

opportunity to prove the propriety of that the State is proceeding
arbitrarily and unconstitutionally.

Conclusion

In summary, it is our opinion that a referendum must be al-
forded an opportunity to show that a referendum has even-
sisted the repeal action based on constitutionally imper-
missible motives. The herein and procedures for that
challenge should remain those adopted for other constitu-
tional challenges to state action.

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Changes and Additions

*right to assembly & exercise
Professional Services regardless
of provider title professional
title*

CONSTITUTIONAL LAW - COMMERCIAL SPEECH - PSYCHOLOGISTS - PERSONS AUTHORIZED TO PRACTICE PSYCHOLOGY MAY NOT BE PRECLUDED FROM USING TRUTHFUL TERMS TO DESCRIBE THAT PRACTICE.

July 7, 1981

*The Honorable Harry Hughes
Governor of Maryland*

On April 28, 1981, we reviewed and approved, for constitutionality and legal sufficiency, House Bill 766 (Psychologists - Licensing). On April 28, 1981, the bill was signed into law as Chapter 236, Laws of Maryland 1981.

While we generally approved the bill for constitutionality, we nevertheless raised one issue:

"We are . . . concerned about provisions of House Bill 766 . . . which, among other things, prohibit certain family counselors from using the words 'psychological,' 'psychologists,' or 'psychology' in describing their title or services. [§16-102 of the Health Occupations Article.] A question is raised as to whether this prohibition violates First Amendment rights of commercial speech as set forth in *Comprehensive Accounting Services Company v. The Maryland State Board of Public Accountancy*, 284 Md. 474 (1979). Because, in any event, the questioned provision[s] are severable from the remaining provisions of House Bill 766, the bill can be signed into law. In the meantime, we [will further research this] issue [and address it more fully] in a separate letter . . . to you . . ." Bill Review Letter (H.B. 766/H.B. 948) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (April 29, 1981).

The purpose of this Opinion is to advise you of the results of that research, and why we believe those provisions of Chapter 236 (House Bill 766) to be unconstitutional.

I

Regulation of Commercial Speech
In *Comprehensive Accounting Services Co. v. State Board of*

Public Accountancy, 284 Md. 474 (1979), the Court of Appeals considered the constitutionality of a statute regulating the practice of public accounting in Maryland. The statute in question provided for the certification, rather than the licensure, of public accountants. The statute did not, however, define the "practice of public accounting".

Among other provisions, the accountancy statute provided that a noncertified accountant could not "hold himself or herself out to the public as 'accountant' or 'auditor' in connection with his own or any other name, nor describe or designate the services offered or performed by him or it as accounting or auditing, with or without any other designation or description". Noncertified accountants were permitted to render a number of "public bookkeeping and tax services" as long as they did not claim to have made an "audit" or "examination" or did not furnish written certificates or opinions of the correctness of information prepared or examined.

The Court of Appeals acknowledged the right of the State to regulate the practice of public accounting, but it found that the complete ban on the use of the term "accounting" violated the First Amendment rights of noncertified accountants—persons who, "although permitted to engage in simple accounting services under the statute, nevertheless were deprived from describing these services to the public as 'accountants'." The Court held as follows:

Because the free flow of truthful information is protected by the first amendment, the courts require remedial relief for proved deceptions to be as narrow as possible.

To prevent the possibility of public confusion and deception, the legislature cannot consistently with the first amendment choose the most drastic remedy—the complete suppression of the use of certain words to describe the lawful activity of non-certified accountants." 284 Md. at 488-89.

H

Chapter 236

Chapter 236 of the 1976 House Bill 765 was enacted, the purpose of which was to amend the accountancy statute.

prohibited persons not certified by the State from utilizing certain words to describe their practice; namely, "psychology", "psychological", or "psychologist". The "practice of psychology" was not defined in the Act. The rationale of *Comprehensive Accounting* strongly suggests, therefore, that the prohibition in the Psychologists Certification Act against the use of these terms was unconstitutional, because the State cannot forbid altogether the truthful description of activities that it permits.

Chapter 236 operates to change the governing statute—now codified at Title 16 of the Health Occupations Article ("HO" Article)—from one of certification to one of licensure. It adds definitions of the terms "practice psychology", "psychologist", "psychological methods", "psychological principles" and "psychological procedures". In addition, it adds a new section, HO §16-301(a), to provide:

"Except as otherwise provided in this section, an individual shall be licensed by the [State] Board of Examiners of Psychologists before the individual may practice psychology in this State."

Because Chapter 236 changes the regulatory scheme for psychologists—by prohibiting the practice of psychology by unlicensed persons, rather than merely restricting the use of certain terminology by uncertified persons—potentially impermissible restrictions on commercial speech are largely avoided. For example, HO §16-102(a) retains the general prohibition against the use of certain terminology:

"Unless authorized or permitted to do so by this title, a person may not use as a title or describe the services the person provides by use of the words 'psychological', 'psychologist', or 'psychology'."

Nevertheless, because the effect of this section is to prohibit the use of these terms by persons not permitted to practice psychology in the first instance, the section is constitutional.

However, one section of the new law does present a constitutional problem. Under HO §16-102(b)(2), certain individuals may continue to provide services within the standards of their professions without running afoul of the licensing provisions of the statute. Specifically, an individual who is a member of a "recognized profession" as defined by HO

§16-102(a), may "provide services consistent with the training and ethical standards of the individual's profession" - but only as long as the individual does not "use[] as a title or describe[] the services the individual provides by use of the words 'psychological', 'psychologist', or 'psychology'".

In essence, these provisions permit certain persons—even though unlicensed—to perform services that might constitute the "practice of psychology", as defined. At the same time, however, these provisions restrict those same persons from using terms that legitimately describe those services. For example, even persons having master's or doctoral degrees in psychology are prohibited by the statute from using the terms "psychological", "psychologist", or "psychology".

We believe that such restrictions are unconstitutional. In fact in the holding of *Comprehensive Accounting* is the requirement that the General Assembly may not, on the one hand, permit an individual to perform a function and, on the other hand, prohibit that same individual from using appropriate terminology to describe that function.

III

Conclusion

In summary, it is our opinion that the prohibition in HO

¹ HO §16-102(a) defines a "recognized profession" as one represented by a national association that:

(1) was incorporated on or before January 1, 1981;

(2) has a code of ethics that governs the conduct of its membership; and

(3) requires for regular membership:

(i) a master's or doctoral degree in psychology, mental health, counseling, personnel and guidance, divinity, marriage and family therapy, or family and community development from an accredited college or university; and

(ii) at least 2 years training or its equivalent under the supervision of a regular member in good standing of the association, a licensed physician or a licensed or certified psychologist.

§16-102(b) against members of certain "recognized professions" from using the terms "psychological", "psychologist", or "psychology" to describe psychological services lawfully performed by them is unconstitutional and may not be enforced. Of course, because this provision does not affect other sections of the Maryland Psychologists Act, it is severable and does not render the remainder of the Act unenforceable.

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Opinions and Advice

Editor's Note: The preceding Opinion was originally written as a supplementary bill review letter. Because of its significance, however, it is published here, after some minor editing, in a revised format.