

OPINION NO. 86-063**Syllabus:**

Pursuant to R.C. 4753.02, no person, including a hearing aid dealer or fitter licensed pursuant to R.C. Chapter 4747, may use the word "audiologist" as a title or as part of a title or description of services unless that person holds a license to practice audiology issued by the Ohio Board of Speech Pathology and Audiology pursuant to R.C. Chapter 4753.

**To: Robert G. Glaser, Chairman, Ohio Board of Speech Pathology and Audiology,
Columbus, Ohio**

By: Anthony J. Celebrezze, Jr., Attorney General, August 21, 1986

I have before me your letter in which you request my opinion on the question whether "the use of the term 'audiologist,' 'certified hearing aid audiologist' or similar term by a person who does not hold a license to practice audiology issued by the Ohio Board of Speech Pathology and Audiology constitute[s] a violation of Revised Code Section 4753.02." Specifically, you are concerned whether persons who are licensed as hearing aid dealers or fitters under R.C. Chapter 4747 may use titles such as "hearing aid audiologist" or "certified hearing aid audiologist." You indicate that you are under the impression that persons who are licensed as hearing aid dealers or fitters under R.C. Chapter 4747 often are also "certified" by a national voluntary professional organization known as the National Hearing Aid Society. You further indicate that the Hearing Aid Dealers and Fitters Licensing Board has expressed the opinion to the Board of Speech Pathology and Audiology that the use of the title "certified hearing aid audiologist" does not violate R.C. Chapter 4747, so long as the hearing aid dealer or fitter is in fact certified by the National Hearing Aid Society.

The practice of audiology is regulated pursuant to the provisions of R.C. Chapter 4753. R.C. 4753.01(D) defines the "practice of audiology" as:

the application of principles, methods, or procedures of measurement, the evaluation of, or counseling and instruction related to hearing and disorders thereof for the purpose of preventing, identifying, or modifying such disorders and conditions in individuals or groups of individuals, but does not include the

practice of medicine and surgery or osteopathic medicine and surgery, or the performance of a task in the normal practice of medicine and surgery or osteopathic medicine and surgery by a person to whom the task is delegated by a licensed physician.

Division (C) of R.C. 4753.01 defines an "audiologist" as: "a person who practices audiology and who offers such services to the general public under any title or description of services incorporating the words 'audiology,' 'audiologist,' 'hearing clinic,' 'hearing clinician,' 'hearing therapy,' 'hearing therapist,' 'audiometry,' 'audiometrist,' or any similar titles or descriptions of services." See R.C. 4753.06 (setting forth who is eligible to take the examination, administered by the Board pursuant to R.C. 4735.05, to qualify for licensure as an audiologist); R.C. 4753.07 (the Board of Speech Pathology and Audiology shall issue a license to applicants who have passed the appropriate examinations and otherwise complied with licensure requirements; a license entitles the holder to practice audiology).

As you note in your letter of request, R.C. 4753.02 limits who may practice audiology and forbids the use of misleading advertising or titles:

No person shall practice or offer to practice the profession of...audiology, or use in connection with his name, or otherwise assume, use, or advertise any title or description tending to convey the impression that he is a[n]...audiologist unless the person is licensed under this chapter.

It thus must be determined whether using the term "audiologist" as a part of a title "tend[s] to convey the impression" that the person using the title is an audiologist.

There is no statutory definition of the phrase "tending to convey the impression" for purposes of R.C. Chapter 4753. Thus, I must construe the words in accordance with their common meanings. See R.C. 1.42 (providing that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). See also 1976 Op. Att'y Gen. No. 76-052 (it is a general rule of statutory construction that words are to be given their natural and normal meaning).

An "impression" is defined as "an effect produced, as on the mind or senses, by some force or influence," and as "a notion, feeling, or recollection, esp[ecially] a vague one." Webster's New World Dictionary, 706 (2d college ed. 1982). "Convey" is defined as serving "as a channel or medium" for transmitting, or "to make known; communicate in words, actions, appearance, etc." Id. at 311. Finally, "tend" is defined as: "to have an inclination, tendency, bias, etc. to do something; incline...to lead or be directed." Id. at 1465. Thus, it does not appear that R.C. 4753.02 requires that a consumer actually misperceive or be misled by a title or advertisement for a violation of the statute to occur. Rather, the use of the broad language "tending to convey the impression" indicates that the statute will be violated if the use of a term might lead or incline a person to have the notion or feeling that one using the term is an audiologist. I believe that a consumer who sees a sign identifying a practitioner as a "hearing aid audiologist" or a "certified hearing aid audiologist" might think, or might have the "vague feeling," that the practitioner is an audiologist. Indeed, I find that the possibility of misperception is very real.

The definition of "audiologist," provided in R.C. 4753.01(C), indicates that an audiologist may be practicing under any of a variety of titles or descriptions of services, incorporating words such as "audiology," "audiologist," "hearing clinic," "hearing clinician," "hearing therapy," "hearing therapist," "audiometry," "audiometrist," or "any similar titles or descriptions of services." Because the terms "hearing aid audiologist" and "certified hearing aid audiologist" incorporate the word "audiologist," it would be logical for a consumer to assume that a person using these titles is an audiologist licensed under R.C. Chapter 4753.

My conclusion is supported by the holding in American Speech-Language-Hearing Association v. National Hearing Aid Society, 224 U.S.P.Q. (BNA) 798 (TTAB 1984). In that case, the Trademark Trial and Appeal Board of the Patent and Trademark Office considered the validity of the challenged collective membership mark of the National Hearing Aid Society. The Board concluded that:

[T]he inclusion of the term "CERTIFIED HEARING AID AUDIOLOGIST" in [the National Hearing Aid Society's] mark is likely to deceive consumers into believing that the hearing aid dealers who use the mark are audiologists (i.e., persons academically trained to at least the master's degree level in audiology) in the hearing aid aspect of the hearing field, when in fact the hearing aid dealers do not have that degree of training;¹ and that the registered mark is deceptive within the meaning of Section 2(a)² of the Trademark Act.³ (Footnotes added.)

¹ R.C. 4753.06 sets forth the qualifications a person must possess in order to be licensed as an audiologist in Ohio. Pursuant to division (B) of R.C. 4753.06, an applicant must have earned a bachelor's, master's, or doctor's degree, having taken a total of sixty semester hours, or its equivalent, in the areas of study specified in that division. Further, an applicant must have completed "a minimum of three hundred clock hours of appropriate supervised clinical experience" in audiology, R.C. 4753.06(C), and must have "obtained professional experience in his field...which shall be at least nine calendar months with a minimum of thirty clock hours per week or an equivalent...in which bona fide clinical work has been accomplished in...audiology...." R.C. 4753.06(D).

By contrast, there are no educational requirements which an applicant for licensure as a hearing aid dealer and fitter must meet, although an applicant must pass a qualifying examination administered by the Hearing Aid Dealers and Fitters Licensing Board. R.C. 4747.05. See R.C. 4747.08. R.C. 4747.10 provides, however, that a person who is currently engaged in training to become a licensed hearing aid dealer or fitter must apply to the Board for a trainee permit. An applicant for a trainee permit must, inter alia, be "[t]he holder of a diploma from an accredited high school, or possess an equivalent education." R.C. 4747.10(B).

² Section 2(a) of the Trademark Act, 15 U.S.C. § 1052(a), prohibits registration of a mark which "consists of or comprises...deceptive...matter...."

³ You note in your letter that the decision of the Trademark Trial and Appeal Board cancelling the National

Id. at 810.

Thus, I conclude that no person may use the word "audiologist" as a title or part of a title or description of services, unless he is licensed as an audiologist pursuant to R.C. Chapter 4753.⁴ Although the practice of a hearing aid dealer or fitter relates to human hearing, as does that of an audiologist, R.C. 4753.02 does not except hearing aid dealers and fitters from its prohibitions. See generally Dougherty v. Torrence, 2 Ohio St. 3d 69, 70, 442 N.E.2d 1295, 1296 (1982) (in construing a statute, words not used may not be inserted). The scope of practice of a person licensed to engage in the practice of dealing in or fitting of hearing aids is defined in R.C. 4747.01(B) as "the sale of a hearing aid, and the measurement and testing of human hearing by means of an audiometer or by any other means for the purpose of selecting, adapting, and selling a hearing aid to any person, and includes the making of impressions for earmolds." Thus, the practice of a hearing aid dealer is quite different from that of an audiologist. See also note one, supra (setting forth the different qualifications applicants for licensure as audiologists and hearing aid dealers and fitters must meet). R.C. 4753.12(I) provides that nothing in R.C. Chapter 4753

Hearing Aid Society's trademark has been automatically stayed pending the resolution of a civil action brought to appeal the Board's decision. Even if the Board is reversed, I still believe that the use of the terms "certified hearing aid audiologist" or "hearing aid audiologist" by someone not licensed as an audiologist violates R.C. 4753.02. I find the reasoning and factual findings of the Trademark Trial and Appeal Board to be persuasive and relevant to this issue.

⁴ The prohibition against unlicensed persons using the term "audiologist" as a title or a part of a title in advertising and promotion creates no freedom of speech problems. The advertising or promotion of a title is commercial speech. In Friedman v. Rogers, 440 U.S. 1, 11 (1979), the Supreme Court concluded that, "[a] trade name is used as part of a proposal of a commercial transaction....[The] purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more." Commercial speech may receive a limited form of first amendment protection, but only if it concerns a lawful activity and is not misleading or fraudulent. See Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 54 U.S.L.W. 4957 (U.S. July 1, 1986) (No. 84-1903) (holding that statutes and regulations restricting advertising of casino gambling are not facially unconstitutional or unconstitutionally vague). See also Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563 (1980) ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it") (citations omitted). Because I have determined that it is misleading for a hearing aid dealer or fitter to use the word "audiologist" as a title or a part of a title unless he has been licensed under R.C. Chapter 4753, the promotion or advertising of such a title by a hearing aid dealer or fitter appears to be unprotected speech.

shall be construed to "[r]estrict a person licensed under [R.C. Chapter 4747] from engaging in the duties as defined in that chapter related to measuring, testing, and counseling for the purpose of identifying or modifying hearing conditions in connection with the fitting, dispensing, or servicing of a hearing aid." A hearing aid dealer licensed under R.C. Chapter 4747 may, therefore, fully engage in the practice of dealing in or fitting of hearing aids, R.C. Chapter 4753 notwithstanding. No provision in R.C. Chapter 4747 or R.C. Chapter 4753, however, permits a hearing aid dealer to practice audiology⁵ or exempts a hearing aid dealer from the prohibition of R.C. 4753.02.⁶

Therefore, it is my opinion, and you are hereby advised, that pursuant to R.C. 4753.02, no person, including a hearing aid dealer or fitter licensed pursuant to R.C. Chapter 4747, may use the word "audiologist" as a title or as part of a title or description of services unless that person holds a license to practice audiology issued by the Ohio Board of Speech Pathology and Audiology pursuant to R.C. Chapter 4753.

⁵ R.C. 4753.12 does permit certain persons to provide various audiology services without being licensed by the Board of Speech Pathology and Audiology. See, e.g., R.C. 4753.12(B) (speech and hearing therapists licensed or certified by the State Board of Education need not obtain licenses so long as they perform activities only within the scope of their employment and do not offer to render services to the general public); 4753.12(C)(person employed as audiologist by any state or federal agency need not obtain license).

⁶ R.C. 4747.12(E) provides that the Hearing Aid Dealers and Fitters Licensing Board may revoke or suspend a license or permit if the person who holds the license or permit "[u]sed or caused or promoted the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published, which is misleading, deceptive, or untruthful." Furthermore, R.C. 4753.99 provides that violation of 4753.02 is a minor misdemeanor. I make no finding as to the culpability of any particular person. Each case must be considered by the appropriate authority in light of the surrounding circumstances.