



AARON D FORD
Attorney General

KYLE E.N. GEORGE
First Assistant Attorney General

CHRISTINE JONES BRADY
Second Assistant Attorney General

JESSICA L ADAIR
Chief of Staff

RACHEL J. ANDERSON
General Counsel

HEIDI PARRY STERN
Solicitor General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

August 21, 2019

OPINION NO. 2019-05

ADVERTISING; NEVADA STATE
BOARD OF COSMETOLOGY;
REGULATION OF COSMETOLOGY
SCHOOLS

The determination whether a cosmetology school's trade name is false, deceptive or misleading is primarily a factual determination that must be made by the Board. The determination requires an evaluation of the facts that give rise to concerns about a trade name's potential to mislead or deceive prospective cosmetology students. According to NAC 644.711(2), this evaluation must include findings as to whether the name inaccurately describes the nature or scope of instruction offered by the school, or suggests a false or exaggerated level of expertise in a branch of cosmetology.

Gary K. Landry, Executive Director
Nevada State Board of Cosmetology
4985 West Russell Road, Suite #100
Las Vegas, Nevada 89148

Dear Mr. Landry,

You requested a formal opinion from the Nevada Attorney General's Office on behalf of the Nevada State Board of Cosmetology (Board), concerning the following:

Gary K. Landry, Executive Director
Nevada State Board of Cosmetology
Page 2
August 21, 2019

QUESTION PRESENTED

May a business that has applied to the Board for a license to operate a cosmetology school in Nevada use the word "medical" in the name of its school?

SHORT ANSWER

A licensee may not use the term "medical" in its name if the licensee's use of that name would mislead consumers. This is a factual determination, not one that can be answered definitively as a legal matter under current Nevada law. The Board is responsible for making this factual determination pursuant to Nevada statute and its governing regulations.

NAC 644.711(2) precludes the use of certain words, including the word "medical," when their use in an advertisement would deceive consumers about the scope of the services offered by the licensee or the licensee's level of expertise in a branch of cosmetology. Because a trade name that is regularly on display to the public constitutes an advertisement, the same considerations apply to trade names. Whether a trade name or advertisement would deceive consumers is primarily a factual question requiring an analysis of the licensee's business, the nature and scope of the services offered by the licensee, the licensee's level of expertise in a given field of cosmetology, and the context in which a potentially deceptive word appears in the licensee's trade name or advertising materials. The Board possesses the specialized knowledge and authority to make this determination and may refuse to issue a license to an applicant if it determines that the applicant uses terms that will mislead consumers in violation of NAC 644.711(2).

ANALYSIS

Tasked with protecting consumers of beauty services, the Board consists of 7 gubernatorial appointees including "four cosmetologists, one nail technologist, one aesthetician and one member representing customers of cosmetology." NRS 644A.200. The basis for this specific composition was to create a governing body with the necessary knowledge and skill to regulate the applicants subject to licensure by the Board. See NRS 644A.205. Applicants subject to licensure by the Board include proprietors of cosmetology schools. NRS 644A.250(4); NRS 644A.700-755.

“As an administrative agency the Board has no general or common law powers, but only such powers as have been conferred by law expressly or by implication.” *Andrews v. Nevada State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 96 (1970) (internal citations omitted). These include the power to monitor licensees to ensure their compliance with the various professional standards that govern the practice of cosmetology, as well as the power to *enforce prohibitions against advertising that is misleading or inaccurate*. See NRS 644A.850-880; NRS 644A.935; NRS 644A.950-970.

NRS 644A.015 defines “advertise” and “advertising” in terms broad enough to encompass a trade name that is regularly on display to the public:

“Advertise” and “advertising” mean an attempt by written, electronic or graphic representation to elicit enrollment or the sale of goods or services. The terms include, without limitation, such representations made:

1. On signs, displays, circulars, brochures, menus of services and recruitment materials; and

2. On the Internet, through the press, radio or television, or by use of any other medium. According to NRS 644A.935(1), it is unlawful for a licensee to provide “misleading or inaccurate [information] with respect to any services relating to the practice of cosmetology offered by a licensee.” NRS 644A.935(1). “Services relating to the practice of cosmetology” necessarily include academic instruction in the practice of cosmetology. Accordingly, a cosmetology school is prohibited from misleading prospective students about the nature or level of instruction that it provides, including by using misleading terms in its name. *Id.*

To facilitate the execution of its statutory mandate to regulate advertising, the Board adopted the provisions of NAC 644.711, thus putting licensees on notice of the types of communications that the Board may consider misleading. NAC 644.711 states:

A licensee is subject to disciplinary action if the licensee:

...

2. Uses advertisements which contain knowingly false or deceptive statements, including, without limitation, using the terms “expert,” “advanced” or “medical” in connection with any description of a licensee’s practice in any branch of cosmetology or otherwise holding the licensee out to the public as an expert, advanced or medical practitioner of any branch of cosmetology.

NAC 644.711(2) describes advertising materials that may subject a licensee to discipline for knowingly making false or deceptive statements. Such false or deceptive statements may include use of words such as “medical,” “advanced” or “expert”—when the words are used (i) to qualify a description of the licensee’s practice or scope of services, or (ii) to suggest a false or exaggerated level of expertise in a branch of cosmetology. *Id.*

The Board must make the factual determination as to whether a trade name is false, deceptive or misleading. This determination requires an evaluation of the facts that give rise to concerns about a trade name’s potential to mislead or deceive prospective cosmetology students. According to NAC 644.711(2), this evaluation must include findings as to whether the name inaccurately describes the nature or scope of instruction offered by the school, or suggests a false or exaggerated level of expertise in a branch of cosmetology.¹

NAC 644.711(2) effectively puts licensees and applicants for licensure on notice that the Board will carefully scrutinize certain terms when they appear in a trade name or advertising materials. While this tends to discourage the use of those terms, the Board must ultimately use its own judgment in determining whether an applicant’s trade name is inaccurate or misleading.

¹ The Board may consider, for example, whether a prospective student might reasonably assume, based upon a school’s trade name alone, that the school offers instruction in procedures that would require licensure or certification by a nursing or medical licensing board.

Gary K. Landry, Executive Director
Nevada State Board of Cosmetology
Page 5
August 21, 2019

The Board has expansive authority to discipline a licensee for failure to adhere to applicable standards of practice, though disciplinary action against a licensee for use of misleading terms requires a finding that the licensee acted with knowledge that the statement was false or deceptive. The Board also has authority to assess the "personal integrity and moral responsibility" of an applicant for licensure. See NRS 644A.705. In light of these statutorily granted authorities, the Board impliedly has the authority to condition the issuance of a license upon the applicant's agreement to refrain from using misleading terms in its trade name or advertising materials.

CONCLUSION

Given their specialized skill, knowledge and expertise in the different branches of cosmetology, the members of the Board are well qualified to decide questions about misleading advertising as they pertain to cosmetology. See, e.g., *Malecon Tobacco, LLC. v. State ex rel. Dept. of Taxation*, 118 Nev. 837, 841, 59 P.3d 474, 477 (2002) (holding that disputes requiring a factual evaluation are most appropriately decided by the agency that "can utilize its specialized skill and knowledge to inquire into the facts of the case"). Moreover, the Board has considerable discretion to determine not only whether an applicant for licensure meets all applicable professional requirements, see NRS 644A.700(4), but also whether the applicant has "present[ed] satisfactory evidence of personal integrity and moral responsibility." NRS 644A.705. This includes evidence that the applicant has remedied or intends to remedy reasonable concerns about the applicant's trade name or advertising materials. After having impartially reviewed all of the relevant facts and circumstances, the Board may condition the issuance of a cosmetology license upon the applicant's agreement to refrain from using a trade name or advertising materials that would, in the Board's expert opinion, violate NAC 644.711(2).

Sincerely,

By: 

Michael Detmer
Deputy Attorney General