounts, Bonuses and Premiums

Section 40-37-190 of the Optometry Practice Act imposes a flat ban on optometrists' "offer[ing] eye exams at a discount price or as a premium, the object of which is to induce the sale of ophthalmic services or materials."⁵ In addition, both the Optometry and Opticianry Practice Acts (§§ 40-37-180 and 40-38-70, respectively) make it unlawful

to offer or give eyeglasses, spectacles, lenses or any part used in connection therewith, as a premium or bonus with merchandise or in any other manner to induce trade or to give or offer to give anything of value . . . the object of which is to induce the examination of the eye or the sale of [ophthalmic materials].

This restriction does not apply to giving "ophthalmic products incidental to the use of the product being offered" (such as eyeglass cases or cleaning solutions) or to discounts for vision care products, provided certain disclosures are made.

We urge the Council to recommend the elimination of these provisions. These bans on discounts, premiums and bonuses

⁴ Bureau of Economics, Federal Trade Commission, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980); Muris and McChesney, Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics, 1979 Am. B. Found. Research J. 179 (1979). See also Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976).

⁵ As interpreted by the South Carolina Attorney General, this provision forbids any person from offering any discounts on eye examinations. See 84 S.C. Op. Att'y. Gen. 142 (1984).

deprive consumers of an important form of price competition that can readily be conveyed through advertising, and we can envision no consumer benefit from such restrictions. Moreover, the offering of such price terms not only can be of great benefit to consumers, but also may be a valuable promotional tool for new practitioners who are trying to establish themselves.

While we recognize the potential for deceptive schemes in the offering of discounts, premiums and bonuses, we believe total bans on such offers are overly restrictive and unnecessary. Both the Practice Acts already contain appropriate general prohibitions on untruthful or deceptive claims. Because any deceptive schemes are likely to involve false or deceptive claims, they would be prohibited under the current Acts.

Disclosure Obligations

Code sections 40-37-180 and 40-38-70 of the Optometry and Opticianry Acts, respectively, contain provisions requiring certain disclosures. The first of these appears to require that discounts from a "standard" price other than the offeror's "regular" price may be advertised only if the "standard" price and its source are disclosed in the ad. If interpreted in this way, this provision would effectively preclude the advertising of certain across-the-board discounts (e.g., "ten percent off manufacturers' list on all frames and lenses"). Since it is impractical to state in an advertisement the standard prices and their source for all of the goods and services covered by such an offer, the proviso likely suppresses this form of truthful and valuable advertising. Because it may harm consumers and competition, we suggest that the provision be eliminated.⁶

Another provision in Code sections 40-37-180 and 40-38-70 requires that certain disclosures be made in all price advertisements of ophthalmic goods and services. Such ads must state whether: (1) an advertised price for eyeglasses includes single vision or multi-focal lenses; (2) a price for contact lenses refers to soft or hard contacts; (3) a price for ophthalmic materials includes all dispensing fees; (4) a price for ophthalmic materials includes an eye examination; and, (5) a price for eyeglasses includes both frame and lenses.⁷ Any disclosure obliga-

⁶ It should be noted that at least one court has invalidated on First Amendment grounds similar requirements that advertisements for discounted prices include all regular non-discounted prices. *South Ogden CVS Store v. Ambach*, 493 F. Supp. 374 (S.D.N.Y. 1980).

⁷ Such disclosure requirements were permitted, but not required, by § 456.5 of the Commission's Advertising of Ophthalmic Goods and Services Trade Regulation Rule ("Eyeglasses

tion increases advertising cost, either because it increases the length of the message or requires practitioners to forego some portion of the advertising message they would have delivered had the space not been taken by the disclosure. Unnecessary disclosure requirements could therefore result in less information being made available to consumers. Consequently, we believe that disclosures should be mandated only where they are necessary to prevent deception. Because we do not believe that there is anything inherently deceptive about truthful price advertising, we recommend repeal of these provisions.

Superiority Claims

Both the Optometry and Opticianry Boards have promulgated regulations forbidding the "slightest intimation of having superior qualifications or being superior to other [licensees]" (§§ 95-1-E and 96-20.6, respectively).

We urge the Council to recommend elimination of these rules. Bans on superiority claims clearly lessen competition among sellers. At a minimum they restrict comparative advertising, which can be a highly effective means of informing and attracting customers. When sellers cannot truthfully compare the attributes of their services to those of their competitors, their incentive to improve or offer different products, services, or prices is likely to be reduced.

Bans on claims of superiority are particularly likely to injure competition and consumers when they are as broad as those in the Practice Acts, which forbid even the "slightest intimation" of superiority. Virtually all statements about a practitioner's qualifications, experience, or performance can be considered to be implicit claims of superiority. Bans on all such claims would make it very difficult for optometrists and opticians to provide consumers with truthful information about the differences between their services and those of their competitors.

Solicitors

Both the Practice Acts impose bans on the use of solicitors to obtain patronage (§§ 40-37-220(15) and 40-38-220(15), respectively). These prohibitions appear to unnecessarily preclude optometrists and opticians from hiring third parties to assist in marketing vision care services and products. Restrictions that prohibit all third-party solicitation, including solicitation in situations where there is little or no risk of coercion,

I"), which was remanded in American Optometric Association v. FTC, 626 F.2d 896 (D.C. Cir. 1980). The Commission has chosen not to reissue the remanded portion of Eyeglasses I.

harassment, or similar abuses, may unnecessarily restrict the dissemination of truthful information about and sales of vision care services and goods to willing and competent purchasers. Similarly, restrictions that permit only licensed optometrists and opticians to engage in solicitation unnecessarily limit the ability of businesses to disseminate information that is beneficial to consumers and for which the professional expertise of an optometrist or optician is not required.

In certain circumstances third-party solicitation could conceivably result in overreaching or undue influence. See Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). But this does not justify prohibiting all third-party solicitation, just as the possibility of deception does not provide a legitimate basis for banning all advertising. The Federal Trade Commission considered the concerns that underlie the Ohralik opinion when it decided American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). After weighing the possible harms and benefits to consumers, the Commission ordered the AMA to cease and desist from restricting solicitation, but permitted the AMA to proscribe uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence. We suggest the Council consider this standard, which protects consumers while allowing them to receive information about available ophthalmic goods and services.

Professional Affiliations

Both the Optometry and Opticianry Boards have rules prohibiting the use of positions in professional organizations "for advertising purposes or for self-aggrandizement" (§§ 95-1(F) and 96-20(7), respectively). These rules may prevent the dissemination of information about eye care professionals that many consumers would find helpful in selecting professionals. Membership in organizations that devote time and resources to studying particular areas of vision care may well indicate skill in that area. While information about membership in an organization may be communicated in a deceptive manner, the mere possibility of deception does not justify a total ban. The Council should urge the replacement of this broad ban with more limited restrictions on deceptive statements concerning one's professional affiliations.

Office Displays

The Optometry Board has adopted several additional rules that appear to restrict optometrists' business practices unnecessarily but provide no apparent consumer benefit. Rule 95-1(D) forbids displaying licenses, diplomas or certificates where they are visible outside the office. Rules 95-1(H) and (K) forbid

displaying eyeglass signs, lenses and frames in optometric offices. These provisions preclude the use of office space to inform consumers of optometrists' educational backgrounds and ophthalmic products available for sale in their offices. We can envision no consumer benefit from such restrictions and recommend their repeal.

II. COMMERCIAL PRACTICE RESTRICTIONS

We also recommend that the Council consider revisions to a restriction on the commercial manner in which optometrists may practice. We believe that this restriction may not be in the best interests of consumers.

Office Locations

Board Rule 95-1(N) forbids the opening of optometric offices in business establishments such as jewelry, department or other stores. We are concerned that this provision may unnecessarily hamper optometrists who wish to market their services in a cost-efficient manner.⁸ For example, banning the practice of optome-

⁸ On January 4, 1985, the Commission proposed an Ophthalmic Practices Trade Regulation Rule ("Eyeglasses II") that would prohibit state-imposed bans on locating in retail centers, bans on employment or other business relationships between optometrists and non-optometrists, bans on nondeceptive trade names, and bans on branch offices. The Commission stated in its Notice of Proposed Rulemaking that public restraints on the permissible forms of ophthalmic practice appear to increase consumer prices for ophthalmic goods and services, but do not appear to protect the public health or safety. See 50 Fed. Reg. 598, 599-600 (1985).

The Commission staff has recently published its report on the proposed rule. The staff concluded that "the rulemaking record demonstrates that these restrictions raise prices to consumers and, by reducing the frequency with which consumers obtain vision care, decrease the quality of care in the market." The staff also concluded that the restrictions provide no quality-related benefits to consumers. The staff therefore recommended that the Commission promulgate a trade regulation rule prohibiting these restrictions. Bureau of Consumer Protection, Federal Trade Commission, Ophthalmic Practice Rules: State Restrictions on Commercial Practice (1986).

While the Presiding Officer also found that commercial practice restrictions raise prices to consumers and limit access to eyecare, he did not believe that the evidence cited in the two Commission studies, discussed infra at 12-14, provided an adequate basis upon which conclusions about the quality of care

try on the premises of a department store prevents optometrists from locating their practices where they can establish and maintain a high volume of patients because of the convenience of the location and a high number of "walk-in" patients. This higher volume may, in turn, allow professional firms to realize economies of scale that may be passed on to consumers in the form of lower prices. This restriction may also increase costs for chain optical firms by requiring optometrists associated with such firms to locate in separate offices. Such higher costs may decrease the number of chain firms, resulting in higher prices for consumers.

Commercial practice restrictions such as this one are frequently defended on the grounds that they help to maintain a high level of quality in the professional services market. Proponents claim, for example, that business relationships between professionals and non-professionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

The available evidence, including comprehensive survey evidence, contradicts these contentions. Two empirical studies conducted by the staff of the Federal Trade Commission indicate that restrictions on commercial optometric practice, including restrictions on mercantile location, in fact harm consumers by increasing prices without providing any quality-related benefits.

issue could be drawn. Federal Trade Commission, Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules (1986). Both the staff and Presiding Officer reports will shortly be under review by the Commission.

In a case challenging various ethical code provisions enforced by the American Medical Association ("AMA"), the Commission found that AMA rules prohibiting physicians from working on a salaried basis for a hospital or other lay institution, and from entering into partnerships or similar relationships with non-physicians, unreasonably restrained competition and thereby violated the antitrust laws. *American Medical Association*, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided court, 455 U.S. 676 (1982). The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business formats and that, in particular, these restrictions precluded competition by organizations not directly and completely under the control of physicians. The Commission also found that there were no countervailing procompetitive justifications for these restrictions.

The first study,⁹ conducted with the help of two colleges of optometry and the chief optometrist of the Veterans Administration, compared the price and quality of eye examinations and eyeglasses provided by optometrists in markets with a variety of regulatory environments. The study found that eye examinations and eyeglasses cost significantly more in markets without chain firms than in markets where chain optical firms were present. The study data showed that prices were almost 18% higher in markets without chains.

The study also provided evidence that commercial practice restrictions do not result in higher quality eye care. The thoroughness of eye exams, the accuracy of eyeglass prescriptions, the accuracy and workmanship of eyeglasses, and the extent of unnecessary prescribing were, on average, the same in restrictive and non-restrictive markets.

A second study¹⁰ of cosmetic contact lens fitting concluded that, on average, "commercial" optometrists -- that is, for example, optometrists who were associated with chain optical firms, used trade names, or practiced in commercial locations -- fitted cosmetic contact lenses at least as well as other fitters, but charged significantly lower prices.

Other evidence, including survey evidence, indicates that state restrictions on commercial practice actually decrease the quality of care in the market by decreasing the frequency with which consumers obtain care. As a result of the higher prices associated with the restrictions, consumers tend to purchase eyecare less frequently and may even forego care altogether.¹¹

⁹ Bureau of Economics, Federal Trade Commission, *Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry* (1980).

¹⁰ Bureaus of Consumer Protection and Economics, Federal Trade Commission, *A Comparative Analysis of Cosmetic Contact Lens Fitting by Ophthalmologists, Optometrists and Opticians* (1983). This study was designed and conducted with the assistance of the major national professional associations representing ophthalmology, optometry and opticianry.

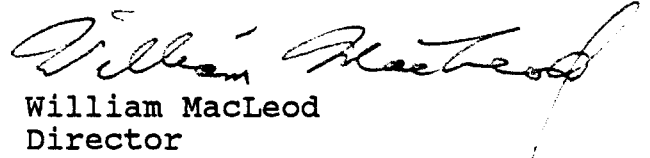
¹¹ Public Health Service, *Eyeglasses and Contact Lenses: Purchases, Expenditures, and Sources of Payment*, National Health Care Expenditures Study 4 (1979); Benham and Benham, Regulating through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421, 438 (1975); Kernan, U.S. Health Profile, Washington Post, Apr. 26, 1979 at p. C-1, col. 4.

CONCLUSION

In sum, the evidence indicates that consumers are harmed by restrictions on truthful, non-deceptive advertising and by restrictions on the forms of commercial practice that may be used by eye care professionals. Such restrictions raise prices above the levels that would otherwise prevail, decrease the quality of care, and do not provide any consumer benefit. We recommend, therefore, that the Council seek to repeal or amend the rules discussed above to remove unnecessary constraints on innovative forms of ophthalmic practice and advertising.

Thank you for inviting our comments. If you would like to have copies of any studies or other materials referred to, but not enclosed with this letter, we would be happy to supply them.

Sincerely yours,

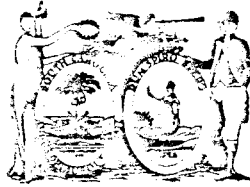


William MacLeod
Director

South Carolina Board of Examiners in Optometry

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Harold S. Vigodsky, O.D.



Libby Wilson
Administrative Support
P.O. Box 8725
Columbia, S.C. 29202
(803) 799-1739

June 9, 1987

Mr. George L. Schroeder, Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, SC 28201

Dear Mr. Schroeder:

The South Carolina Board of Examiners in Optometry has reviewed the final report of the Legislative Audit Council and requests the following comments be included as an appendix to the report.

The Board was surprised to find articles in the February 26, 1987 and March 1, 1987 editions of Columbia newspapers in which issues addressed in the Legislative Audit Council's Sunset Review were discussed. The Board feels it very unfair that, while Board Members were held to a policy of confidentiality, the Federal Trade Commission obliged in releasing prejudicial remarks to the public.

The Board is also concerned as to the following statement from the Federal Trade Commission's letter included as Appendix 3 of your report.

"The staff of the Federal Trade Commission is pleased to respond to your invitation to participate in the Sunset audits of the South Carolina Board of Optometry..."

Several of the Audit Council's recommendations are based on what the Board feels are opinions of the staff of the Federal Trade Commission. These opinions are often not well thought through and are contradictory to laws and regulations of the State of South Carolina. Our Board would prefer the Audit Council to have based its recommendations on facts that relate to the State of South Carolina and not on the opinions/interpretations of staff members of a commission of the federal government.

Mr. George L. Schroeder
June 2, 1987
Page 2

The Board takes exception with the recommendation that the General Assembly should consider amending Title 33 of the South Carolina Code of Laws to allow professionals to work for corporations to provide services to the general public. It is the Board's opinion that the professional would be working for the corporation and not the patient and that professional judgment would be influenced by corporate profit. American Optometric Association studies indicate allowing professionals to work for corporations does not decrease the cost to the patient but could decrease the quality of care due to the concern for profit by the corporation. Joseph R. Gunn, III, Vice-President for Robert R. Nathan Associates, Inc. concluded in his statement regarding Ophthalmic Practice Rules; Proposed Trade Regulation Rule (Eyeglasses II): Notice of Proposed Rulemaking (50 Fed. Reg. 598, January 4, 1985), "...the existence of large chain firms in a market results in a lowering of the quality of care available to consumers; economies of scale (if any) generated by large volume operations are not passed along to the consumer in the form of lower than average prices for either eye examinations or eyeglasses. . ." Also, Mr. Gunn conducted a survey among commercial and noncommercial optometrists to determine if there was a significant difference in the ability of the two groups of optometrists to detect vision problems other than routine myopia. The survey found there was a very great difference with noncommercial optometrists detecting such conditions almost twice as frequently as did the commercial practitioners. Further, the American Optometric Association can cite a multitude of incidents of inferior service provided by professionals working for corporations as noted in Enclosure 1.

The recommendation to repeal State Regulation 95-1(N) restricting office location of optometrists cannot be supported by the Board for the reasons just mentioned. The Board's stand on this issue is supported by the Richland County, South Carolina Court of Common Pleas ruling in the 1985 case of Pack and Holcombe vs the South Carolina Board of Optometry that State Regulation 95-1(N) does have a rational relationship to the public health, safety and welfare of the residents of South Carolina.

The Board strongly disagrees with the recommendation to consider permitting out-of-state optometrists, who have passed practical exams substantially equivalent to South Carolina's, to be exempted from the South Carolina Practical Exam. Requiring all optometrists to pass the South Carolina Practical Exam ensures the

Mr. George L. Schroeder
June 9, 1987
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licensing of qualified candidates and protects the welfare of the people of South Carolina. The South Carolina Supreme Court ruling reversing Richland County Circuit Court's decision to allow an out-of-state optometrist to practice in South Carolina without passing the South Carolina practical exam supports the Board's stand on this issue. (Dunton vs. South Carolina Board of Examiners in Optometry, Opinion No. 22661, Filed February 2, 1987)

The General Assembly should clarify the statutory requirements for the licensure of out-of-state optometrists. Section 40-37-90 (3) and (4) should be modified to state that all applicants are required to pass a South Carolina practical examination and the National Board of Optometry examination.

The recommendation that small licensing boards would benefit from sharing staff and office space cannot be supported by fact or by experience. Our Board opposes their recommendations for the following reasons:

- a. The services offered to the public by the seven boards are too diversified to enable a single administrative staff to be well versed to respond timely to the public.
- b. The size and type of staff required to provide the administrative support service to each board and its public would be more costly than the total revenues of all the boards, thereby causing an additional tax burden on the citizens of the state or causing the boards to charge higher fees to be able to pay their staff.
- c. The individual boards would lose their individuality.
- d. The ability for the public to know to whom they should communicate would become more difficult.

The Board agrees with the recommendation that licenses be renewed biennially. In addition to increasing revenue from interest earned, this would indeed reduce administrative time and expenses required to process the renewals.

The Board would like to point out the doctor-patient relationship optometrists have with their patients and not that of merchant-customer as inferred in paragraph 2, page 20 of the Sunset Review.

A job description for the Board's only employee has been prepared.

Mr. George L. Schroeder
May 26, 1987
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Designated Board members are in the process of preparing a comprehensive Policy and Procedures Manual.

The Board is in the process of complying with state minority business procurement laws. Applicable information will be provided to the Office of Small and Minority Business Assistance.

Regulations establishing fees are to be promulgated as soon as possible.

The above comments are based on the desire of each member of the South Carolina Board of Examiners in Optometry to fulfill his/her obligation to protect the welfare of the citizens of the State of South Carolina. We look forward to the release of the report to the public.

Sincerely,



William C. Oliver, O. D.
President

WCO:pd

Excerpts from the American Optometric Association's

State Legislative Action Pack

Preserving the
Doctor-Patient Relationship

III. DOCUMENTED ABUSES RESULTING FROM DETRIMENTAL RESTRAINTS

There are a multitude of abuses which have resulted from detrimental restraints. This section notes some of the more common of these encroachments, inherent in corporate and/or franchise settings. Also included are two specific state responses to the evils of detrimental restraints.

1. Dangers from Corporate Practice

State legislative journals and court transcripts document abuses which can result when detrimental restraints are permitted. There are countless variations of the violations of the independent, professional judgment of the doctor, and the resulting corporate intrusion into the critical area of the doctor/patient relationship.

Any such listing of these encroachments includes the following:

- Doctor is under pressure to provide less thorough examinations
- Doctor is under economic pressure to prescribe unnecessary eyewear
- Doctor not permitted to perform full scope of practice, including dispensing/fitting
- Doctor is not able to choose own suppliers
- Doctor is under pressure to accept substandard materials or lab work
- Little or no patient followup
- No continuity of care
- No emergency services available
- Loss of confidentiality for patient records

[For further information see: The California Optometric Association material of March 23, 1983, pages 14-16 in section 16 of the State Optometry Law: Enactment and Enforcement (1983, green) binder. Depositions, section 31 of the FTC Eyeglasses II: State Legislative Aspects (1981, brown) binder. Sworn testimony, section 31 of the State Optometry Law: Enactment and Enforcement (1983, green) binder.]

2. Dangers from Abuse of Franchising

Further examples of interference with the professional judgment of the optometrist may be found in a recent typical "Franchise Agreement". It requires that "each and every operating procedure, every product, service or equipment requirement . . . are continually subject to [franchisor] and may be modified, deleted or expanded from time to time at [franchisors] sole discretion." (Emphasis supplied.) It further enumerates that only the following goods and services "and no other goods or services without [franchisor's] prior written approval" may be supplied:

- a) Franchisor's approved line(s) of eyeglass frames
- b) Franchisor's approved line of related optical products and supplies
- c) Franchisor's approved inventory of standard prescription lenses
- d) On-site laboratory equipment and services
- e) Franchisor's eyeglass guarantee
- f) Optometric services such as eye examinations and fitting of prescription eyewear
- g) Such other equipment, products, services, guarantees and marketing programs as [franchisor] may, from time to time designate
- h) Franchisor's approved line of contact lenses and instruction in the use and care of contact lenses.

Thus, if a patient needs low vision care, vision therapy, protective eyewear, or other specialized optometric services, the "franchise optometrist" will likely not be able to provide these services. Additional prohibitions can include non-standard prescription lenses or contact lenses not available through the franchiser.

[For further information see: Section III.5, of this Action Pack and the California Optometric Association material of March 23, 1983, pages 15-17 in Section 16 of the State Optometry Law: Enactment and Enforcement (1983, green) binder.]

3. Texas Legislative Response to Corporate Practice Dangers

Texas legislation, passed during the "Sunset" review of 1981, prohibits six forms of detrimental restraints that had been permitted in the state under the previous law. These are:

1. Setting or attempting to influence the professional fees of an optometrist.
2. Setting or attempting to influence the office hours of an optometrist.
3. Restricting or attempting to restrict an optometrist's freedom to see patients on an appointment basis.
4. Terminating or threatening to terminate any lease, agreement, or other relationship in an effort to control the professional judgment, manner of practice, or practice of an optometrist.
5. Providing, hiring or sharing employees or business services or similar items to or with an optometrist.
6. Making or guaranteeing a loan to an optometrist in excess of the value of the collateral securing the loan.

Documentation from Texas, detailing abuses when detrimental restraints were permitted, relates horror stories demonstrating that the welfare of the patient ranks a distant second to that of the corporation's profits.

[For further details see Depositions, Section 31 in the FTC Eyeglasses II: State Legislative Aspects (1981, brown) binder, and Sworn Testimony, Section 31 in the State Optometry Law: Enactment and Enforcement (1983, green) binder.]

[The full text of the 1981 Texas law can be found in Section 29 of the FTC Eyeglasses II: State Legislative Aspects (1981, brown) binder; excerpts (Sections 511 through 518) of the 1981 Texas law are in Section 10 of the State Optometry Law: Enactment and Enforcement (1983, green) binder.]

4. Oklahoma Mercantile Environment Law Upheld

One of the most recent challenges of statutes regulating practice in the mercantile environment took place in Oklahoma. A case was filed in the District Court of Oklahoma County, Oklahoma by Montgomery Ward and Co., Inc., challenging the Oklahoma law (Sections 59 596 and 59 944) prohibiting the practice of optometry in a mercantile establishment. (Section 59 944 had earlier been upheld by the U.S. Supreme Court in the Williamson v. Lee Optical of Oklahoma, Inc. case.)

The District Court on October 30, 1979, ruled that the proposed activities of Montgomery Ward violated 59 596 and 59 944. On March 8, 1983, the Supreme Court of Oklahoma affirmed the trial court's decision.

Enclosed in the Reference Materials in this Action Pack is a copy of Sections 59 596 and 59 944, and excerpts of the brief of Appellees, Oklahoma Optometric Association. [The full text of the District Court Order and the Oklahoma Supreme Court Decision is in Section 9 of the State Optometry Law: Enactment and Enforcement (1983, green) binder.]

5. Update: California Defeat of Franchising Legislation

During 1983 and 1984 there have been no less than five attempts by large corporate interests to reverse California's consumer protection laws which safeguard the public and protect the doctor/patient relationship in vision care. The struggle began with an attempt by an out-of-state chain's decision to start chain optometry in California in spite of the existing California laws prohibiting their opening. An injunction was issued to stop this attempt.

Subsequent to the injunction, the legislative battle was begun in an attempt to change the California laws with regard to corporate/franchise, branch offices, and trade names. Through hard work, independent optometry in California has managed to convince their legislators that it is important to continue their beneficial regulations for the benefit of their constituents.

BOARD OF EXAMINERS IN OPTICIANRY

BOARD OF EXAMINERS IN OPTICIANRY

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INTRODUCTION

After reviewing its laws and operations, the Legislative Audit Council concludes that there is a public need for the regulation of opticianry, and that the Opticianry Board should be continued. In most areas, the Board has operated efficiently and effectively. However, the Audit Council has identified several laws and regulations which unnecessarily limit competition and may increase prices, while providing questionable protection of the public's health and welfare.

BACKGROUND

The South Carolina Board of Examiners in Opticianry was created as an independent body by the General Assembly in 1978 to regulate the profession. Prior to 1978, this Board was combined with the Board of Examiners in Optometry. Nationwide, 21 states regulate opticianry through licensure.

Opticians are one of three types of professionals who provide eye care. They prepare and dispense corrective lenses and spectacle frames from the prescriptions of optometrists and ophthalmologists. Opticians also duplicate lenses without prescription. Optometrists examine eyes for vision defects and diseases, and prescribe and dispense corrective lenses. Ophthalmologists are physicians who diagnose and treat vision defects and diseases, perform surgery, and prescribe and dispense corrective lenses. The Opticianry Board regulates opticians only.

The Board is composed of five licensed opticians and two public members having no connection with an optical profession. The Governor appoints the optician members upon nomination by all licensed opticians in the state. He also appoints the public members who can be nominated by any individual or group. Board members may serve no more than two consecutive four-year terms.

The Opticianry Board examines applicants for licensure, investigates complaints, and investigates and prosecutes violations of South Carolina opticianry law. The Board also promulgates regulations governing the practice of opticianry.

In February 1987, there were 297 licensed opticians, 65 of whom lived out-of-state. All licenses must be renewed annually by October 1.

SUNSET ISSUES AND FINDINGS

- (1) DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS OR SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The Opticianry Board has no direct control over the prices charged by opticians for their goods and services. The Board does impose regulatory costs on opticians through examination fees, license fees and continuing education requirements. However, it is not likely that these costs significantly affect the prices charged by opticians.

Consumer prices may be affected by some state laws and regulations administered by the Board. These are discussed below.

Limits on Competition

The Audit Council identified three state laws and regulations which limit competition while providing questionable benefit to the public health and welfare. The laws and regulations in question were identified with the assistance of the Bureaus of Consumer Protection, Competition and Economics of the Federal Trade Commission (FTC) upon the request of the Audit Council.¹ Laws which limit competition can result in higher consumer prices.

Qualification Claims and Professional Affiliations

State Regulation 96-20(6) states:

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

¹See page 33 for February 1987 FTC letter to the Audit Council, which includes several issues not addressed in this report.

State Regulation 96-20(7) states:

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

By prohibiting all ads with the "slightest intimation" of superior qualifications, state regulation limits competition by preventing opticians from informing their customers of pertinent education and experience qualifications. In addition, FTC analysts note that, while it is possible for professional affiliations to "...be communicated in a deceptive manner, the mere possibility of deception does not justify a total ban." Advertising would be more informative to consumers if regulation prohibited only those claims of qualifications and professional affiliations which are deceptive.

Solicitors

Section 40-38-220(15) of the South Carolina Code of Laws permits the Board to discipline opticians when "... the holder of a license has been guilty of using a solicitor to obtain patronage." This statute could be used to prohibit opticians from using third parties to assist in marketing their products in any manner. FTC analysts suggest only prohibiting third-party solicitation which involves:

...uninvited, in-person solicitation of persons who, because of their particular circumstances, may be vulnerable to undue influence.

Third-party solicitation which is truthful, nondeceptive, and noncoercive could provide beneficial information to consumers on the qualifications and services of opticians.

Summary

When the truthful, nondeceptive advertising of opticianry services is unnecessarily restricted, competition

is reduced, and price and quality comparison becomes more time-consuming and inconvenient for consumers. Reduced competition often results in higher prices.

RECOMMENDATIONS

THE OPTICIANRY BOARD SHOULD AMEND REGULATIONS 96-20(6) AND (7) TO ALLOW TRUTHFUL, NONDECEPTIVE CLAIMS OF QUALIFICATIONS AND PROFESSIONAL AFFILIATIONS.

THE GENERAL ASSEMBLY SHOULD CONSIDER AMENDING §40-38-220(15) OF THE SOUTH CAROLINA CODE OF LAWS TO ALLOW TRUTHFUL, NONDECEPTIVE, NONCOERCIVE THIRD-PARTY SOLICITATION.

- (2) DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The complete deregulation of opticianry would remove state laws and regulations which help ensure the quality of eye care opticians provide to the public. Opticians are responsible for ensuring that prescriptions for corrective lenses are properly filled. Improperly filled prescriptions fail to ensure optimal vision for patients. Deregulation would eliminate entry requirements, including education and examination. It would also eliminate a mechanism for suspending or revoking an unqualified optician's license.

As a result of complete deregulation, the number of opticians might increase. Increased competition could lead to lower prices for prescription lenses and associated products. But, the public may be exposed to more untrained and potentially harmful practitioners, thus affecting public health, safety and welfare. Therefore, the Audit Council

recommends that the Board and regulation of the profession be continued.

(3) **DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.**

To support its administrative costs, the Opticianry Board collects revenue through examination and license fees (see p. 66). From FY 81-82 through FY 85-86, the Board's expenditures increased from \$10,490 to \$11,984, while revenues increased from \$15,955 to \$17,500 (see Table 1). In FY 85-86, expenditures were equal to 69% of the revenue collected. The remaining 31% was retained in the state General Fund.

The Board employs one of its members to perform part-time administrative duties. This individual is the only employee of the Board.

TABLE 1
SOUTH CAROLINA BOARD OF EXAMINERS IN OPTICIANRY
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License & Examination Fees	\$ 15,955	\$ 16,110	\$ 14,630	\$ 17,645	\$ 17,500
TOTAL Revenues	<u>\$ 15,955</u>	<u>\$ 16,110</u>	<u>\$ 14,630</u>	<u>\$ 17,645</u>	<u>\$ 17,500</u>
 <u>Expenditures</u>					
Personal Service	\$ 5,262	\$ 4,821	\$ 5,620	\$ 4,705	\$ 4,455
Other Operating Expenses	5,129	7,130	5,757	8,259	7,340
Employee Benefits	99	101	116	110	189
TOTAL Expenditures	<u>\$ 10,490</u>	<u>\$ 12,052</u>	<u>\$ 11,493</u>	<u>\$ 13,074</u>	<u>\$ 11,984</u>

Source: South Carolina Budget and Control Board Budget Documents, FY 83-84 through FY 87-88.

Board Employee

Since 1979, the Secretary-Treasurer of the Opticianry Board has been a part-time employee of the Board. This Board member was paid \$1,690 in FY 86-87 to perform extensive administrative functions. However, the Board has no written job description for this position. Without a written job description, the public does not know which services have been purchased with its funds.

RECOMMENDATION

THE OPTICIANRY BOARD SHOULD ENSURE THAT ALL EMPLOYEES HAVE WRITTEN JOB DESCRIPTIONS.

- (4) **EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

Since the Audit Council's 1981 review, the Opticianry Board has made efforts to conduct its operations more efficiently. Some of the Board's records have been automated by the Secretary-Treasurer. However, improvements could be made by developing an administrative procedures manual and in some licensing procedures.

Written Administrative Procedures

Although the Board is governed by state laws and regulations, they have not been implemented through written administrative procedures. For example, no written procedures exist for investigating complaints or administering exams.

Section 1-23-140 of the South Carolina Code of Laws requires that all state agencies adopt and make available to the public a written policy statement of all formal and informal procedures. This law allows more effective public oversight of agencies. Also, without written policies and procedures, government actions are less likely to be

consistent. In addition, the Board could violate the constitutional guarantee of equal protection under the law.

RECOMMENDATION

THE OPTICIANRY BOARD SHOULD DEVELOP A
WRITTEN ADMINISTRATIVE PROCEDURES
MANUAL.

Licensing Procedures

All applicants for opticianry licensure are required either to have a certificate from a school of opticianry, to have served an apprenticeship, or to have practiced in another state. Applicants for licensure are also required to pass a minimum of two examinations: a national exam administered by the American Board of Opticianry and a South Carolina practical exam. Opticians who dispense contact lenses are required to pass a national exam administered by the National Contact Lens Examiners.

Practical Examinations

Practical exams have been developed and graded each year by individual members of the state Opticianry Board. However, the content of the exams, the methods of grading, and the minimum passing scores have not been formally approved by the Board. Since the entire Board is responsible for the practical exams, good management would require the Board to formally approve the content, administration and grading of exams. Without such approval, the public is not adequately assured that the Board has reviewed the exams for validity, reliability and objectivity.

Out-of-State Applicants

The Opticianry Board requires that licensed out-of-state opticians pass the American Board of Opticianry

exam, the National Contact Lens Examiners exam (if applicable), and the South Carolina practical exam in order to be licensed in South Carolina. Applicants who have previously passed the national exams are not required to retake them. However, applicants are required to pass South Carolina's practical exam, even if they have passed an equivalent exam in another state. They must, therefore, travel to South Carolina on one of two times each year that the exam is given.

Requiring licensed out-of-state opticians to pass South Carolina's practical exam may not be necessary to protect the public's health when they have satisfactory credentials and have passed equivalent tests in other states. Other health-related boards in South Carolina do not require further testing when out-of-state applicants meet certain criteria. For example, physicians from out-of-state may be licensed with no further testing based on approved education, postgraduate training, national test scores, years of experience, and letters of reference. If these credentials are approved by the Board of Medical Examiners, licensure is granted without further testing.

When licensure of out-of-state opticians, who have satisfactory credentials and have passed equivalent tests in other states, is unnecessarily delayed by requiring additional examination, the public may be denied the services of qualified individuals. Further, the public may not receive the price benefits from increased competition.

RECOMMENDATIONS

THE OPTICIANRY BOARD SHOULD FORMALLY APPROVE THE CONTENT, ADMINISTRATION AND GRADING OF ITS PRACTICAL EXAMINATIONS FOR LICENSURE.

THE GENERAL ASSEMBLY SHOULD CONSIDER LEGISLATION WHICH PERMITS OPTICIANS

LICENSED OUT-OF-STATE TO RECEIVE SOUTH CAROLINA LICENSES BASED ON THEIR CREDENTIALS. THIS LEGISLATION SHOULD EXEMPT APPLICANTS FROM THE PRACTICAL EXAM IF THEY HAVE PREVIOUSLY PASSED A PRACTICAL EXAM WHICH IS SUBSTANTIALLY EQUIVALENT TO SOUTH CAROLINA'S.

- (5) **DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.**

To encourage public participation, state law requires that two of the seven Opticianry Board members be public members, not associated with an eye care profession. These members are frequently assigned complaint investigations. The Board also conducts meetings approximately four times per year. However, the Board does not have a listing in any South Carolina telephone directory. Telephone listings would improve public access to the Board.

RECOMMENDATION

THE OPTICIANRY BOARD SHOULD LIST ITS ADDRESS AND TELEPHONE NUMBER IN THE COLUMBIA AND STATE GOVERNMENT TELEPHONE DIRECTORIES.

- (6) **DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.**

The Audit Council found no evidence that the Opticianry Board significantly duplicates the services, functions or programs of other state, federal, or local government agencies. Federal regulations (16 CFR 456) apply to advertising by the opticianry profession, addressing

practices of opticians as well as state regulatory boards. However, the Opticianry Board is the only government agency which issues licenses for dispensing of prescription glasses and contact lenses in South Carolina to persons who are not licensed optometrists or physicians.

(7) EVALUATE THE EFFICIENCY WITH WHICH FORMER COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OF INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.

From FY 83-84 through FY 85-86, the Opticianry Board investigated 15 complaints filed against South Carolina opticians. The most frequent type of complaint involved optical stores operating without licenses of opticians. However, the efficiency with which the Board processes complaints could not be adequately assessed because complaint files were incomplete. Also, the Board does not have written procedures for investigating complaints. Written procedures would help ensure investigations are conducted thoroughly and consistently (see p. 58).

Board members have stated that investigations could be improved if conducted by investigators who are not Board members. Due to the low volume of complaints, independent investigators would likely be more effective if shared with other small medically-related boards. The benefits of sharing staff, including investigators, are discussed in the report summary (see p. 7).

Administration of Complaint Files

The Opticianry Board maintains separate files on all complaints. However, 12 of the 15 files reviewed did not include all of the following: the complainant, the date of the complaint, the investigator, and how the complaint was resolved. To obtain the missing information, it was necessary to interview Board members and review Board

minutes. Information not based on written records may not be accurate and complete. Written records, including all relevant information and a chronological log of complaints, would permit a more efficient and accurate review of past complaints than is now possible.

RECOMMENDATION

THE OPTICIANRY BOARD SHOULD ENSURE THAT COMPLAINT FILES CONTAIN A COMPLETE RECORD OF COMPLAINT INVESTIGATIONS. THESE FILES SHOULD INCLUDE A CHRONOLOGICAL LOG OF ALL COMPLAINTS.

- (8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.**

The Opticianry Board was created under and is subject to South Carolina laws and regulations. Federal regulations (16 CFR 456) regarding advertising practices also apply to the opticianry profession. As noted earlier, the Opticianry Board has not complied with state law requiring written administrative procedures.

In addition, the Board has not sent minority business procurement plans to the Office of Small and Minority Business Assistance, as required by the South Carolina Consolidated Procurement Code. This law's purpose is to ensure minority businesses access to the state government procurement process. When agencies do not comply with its provisions, businesses owned and operated by minorities may not be afforded the opportunity to participate in the process.

Also, the state sales tax on ophthalmic materials is not equitable. Sales tax regulations require different sales tax charges on ophthalmic materials sold by opticians

than on those sold by optometrists and ophthalmologists.
This is discussed in detail on page 29.

RECOMMENDATION

THE OPTICIANRY BOARD SHOULD COMPLY WITH
STATE MINORITY BUSINESS PROCUREMENT
LAWS.

APPENDICES

APPENDIX A

BOARD OF EXAMINERS IN OPTICIANRY

SCHEDULE OF FEES

	<u>Fees</u>
License Application	\$50
Apprenticeship Application	20
Annual Renewal	
In-state	50
Out-of-state	25
Certificate of Registration	15

Source: South Carolina Code of Laws.



The South Carolina Board Of Examiners In Opticianry

Mr. George L Schroeder
Director
Legislative Audit Council
620 NCNB Tower
Columbia, South Carolina 29201

June 16, 1987

Dear Mr. Schroeder,

We have received your letter of June 10, 1987 in which you requested comments for the final draft.

An initial oversight, which I would like to comment on is on page 17, under the section "Background". The Board requested at our June 13, meeting that you enlarge the scope of the definition of opticians to insert "contact lenses" in the sentence starting on line 7. This should read " They prepare and dispense corrected lenses, contact lenses, and spectacle frames from the prescriptions of optometrists and ophthalmologists."

The Board appreciates your making the revisions which it requested in its initial comments and has no other comments at this time.

Sincerely,

A handwritten signature in cursive script that reads "Jack S. Folline".

Jack S. Folline
President

JSF/co'n

BOARD OF PHYSICAL THERAPY EXAMINERS

BOARD OF PHYSICAL THERAPY EXAMINERS

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INTRODUCTION

After reviewing the laws and operations of the Board of Physical Therapy Examiners, the Legislative Audit Council concludes that state regulation of physical therapy should continue. Termination of regulation would pose a threat to the public health, safety and welfare. However, the Audit Council recommends that a single board should regulate both physical therapy and occupational therapy. In addition, the Board should adopt a policies and procedures manual and improve its system for handling complaints.

BACKGROUND

With Act 790 of 1952, the General Assembly created the South Carolina Board of Physical Therapy Examiners to regulate the profession. Section 40-45-20 of the South Carolina Code of Laws defines physical therapy as:

...the evaluation and treatment of any bodily or mental condition of any person by the use of physical, chemical, or mechanical agents, the properties of heat, light, water, electricity, massage, sound, and therapeutic exercises, including rehabilitation procedures, all under the prescription of a licensed doctor of medicine or dentistry.

By state law, the Board consists of three licensed physical therapists and a licensed physical therapy assistant, each having at least three years experience, and one public member. Board members are appointed by the Governor for four-year terms. The South Carolina Physical Therapy Association may submit to the Governor at least two names for each vacancy on the Board to be filled by licensees. Also, any individual or group may submit nominations to the Governor for Board vacancies. By statute, no member may serve more than two consecutive terms.

The Board is responsible for evaluating, licensing and disciplining physical therapists and physical therapy assistants. Its duties include adopting rules and regulations governing the profession, and conducting investigations and hearings for alleged malpractice or misconduct by these licensed professionals.

In addition to South Carolina, 47 states regulate physical therapy through licensure. The remaining two states regulate the profession through registration. All states require applicants for licensure as physical therapists to complete an accredited physical therapist

educational program and pass a written examination prepared by the Professional Examination Service.

In FY 85-86, the Board licensed 587 physical therapists and 182 physical therapy assistants. All licenses issued by the Board must be renewed by January 1 of each year.

SUNSET ISSUES AND FINDINGS

- (1) **DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The programs and functions of the Board of Physical Therapy Examiners do not directly affect the costs of services provided by physical therapists. The Board does not regulate the fees charged by physical therapists for their services. Examination fees and annual license renewal fees charged to licensees are costs of regulation that may be passed on indirectly to consumers.

The fees charged by members of a regulated profession may be higher than if it were unregulated. Regulation also creates a barrier to entry into the profession and tends to limit competition through additional restrictions. However, no information was found addressing the effects regulation has had on the cost of physical therapy services.

- (2) **DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The primary functions of the Board of Physical Therapy Examiners are testing, licensing, and disciplining physical therapists and physical therapy assistants. In the absence of these functions, the public would have no assurance that those individuals who present themselves as physical therapists and physical therapy assistants are qualified to practice. An unqualified physical therapist might harm patients through inappropriate care or neglect by further injuring the condition being treated. Therefore, deregulation of the profession could have a significant impact on the public health, safety and welfare.

Also, with complete deregulation, the number of physical therapists might increase, and the resulting increased competition could lead to lower prices for physical therapy services. However, deregulation would allow unqualified individuals to practice physical therapy. Therefore, the Audit Council recommends that regulation of the profession be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

The Board of Physical Therapy Examiners is self-supporting. Board revenue is generated through annual license and examination fees (see p. 83). In FY 85-86, the Board collected \$24,799 and expended \$22,898. For the five years, FY 81-82 through FY 85-86, revenues exceeded expenditures by an average of \$3,778 a year. Excess revenues were retained in the state General Fund.

The Board has a permanent part-time administrative employee whose salary and fringe benefits cost the Board \$11,808 in FY 85-86. Also, in September 1986, the Board rented an office in the state capitol complex for \$1,130 for the remainder of FY 86-87. The Board's budget is summarized in Table 1.

TABLE 1
SOUTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License Fees	\$ 7,680	\$ 8,987	\$ 10,115	\$ 15,216	\$ 16,155
Exam Fees	5,174	6,838	5,241	5,985	1,610
Reciprocity Fees	4,045	3,220	4,810	5,860	7,000
Other	20	9	40	32	34
TOTAL Revenues	\$ 16,919	\$ 19,054	\$ 20,206	\$ 27,093	\$ 24,799
 <u>Expenditures</u>					
Personal Services	\$ 6,837	\$ 7,202	\$ 9,456	\$ 9,900	\$ 10,930
Other Operating Expenses	5,000	6,209	6,911	9,754	10,391
Employee Benefits	1,359	979	1,309	1,365	1,577
TOTAL Expenditures	\$ 13,196	\$ 14,390	\$ 17,676	\$ 21,019	\$ 22,898

Source: South Carolina Budget and Control Board Budget Documents, FY 83-84 through FY 86-87, and the Comptroller General's Office.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The Board of Physical Therapy Examiners is carrying out its statutory requirements in an efficient manner. While the number of physical therapists licensed in the state has more than doubled during the past six years, the Board has been able to increase its administrative functions accordingly. The Board's administrative assistant now works 32 hours a week and, in FY 86-87, the Board rented an office in the state capitol complex, thereby increasing its accessibility to the public and the industry. Previously, the Board's administrative assistant worked out of her home.

While renting an office costs the Board approximately \$1,300 annually, it should reduce the Board's travel costs by \$778 in FY 86-87. This savings offsets almost 60% of the Board's annual rent because the Board's administrative assistant no longer has to drive 17 miles each day to collect the Board's mail from its post office box.

While the Board is carrying out its requirements in an efficient manner, it has not adopted written policies and procedures which might further increase efficiency.

Written Administrative Procedures

The Board of Physical Therapy Examiners has not adopted written policies and procedures.¹ Section 1-23-140 of the South Carolina Code of Laws, the Administrative Procedures Act, requires that all state agencies adopt and make available to the public a written policy statement of all formal and informal procedures.

Written procedures provide a system of operating controls and are generally accepted as good management practice. The absence of guidelines for agency hearings, investigations, and enforcement of Board statutes may result in inconsistent agency management. In addition, without written procedures, the Board could violate the constitutional guarantee of equal protection under the law.

RECOMMENDATION

THE BOARD OF PHYSICAL THERAPY EXAMINERS
SHOULD ADOPT A POLICIES AND PROCEDURES
MANUAL.

- (5) **DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.**

By statute, the Board of Physical Therapy Examiners has one public member which ensures some public participation in the Board's activities. According to the physical therapists serving on the Board, the public member has

¹The Board took steps to begin developing a policies and procedures manual during the Council's review.

played an active and "invaluable" role in presenting a view different from their professional perspectives. In addition, the Board has increased its availability to the public and the physical therapy profession by renting an office in the state capitol complex and installing an answering device on its phone. The answering machine ensures access to the Board when the Board's administrative assistant is away from the office and after normal office hours.

While Board accessibility has increased, more could be done to encourage public and industry participation. Members of the industry have not actively participated in Board activities, and Board minutes for FY 83-84 through FY 85-86 show no attendance at its meetings by members of the general public. The Board could attempt to encourage both public and industry participation through public service announcements in the news media.

(6) DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.

The Board of Physical Therapy Examiners does not duplicate the services, functions and programs of any federal or local agency. However, the Board does duplicate the programs administered by the Board of Occupational Therapy. Both boards license and regulate specialties within the field of rehabilitative health, and their governing statutes are similar. Section 40-45-20 of the South Carolina Code of Laws defines physical therapy as "...the evaluation and treatment of any bodily or mental condition of any person...." Occupational Therapy is similarly defined by §40-36-20 as:

...the functional evaluation and treatment of individuals whose ability to cope with the tasks of living are threatened or impaired by developmental

deficits, the aging process, poverty and cultural differences, physical injury or illness or psychological or social disability.

The professions have many similarities, and members of the two regulatory boards agree that the professions overlap. Both physical and occupational therapists are specialists in the field of rehabilitative health and are required to complete a similar amount of training and education. Licensees of both boards evaluate and treat the bodily and/or mental conditions of their patients. The treatment includes exercise therapy and training in the use of ambulatory equipment (wheel chairs, canes and walkers) and artificial limbs.

There are some differences between the two professions. According to members of both boards, occupational therapists work primarily with a patient's hands and finer muscles, emphasizing their daily activities, such as getting dressed, and the psychological problems of disabilities. Physical therapists usually work to improve the gross muscle skills, especially for the lower extremities.

Iowa regulates occupational and physical therapy through a single licensing body. The chairman of the Iowa Board of Physical and Occupational Therapy Examiners stated that Iowa's Board has had no problems regulating both professions. In addition, the South Carolina Board of Medical Examiners regulates physicians who practice in such diverse specialties as ophthalmology, surgery and psychiatry.

A combined board could more adequately regulate the professions, better serving therapists and their patients. Currently, regulation is hindered by the Board of Occupational Therapy's lack of an office, a telephone, a permanent mailing address, and staff. However, the Board of Physical Therapy has a permanent part-time administrative employee and an office in the state capitol complex. A combined board could use the Board of Physical Therapy

Examiners' office and staff. In addition, patients and employers of both therapists, including hospitals, therapy clinics and school districts, would be able to obtain information from and register complaints with one agency.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER COMBINING THE BOARD OF OCCUPATIONAL THERAPY AND THE BOARD OF PHYSICAL THERAPY EXAMINERS INTO A SINGLE BOARD OF OCCUPATIONAL AND PHYSICAL THERAPY. BOARD MEMBERSHIP SHOULD PROVIDE FOR EQUAL REPRESENTATION OF THE TWO PROFESSIONS AND FOR A PUBLIC MEMBER. THE NEW BOARD SHOULD CONTINUE TO OFFER SEPARATE LICENSES FOR OCCUPATIONAL THERAPISTS, OCCUPATIONAL THERAPY ASSISTANTS, PHYSICAL THERAPISTS AND PHYSICAL THERAPY ASSISTANTS.

- (7) **EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.**

The Board of Physical Therapy Examiners' handling of complaints has been consistent and generally efficient. However, the Board needs to improve its system for tracking complaints, as discussed below.

The Board received 22 formal complaints from July 1983 through December 1986. Eleven complaints concerned the use of the term "physical therapy" in chiropractors' advertisements, and two concerned the use of the term in advertisements by other businesses. Other complaints alleged the use of unlicensed physical therapists by hospitals and physical therapy assistants treating and

evaluating patients without the supervision of physical therapists.

When a formal complaint is filed, the Board reviews the complaint and decides whether to conduct an investigation. If the Board decides an investigation is necessary, the investigation is conducted by a Board member. However, the Board's Chairman has stated that investigations could be improved if conducted by professional investigators. Due to the low volume of complaints, investigators would likely be more effective if shared with other medically-related boards. The benefits of sharing staff, including investigators, are discussed in the Report Summary (see p. 7).

Administration of Complaint Files

The Board's complaint tracking system has not been implemented consistently and needs to include additional information. On its complaint form, the Board records the complaint number, the license number of the physical therapist or assistant, whether the complaint is investigated, and the Board's disposition of the case. However, the Board has not recorded this information for all complaints, and the form does not include all information relevant to each case. Further, the Board does not maintain a complaint log.

The State Board of Medical Examiners and the Board of Pharmacy maintain complaint logs and have complaint records which include such other information as the complainant's name and the agencies and investigators involved. Adequate documentation of complaints is necessary to ensure that appropriate investigations have been made by the Board.

By not maintaining adequate complaint records, the Board makes the tracking of problem physical therapists and physical therapy assistants more difficult. Furthermore, if adequate records are not kept, complete review of Board actions may not be possible.

RECOMMENDATION

THE BOARD OF PHYSICAL THERAPY EXAMINERS SHOULD REVISE ITS COMPLAINT TRACKING SYSTEM BY INCLUDING ADDITIONAL CASE INFORMATION ON ITS COMPLAINT FORM, DEVELOPING A COMPLAINT LOG AND ENSURING SUCH INFORMATION IS RECORDED FOR ALL COMPLAINTS RECEIVED.

- (8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.**

The Board of Physical Therapy Examiners is created and governed by state laws and regulations. Federal and local statutes and regulations do not directly address the Board. The Audit Council found the Board has complied with applicable state laws with one exception. The Board did not send a minority business procurement plan to the Office of Small and Minority Business Assistance for FY 85-86 and FY 86-87, as required by the South Carolina Consolidated Procurement Code. This law's purpose is to ensure minority businesses access to the state government procurement process. The Board did submit a plan in FY 84-85. However, submitting a minority business plan annually will better ensure businesses owned and operated by minorities are given the opportunity to participate fully in the state procurement process.

RECOMMENDATION

THE BOARD OF PHYSICAL THERAPY EXAMINERS SHOULD COMPLY WITH STATE MINORITY BUSINESS PROCUREMENT LAWS.

APPENDICES

APPENDIX A

BOARD OF PHYSICAL THERAPY EXAMINERS

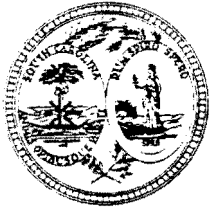
SCHEDULE OF FEES

	<u>Fees</u>
Physical Therapist	
License Renewal	\$ 35
Examination	130
Endorsement	70
Physical Therapy Assistant	
License Renewal	\$ 30
Examination	115
Endorsement	50

Source: South Carolina Board of Physical Therapy
Examiners.

South Carolina State Board
Of Physical Therapy Examiners

915 Main Street
Post Office Box 11594
Columbia, South Carolina 29211
(803) 734-3184



June 9, 1987

Mr. George L. Schroeder, Director
Legislative Audit Council
620 NCNB Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

The Physical Therapy Board has reviewed the minor changes in the audit report and has submitted the enclosed responses.

We appreciate your efforts at the time spent in this audit.

Sincerely,

Fred S. Buchanan, Jr.
Fred S. Buchanan, Jr., RPT
President

FSB:bmo

Enclosures

South Carolina State Board Of Physical Therapy Examiners

915 Main Street
Post Office Box 11594
Columbia, South Carolina 29211
(803) 734-3184

RESPONSES TO LEGISLATIVE AUDIT SUNSET REVIEW

RECOMMENDATIONS REGARDING CORPORATIONS AND PA'S: The South Carolina Board of Physical Therapy Examiners suggests that while repealing the provisions in Title 33, Chapter 51 that prohibit PA's from offering more than one professional service would be potentially procompetitive, the Board maintains that direct access must be provided to the consumer for services that are not provided by the physician. The requirement of a physician referral for physical therapy is anticompetitive. (See below) In addition, the Legislative Audit Council has failed to include recommendations for disclosure laws for PA's that are physician-owned but provide services such as physical therapy, occupational therapy, etc.

The Physical Therapy Board agrees that amending Title 33 of the South Carolina Code of Laws should be considered in lieu of current corporations in South Carolina that are providing services to the public.

Repealing the provisions in Title 33, Chapter 51, prohibiting PA's from offering more than one professional service may also receive the support from the Physical Therapy Board; however, please consider several contributing factors unique to the SC Code of Laws of Physical Therapy. The consumer of health care in South Carolina does not have direct access to a physical therapist due to our state law requiring a prescription from a licensed physician or dentist. Thus, a physical therapist PA cannot compete on an equal basis with a physician owned physical therapy service (PA). The repealing of Title 33, Chapter 51, without the elimination of the required physical therapy prescription creates a grossly unfair market place for the physical therapist owned PA.

The Board further contends that physician owned physical therapy services where the physician gains financially from patient referrals raises ethical considerations. The potential for overutilization exists in POPT's, as does the potential for loss of quality in treatment and potential decline in motivation of a therapist to maintain a high level of skill and expertise.

The Board would like the Legislative Audit Council to strongly consider recommending to the General Assembly that the prescription requirement be omitted from the Code of Laws for Physical Therapy allowing the consumer of South Carolina direct access to physical therapy services. Then, repealing Chapter 51 of Title 33 would create equal access to physical therapy for all PA's providing physical therapy services.

RECOMMENDATION REGARDING CENTRALIZATION OF ADMINISTRATIVE SERVICES: The Physical Therapy Board suggests that it has outgrown its small Board status and should not be included in a centralization of administrative services. The Physical Therapy Board, according to the Legislative Audit Council, has public visibility and accessibility, an efficient administrative staff, and

computer services from Research and Statistics. To include the Physical Therapy Board in centralization would increase costs and decrease efficiency of this Board's functions.

The Board of Physical Therapy Examiners would like to be excluded from the proposed centralization of administrative services. The Board would like to suggest that we are becoming large enough to provide our own administrative services, considering a growth rate of 10 to 15 percent a year. Our administrative assistant is being upgraded to a full time position effective July 1, 1987. Funds have also been appropriated to provide for the contracting of outside investigative services. The Board currently has accessibility (telephone and office space), an efficient administrative staff, as well as computer services from the Division of Research and Statistics.

The consumer and the licensee have direct access to the Board as well as a quick response time.

The Board perceives a more complicated network with a centralized administrative staff and shared office space which may decrease present efficiency and increase cost to the Board which eventually is passed on to the consumer.

BIENNIAL LICENSURE: The Physical Therapy Board is open to the biennial licensure concept but anticipates a negative impact in lieu of present budgetary process based on annual appropriations.

The Physical Therapy Board suggests that while the concept of biennial licensure is somewhat appealing, the impact of such a change must be considered in lieu of the present budgetary system. Appropriations are based on an annual budget and thus the Physical Therapy Board anticipates some difficulty in such a change but would be open to consideration.

REPORTING OF MALPRACTICE AWARDS: The Physical Therapy Board strongly supports the recommendation to require insurance companies and licensed medical professionals to report malpractice awards.

WRITTEN ADMINISTRATIVE PROCEDURES: The Physical Therapy Board initiated the process of developing a Policies and Procedures manual at its January 20, 1987, meeting.

The Physical Therapy Board would appreciate having the report indicate that, in fact, we have initiated the process of developing a Policies and Procedures manual even before the Council made the recommendation. Enclosed is a copy of the content outline which the Board approved at its January 20, 1987, meeting.

DUPLICATION OF SERVICES: The Physical Therapy Board strongly suggests that there are sufficient differences in physical therapy and occupational therapy to merit separate boards. Occupational therapy is not a specialty of physical therapy as implied by the analogy in the Legislative Audit Council's report.

The Physical Therapy Board strongly feels that because of the recent growth and potential growth, as well as the differences that exist between the professions of physical therapy and occupational therapy, that the Boards should not be combined.

The Board now has public accessibility (office and telephone number), extremely efficient administrative services and computer access via the Division of Research and Statistics. Therefore, the Physical Therapy Board suggests that the shifting of the Occupational Therapy Board administration would cause the Physical Therapy Board increased costs or in effect penalize the Physical Therapy Board for creating a positive position.

As far as specialties are concerned, the Physical Therapy Board regulates physical therapists who specialize in pediatrics, neurology, orthopaedics, sports medicine, etc. Occupational therapy is not a specialty of physical therapy and therefore should have a separate board.

ADMINISTRATION OF COMPLAINT FILES: The Physical Therapy Board accepts and appreciates the suggestion by the Legislative Audit Council to improve the efficiency of handling complaints.

The Physical Therapy Board has made considerable progress toward handling complaints. Attachments can be and are made to the complaint form to allow for additional information. The Board concurs with the recommendation of developing a complaint log and ensuring complete information is recorded for all complaints received.

MINORITY BUSINESS PROCUREMENT LAWS: The Physical Therapy Board concurs with the recommendation to comply with State Minority Business Procurement Laws.

ADMINISTRATIVE PROCEDURES MANUAL

1. *Physical Therapist Examination*
 - a. *Examination procedure*
 - b. *Application forms*
 - c. *Procedure for repeaters*
 - d. *Procedure for PT's passing PES*
2. *Physical Therapist Assistant Examination*
 - a. *Examination procedure*
 - b. *Application forms*
 - c. *Procedure for repeaters*
 - d. *Procedure for PTA's passing PES*
3. *PT & PTA Endorsements*
 - a. *Endorsement procedure*
 - b. *Application forms*
4. *Foreign Trained Physical Therapists*
 - a. *Examination & endorsement procedures*
 1. *Educational credentials*
 2. *TOEFL*
 - b. *Application forms*
5. *Annual Renewal Process*
 - a. *Cut off date for new licenses*
 - b. *Processing application for renewal*
 - c. *Mail backs*
 - d. *Lost license*
 - e. *Renewal forms*
6. *Reinstatement/Change of Name*
 - a. *Reinstatement procedure*
 - b. *Request for change of name*
7. *Certification*
 - a. *Procedure for transferring license to another state*
 - b. *Forms*
8. *Disciplinary*
 - a. *Complaint procedure*
 - b. *Investigative procedure*
 - c. *Hearing procedure*
9. *Board Meetings*
 - a. *Procedure for setting up meeting*
 - b. *Procedure for agenda*
10. *Requests for PT/PTA Listing*
11. *Process for Changing Regulations*

12. General Information
 - a. Accounting procedures
 1. Annual budget
 2. Receipt of money
 3. Deposit of revenue
 4. Payment of bills
 5. Payroll
 - b. Purchase of supplies & equipment
 - c. Reports
 1. Annual report
 2. Quarterly reports
 - d. Record retention/disposition

BOARD OF OCCUPATIONAL THERAPY

BOARD OF OCCUPATIONAL THERAPY

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INTRODUCTION

After reviewing the laws and operation of the Board of Occupational Therapy, the Legislative Audit Council concludes that state regulation of occupational therapy should continue. Termination of regulation would pose a threat to public health, safety and welfare. However, the Audit Council recommends that a single board regulate both occupational therapy and physical therapy. In addition, the General Assembly should consider amending the statutes governing requirements for Board membership and accreditation of occupational therapy educational programs.

BACKGROUND

With Act 139 of 1977, the General Assembly created the South Carolina Board of Occupational Therapy to regulate the profession. Section 40-36-20 of the South Carolina Code of Laws defines occupational therapy as:

...the functional evaluation and treatment of individuals whose ability to cope with the tasks of living are threatened or impaired by developmental deficits, the aging process, poverty and cultural differences, physical injury or illness or psychological or social disability.

Occupational therapists work to prevent or correct physical or emotional disabilities in individuals through goal-oriented activities. If disabilities cannot be corrected, occupational therapists work with patients to minimize the effects of the disabilities on their lives.

By state law, the Board consists of three licensed occupational therapists each having at least three years' experience, one licensed occupational therapy assistant and one public member. The South Carolina Occupational Therapy Association may submit to the Governor at least two names for each vacancy on the Board to be filled by licensees. Any individual or group may also submit nominations for Board vacancies to the Governor. Board members are appointed by the Governor for three-year terms and may serve no more than two consecutive terms.

The Board is responsible for evaluating, licensing and disciplining occupational therapists and occupational therapy assistants. Its duties include adopting rules and regulations governing the profession, and conducting investigations and hearings for alleged malpractice or misconduct by these licensed professionals.

In addition to South Carolina, 27 states regulate occupational therapy. All 28 states require applicants for licensure as occupational therapists to complete an

accredited occupational therapy educational program, pass the American Occupational Therapy Association's certification examination, and serve a six-month internship.

In FY 85-86, the Board licensed 314 occupational therapists and 19 occupational therapy assistants. All licenses issued by the Board must be renewed by March 15 of each year.

SUNSET ISSUES AND FINDINGS

- (1) DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The programs and functions of the Board of Occupational Therapy do not directly affect the costs of services provided by occupational therapists. The Board does not regulate the fees charged by occupational therapists for their services. Examination fees and annual license renewal fees are costs of regulation that may be passed on indirectly to consumers.

The fees charged by members of a regulated profession may be higher than if it were unregulated. Regulation also creates a barrier to entry into the profession and tends to limit competition through additional restrictions. However, no information was found addressing the effects regulation has had on the cost of occupational therapy services.

- (2) DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The primary functions of the Board of Occupational Therapy are testing, licensing and disciplining occupational therapists and occupational therapy assistants. In the absence of these functions, the public would have no assurance that those individuals who present themselves as occupational therapists and occupational therapy assistants are qualified to practice. An unqualified occupational therapist may harm patients through inappropriate care or neglect by further injuring the condition being treated. Therefore, deregulation of the profession could have a significant impact on the public health, safety and welfare.

Also, with complete deregulation, the number of occupational therapists might increase, and the resulting increased competition could lead to lower prices for occupational therapy services. However, deregulation would allow unqualified individuals to practice occupational therapy. Therefore, the Audit Council recommends that regulation of the profession be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

The Board of Occupational Therapy is self-supporting. Board revenue is generated through annual and temporary license fees (see p. 105). In FY 85-86, the Board collected \$5,137 and expended \$1,994. For the five years, FY 81-82 through FY 85-86, revenues exceeded expenditures by an average of \$2,332 a year. Excess revenues were retained in the state General Fund.

The Board has no permanent staff. However, the Board has employed temporary part-time clerical help to process license applications and renewals. Expenditures for personal services and employee benefits comprised 55% of the Board's total expenditures in FY 85-86. The Board's revenues and expenditures are summarized in Table 1.

TABLE 1
SOUTH CAROLINA BOARD OF OCCUPATIONAL THERAPY
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License Fees	\$3,254	\$3,130	\$3,840	\$3,103	\$5,137
TOTAL Revenues	<u>\$3,254</u>	<u>\$3,130</u>	<u>\$3,840</u>	<u>\$3,103</u>	<u>\$5,137</u>
<u>Expenditures</u>					
Personal Services	\$ 385	\$ 525	\$ 280	\$ 420	\$1,093
Other Operating Expenses	1,079	1,109	491	521	885
Employee Benefits	-	-	-	-	16
TOTAL Expenditures	<u>\$1,464</u>	<u>\$1,634</u>	<u>\$ 771</u>	<u>\$ 941</u>	<u>\$1,994</u>

Source: South Carolina Budget and Control Board Budget Documents,
FY 83-84 through FY 86-87, and the Comptroller General's Office.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

In most respects, the Board of Occupational Therapy is carrying out its statutory requirements in an efficient manner. However, the Board does not have an office, a listed phone number, or a permanent mailing address where interested parties can contact the Board. Board records are maintained in the home of the Board's part-time employee. Further, Board members have stated the part-time employee cannot handle all the administrative work of the Board, and Board members must help perform administrative duties without pay. The Board could more adequately carry out its statutory requirements if it shared office space and staff with other small medically-related licensing boards (see p. 7).

Currently, the Board of Physical Therapy Examiners has a permanent part-time administrative employee and an office in the state capitol complex. By sharing office space and staff with this and/or other medically-related boards, the Board of Occupational Therapy would obtain a permanent mailing address, an office, and a phone number where

licensees, employers of occupational therapists, and consumers could contact the Board for information or to file a complaint.

- (5) **DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.**

The statutory requirement that the Board of Occupational Therapy have one public member ensures some public participation in the Board's activities. However, members of the profession have not actively participated in Board activities, and Board minutes for FY 83-84 through FY 85-86 show no attendance at its meetings by members of the general public.

More could be done to encourage public and industry participation. The Board could attempt to encourage both public and industry participation through public service announcements in the news media. In addition, the Audit Council suggests that the Board's mailing address and telephone number be listed in the state government and Columbia telephone directories. Currently, the Board is not listed in any telephone directory in the state. Finally, requiring Board members representing the profession to be employed in the field would increase industry participation, as discussed below.

Board Member not Working in the Profession

One of the Board members representing the occupational therapy profession is not employed in the field of occupational therapy. A nonpracticing Board member may not best represent the ongoing concerns and needs of the profession.

Section 40-36-60 of the South Carolina Code of Laws requires occupational therapists and occupational therapy assistants on the Board only to be licensed. However, the

General Assembly has made working in the profession a condition of service on other licensing boards. For example, §40-45-30 requires that the physical therapists and physical therapy assistants serving on the Board of Physical Therapy Examiners "...be actively practicing in this state during their respective periods of incumbency." Also, §40-51-30 states that the podiatrists on the Board of Podiatry Examiners must be "actually engaged" in the practice of podiatry.

RECOMMENDATIONS

THE BOARD OF OCCUPATIONAL THERAPY SHOULD LIST ITS ADDRESS AND TELEPHONE NUMBER IN THE STATE GOVERNMENT AND COLUMBIA TELEPHONE DIRECTORIES.

THE GENERAL ASSEMBLY SHOULD CONSIDER AMENDING §40-36-60 OF THE SOUTH CAROLINA CODE OF LAWS TO REQUIRE THE OCCUPATIONAL THERAPISTS AND OCCUPATIONAL THERAPY ASSISTANTS SERVING ON THE BOARD TO BE EMPLOYED IN THE FIELD OF OCCUPATIONAL THERAPY.

- (6) DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.**

The Board of Occupational Therapy does not duplicate the services, functions and programs of any federal or local agency. However, the Board does duplicate the programs administered by the Board of Physical Therapy Examiners. Both boards license and regulate specialties within the field of rehabilitative health, and their governing statutes and definitions are similar. Section 40-45-20 of the South Carolina Code of Laws defines physical therapy as "...the

evaluation and treatment of any bodily or mental condition of any person...." Occupational Therapy is similarly defined by §40-36-20 as:

...the functional evaluation and treatment of individuals whose ability to cope with the tasks of living are threatened or impaired by developmental deficits, the aging process, poverty and cultural differences, physical injury or illness or psychological or social disability.

The professions have many similarities, and members of the two regulatory boards agree that the professions overlap. Both physical and occupational therapists are specialists in the field of rehabilitative health and are required to complete a similar amount of training and education. Licensees of both boards evaluate and treat the bodily and/or mental conditions of their patients. The treatment includes exercise therapy and training in the use of ambulatory equipment (wheel chairs, canes and walkers) and artificial limbs.

There are some differences between the two professions. According to members of both boards, occupational therapists work primarily with a patient's hands and finer muscles, emphasizing their daily activities, such as getting dressed, and the psychological problems of disabilities. Physical therapists usually work to improve the gross muscle skills, especially for the lower extremities.

Iowa regulates occupational and physical therapy through a single licensing body. The chairman of the Iowa Board of Physical and Occupational Therapy Examiners stated that Iowa's Board has had no problems regulating both professions. In addition, the South Carolina Board of Medical Examiners regulates physicians who practice in such diverse specialties as ophthalmology, surgery and psychiatry.

A combined board could more adequately regulate the profession, better serving therapists and their patients.

Currently, regulation is hindered by the Board of Occupational Therapy's lack of an office, a telephone, a permanent mailing address, and staff. However, the Board of Physical Therapy Examiners has a permanent part-time administrative employee and an office in the state capitol complex. A combined board could use the Board of Physical Therapy Examiners' office space and staff. In addition, patients and employers of both therapists, including hospitals, therapy clinics and school districts, would be able to obtain information from and register complaints with one agency.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER COMBINING THE BOARD OF OCCUPATIONAL THERAPY AND THE BOARD OF PHYSICAL THERAPY EXAMINERS INTO A SINGLE BOARD OF OCCUPATIONAL AND PHYSICAL THERAPY. BOARD MEMBERSHIP SHOULD PROVIDE FOR EQUAL REPRESENTATION OF THE TWO PROFESSIONS AND FOR A PUBLIC MEMBER. THE NEW BOARD SHOULD CONTINUE TO OFFER SEPARATE LICENSES FOR OCCUPATIONAL THERAPISTS, OCCUPATIONAL THERAPY ASSISTANTS, PHYSICAL THERAPISTS AND PHYSICAL THERAPY ASSISTANTS.

- (7) EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.**

The Board of Occupational Therapy received two complaints during the last three fiscal years (FY 83-84 through FY 85-86). The Board sent both complainants its standard complaint form and involved its attorney in the

Attorney General's Office in the review process. The complaints were handled in a systematic and efficient manner.

(8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.

The Board of Occupational Therapy is created and governed by state laws and regulations. Federal and local statutes and regulations do not directly address the Board. The Audit Council review found that the Board is in compliance with applicable laws and regulations with one exception. The Board has not submitted minority business plans to the Office of Small and Minority Business Assistance, as required by the South Carolina Consolidated Procurement Code. Also, a change is needed in the law which requires occupational therapy educational programs to be accredited by the professional association.

Accreditation of Occupational Therapy Programs

State law allows the American Occupational Therapy Association (AOTA) to set indirectly the entry level educational requirements for the profession in South Carolina. Section 40-36-120 of the South Carolina Code of Laws requires an applicant for licensure as an occupational therapist or occupational therapy assistant to have graduated from an educational program accredited by the American Medical Association (AMA) in collaboration with the AOTA.

Currently, the AMA and AOTA accredit bachelor's degree programs in occupational therapy. Under the present state law, the AOTA could change the entry level educational standard for occupational therapists from a bachelor's degree to a master's degree by only accrediting master's degree programs. When accreditation by the professional

association is required by law, the association can control entry requirements. The association then could decrease competition within the profession, and higher prices could be charged to consumers.

Recognizing that this situation could develop, the Southern Association of Allied Health Deans has suggested that states amend their professional licensing laws to discontinue requiring graduation from a program accredited by a professional association. Instead, the members unanimously propose that state laws governing licensure state: "The right to sit for [a professional] license exam shall depend upon graduation from a national or regionally accredited program." The Dean of Health Related Professions at the Medical University of South Carolina, the only school in the state which trains occupational therapists, stated that he supports this recommendation. Other South Carolina health-related licensing laws do not restrict accreditation of educational programs to the professional association only.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER
AMENDING §40-36-120 OF THE SOUTH
CAROLINA CODE OF LAWS TO REQUIRE AN
APPLICANT FOR LICENSURE AS AN
OCCUPATIONAL THERAPIST OR OCCUPATIONAL
THERAPY ASSISTANT TO HAVE SUCCESSFULLY
GRADUATED FROM A NATIONALLY OR
REGIONALLY ACCREDITED PROGRAM IN
OCCUPATIONAL THERAPY.

APPENDICES

APPENDIX A

BOARD OF OCCUPATIONAL THERAPY

SCHEDULE OF FEES

	<u>Fees</u>
Occupational Therapist	
Application	\$35
License Renewal	20
Occupational Therapy Assistant	
Application	\$35
License Renewal	10

Source: South Carolina Board of Occupational
Therapy.

SOUTH CAROLINA BOARD
OF
OCCUPATIONAL THERAPY

June 18, 1987

Mr. George Schroeder
Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

In response to the following issues related to the practice of Occupational Therapy our board would like to make the following comments on each issue:

I. Legality of Innovations in Professional Practices, Professionals Working for Corporations, Professional Associations Providing Only One Service:

The O. T. Board is in full agreement to amend Title 33 of the S. C. Code of Laws to allow professionals to work as corporations to provide services to the general public and to repeal the provision in Title 33 Chapter 51 to allow P.A.'s to offer more than one professional service.

II. Central Administrative Office Need:

The O. T. Board feels this would be extremely beneficial. A permanent address and phone number is greatly needed. We now have a temporary employee to provide clerical services in her home. This at times is a problem and therapist often have difficulty getting in touch with board members. We are strongly in favor of this. This suggestion has been made in the past and nothing was ever developed. Would the state be responsible for implementing this? Could budget adjustments be made if there is any increase in expenses because of this?

III. Biannual Licensure

The O. T. Board is in agreement with biannually licenses on a staggered basis if:

1. The central administrative office is developed.
2. Necessary amendments are made in our policies and procedures to accommodate this.

IV. Malpractice:

The O. T. Board is in agreement with this.

- V. A. Listing of O. T. Board (phone and address) in the State and Columbia directory. A central office would help this.
- B. Board members not working in Profession - there are a limited number of COTA's so this would hurt our selection - the final decision is the Governor's so if several names have been submitted to him and he chooses one who is not working this is his choice.
- This is in direct conflict with the suggestion to combine O.T. and P.T. agencies that would also be a non-practicing O.T.

VI. Combining O.T. and P.T. Boards:

All members strongly oppose because:

1. They are two entirely different health/medical professions offering similar services. Frequently they serve the same population but this is true for several specialties of rehabilitation services (i.e. internist, orthopedist, psychiatrist).
2. Issues facing each Board (i.e. professional ethics, malpractice, continuing education) any matter which effects the quality of professional services and the safety and protection of the public, would not be addressed by the professionals delivering the service.
Board members not representing the Occupational Therapy profession may not best represent the ongoing concerns and needs of the profession.
3. Although there is one state with a combined board, all other states with a regulatory board for Occupational Therapy and Physical Therapy find it in the best interest of their state to separate these boards.
4. We would only be in favor of sharing administrative services with the Physical Therapy Board.
5. On last Sunset Review this matter was thoroughly discussed and it was felt by both boards that it was in the best interest to remain separate.

VII. Amending 40-36-12 Regarding Accreditation of Occupational Therapy Program:

The O. T. Board opposes this amendment because:

Specialized accreditation insures that individuals practicing

occupational therapy across the country will demonstrate similar entry level skills and competence. This is accomplished by having national standards for basic professional training, including fieldwork and passing a certification exam. The current standards required by the American Occupational Therapy Association, Inc. (AOTA) and the AMA's Committee on Allied Health Education and Accreditation insure only those skills considered essential to begin entry-level practice of occupational therapy. These basic skills are considered the minimum needed to protect the health and safety of the public as well as provide therapeutic services that will remediate or alleviate dysfunction and disability. Advanced skills are not included in the current certification programs approved by AOTA and the AMA.

Regional or institutional accreditation would jeopardize entry-level practice of occupational therapy by allowing the possibility of different standards from region-to-region or even state-to-state across the country. This would place individuals at risk of receiving substandard or inadequate care and would jeopardize the ability of occupational therapy personnel to move to a different state and be eligible to meet state requirements for licensure or registration.

Currently, thirty-six states in addition to the District of Columbia and Puerto Rico, regulate the practice of occupational therapy. All thirty-eight jurisdictions require the same basic training regarding education, fieldwork and examination. This has been accomplished through the dedication of AOTA and state desire to provide the same basic entry level training to protect consumers of occupational therapy services.

"A specialized accrediting body focuses its attention on a particular program within an institution of higher education. The close relationship of the specialized accrediting body with the professional association for the field helps insure that the requirements for accreditation are related to the current requirements for professional practice."

AOTA is well aware of the concerns related to increasing educational requirements in the health professions. A two-year study regarding this subject in occupational therapy has just been completed. The following statement, voted on by the Representative Assembly in April of 1987 expresses our position very clearly:

The Representative Assembly supports multiple forms of occupational therapy education including technical education for occupational therapy assistants, baccalaureate, masters and doctoral education for occupational therapists. We further support increased emphasis on graduate entry-level preparation. The policies, positions and implementation plans included in the actions of the Representative Assembly in response to the Executive Board's recommendations for

action on the Entry Level Study Committee's report, Directions for the Future, are intended to foster continued development of occupational therapy practice, education and research. The actions of the Representative Assembly are not intended to restrict educational programs for the occupational therapist to those offered at the master's degree level.

In April 1986 the American Occupational Therapy Association (AOTA) established an autonomous credentialing agency, the American Occupational Therapy Certification Board, to administer a certification program for occupational therapy personnel. Although the AOTA had an excellent 50 year track record for conducting a successful certification program, the AOTA leadership and membership decided that the needs of the professional and the public would be better served if certification became the responsibility of the AOTCB. Thus, in 1986, the AOTA became a membership organization focused on serving the needs of the profession and the AOTCB became a credentialing agency focusing on serving the needs of the public.

The AOTCB is an autonomous credentialing agency, in that the AOTA has no authority, control, or influence over certification policies, procedures, or the financial affairs of the AOTCB. In this manner, standards for entry into the profession of occupational therapy can be determined objectively according to the needs of the public and the health care delivery system. Entry into the profession cannot be regulated by the AOTA.

Sincerely,

Clare N. McMill, OTRK
Chairperson

BOARD OF PODIATRY EXAMINERS

BOARD OF PODIATRY EXAMINERS

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INTRODUCTION

After reviewing the laws and operations of the Board of Podiatry Examiners, the Legislative Audit Council concludes that the Board should be continued. Termination of regulation would pose a threat to public health, safety and welfare. However, the Audit Council recommends that the Board establish regulations to govern its operations, including licensure and examination. Further, the General Assembly should consider giving clear authority to the Board to investigate complaints, and the Governor should appoint a public member to the Board.

BACKGROUND

The General Assembly created the Board of Podiatry Examiners in 1935 to regulate the podiatry profession. Section 40-51-20 of the South Carolina Code of Laws defines podiatry as the diagnosis and medical and surgical treatment of ailments of the human foot.

Podiatrists can take x-rays, prescribe drugs and perform surgery to treat ailments, diseases and deformities of the foot. However, they cannot amputate the foot or toes, administer an anaesthetic, other than local, or extend medical treatment to "...any systemic disease causing manifestations in the foot."

By state law, the Board consists of three podiatrists, actually engaged in practice, and a consumer member. Board members are appointed by the Governor for two-year terms. Nominations for appointment to the Board can be made by any individual, group or association. In addition, the Board of Medical Examiners designates one medical doctor to serve as a consultant to the Board.

The Board is responsible for examining, licensing and disciplining podiatrists in the state. To carry out these responsibilities, the Board can formulate regulations governing its activities and the profession.

All states regulate the practice of podiatry through licensure and require applicants to have graduated from an approved school of podiatry. In South Carolina, applicants are required to complete three years of pre-podiatry training at a recognized college and four years at a college of podiatric medicine.

In FY 85-86, the Board licensed 55 podiatrists, 17 of whom resided out-of-state. All licenses issued by the Board must be renewed by January 1 each year.

SUNSET ISSUES AND FINDINGS

- (1) DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The programs and functions of the Board of Podiatry Examiners do not directly affect the costs of services provided by podiatrists. The Board does not regulate the fees podiatrists charge for their services, but does impose regulation costs through examination fees and annual license renewal fees. These costs may be passed on indirectly to consumers, but it is not likely that they significantly affect the cost of podiatric medical services.

Regulation of professions increases the costs consumers pay for their services by creating barriers to entry into the profession. For example, prices consumers pay for podiatric services may be affected by state laws which limit competition (see p. 118).

Regulation also creates a barrier to entry into the profession and tends to restrict competition through additional requirements. Some Board requirements and a state law regarding licensure are restrictive, particularly to applicants already licensed in another state (see below). Further, the Board does not use the provision in law for licensing out-of-state applicants. When entry into the profession is restricted, consumers may pay higher prices for services. Further, there are fewer practitioners available to serve the public. In 1987, South Carolina has less than two podiatrists per 100,000 people, while the other eight southeastern states average more than three per 100,000.

Application for Examination

The Board of Podiatry Examiners requires information of applicants which is unnecessary and can be prejudicial.

These requirements may restrict entry into the podiatry profession in the state.

The application for examination requires the applicant to provide a certificate of good moral character to be signed by a medical doctor and two podiatrists, one of whom must be licensed by and practicing in South Carolina. This requirement could prevent qualified out-of-state applicants, who do not know a medical doctor or a podiatrist licensed and practicing in the state, from taking the examination for licensure. A representative of the Attorney General's Office advised the Board in 1983 to eliminate this requirement.

The application also requires the applicant to state his intended residence, where he expects to establish a practice and the reason for selecting this state. It further asks if a permanent residence in the state will be established for practicing podiatry within six months following licensure. These requirements provide no useful information to the Board in determining the applicant's competence to practice and could be interpreted as discriminatory.

RECOMMENDATIONS

THE BOARD OF PODIATRY EXAMINERS SHOULD ELIMINATE THE APPLICATION REQUIREMENT THAT A CERTIFICATE OF GOOD MORAL CHARACTER BE SIGNED BY A MEDICAL DOCTOR OR A PODIATRIST LICENSED BY AND PRACTICING IN THE STATE.

THE BOARD SHOULD REMOVE FROM ITS APPLICATION REQUIREMENTS QUESTIONS RELATING TO EXPECTED LOCATION OF PRACTICE AND OTHER INFORMATION NOT PERTINENT TO PROFESSIONAL COMPETENCE.

Licensure by Reciprocity

State law provides for licensure of out-of-state applicants by reciprocity. This provision is restrictive to entry into the profession in South Carolina. Further, the Board of Podiatry Examiners does not use the provision in licensing out-of-state applicants.

Reciprocity Statute

Section 40-51-110 of the South Carolina Code of Laws allows the Board to issue a license to a podiatrist from out-of-state without examination if certain requirements are met. The podiatrist must be licensed in another state which has requirements for licensure equal to South Carolina's and which also extends the same reciprocal privileges. The applicant must also be a practicing podiatrist for one year or more and have a good professional reputation during that time. This combination of requirements has impeded out-of-state podiatrists from practicing in South Carolina. Since 1963 only one podiatrist has been licensed under the reciprocity provision. Also, the Board has not identified states extending reciprocal privileges to South Carolina podiatrists.

Although the state should protect the public from unqualified practitioners, it must also provide ample opportunity for qualified individuals to practice. Other states license out-of-state podiatrists by endorsement of the applicant's credentials, including education and experience, a less restrictive means of licensing than reciprocity. Also, the South Carolina Board of Medical Examiners licenses physicians from out-of-state with no further testing based on approved education, postgraduate training, national test scores, years of experience, and letters of reference. With licensure based on credentials, applicants can be considered for licensure regardless of their state's own reciprocity practices, and the Board can

evaluate each applicant on his competence without other restricting factors.

Use of Reciprocity

The Board of Podiatry Examiners has not exercised its authority to license out-of-state podiatrists through reciprocity. The Board requires all applicants for licensure to meet the same informational requirements and take an oral exam administered by the Board. As a result, licensure to practice in this state may be further restricted for podiatrists licensed out-of-state.

The Board has licensed only one podiatrist under the reciprocity provision since 1963. This applicant was given a license by reciprocity because an "emergency" situation existed. However, in other requests for licensure by reciprocity, the Board did not agree to waive any of the information or exam requirements. In a letter to the Board in 1983, a representative of the Attorney General's Office stated:

The only requirements for licensure by reciprocity which are authorized by your Act are contained in §40-51-110 of the Code of Laws of South Carolina, 1976, as amended. If these requirements are met by the applicant, I don't think the Board can impose any further substantive requirements on him.

By not using its reciprocity provision, the Board has imposed unnecessary requirements, including the exam, on applicants who may be eligible for licensure without these requirements.

RECOMMENDATIONS

THE GENERAL ASSEMBLY SHOULD CONSIDER
AMENDING §40-51-110 OF THE SOUTH
CAROLINA CODE OF LAWS TO ELIMINATE THE
RECIPROCITY REQUIREMENT AND PERMIT THE
BOARD OF PODIATRY EXAMINERS TO LICENSE

OUT-OF-STATE PRACTITIONERS BY
ENDORSEMENT OF CREDENTIALS ALONE.

THE BOARD OF PODIATRY EXAMINERS SHOULD
DEVELOP REGULATIONS ADDRESSING THE
QUALIFICATIONS NEEDED FOR OUT-OF-STATE
PRACTITIONERS TO BE LICENSED BY
CREDENTIALS. THESE REGULATIONS SHOULD
ENSURE APPLICANTS POSSESS QUALIFICATIONS
EQUIVALENT TO SOUTH CAROLINA STANDARDS.

Limits on Competition

The Board of Podiatry Examiners administers two laws which limit competition while providing questionable benefit to the public's health and welfare. These laws prohibit commercial practice and incorporation by podiatrists. Attorneys with the Bureau of Competition for the Federal Trade Commission (FTC) stated these laws "...may deprive consumers of significant cost savings and convenience without providing any countervailing benefits in the quality of care podiatrists deliver."¹

Commercial Practice

Section 40-51-250 of the South Carolina Code of Laws states:

It shall be deemed unlawful for any practitioner of podiatry...to open an office or practice podiatry...or become employed to practice podiatry...in connection with a commercial establishment.

This law prohibits podiatrists from practicing in nontraditional settings. Also, a Board member stated that

¹See page 134 for the April 1987 FTC letter to the Audit Council.

the restriction prevents commercial establishments, such as stores selling foot care products, from having undue influence over podiatrists who may practice with them. However, it is questionable how the public can be harmed by a qualified podiatrist who has an office in or works for a commercial establishment. Further, FTC attorneys stated, where commercial practice is allowed, studies show lower prices for services result without sacrificing the quality of care.

Incorporation

Section 40-51-210 states:

It shall be unlawful for any person or persons to incorporate...for the purpose of practicing podiatry...within the State.

FTC attorneys stated this restriction can prevent the formation of innovative forms of practice for podiatrists, including the association of podiatrists with health maintenance organizations (HMOs) and with other podiatrists. However, it is questionable how the public can be harmed by this form of practice. Further, restrictions on incorporation can raise the cost of capital to podiatrists and result in higher prices to consumers.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER
REPEALING §40-51-250 AND §40-51-210 OF
THE SOUTH CAROLINA CODE OF LAWS WHICH
PROHIBIT PRACTICE IN CONNECTION WITH
COMMERCIAL ESTABLISHMENTS AND
INCORPORATION BY PODIATRISTS.

(2) DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The Board of Podiatry Examiners is responsible for testing, licensing and disciplining podiatrists in the state. Termination of the Board and deregulation of the profession would remove state laws which affect the quality of foot care, including surgery, that podiatrists provide to the public. Deregulation would eliminate education and examination requirements for podiatrists. It would also eliminate a mechanism for removing unqualified practitioners from the profession. As a result, the public would have no assurance that individuals who present themselves as podiatrists are qualified to practice.

Complete deregulation could result in an increase in the number of podiatrists, and thus, a decrease in the cost of foot care due to increased competition. However, the public would be exposed to more untrained and potentially harmful practitioners, affecting public health, safety and welfare. Therefore, the Audit Council recommends that the Board and regulation of the profession be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

The Board of Podiatry Examiners is required by law to collect revenues sufficient to equal its annual appropriation. The Board's examination and annual license renewal fees generate enough revenues for the Board to be self-supporting. In FY 85-86, the Board collected \$1,580 while spending \$520. From FY 81-82 through FY 85-86, revenues exceeded expenditures by an average of \$1,440. Excess revenues were retained in the state General Fund.

The Board does not employ any staff. The Board's Secretary-Treasurer performs all administrative functions

for the Board. Personal services expenditures represent per diem paid to Board members. Other operating expenses include supplies, materials, fixed charges, and travel (see Table 1).

TABLE 1
BOARD OF PODIATRY EXAMINERS
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License and Examination Fees ¹	<u>\$2,010</u>	<u>\$2,475</u>	<u>\$1,575</u>	<u>\$2,065</u>	<u>\$1,580</u>
TOTAL Revenues	<u>\$2,010</u>	<u>\$2,475</u>	<u>\$1,575</u>	<u>\$2,065</u>	<u>\$1,580</u>
 <u>Expenditures</u>					
Personal Services	\$ 70	\$ 210	\$ 105	\$ 105	\$ 105
Other Operating Expenses	<u>281</u>	<u>551</u>	<u>331</u>	<u>331</u>	<u>415</u>
TOTAL Expenditures	<u>\$ 351</u>	<u>\$ 761</u>	<u>\$ 436</u>	<u>\$ 436</u>	<u>\$ 520</u>

¹See page 133 for a schedule of fees.

Sources: South Carolina Budget and Control Board Budget Documents, FY 83-84 through FY 86-87, and the Comptroller General's Office.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The Audit Council reviewed the Podiatry Board's operations and found several problems which affect its efficiency. The Board has not adopted written policies and procedures or promulgated regulations to govern its operations. The Board also needs to improve the administration of its oral examination required for licensure. These findings are discussed in the following pages.

In addition, the Board does not have an office or staff. Currently, the Secretary-Treasurer performs all administrative functions for the Board without pay, and all

Board records are kept in his private office in Charleston. The Audit Council noted that deposits of fee revenues collected by the Board have not been made in a timely manner as required by law (see p. 125). Also, the Board has not made timely responses to some correspondence. Further, the Board does not have a permanent address or telephone number where the public can contact the Board to file a complaint or obtain information.

The Board could perform its functions more efficiently and effectively if it shared full-time staff and an office in the state capitol complex with other small medically-related boards (see p. 7). Sharing an office and staff would also increase public accessibility by giving the Board a permanent mailing address and a telephone number.

Procedures and Regulations

The Board of Podiatry Examiners has not adopted written policies and procedures as required by law. Further, the Board has not promulgated regulations to govern its operations.² Therefore, the Board has no guidelines to follow in licensing applicants, administering exams, or investigating complaints.

Section 1-23-140 of the South Carolina Code of Laws requires all state agencies to adopt and make available to the public a written policy statement of all formal and informal procedures. Section 40-51-70 states the Board may make such regulations as necessary to conduct its examinations and meetings. Further, state law requires the Board to set fees for licensure and license renewal by regulation (see p. 130).

Without written policies, procedures and regulations to govern its operations, the Board's actions are less likely

²During the Council's review, the Board began developing regulations to govern its operations.

to be consistent. Also, the Board could violate the constitutional guarantee of equal protection under the law.

RECOMMENDATIONS

THE BOARD OF PODIATRY EXAMINERS SHOULD
DEVELOP A POLICIES AND PROCEDURES
MANUAL.

THE BOARD SHOULD PROMULGATE REGULATIONS
TO GOVERN ITS OPERATIONS.

Oral Examination

Applicants for licensure must take a national exam, administered by the National Board of Podiatric Medical Examiners, and an oral, practical exam administered by the Board. Several improvements are needed in the administration of the oral exam to ensure it is applied in a fair and consistent manner.

Approval of the Exam

The Board, as a whole, does not approve the oral exam prior to its use. Each Board member develops and administers one section of the three-part exam. Some questions are repeated from year to year. However, one Board member stated he changes the questions in his section each year. Since the entire Board is responsible for giving the oral exam, good management would require the Board to formally approve the exam. Without Board approval, Board members may not have the opportunity to review the entire exam to determine if the questions are a good measure of an applicant's competence.

Method of Grading Exam

The Board also does not approve the method for grading each section of the oral exam. The Board member who

develops and administers each section determines how that section is graded, according to the content of answers acceptable for him, and then he alone grades that section of the exam.

Section 40-51-90 of the South Carolina Code of Laws states no applicant shall be granted a license unless he obtains a general average of 75% on the exam and not less than 50% on any one subject. When all Board members do not approve the method of grading the exam and do not participate in grading all parts of the exam, one Board member can deny an applicant a license by failing the applicant on one section. Having all Board members grade the exam would ensure a system of checks and balances so that tests are graded as fairly as possible.

Records of Oral Exam

The Board does not maintain records of the oral exam, except for a form on each applicant specifying the grades obtained on each section and the final grade. The Board has no documentation of the specific questions asked, the applicant's response or the results on each question. Section 40-67-60 requires the Board of Examiners in Speech Pathology and Audiology to keep a transcript of any oral examination as part of its records for at least one year following the exam. When records of an oral exam are not maintained, the Board cannot document that the exam is administered in a fair and consistent manner or is a reliable tool for assessing the competence of applicants.

Summary

As stated earlier, the Board has not developed written policies and procedures governing such activities as the administration of exams. When procedures are developed by the Board, they should address Board approval of exam content, methods of grading, and requirements for maintaining records on all aspects of the oral exam.

RECOMMENDATIONS

THE BOARD OF PODIATRY EXAMINERS SHOULD FORMALLY APPROVE THE DEVELOPMENT, ADMINISTRATION AND GRADING OF ITS ORAL EXAMINATION FOR LICENSURE.

THE BOARD SHOULD KEEP A TRANSCRIPT OF THE ORAL EXAMINATION AS PART OF ITS RECORDS FOR AT LEAST ONE YEAR FOLLOWING THE EXAM.

THE BOARD SHOULD ADDRESS THE ADMINISTRATION OF ITS ORAL EXAMINATION WHEN DEVELOPING WRITTEN POLICIES AND PROCEDURES.

Revenue Deposits

The Board of Podiatry Examiners is not making timely deposits of revenues as required by law. Section 40-51-170 of the South Carolina Code of Laws requires all revenues collected by the Board from license and examination fees to be remitted to the State Treasurer as collected, but at least once each week. However, fees have been held by the Board for up to three and a half months before being deposited with the State Treasurer. Of 13 checks for which the Audit Council could determine the receipt date, ten were held for more than one week before deposit, and five were held a month or more.

When revenues are not promptly deposited, the state loses interest income on those revenues. Further, the revenues may be lost or misplaced. For example, in February 1987, the Audit Council found an undeposited check for license renewal, dated July 1985, in the Board's files.

RECOMMENDATION

THE BOARD OF PODIATRY EXAMINERS SHOULD
REMIT ALL REVENUES TO THE STATE
TREASURER IN A TIMELY MANNER AS REQUIRED
BY LAW.

- (5) **DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.**

Public and industry participation in Board activities needs improvement. The Board does not have a public member, as required by law (see below). Also, Board minutes for 1982 through 1986 show no podiatrists, other than Board members, and no members of the general public have attended Board meetings. Prior to February 1987, the Board did not notify the public and the news media of its meetings, as required by the Freedom of Information Act, because the Board was unaware of these requirements. However, the Board posted a notice for a special meeting held in February 1987 and contacted newspapers in Charleston, Greenville and Columbia about the meeting. The Board's Secretary-Treasurer stated he would follow these requirements in the future.

Also, the Board does not list its address and telephone number in the state government section of any telephone book in the state. Public access to the Board would be increased if the Board listed these in the state government and Columbia telephone directories.

Public Member

The Board of Podiatry Examiners does not have a public member as required by law. In 1982, §40-51-30 of the South Carolina Code of Laws was amended to add a public member to the Board, to be appointed by the Governor. However, records of the Governor's Office show no public member was

appointed, and Board minutes indicate the only Board members attending meetings were podiatrist members.

Public members are appointed to regulatory boards to ensure some public input in Board activities and provide an additional perspective in Board decision making. When public members are not appointed, public input is limited.

RECOMMENDATIONS

THE BOARD OF PODIATRY EXAMINERS SHOULD LIST ITS ADDRESS AND TELEPHONE NUMBER IN THE STATE GOVERNMENT AND COLUMBIA TELEPHONE DIRECTORIES.

THE GOVERNOR SHOULD APPOINT A PUBLIC MEMBER TO THE BOARD OF PODIATRY EXAMINERS.

- (6) DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.**

The Board of Podiatry Examiners does not duplicate the services, functions or programs of any other state, federal or local government agency. The Board is the only entity responsible for examining and licensing podiatrists.

The Department of Health and Environmental Control (DHEC) does register podiatrists for the handling of controlled substances. DHEC also investigates violations of controlled substance regulations. The Board receives notification of violations of these regulations and actions taken by DHEC involving podiatrists.

- (7) EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.

The Audit Council reviewed the Board of Podiatry Examiners' minutes and files and found the Board has not reviewed two of the three complaints it received since July 1983. This is due in part to the Board's not having clear authority to investigate complaints. Therefore, the efficiency with which complaints are handled could not be determined.

Complaint Handling

The Board received three complaints from July 1983 through December 1986. As of February 1987, the Board had not reviewed two complaints received in 1986. One complaint involved disputed fees for podiatry services, while the other complaint alleged unprofessional conduct by a podiatrist. A third complaint, received in 1984, was reviewed by the Board, according to a Board member. However, Board files and minutes contain no record of this complaint.

The Board's Secretary-Treasurer stated complaints have not been reviewed because the Board does not have written procedures for handling complaints (see p. 122). Also, the Board's enabling legislation does not give the Board clear authority to investigate complaints. Section 40-51-160 of the South Carolina Code of Laws states only the procedure for denying or revoking a license to practice podiatry shall be the same as that for denying or revoking a license to practice medicine. The statute governing suspension and revocation of medical licenses by the Board of Medical Examiners sets forth the procedures for complaint resolution, which is a prerequisite to suspending or revoking a license. Therefore, indirectly, the Board of

Podiatry Examiners is required to handle complaints as part of its procedure for denying or revoking a license.

Other professional licensing boards are specifically authorized to investigate complaints and/or violations of the laws governing their professions. When the Board does not investigate complaints, the public is not adequately protected and confidence in the Board may be undermined.

RECOMMENDATIONS

THE GENERAL ASSEMBLY SHOULD CONSIDER
GIVING THE BOARD OF PODIATRY EXAMINERS
CLEAR AUTHORITY TO INVESTIGATE
COMPLAINTS.

THE BOARD SHOULD DEVELOP WRITTEN
POLICIES AND PROCEDURES GOVERNING THE
INVESTIGATION OF COMPLAINTS, INCLUDING
RECORD-KEEPING REQUIREMENTS.

- (8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.**

The Board of Podiatry Examiners was created and is governed by state laws and regulations. Federal and local statutes and regulations do not directly address the Board. As noted earlier, the Board has not complied with state laws requiring written administrative procedures and timely deposit of revenues. Also, the Board did not provide public notice of meetings prior to February 1987.

The following sections discuss two other problems the Board has had in complying with state laws. The Board has not set fees in regulation nor has it submitted minority business plans as required by law.

Setting of Fees

The Podiatry Board's license and license renewal fees have not been enacted in regulation, as required by state law. As a result, the General Assembly, the public and podiatrists have had little input into the setting of fees.

Sections 40-51-60, 40-51-110 and 40-51-140 of the South Carolina Code of Laws require the Board's license and license renewal fees to be established in regulation through a process set forth in the state Administrative Procedures Act (APA). This process allows the General Assembly, the public and podiatrists a specific period of time to review and comment on proposed regulations before they become law. This helps to ensure that regulatory agencies are responsive to the citizens of South Carolina. The Podiatry Board, however, has independently set fees without going through the APA process.

RECOMMENDATION

THE BOARD OF PODIATRY EXAMINERS SHOULD
COMPLY WITH STATE LAWS REQUIRING THAT
FEES BE ESTABLISHED IN STATE
REGULATIONS.

Minority Business Plans

The Board of Podiatry Examiners has not sent minority business plans to the Office of Small and Minority Business Assistance, as required by the South Carolina Consolidated Procurement Code. This law's purpose is to ensure minority businesses access to the state government procurement process. When agencies do not comply with its provisions, businesses owned and operated by minorities may not be afforded the opportunity to participate fully in the process.

RECOMMENDATION

THE BOARD OF PODIATRY EXAMINERS SHOULD
COMPLY WITH STATE MINORITY BUSINESS
PROCUREMENT LAWS.

APPENDICES

APPENDIX A

BOARD OF PODIATRY EXAMINERS

SCHEDULE OF FEES

	<u>Fees</u>
Examination	\$150
License Renewal	25
Late Renewal	45

Source: South Carolina Board of Podiatry Examiners.



BUREAU OF COMPETITION

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

APR 23 1987

Mr. George L. Schroeder
Director
Legislative Audit Council
State of South Carolina
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

We are pleased to respond to your invitation to assist in the sunset review of the laws governing, and regulations implemented by, the South Carolina State Boards of Podiatry Examiners, Occupational Therapy Examiners, Speech and Audiology Examiners, and Psychology Examiners.¹ Our comments address: (1) restrictions on business practices of professionals, including restrictions on corporate practice, employment of professionals by corporations, and commercial affiliations, (2) restrictions on truthful, nondeceptive advertising, and (3) restrictions on advertising and fee splitting that are incorporated directly from ethical rules promulgated by private professional associations composed of competitors. In our view, these three types of provisions are likely to injure South Carolina consumers, and we therefore urge the Council to seek their repeal or modification.

I. Interest and Experience of the Federal Trade Commission

The Federal Trade Commission is empowered under 15 U.S.C. § 41, et seq. to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. Pursuant to its statutory mandate, the Commission encourages competition among members of the licensed professions to the maximum extent compatible with legitimate state and federal goals. For several years, the Commission staff has been investigating the competitive effects of restrictions on the kinds of business arrangements that state-licensed professionals,

¹ These comments represent the views of the Bureaus of Competition, Consumer Protection, and Economics of the Federal Trade Commission, and do not necessarily represent the views of the Commission itself. The Commission has, however, voted to authorize us to submit these comments to you.

kinds of business arrangements that state-licensed professionals, including optometrists, dentists, lawyers, physicians, and others, are permitted to use in their respective professions. Our goal is to identify and seek the removal of restrictions that impede competition, increase costs, and harm consumers without providing countervailing benefits.

As a part of the Commission's efforts to foster competition among licensed professionals, it has examined public and private restrictions that limit the ability of professionals to engage in truthful and nondeceptive advertising.² The Commission's staff has gained considerable experience with the economics of competition among health professionals, and with the effects of state board regulation on competition.

II. Restrictions on the Practice of Podiatry

S.C. Code Ann. § 40-51-210 prohibits any person from incorporating for the purpose of providing podiatry services to the public. This "corporate practice" restriction apparently prevents podiatrists from practicing as corporations or affiliating with lay corporations. It is also unlawful for podiatrists to open an office or practice podiatry "in connection with a commercial establishment," S.C. Code Ann. § 40-51-250, which apparently means that podiatrists cannot practice in commercial settings such as department or drug stores. Such restrictions are anticompetitive and harmful to consumers because they prevent podiatrists from choosing the form of practice they consider most efficient, they increase the costs of providing

² See Wyoming State Board of Registration in Podiatry, 107 F.T.C. 19 (1986) (consent order) (settling charges that the Board, through regulations it promulgated and enforced, had restrained competition among podiatrists by restricting the truthful advertising of podiatric goods and services); Louisiana State Board of Dentistry, 106 F.T.C. 65 (1985) (consent order) (settling charges that the Board, through regulations it promulgated and enforced, had restrained competition by restricting the advertising of the cost and availability of dental services); Montana Board of Optometrists, 106 F.T.C. 80 (1985) (consent order) (settling charges that the Board, through regulations it promulgated and enforced, had restrained competition by restricting the truthful advertising of prices and claims of professional superiority); American Medical Association, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982) (holding that the AMA had illegally conspired to restrain competition among physicians by suppressing through its ethical guidelines truthful advertising and other forms of solicitation of patients by member physicians).

podiatry services, and they deter entry into the market by new podiatrists. Thus, we urge the Council to recommend that these statutory restrictions be repealed.

The combined effect of corporate and commercial practice restrictions is to prevent podiatrists from choosing whatever they consider to be the most efficient way to practice. These restrictions would, for example, prevent podiatrists from forming or affiliating with business arrangements such as ambulatory clinics or health maintenance organizations ("HMOs") that are not controlled by podiatrists or are "commercial." Such arrangements can facilitate entry by new practitioners and lead to high-volume practices that may be more efficient than traditional practices. Competition from new entrants, and the productivity gains from increased volumes of patients seen, can benefit consumers through lower prices or a greater variety of services.

Notwithstanding the anticompetitive nature of these types of restrictions, they are frequently defended on the grounds that they help maintain a high level of quality in the professional services market. Proponents claim, for example, that business relationships between professionals and non-professionals are undesirable because they permit lay interference with the professional judgment of licensees. They also allege that, while lay firms might offer lower prices, such firms might also encourage their professional employees to cut corners to maintain profits.

Some studies of the delivery of optometric services appear to contradict these contentions, however. They indicate that the presence of innovative arrangements such as chain stores in optometric markets is likely to strengthen both price and service competition.³ Such arrangements can increase consumer access to optometric care by permitting the establishment of high-volume practices that charge significantly lower prices without sacrificing the quality of care provided. The results of these studies may be applicable to similar restrictions in other areas, such as podiatry.

The statute prohibiting podiatrists from practicing in connection with commercial establishments could also have anticompetitive effects even standing alone, apart from the corporate practice restriction. This restriction effectively

³ Bureau of Economics, Federal Trade Commission, Bureau of Consumer Protection and Economics, Federal Trade Commission, A Comparative Analysis of Cosmetic Lens Fitting By Ophthalmologists, Optometrists and Opticians (1983); Staff Report on Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry (1980).

prohibits podiatrists from providing services in locations frequented by numerous consumers, for instance, on the premises of a department store or shopping mall.⁴ Consumers desire and can benefit from convenient access to goods and services, including professional goods and services. Restrictions on practicing in commercial locations can reduce the accessibility of podiatry services as well as consumers' opportunity to choose among a variety of providers practicing at different locations.

Similarly, the restriction on corporate practice can, by itself, have anticompetitive effects. Corporate business arrangements can be procompetitive because they may be a means to raise needed equity capital to start or expand a practice. For example, podiatrists may want to finance their practice by becoming co-workers with outside investors or put together chains of clinics or other types of innovative arrangements to accommodate high volume practices. Because current law precludes a sale of stock, podiatrists may be forced to rely on more expensive alternative financing. The cost of obtaining bank financing or personal loans may be a significant impediment to entry. If raising needed equity capital is made more difficult, some podiatrists may be deterred from entering the market altogether. Competition may be lessened because of the reduced entry of new podiatrists, and potential productivity gains from innovative practice arrangements may be inhibited.

We are also concerned that the restriction on corporate practice may hinder the development of ambulatory clinics, HMOs, preferred provider organizations ("PPOs"), or other innovative types of health care organizations. For example, if these types of organizations hire or affiliate with podiatrists, they may be considered to be engaged in the delivery of podiatry services in a manner prohibited by §40-51-210. If the South Carolina provision is interpreted in this manner (cf. American Medical Association, 94 F.T.C. 701, 1016-18 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982)), it could restrict the development of efficient arrangements between podiatrists and clinics, HMOs, or PPOs. Because these organizations can provide quality health care services and health care financing at discounted prices, a restriction that impedes their development can harm consumers.

The anticompetitive effects of restrictions on corporate practice were carefully considered by the Commission in the American Medical Association case. The Commission found that AMA

⁴ See, e.g., Oklahoma Optometric Association, 106 F.T.C. 556 (1985) (consent order) (settling charges that the association's prohibition on franchise or other commercial arrangements unreasonably restrained competition and injured consumers).

rules preventing physicians from entering into various contractual relationships, such as affiliating with HMOs, unreasonably restrained competition and thereby violated the antitrust laws.⁵ The Commission concluded that the AMA's prohibitions kept physicians from adopting more economically efficient business arrangements. These restrictions also precluded competition by organizations not directly and completely under the control of physicians. The Commission found that there were no countervailing procompetitive justifications for these provisions.⁶

In sum, bans on corporate practice and on practice in connection with commercial establishments may deprive consumers of significant cost savings and convenience without providing any countervailing benefits in the quality of care podiatrists deliver. Thus, we urge the Council to recommend the repeal of these provisions.

III. Restrictions on the Practice of Occupational Therapy

The South Carolina Attorney General's Office has issued an opinion letter concerning the practice of occupational therapy.⁷ That letter raises two issues of competition policy. First, it appears to hold that the corporate practice of occupational therapy is unlawful.⁸ Second, it appears to hold that the employment of an occupational therapist by a corporation is

⁵ 94 F.T.C. at 1011-18.

⁶ See also Michigan Optometric Association, 106 F.T.C. 342 (1985) (consent order) (settling charges that an optometric association's prohibition of corporate practice unreasonably restrained competition and injured consumers).

⁷ See letter from Robert D. Cook, Assistant Attorney General to Barbara Waugh, Secretary, Occupational Therapy Board (September 8, 1982) (hereinafter cited as "Waugh Letter").

⁸ Waugh letter at 2. The attorney general's opinion is based on a common law rule prohibiting a corporation from engaging in a learned profession. It cites Wadsworth v. McRae Drug Co., 203 S.C. 543, 548, 28 S.E.2d 417 (1943) (holding that a corporation may not engage in the practice of a learned profession even through a licensed employee). The opinion letter also emphasizes the absence of any statutory authority for the Board of Occupational Therapy to issue a license to practice occupational therapy to a corporation. See S.C. Code. Ann. § 40-36-10 et. seq.

prohibited.⁹ South Carolina does not have any statutes or regulations containing such restrictions. Rather they are apparently found in the common law of South Carolina.

The restrictions identified by the Attorney General's office are likely to hinder, or prevent altogether, the development and formation of innovative forms professional practice by occupational therapists. Thus, we urge the Council to recommend that the legislature act to alter the common law to permit corporate practice by occupational therapists and their employment by a corporation.

We have previously discussed our concerns about the potential anticompetitive effects of a restriction on the corporate practice of podiatry. These concerns are likely to be applicable to prohibitions on incorporation by occupational therapists as well. Therefore, we refer the Council to our comments on that subject in Part II above.

The restriction on the employment of occupational therapists by a corporation may also generate significant anticompetitive effects and increase costs to consumers.¹⁰ For example, occupational therapists may seek to associate with corporations such as ambulatory clinics or HMOs and agree to accept compensation in the form of a salary. Such an arrangement may allow occupational therapy services to be delivered to the public in connection with a variety of other health care services or through a more competitive cost structure. Consequently, the employment of occupational therapists under a salary arrangement can increase consumer choice by increasing price and service competition among occupational therapists.

⁹ Waugh letter at 3-7. The opinion cites to an early South Carolina case holding that a corporation was forbidden to employ a licensed professional, because employment by a corporation could be used as an "expedient" to circumvent the existing restrictions on corporate practice. See *Ezell v. Ritholz*, 188 S.C. 30, 198 S.E. 419 (1938).

¹⁰ See e.g., *American Medical Association*, 94 F.T.C. at 1016 (finding that AMA had illegally conspired to restrain its members from working on a salaried basis or at less than ordinary rates for hospitals, HMOs, and other institutions); *American Society of Anesthesiologists*, 93 F.T.C. 101, 102 (1979) (consent order) (settling charges that the society, through its ethical guidelines and membership requirements, illegally restrained members from being paid on other than a fee-for-service basis or from becoming salaried hospital employees).

The availability of salaried employment also may be an important option for those occupational therapists who cannot obtain the capital necessary to open a practice or who seek to avoid the difficulties of debt financing. Salaried employment can present fewer economic risks than independent practice. If occupational therapists desire salaried employment but are prevented by law from accepting it, they may be deterred from entering the market, thus decreasing the availability of occupational therapists.

We therefore urge the Council to recommend that the legislature permit corporate practice by occupational therapists and the employment of occupational therapists by corporations.

IV. Regulations of the Board of Speech and Audiology Examiners

The Board of Speech and Audiology Examiners has adopted regulations that contain two provisions that could have significant anticompetitive effects. The first of these provisions, S.C. Admin. R. 115-15 D(5), requires speech pathologists and audiologists to "announce their services in a manner consistent with the highest professional standards in the community." The second provision, S.C. Admin. R. 115-15 D(4), prohibits speech pathologists and audiologists from "using professional or commercial affiliations in any way that would mislead or limit services to persons served professionally." These restrictions are anticompetitive because they may suppress the dissemination of potentially useful information and may well contribute to an increase in prices. We therefore urge the Council to recommend their repeal.

The Commission has long been concerned about public and private restrictions that limit the ability of professionals to engage in truthful, nondeceptive advertising.¹¹ The Supreme Court has emphasized the vital role that advertising plays in promoting the efficient allocation of society's scarce resources.¹² Studies indicate that prices for professional goods

¹¹ See, e.g., American Medical Association, 94 F.T.C. at 1023.

¹² See, e.g., Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2279-80 (1985) ("the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful"); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) ("commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system").

and services are lower where advertising exists than where it is prohibited,¹³ and provide evidence that, while advertising is likely to lead to lower prices, it does not lead to lower quality services.¹⁴ Therefore, to the extent that truthful, nondeceptive advertising is restricted, higher prices and a decrease in consumer welfare may result. For this reason, we believe that only false and deceptive advertising should be prohibited.

The requirement that advertising be "consistent with the highest professional standards in the community," is similar to the dignity requirement that the Supreme Court addressed in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985). Both requirements in large part regulate the manner, rather than the content, of advertising. They are therefore overbroad and go beyond what is necessary to protect consumers.¹⁵ The Supreme Court held in Zauderer, in a First Amendment context, that a state's interest in promoting dignity in an attorney's communication with the public is insufficient to justify a restriction on truthful and nondeceptive advertising.¹⁶ Like the disciplinary rule invalidated in Zauderer, a provision such as S.C. Admin. R. 115-15 D(5), which requires advertisements to meet the "highest" professional standards in a community, may be interpreted to prohibit, or may have a chilling effect on, truthful, nondeceptive advertising.

The phrase "highest standard in the community" is, like the concept of "dignity," vague and subjective. It may be interpreted so broadly as to prohibit a wide variety of truthful, nondeceptive advertising, including, for example, dramatizations, graphic illustrations, comparative advertising, or testimonials. These advertising techniques are not inherently deceptive and are widely used in other contexts to communicate a message effectively to consumers. Even if the provision is not actually interpreted in this manner, moreover, it may still deter speech pathologists and audiologists from engaging in some forms of

¹³ See supra note 3; see also Benham and Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J.L. & Econ. 337 (1972).

¹⁴ See supra note 3.

¹⁵ See letter from Jeffrey I. Zuckerman, Director, Bureau of Competition, to Thomas S. Johnson, Chairman, Commission on Advertising, American Bar Association (December 8, 1986).

¹⁶ 105 S.Ct. at 2280-81.

advertising for fear of violating the regulation. Finally, the regulation is unnecessary, because, in competitive markets, consumers are able to decide what they consider to be acceptable forms of marketing and will withhold their business from providers whose advertisements they regard as "undignified" or offensive.

The second provision imposes a ban on "using" commercial affiliations improperly. It is not clear to us how the Board interprets or would apply this provision. To the extent that this regulation prohibits materially misleading practices, it is unnecessary, because such practices are prohibited elsewhere in the regulations.¹⁷ To the extent that this regulation is intended to go beyond a simple prohibition on deceptive practices, and to substantially restrict forms of commercial practice by speech pathologists or audiologists, it may interfere with the efficient delivery of professional services. We therefore refer the Council to our comments above in Part II on that subject.

Thus, because both of the restrictions discussed above appear to unnecessarily limit competition and consumer choice, we urge the Council to recommend their repeal.

V. Regulations of the Board of Psychology Examiners

S.C. Code Ann. § 40-55-60 provides that the Board of Psychology Examiners must adopt the American Psychological Association's ("APA's") Code of Ethics. Pursuant to this statute, the Board has adopted the APA's Code of Ethics, both by reference, S.C. Admin. R. 100-4, and by reprinting the text of the APA's principles relating to advertising and fee splitting. S.C. Admin. R. 100-6. We urge the Council to recommend the repeal of both S.C. Ann. § 40-55-60 and the Board's implementing regulations.

There are significant risks of anticompetitive effects when a code of ethics of a private organization composed of competitors is adopted by a state or state board. Provisions contained in ethical codes developed by a private group of professionals composed of competitors may restrict competition among members of the group and be inconsistent with the best interests of consumers. We discuss below the kinds of consumer injury that can be caused by restrictions contained in such ethical codes and that appear to arise from § 40-55-60 and the Board's implementing regulations.

¹⁷ See S.C. Admin. R. 115-15 D(3).

Some private professional associations composed of competitors have adopted a wide range of anticompetitive restrictions on advertising and other forms of competition by their members. For instance, such associations have limited the kind of fee advertising that is permissible, restricted comparative advertising, prohibited testimonials as to the quality of services provided, restricted advertising that appeals to consumers' emotions, prohibited direct solicitation of consumers, and banned certain fee-splitting arrangements. See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978); American Medical Association, 94 F.T.C. at 1018; Oklahoma Optometric Association, 106 F.T.C. 556 (1985) (consent order). Such ethical rules are often broader than necessary to prevent false or deceptive advertising, and thus needlessly restrain competition. As discussed above, advertising standards should be implemented only where specific forms of promotion are inherently likely to deceive or where there is evidence that particular forms of advertising have in fact been deceptive. See American Medical Association, 94 F.T.C. at 1009-10; see also In re R.M.J., 455 U.S. 191, 202 (1982).

Restrictions on fee advertising, for example, can directly stifle price competition and thereby harm consumers. Fee advertising for professional services, whether through the publication of specific fees, a range of fees, or other means, can disseminate useful information to consumers and may help to keep fees competitive. See Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977) (the lack of price information in attorney advertising "serves to increase the [consumer's] difficulty of discovering the lowest cost seller of acceptable ability. As a result . . . attorneys are isolated from competition and the incentive to price competitively is reduced"). As a general proposition, when consumers are able to obtain more information on the prices at which goods or services are offered, prices are lower. A restriction on the manner of advertising professional fees may prevent advertisements designed to increase consumers' awareness of existing fee levels or any discounts from usual fees.

Restrictions on comparative advertising are also likely to harm consumers. When sellers cannot compare the attributes of their services to those of their competitors, their incentive to improve or to offer different services, products, or prices can be reduced. These restrictions are likely to be especially harmful to competition and consumers because comparison of the fees or services offered by competing professionals may be helpful to consumers in deciding whether care is affordable and what specific professional services are offered. Comparative advertisements are not inherently deceptive, and permitting them may increase the effectiveness of advertising and result in lower

prices and the dissemination of useful information to consumers.

Like comparative claims, testimonials can be a means to disseminate useful and truthful information that consumers may use in selecting a provider. Testimonials pertaining to quality or efficiency can inform consumers about such attributes as a professional's training or methods of practice. Such testimonials can be a highly effective means of attracting and informing clients and fostering competition. Although testimonials, like all advertising, have the potential to be deceptive, there is no inherent deception in the use of testimonials as to the quality of a professional's services. Testimonials as to short waiting time before appointments or expressing general consumer satisfaction, for example, are not inherently deceptive and can provide useful information. Prohibiting all such advertising is overbroad.¹⁸

A prohibition on making statements that are intended or likely to appeal to a client's fears, anxieties, or emotions may also be overbroad. Of course, there may be individuals who are especially vulnerable to such appeals, and the Board may well want to consider this factor when determining whether a particular advertising claim is false or deceptive. However, advertisements such as those containing presentations of simulated real-life problems (e.g., depicting the consequences of drug abuse or marital conflict) that strike an emotional chord in a viewer or listener can be a very effective way to alert some consumers to the need for professional treatment, while not exploiting vulnerable consumers. We do not believe that the risk that some consumers may be vulnerable justifies a blanket prohibition on advertising that is not inherently deceptive.¹⁹

¹⁸ See In re R.M.J., 455 U.S. at 203 (1982) (holding that states may not place an absolute prohibition on information that is potentially misleading if the information can be presented in a manner that is not deceptive).

¹⁹ The Commission, in the context of a formal advisory opinion, emphasized that a provision of a proposed ethical code prohibiting "unfair" or "oppressive" communications that cause consumers anxiety would not violate the antitrust laws only insofar as it was enforced reasonably and objectively to avoid discouraging the dissemination of available information to consumers. American Academy of Ophthalmology, 101 F.T.C. 1018, 1024 (1983). See generally the Commission's Policy Statement on Deception, reprinted in Cliffdale Associates, Inc., 103 F.T.C. 110, 179 (1984) (Commission's test for deception takes into account, among other things, the likely impact on the audience to whom the advertisement is addressed).

Restrictions on direct solicitation of clients can also be anticompetitive. See American Medical Association, 94 F.T.C. at 1005. Such restrictions prohibit what can be a valuable technique for informing consumers about the availability of a professional's services. Solicitation, in and of itself, is not inherently deceptive. The Supreme Court has ruled in the First Amendment context that a state may regulate in-person solicitation by attorneys of clients, where the individual being solicited would be forced to bargain from adverse circumstances (e.g., after suffering a personal injury). See Ohralik v. Ohio State Bar Association, 436 U.S. 462, 468 (1978); see also In re Primus, 436 U.S. 412 (1978). Under such circumstances, the Supreme Court found, there is a potential for abuse inherent in the face-to-face selling of legal services. In view of this potential for abuse, regulations prohibiting uninvited, in-person solicitation of persons who are particularly vulnerable to undue influence may be appropriate.²⁰

Finally, restrictions on fee-splitting arrangements may, depending on how they are interpreted, interfere with the operation of alternative health care delivery systems that may have incentive arrangements with health care professionals in which fees are divided between the medical plan and the professional. Such restrictions can impede legitimate cost containment measures implemented by such organizations as HMOs.

Restrictions on fee-splitting may also prevent professionals from paying an independent referral service that matches clients with an appropriate practitioner. As a result, it may be more difficult for consumers to identify practitioners with whom they would like to deal. It is not clear that any regulation of referral fees is necessary. If, however, such regulation is considered to be necessary in order to prevent deception, the less restrictive alternative of requiring disclosure to the consumer of the referral fee arrangement might be imposed.

For the reasons expressed above, we urge the Council to recommend the repeal of the statutory requirement that the Board adopt the APA's Code of Ethics and recommend that the Board delete the APA's Code of Ethics from its regulations.

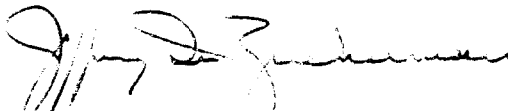
VI. Conclusion

For the foregoing reasons, we urge that the South Carolina Legislative Audit Council consider whether the statutes and regulations discussed above are reasonably necessary to protect consumers, and we urge the Council to seek the repeal or modification of the provisions that are not necessary to these

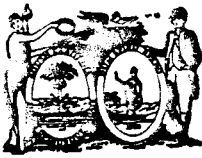
²⁰ See American Medical Association, 94 F.T.C. at 1030.

ends. We appreciate having had this opportunity to present our views. We would be happy to furnish you copies of any of the reports that we have mentioned, and to answer any questions you may have regarding these comments or to provide any other assistance you may find helpful.

Sincerely,



Jeffrey I. Zuckerman
Director
Bureau of Competition



SOUTH CAROLINA STATE BOARD OF PODIATRY
DR. NICHOLAS A. STRANEY, SEC. - TREAS.
701 ST. ANDREWS BLVD.
CHARLESTON, SOUTH CAROLINA 29407

June 17, 1987

Legislative Audit Council
State of South Carolina
620 NCNB Tower
Columbia, South Carolina 29201

Re: Sunset Review of South Carolina Board of Podiatry Examiners

Dear Mr. Schroeder:

The South Carolina Board of Podiatry Examiners has reviewed the Audit Council's confidential draft of the final report of Sunset Review, and is responding with the following final comments:

APPLICATION FOR EXAMINATION:

The South Carolina Board of Podiatry Examiners does not concur with the recommendation of the Audit Council concerning suggested changes in the application for examination for licensure to practice podiatry in the state of South Carolina.

LICENSURE BY RECIPROCITY:

The South Carolina Board of Podiatry Examiners does not concur with the recommendation by the Audit Council concerning licensure by reciprocity.

LIMITS ON COMPETITION:

The South Carolina Board of Podiatry Examiners does not concur with and strongly discourages any repeal of statute prohibiting practice in connection with commercial establishments. The Board does not concur with the Federal Trade Commission's analysis of the benefits of a podiatry practice being connected with a commercial establishment.

PROCEDURES AND REGULATIONS:

The South Carolina Board of Podiatry Examiners is in the process of developing a procedures and regulations manual.

ORAL EXAMINATION:

The South Carolina Board of Podiatry Examiners does not concur with the recommendation concerning the development, administration, and grading of its oral examination for licensure.

REVENUE DEPOSITS:

The treasurer of the South Carolina Board of Podiatry Examiners, as a result of Sunset Review, stands corrected and aware of Section #40-51-170 of the South Carolina Code concerning timely deposits for license and examination fees and will comply with this statute in the future.

PUBLIC PARTICIPATION:

The South Carolina Board of Podiatry Examiners concurs with the recommendation concerning the listing of its telephone number in the state government directory.

HANDLING OF COMPLAINTS:

The South Carolina Board of Podiatry Examiners concurs with the recommendation giving the Board of Podiatry Examiners clear authority to investigate complaints.

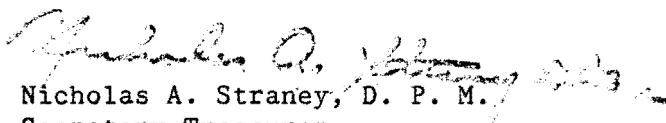
SETTING OF FEES:

The Board of Podiatry Examiners has complied with state law concerning the establishment of fees. These were not contained in regulation because, until this year, the Board had not had any regulations.

MINORITY BUSINESS PLANS:

The Board of Podiatry Examiners has not complied with state minority business procurement laws because this agency budget is such that it does not purchase anything in sufficient quantity to warrant compliance. Also be advised that no official of the state of South Carolina nor any official of the Office of Small and Minority Business Assistance has ever contacted the Board of Podiatry Examiners to advise of non-compliance or procedures therein.

Very truly yours,


Nicholas A. Straney, D. P. M.
Secretary-Treasurer
S. C. Board of Podiatry Examiners

BOARD OF EXAMINERS IN PSYCHOLOGY

BOARD OF EXAMINERS IN PSYCHOLOGY

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INTRODUCTION

After reviewing the laws and operations of the Board of Examiners in Psychology, the Legislative Audit Council concludes that the Board of Psychology should be continued. Termination of regulation would pose a threat to public health, safety and welfare. However, the Audit Council recommends the Board repeal regulations which restrict advertising and ensure that its fees are set in regulation. Further, the General Assembly should consider deleting the requirement that physicians examine clients of psychologists at the start of their treatment.

BACKGROUND

With Act 1006 of 1968, the General Assembly created the South Carolina State Board of Examiners in Psychology to regulate the profession. Section 40-55-50 of the South Carolina Code of Laws defines the practice of psychology as:

...any service involving the recognized principles, methods and procedures of the science and profession of psychology, such as: (a) assessment or measurement, through the use of psychological tests and interviews, of intelligence, aptitudes, skills, personality traits, behavior adjustment, attitudes and interests; (b) techniques of personality and behavior readjustment, such as group and individual psychotherapy, remotivation and conditioning.

Psychology and psychiatry are separate professions. Psychiatrists are medical doctors who can prescribe medication to treat the emotional disorders of their patients. Psychologists use nonmedical means to treat less severe emotional disorders. The Board of Medical Examiners licenses psychiatrists in the state.

The Governor appoints the eight-member Psychology Board for terms of five years. The Board is composed of three clinical psychologists, two counseling psychologists, one school psychologist, one psychologist who is licensed in experimental, social, industrial/organizational or community psychology, and one lay member. No Board member is eligible for reappointment for four years following the completion of his term.

The Board is responsible for evaluating, licensing and disciplining psychologists. Its duties include adopting rules and regulations governing the profession, and conducting investigations and hearings for alleged misconduct by psychologists.

By 1977, all 50 states regulated the practice of psychology. Forty-eight states require that anyone licensed

as a psychologist have a doctorate degree. Forty-three states, including South Carolina, also require at least one year of practical experience.

In 1986, there were 290 psychologists licensed by the state. Licenses are renewed every two years.

SUNSET ISSUES AND FINDINGS

- (1) DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The programs and functions of the Board of Examiners in Psychology do not directly affect the costs of services provided by psychologists. The Board does not regulate the fees psychologists charge but does require application, examination and biennial license renewal fees (see p. 166). These costs may be passed on indirectly to consumers. Also, the Board's regulations on advertising restrict competition within the profession and can result in increased costs for services.

Advertising Restrictions

State Regulation 100-6, concerning advertising by psychologists, is unduly restrictive. Attorneys for the Bureau of Competition of the Federal Trade Commission (FTC) stated that the following four sections of this regulation restrict advertising while providing no benefit to consumers.¹

Testimonials of Patients

Regulation 100-6.A.2.(iii) prohibits psychologists from using testimonials from their patients regarding the quality of services they received. However, testimonials and endorsements are a means to disseminate useful and truthful information and can help clients in deciding which psychologist to choose. According to FTC attorneys:

¹See page 134 for the April 1987 FTC letter to the Audit Council, which includes issues not addressed in this report.

Testimonials pertaining to quality or efficiency can inform consumers about such attributes as a professional's training or methods of practice.

Appeals to Emotions

Regulation 100-6.A.2.(vi) prohibits statements which appeal to a client's fears, anxieties, or emotions concerning the possible results of failure to obtain the offered psychological services. Much advertising has emotional content, such as ads for drug abuse centers. As long as the ads are truthful, this type of advertising can help convince clients who need psychological services to seek such help.

Comparisons

Regulation 100-6.A.2.(vii) prohibits statements concerning the comparative desirability of services offered by a psychologist. Comparative claims are not inherently deceitful and can provide useful information to the consumer. According to FTC attorneys:

These restrictions are likely to be especially harmful to competition and consumers because comparison of the fees or services offered by competing professionals may be helpful to consumers in deciding whether care is affordable and what specific professional services are offered.

Direct Solicitation

Regulation 100-6.A.2.(viii) prohibits the direct solicitation of individual clients. This prohibition includes direct mailings and may include advertisements in newspapers and other media. According to FTC attorneys, direct solicitation is not inherently deceptive and "...can be a valuable technique for informing consumers about the availability of a professional's services."

Summary

These four prohibitions on advertising unnecessarily restrict psychologists in seeking clients and prevent the public from getting information which would be useful in choosing a psychologist. Lessening restrictions on advertising can help to mitigate the embarrassment some people experience in seeking psychological services. Further, laws which restrict competition can result in higher consumer prices.

RECOMMENDATION

THE PSYCHOLOGY BOARD SHOULD REPEAL REGULATIONS 100-6.A.2.(iii), (vi), (vii), AND (viii).

- (2) **DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.**

The Board of Examiners in Psychology tests, licenses and disciplines psychologists. Without state regulation of psychologists, the public would have no assurance that individuals who present themselves as psychologists are qualified to practice. An unqualified psychologist could harm clients through inappropriate care or neglect. Also, in order to pay for psychotherapy, many insurance companies require psychologists to be licensed. Therefore, deregulation of the profession could have a significant impact on the public health, safety and welfare.

Also, with complete deregulation, the number of psychologists might increase, and the resulting increased competition could lead to lower prices for psychological services. However, deregulation would allow unqualified individuals to practice psychology. Therefore, the Audit Council recommends that the Board and regulation of the profession be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

The Psychology Board is self-supporting. Board revenue is generated through application, examination and biennial license renewal fees (see p. 166). In FY 85-86, the Board collected \$14,377 while spending \$9,873. For the five years, FY 81-82 through FY 85-86, revenues exceeded expenditures by an average of \$4,182 a year. Excess revenues were retained in the state General Fund.

The Board has one part-time administrative specialist who was paid \$3,425 in FY 85-86. She is responsible for updating license renewals, paying bills, scheduling licensure exams and maintaining the Board's records. The Board's budget is summarized in Table 1.

TABLE 1
SOUTH CAROLINA BOARD OF EXAMINERS IN PSYCHOLOGY
SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
Licensure and Examination Fees	\$ 10,065	\$ 10,295	\$ 13,955	\$ 13,950	\$ 14,377
TOTAL Revenues	<u>\$ 10,065</u>	<u>\$ 10,295</u>	<u>\$ 13,955</u>	<u>\$ 13,950</u>	<u>\$ 14,377</u>
<u>Expenditures</u>					
Personal Service	\$ 2,713	\$ 2,683	\$ 3,033	\$ 3,234	\$ 3,425
Other Operating Expenses	5,074	4,261	4,561	5,431	6,148
Employee Benefits	192	177	208	288	300
TOTAL Expenditures	<u>\$ 7,979</u>	<u>\$ 7,121</u>	<u>\$ 7,802</u>	<u>\$ 8,953</u>	<u>\$ 9,873</u>

Source: South Carolina Budget and Control Board Documents, FY 83-84 through FY 86-87, and the Comptroller General's Office.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

In most respects, the Psychology Board is meeting its statutory requirements in an efficient manner. However,

investigations of complaints could be more timely if the Board had access to a trained investigator (see p. 160). Also, the Board Chairman stated that the Board's part-time administrative specialist cannot manage all of the administrative work of the Board. The Chairman believes that upgrading the position from one-third time to one-half time is necessary for the Board to operate efficiently. The Board could more adequately meet its statutory requirements if it shared office space and staff with other small medically-related boards (see p. 7). Full-time administrative staff would be available, and the boards could share an investigator. The Board would also gain a permanent office.

(5) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.

The statutory requirement that the Psychology Board have one public member ensures some public participation in the Board's activities. Further, a Board member stated that the public member's contributions to the Board are important because his perspective is different.

From August 1982 through December 1986, however, Board minutes show that no psychologists, other than Board members, and no members of the general public attended Board meetings. Prior to the Audit Council review, the Board did not notify the public and the news media of its meetings, as required by the Freedom of Information Act, because the Board was unaware of these requirements. After learning of the requirements, the Board posted a notice and agenda for its February 1987 meeting and contacted a Columbia newspaper about the meeting. The Board Chairman stated he would follow these requirements in the future.

- (6) DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.

The Psychology Board does not duplicate the services, functions and programs of any other state, federal or local government agency. The Board is the only entity responsible for the examination and licensing of psychologists in the state.

- (7) EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.

The Audit Council examined nine complaints reviewed by the Psychology Board from 1984 through 1986. The Board could improve its handling of complaints by using a complaint log, documenting the resolution of each complaint and providing consistent responses to complainants and psychologists (see p. 160).

The Board has established procedures for processing complaints. These procedures include requiring the complainant to file a notarized complaint form, assigning a Board member to investigate the complaint and reviewing the investigator's findings. The Board then decides if further information is needed or if a decision can be made on the complaint. In some cases, the Board's representative from the Attorney General's Office provides assistance with the complaints.

Of the nine complaints reviewed, five concerned biased or deceptive conduct by psychologists. Two complaints related to the inappropriate use of the terms psychologist and psychological by persons not licensed as psychologists. Since 1984, the Board has not suspended or revoked any psychologist's license.

Complaint Processing

Several problems hinder the efficiency with which the Board handles complaints. First, the Board has no complaint log. Therefore, information about each complaint, such as the names of the complainant, psychologist and investigator, as well as dates, description, and disposition of the complaint, is not easily accessible to Board members. Second, while eight of the nine complaint files contained the Board's complaint form with a completed statement from the complainant, only one form documented the resolution of the complaint. Adequate documentation of complaints is necessary to ensure appropriate investigations have been made by the Board.

Further, on four complaints, the Board was not consistent in its responses to the complainants and the psychologists about whom the complaints were made. The Board wrote the complainants that the complaints were unsubstantiated, while giving suggestions for improvement to the psychologists. As a result, the complainants received incomplete and misleading information about the Board's disposition of their complaints.

Finally, the Board's Chairman stated that complaint investigations could be more timely if they were conducted by trained investigators. The nine complaints averaged seven months from the time the complaints were filed to the time the Board notified the complainants of its decisions. When investigations are unnecessarily lengthy, other clients can be harmed by incompetent psychologists who continue to practice during the investigations. Due to the low volume of complaints, however, investigators would be more effective if shared with other small medically-related boards. The benefits of sharing staff, including investigators, are discussed in the Report Summary (see p. 7).

RECOMMENDATIONS

THE PSYCHOLOGY BOARD SHOULD USE A COMPLAINT LOG AND ENSURE THAT THE RESOLUTION OF EACH COMPLAINT IS DOCUMENTED ON THE COMPLAINT FORM.

THE PSYCHOLOGY BOARD SHOULD ALSO BE CONSISTENT IN ITS RESPONSES TO COMPLAINANTS AND PSYCHOLOGISTS CONCERNING THE DISPOSITION OF COMPLAINTS.

- (8) **DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.**

The Board of Examiners in Psychology is created and governed by state laws and regulations. Federal and local statutes and regulations do not directly address the Board.

The following sections discuss three problems the Board has regarding state laws. First, the Board has not set fees through regulation as required by state law. Second, §40-55-60 of the South Carolina Code of Laws, which requires psychologists' clients to have examinations by physicians, is unnecessary and difficult to enforce. Third, the Board needs to adopt its own code of ethics in regulation.

Setting of Fees

The Psychology Board's examination and licensure fees have not been enacted in regulation, as required by state law. As a result, the General Assembly, the public and psychologists have had little input into the setting of fees.

Section 40-55-40 of the South Carolina Code of Laws requires the Board's examination and licensure fees to be established in regulation through a process set forth in the

state Administrative Procedures Act (APA). This process allows the General Assembly, the public and psychologists a specific period of time to review and comment on proposed regulations before they become law. Its purpose is to ensure that regulatory agencies are responsive to the citizens of South Carolina. The Psychology Board, however, has independently set fees without going through the APA process.

RECOMMENDATION

THE PSYCHOLOGY BOARD SHOULD COMPLY WITH
STATE LAWS REQUIRING THAT FEES BE
ESTABLISHED IN STATE REGULATIONS.

Physician's Exam Required

Section 40-55-60 of the South Carolina Code of Laws requires a client who is not a medical referral to be examined by a physician within the first four weeks of extended treatment by a psychologist. This requirement is unnecessary. Many psychological problems are not physiological in nature and do not need a medical doctor's attention. For example, under this requirement, a husband and wife undergoing marriage counseling would each be required to have a physical examination.

Section 40-55-60 already requires a psychologist to consult appropriate specialists whenever aspects of a case fall outside the boundaries of his competence. The American Psychological Association's Code of Ethics also requires psychologists to recognize the boundaries of their competence and to provide only those services for which they are qualified by training. Further, no other southeastern state requires psychologists' clients to have medical examinations.

Requiring a medical exam for treatment in all cases raises the cost of psychotherapy. A Board member stated that the requirement is also difficult to enforce because

psychologists do not report this information to the Board, and the Board has no investigative staff.

RECOMMENDATION

THE GENERAL ASSEMBLY SHOULD CONSIDER DELETING IN §40-55-60 OF THE SOUTH CAROLINA CODE OF LAWS THE REQUIREMENT THAT PHYSICIANS EXAMINE THE CLIENTS OF PSYCHOLOGISTS WITHIN THE FIRST FOUR WEEKS OF THE START OF EXTENDED TREATMENT.

Code of Ethics

In Regulation 100-4, the Psychology Board has adopted the Code of Ethics of the American Psychological Association (APA). This is required by §40-55-60 of the South Carolina Code of Laws. Attorneys with the Bureau of Competition for the Federal Trade Commission (FTC) stated that there are significant risks in adopting a professional organization's code of ethics because they can contain anti-competitive statements.² For example, the APA Code of Ethics bans comparative advertising for psychologists. However, comparative claims are not inherently deceitful and can provide useful information to the consumer. The FTC's attorneys stated that regulatory boards should author their own codes of ethics.

RECOMMENDATIONS

THE GENERAL ASSEMBLY SHOULD CONSIDER REPEALING §40-55-60 OF THE SOUTH CAROLINA CODE OF LAWS REQUIRING THE PSYCHOLOGY BOARD TO ADOPT THE CODE OF

²See page 134 for the April 1987 FTC letter to the Audit Council.

ETHICS OF THE AMERICAN PSYCHOLOGICAL
ASSOCIATION.

THE PSYCHOLOGY BOARD SHOULD THEN REPEAL
REGULATION 100-4 AND, IF IT SO CHOOSES,
WRITE AND ADOPT ITS OWN CODE OF ETHICS.

APPENDICES

APPENDIX A

BOARD OF EXAMINERS IN PSYCHOLOGY

SCHEDULE OF FEES

	<u>Fees</u>
License Application	\$100
Written Examination	120
Biennial Renewal	80
Late Renewal	90

Source: South Carolina Board of Examiners in
Psychology.



APPENDIX B

STATE OF SOUTH CAROLINA
BOARD OF EXAMINERS IN PSYCHOLOGY

SARAH K. CHAPMAN, Ph.D.
CHAIRPERSON
ALFRED J. FINCH, JR., Ph.D.
VICE-CHAIRPERSON
JUDITH B. SMALL, Ph.D.
SECRETARY
ROBERT BROWN, Ph.D.
TREASURER

IN REPLY ADDRESS:

May 22, 1987

George Schroeder
Executive Director
Legislative Audit Council
620 NCNB Tower
Columbia, SC 29201

Dear Mr. Schroeder:

We have reviewed the Legislative Audit Council's report of the sunset review of the Board of Examiners in Psychology. In general, we are in agreement with the recommendations made in that report. We are taking corrective action in those areas related to our operation as a board.

Please keep us informed of any changes in the licensure laws as they pertain to the practice of psychology.

Sincerely,

A handwritten signature in cursive script that reads "Sarah K. Chapman".

Sarah K. Chapman, Ph.D.
Chair

SC/at

BOARD OF EXAMINERS IN SPEECH PATHOLOGY AND AUDIOLOGY

BOARD OF EXAMINERS IN SPEECH PATHOLOGY AND AUDIOLOGY

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INTRODUCTION

After reviewing the laws and operations of the Board of Examiners in Speech Pathology and Audiology, the Legislative Audit Council concludes that the Board should be continued. Termination of regulation of speech pathology and audiology would pose a threat to public health, safety and welfare. In most areas, the Board has operated efficiently and effectively. However, some Board regulations may unnecessarily restrict competition and advertising of speech pathologists and audiologists.

BACKGROUND

With Act 439 of 1973, the General Assembly created the South Carolina Board of Examiners in Speech Pathology and Audiology to regulate the two professions. Speech pathologists work with individuals who have problems with speech, voice, and language development. They test and evaluate their patients, and use remedial procedures in an attempt to remedy speech language problems. Audiologists work with individuals who have hearing disorders and seek to improve their abilities to communicate with and understand other individuals. After evaluation, audiologists provide rehabilitative and habilitative services to their patients as needed.

By state law, the Board consists of two licensed speech pathologists, two licensed audiologists, a licensed otolaryngologist (a physician specializing in the ears, nose and throat) and one lay member, each serving four-year terms. Any individual or group may submit nominations to the Governor for Board vacancies, and the state Speech and Hearing Association must submit lists of nominations consisting of four names for each Board position. By statute, no member may succeed himself.

The Board is responsible for evaluating, licensing and disciplining speech pathologists and audiologists in private practice. Its duties include adopting rules and regulations governing the professions, and conducting investigations and hearings for alleged malpractice or misconduct by speech pathologists and audiologists.

Speech pathologists and audiologists who work for the state or its political subdivisions, such as school districts, are not required under state law to be licensed by the Board. However, the federal Education of the Handicapped Act Amendments of 1987 (Public Law 99-457), effective in June 1987, may require these speech

pathologists and audiologists to become licensed
(see p. 177).

In addition to South Carolina, 35 states regulate the two professions through licensure. All 36 states require applicants for licensure as speech pathologists or audiologists to have a master's degree or its equivalent in their area of specialty and to pass a written exam given by the Educational Testing Service.

In FY 85-86, there were 251 speech pathologists and 63 audiologists licensed by the Board. All licenses must be renewed by March 31 of each year.

SUNSET ISSUES AND FINDINGS

- (1) DETERMINE THE AMOUNT OF THE INCREASE OR REDUCTION OF COSTS OF GOODS AND SERVICES CAUSED BY THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The programs and functions of the Board of Examiners in Speech Pathology and Audiology do not directly affect the costs of services provided by speech pathologists and audiologists. The Board does not regulate the fees charged by these professions. Application fees and annual license renewal fees are costs of regulation that may be passed on indirectly to consumers.

Fees charged by members of a regulated profession may be higher than if it were unregulated. Also, regulation creates a barrier to entry into the profession and tends to limit competition through additional restrictions. However, no information was found addressing the effects regulation has had on the cost of services offered by speech pathologists and audiologists.

- (2) DETERMINE THE ECONOMIC, FISCAL AND OTHER IMPACTS THAT WOULD OCCUR IN THE ABSENCE OF THE ADMINISTERING OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The primary functions of the Board of Examiners in Speech Pathology and Audiology are the licensing and disciplining of speech pathologists and audiologists. In the absence of these functions, the public would have no assurance that individuals who present themselves as speech pathologists or audiologists are qualified to practice. An unqualified speech pathologist or audiologist can cause physical harm to patients by using improper treatment procedures and by misdiagnosing speech and hearing problems. Also, the ability to communicate clearly one's thoughts through the spoken word or to understand another's is one of

the keys to economic well-being in life. Therefore, deregulation of the profession could have a significant impact on public health, safety and welfare.

Complete deregulation could result in an increase in the number of speech pathologists and audiologists, and thus, a decrease in the cost of services due to increased competition. However, it could allow unqualified individuals to practice. Therefore, the Audit Council recommends that the Board and regulation of the professions be continued.

(3) DETERMINE THE OVERALL COSTS, INCLUDING MANPOWER, OF THE AGENCY UNDER REVIEW.

The Board of Examiners in Speech Pathology and Audiology is self-supporting. Board revenue is generated through annual license and application fees (see p. 182). In FY 85-86, the Board collected \$14,555 while spending \$11,269. For the five years, FY 81-82 through FY 85-86, revenues exceeded expenditures by an average of \$3,469 a year. The excess revenues were retained in the state General Fund. The Board's revenues and expenditures are summarized in Table 1.

The Board does not have an office. However, it does have a part-time administrative employee, who works out of and maintains the Board's records in her home. The cost to the Board for the employee's salary and benefits was \$5,940 in FY 85-86.

TABLE 1

SOUTH CAROLINA BOARD OF EXAMINERS IN SPEECH PATHOLOGY AND AUDIOLOGY

SOURCE OF REVENUES AND EXPENDITURES

<u>Revenues to General Fund</u>	<u>FY 81-82</u>	<u>FY 82-83</u>	<u>FY 83-84</u>	<u>FY 84-85</u>	<u>FY 85-86</u>
License Fees	\$ 9,285	\$10,055	\$11,000	\$11,590	\$12,140
Application Fees	<u>1,255</u>	<u>1,435</u>	<u>1,715</u>	<u>2,100</u>	<u>2,415</u>
TOTAL Revenues	<u>\$10,540</u>	<u>\$11,490</u>	<u>\$12,715</u>	<u>\$13,690</u>	<u>\$14,555</u>
<u>Expenditures</u>					
Personal Services	\$ 4,311	\$ 5,041	\$ 5,260	\$ 5,606	\$ 5,637
Other Operating Expenses	1,085	3,061	3,319	4,129	4,840
Employee Benefits	<u>575</u>	<u>603</u>	<u>661</u>	<u>721</u>	<u>792</u>
TOTAL Expenditures	<u>\$ 5,971</u>	<u>\$ 8,705</u>	<u>\$ 9,240</u>	<u>\$10,456</u>	<u>\$11,269</u>

Source: South Carolina Budget and Control Board Budget Documents, FY 83-84 through FY 86-87, and the Comptroller General's Office.

(4) EVALUATE THE EFFICIENCY OF THE ADMINISTRATION OF THE PROGRAMS OR FUNCTIONS OF THE AGENCY UNDER REVIEW.

The Board of Examiners in Speech Pathology and Audiology is carrying out its statutory requirements in an efficient manner. The Board's records and files are kept in an orderly fashion and contain all pertinent information. Furthermore, the Board has replied to its correspondence in a timely manner.

However, it would be advantageous for the Board to combine administratively, sharing office space and staff, with other small medically-related licensing boards (see p. 7). Currently, the Board has no office or listed phone number where interested parties can contact the Board. By combining administratively with other boards, the Board of Examiners in Speech Pathology and Audiology would increase its accessibility by obtaining an office and a phone number where licensees, employers of speech pathologists and audiologists, and consumers could contact the Board for information or to file a complaint.

- (5) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS ENCOURAGED THE PARTICIPATION OF THE PUBLIC AND, IF APPLICABLE, THE INDUSTRY IT REGULATES.

While the statutory requirement for a public member on the Board ensures some public participation, the Board of Examiners in Speech Pathology and Audiology has actively encouraged additional participation by both the public and the speech and hearing industry. The Board has attempted to place public service announcements in the Columbia newspapers before each meeting, announcing its meeting time, place and proposed agenda. For the February 1987 meeting, the Board posted notices announcing the meeting and placed signs throughout the building, clearly showing the way to the meeting room.

In addition, the Board contributes articles to the state Speech and Hearing Association's newsletters. These articles have included explanations on the procedures for obtaining state licensure in speech pathology and audiology and the opinions of the Board on the relevancy of the national test used for licensure. The Board also holds an informational forum at the Association's annual meeting to discuss the purpose of the Board, its regulations and the procedures for filing complaints.

While the Board has actively encouraged public and industry participation, it does not list its address and telephone number in any telephone book in the state. The Board would increase accessibility by obtaining a listing in the state government and Columbia telephone directories.

RECOMMENDATIONS

THE BOARD OF EXAMINERS IN SPEECH
PATHOLOGY AND AUDIOLOGY SHOULD CONTINUE
TO ACTIVELY ENCOURAGE BOTH PUBLIC AND
INDUSTRY PARTICIPATION IN ITS
ACTIVITIES.

THE BOARD SHOULD LIST ITS ADDRESS AND
PHONE NUMBER IN THE STATE GOVERNMENT AND
COLUMBIA TELEPHONE DIRECTORIES.

- (6) **DETERMINE THE EXTENT TO WHICH THE AGENCY DUPLICATES THE SERVICES, FUNCTIONS AND PROGRAMS ADMINISTERED BY ANY OTHER STATE, FEDERAL, OR OTHER AGENCY OR ENTITY.**

The Board of Examiners in Speech Pathology and Audiology does not currently duplicate the services, functions or programs of any other state, federal or local government agency. However, the federal Education of the Handicapped Act Amendments of 1986 (Public Law 99-457), effective in June 1987, may require speech pathologists and audiologists employed by school districts to become licensed by the Board. If this occurs, the Board will duplicate the state Department of Education's (SDE) certification of school speech pathologists and audiologists.¹

Public Law 99-457 requires professionals providing services to the handicapped to meet the highest standard of their profession in their state. Since the United States Department of Education has yet to issue regulations specifying its interpretation of the Act, this is being interpreted different ways by state officials. The Board's Chairman believes that, since the Board's licensing standards are higher than SDE's, speech pathologists and audiologists in the schools will be required to meet the Board's minimum standards and become licensed. The Director

¹The difference between the Board's minimum education requirement and SDE's requirement is substantial. To be licensed by the Board, an applicant must hold at least a master's degree or its equivalent in speech pathology or audiology. However, SDE allows persons holding a bachelor's degree in education with only six hours in speech pathology or audiology to perform speech pathology or audiology services in schools.

of SDE's Program for the Handicapped believes that, since speech pathologists and audiologists employed by school districts are exempted from licensure under §40-67-50 of the South Carolina Code of Laws, SDE's standards are the highest standards for teachers. Thus, speech pathologists and audiologists working in the schools will not be required to be licensed by the Board. Because the law has yet to be tested, it is unclear which interpretation is correct.

(7) EVALUATE THE EFFICIENCY WITH WHICH FORMAL COMPLAINTS, FILED WITH THE AGENCY CONCERNING PERSONS OR INDUSTRIES SUBJECT TO THE REGULATION AND ADMINISTRATION OF THE AGENCY UNDER REVIEW, HAVE BEEN PROCESSED.

The Board of Examiners in Speech Pathology and Audiology's handling of complaints has been consistent and efficient. The Board received eight complaints from July 1984 through January 1987. One complaint alleged that a licensed speech pathologist falsified her educational credentials to obtain licensure. Unprofessional behavior was alleged in two complaints. Five complaints concerned allegations of improper advertising.

When a formal complaint is filed, the Board reviews the complaint and makes a determination as to whether to conduct an investigation. In the only case where the Board decided a formal investigation was needed, the Board hired a licensed speech pathologist to conduct the investigation. The investigator and the Attorney General's Office substantiated that the speech pathologist, alleged to have falsified her credentials, did not hold a master's degree as claimed. The Board revoked the pathologist's license.

- (8) DETERMINE THE EXTENT TO WHICH THE AGENCY UNDER REVIEW HAS COMPLIED WITH ALL APPLICABLE STATE, FEDERAL AND LOCAL STATUTES AND REGULATIONS.

The Board of Examiners in Speech Pathology and Audiology is created and governed by state laws and regulations. Federal and local statutes and regulations do not directly address the Board. The Audit Council found the Board has complied with applicable state laws, but may unnecessarily restrict competition and advertising of speech pathologists and audiologists.

Code of Ethics

The Board of Examiners in Speech Pathology and Audiology has adopted the Code of Ethics of the American Speech and Hearing Association as state Regulation 115-15. Attorneys with the Bureau of Competition for the Federal Trade Commission (FTC) state that there is a danger in adopting a professional organization's code of ethics because they can contain anti-competitive statements.²

For example, Board Regulation 115-15.D.III.(4) states:

Individuals must not use professional or commercial affiliations in any way that would mislead or limit services to persons served professionally.

While the Board was unable to define the meaning of this regulation, commercial activities and prepaid practices could be restricted by the regulation. For example, it may be illegal for speech pathologists and audiologists to practice in a commercial establishment, to set up a corporate practice, or to be affiliated with a health maintenance organization (HMO).

²See page 134 for the April 1987 FTC letter to the Audit Council.

In addition, Regulation 115-15.D.III.(5) states:

Individuals should announce services in a manner consonant with the highest professional standards in the community.

FTC attorneys state this restriction on advertising is overbroad and unnecessary to protect consumers. The regulation may prohibit comparative advertising, dramatization or testimonials, even if they are truthful and nondeceptive. Such advertising can provide useful information to consumers in choosing a speech pathologist or audiologist.

When boards adopt a professional organization's code of ethics, they may also adopt restrictions which unnecessarily inhibit competition within the profession. This can lead to higher prices for services without improving the providers' quality of service.

RECOMMENDATION

THE BOARD OF EXAMINERS IN SPEECH
PATHOLOGY AND AUDIOLOGY SHOULD REPEAL
REGULATION 115-15 AND, IF IT SO CHOOSES,
WRITE AND ADOPT ITS OWN CODE OF ETHICS.

APPENDICES

APPENDIX A

BOARD OF EXAMINERS IN SPEECH PATHOLOGY AND AUDIOLOGY

SCHEDULE OF FEES

	<u>Fees</u>
Application	\$35
Initial License	35
License Renewal	
Active Licenses	35
Inactive Licenses	10

Source: South Carolina Occupational and Professional
Licensing Boards Annual Report 1985-1986.



**S.C. State Board of Examiners in
Speech Pathology and Audiology**

Post Office Box 11876
Columbia, South Carolina 29211

June 18, 1987

George L. Schroeder, Director
Legislative Audit Council
State of South Carolina
6020 NCNB Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

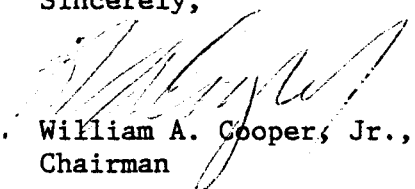
I have obtained a copy of your Report concerning the Board of Examiners in Speech Pathology and Audiology and have shared and discussed it with the members of the Board in a meeting May 14, 1987. We are pleased with the Council's findings and wish to commend Mr. Aaron Allred for his thorough review of our activities.

The Board has moved to implement immediately the recommendations concerning availability of telephone service and are presently seeking information as to how best to provide such access to our practitioners. The Board agrees with recommendation that several of the boards share staff and an office in order to increase availability to the public.

The Board will continue to seek ways in which its activities can be brought to the attention of the public and to improve its responsiveness to the public and professional communities.

Thank you for the opportunity to comment on your findings.

Sincerely,


William A. Cooper, Jr., Ph.D.
Chairman

/kms