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The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

December 27, 1989

The Honorable W. Richard Lee
Senator, District No. 11
Post Office Box 142
Suite 510
Gressette Senate Office Building
Columbia, South Carolina 29202

Dear Senator Lee:

In a letter to this Office you forwarded materials which referenced that the National Institute of Nutritional Education (NINE) received from the United States Patent and Trademark Office the service mark (CN). The service mark is used to identify graduates of the NINE program as certified nutritionists. You also referenced proposed legislation, S.397, which would provide for the licensing by the State of dietitians and nutritionists.

Pursuant to a provision of S. 397,

(a) person who practices dietetics or nutrition may practice as long as he does not hold himself out or represent himself to the public as a "licensed dietitian" or "licensed nutritionist". A person may be regarded as a "licensed dietitian" or "licensed nutritionist" within the meaning of this chapter who meets the qualifications as prescribed in Section 44-76-80. It is unlawful for a person to use the title "licensed dietitian" or "licensed nutritionist", alone or in combination, or use the letters 'L.D.' or 'L.N.', or a facsimile of the above unless qualified and licensed in the manner prescribed in this chapter. Nothing in this chapter requires an agency, public or private, to employ 'licensed dietitians' or 'licensed nutritionists' nor mandates third party reimbursement by any insurance company for services rendered by a 'licensed dietitian' or 'licensed nutritionist'.

Therefore the legislation provides for the use of the designation "licensed dietician" or "licensed nutritionist" or the use of the letters "L.D." or "L.N." by individuals qualified under the legislation. Requirements which must be met by individuals desiring the distinction are established by the legislation. A criminal penalty also is provided for the violation of such provisions.

Concern has been expressed as to the potential criminal liability of NINE graduates using the (CN) label if the legislation is enacted. The NINE organization has raised the following questions:

1. If the dietitian's bill is passed as presently structured, would it be a criminal act for a graduate of NINE residing in South Carolina to use the initials "CN" after their name upon completion of their educational curriculum?

2. Would the awarding of the designation of licensed nutritionist or certified nutritionist or "CN" by the State constitute a taking, under relevant federal and State constitutional provisions of the property given NINE by the Patent and Trademark Office?

3. Would the use of the title by state licensing officials which could be listed as "CN" exempt those receiving such a title from infringement litigation by NINE?

It appears that there is some confusion as to the designation that would be afforded by the State for individuals wishing to be considered "licensed dieticians" or "licensed nutritionists." As stated in the legislation, individuals qualified within the terms of S. 397 may use the title "licensed dietician", "licensed nutritionist" alone or in combination with the letters "L.D." or "L.N.". I do not read such provisions as forbidding the use of the service mark (CN), the designation afforded graduates of the NINE program as a result of the registration of such service mark with the U.S. Patent and Trademark Office. Of course, the legislation could be drafted to specifically include any other designations or titles desired to be included. Moreover, it is generally stated that "...a generic word or name is not subject to exclusive appropriation as a trademark or tradename." 74 AM. Jur.2d Trademarks and Tradenames, Section 48 p. 731. Therefore it is questionable whether the designations as set forth by the legislation could be protected by subsequent action inasmuch as such designations are purely descriptive terms. Also, as stated, the legislation provides a criminal penalty for individuals to use the designations authorized unless qualified under the terms of the legislation. Generally, courts have held that statutes which are criminal or penal in nature must be strictly construed. See: Op.Atty.Gen. dated September 27, 1989; November 14, 1983; Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 (1970). Therefore, it could be argued that the legislation as presently written would not affect individuals using the designation (CN).

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Of course, this Office in addition to rendering advice to members of the General Assembly, occupies the dual role of the chief prosecutor of the State. As chief prosecutor, we would have great reluctance to render a legal opinion which ultimately might be interpreted as jeopardizing any action taken by a circuit solicitor in the course of his official duties. That is why we are always hesitant to construe any statute having criminal penalties in such a way as to suggest that a particular act is not criminal. Accordingly, the most prudent legal course to insure that the letters "CN" could be used without criminal liability might be to make such approval by the General Assembly absolutely clear in the legislation.

The second question referenced the "designation of licensed nutritionist or certified nutritionist or CN by the State" and questioned whether such would constitute a "taking" of the property of NINE. Again, the legislation only references the use of the designations "licensed nutritionist", "licensed dietician", "L.D." or "L.N.". No restrictions are placed on the use of the designations "certified nutritionist" or (CN). Therefore I do not construe the legislation as constituting a "taking" of the property of NINE.

The third question also referenced the supposed use of the title "CN" by state licensing officials. Again, I do not see the basis for the question inasmuch as no reference is made in the legislation to such designation or to the use by individuals of such title.

If there is anything further, please advise.

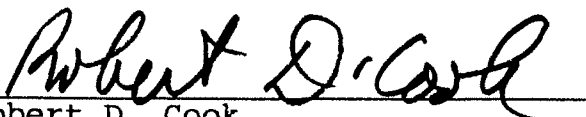
Sincerely,



Charles H. Richardson
Assistant Attorney General

CHR/nnw

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions