

BOARD OF ACCOUNTANCY:

) State Board of Accountancy has no power with or  
) without a rule to that effect to prohibit the  
) use of the words "Company" or "and Company" in  
) the name of a partnership practicing public  
) accountancy; nor does it have any power to refuse,  
) on that ground alone, to register the name of a  
) partnership or issue a permit to practice.

September 23, 1953



Honorable Thomas M. Keyes  
President  
State Board of Accountancy  
209 Monroe Street  
Jefferson City, Missouri

Dear Sir:

Following is our opinion based on your request of August 4, 1953, which request reads as follows:

"For some time it has been the policy of the Missouri State Board of Accountancy to refuse to permit the use of a firm name by two practitioners of public accountancy which includes the two partners' names in conjunction with 'and Company.' For example, the board has approved the designation of a firm such as 'Sharon and Headley' or 'Sharon, Headley Company'; but has refused to approve the designation 'Sharon, Headley and Company' where in fact Messrs. Sharon and Headley are the only members of the firm. The apparent policy behind this restriction has been that the addition of the two words 'and Company' is misleading in that it impliedly represents the association of other persons with the principals where in fact no other persons are so associated with the firm.

"The board has been unable to find within the Missouri law regulating the practice of public accountancy any authority for

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approving or restricting the above-related policy. We would appreciate your opinion as to whether such a policy is violative of any rule of law, or is in any way an infringement upon a firm's right to designate their name as they may choose. In other words, is the State Board of Accountancy empowered to force the deletion of the words 'and Company' from the name of a firm under the circumstance outlined above?"

We infer from the request that the board has promulgated no rule or regulation prohibiting use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy. We assume that the board has from time to time denied registration and has denied the permit provided for in Section 326.040, RSMo 1949, to partnerships whose names include the words "and Company," as a matter of policy and not because the use of such words contravene any duly adopted regulation filed with the Secretary of State.

We believe it is beyond the authority of the Missouri State Board of Accountancy to prohibit the use of the words "and Company" in the name of a partnership practicing public accountancy.

First, let us look at the refusal of registration and permit as a matter of "policy" to a partnership using these words in its name.

Section 326.040, RSMo 1949, provides that "the board shall authorize the registration, as certified public accountants, of firms and partnerships, provided it be shown to the board that \* \* \*" and there follows a number of conditions with which the partnership seeking registration and permit must comply. Having complied with these conditions, the statute provides the board "shall authorize" the registration.

The board, by the terms of this statute, "shall authorize" the registration. "Shall" is ordinarily held to be a word of mandate negating permissiveness or discretion on the part of the subject of the action. In *State v. Wade*, 360 Mo. 895, 231 S.W. (2d) 179, l.c. 181, the court made this observation:

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" \* \* \* Certainly statutes that use the word 'shall', and then provide a penalty for failure to do what is required, are mandatory statutes.  
\* \* \*"

The only inquiry the board is permitted to make relating to the name of the partnership is where the name is a fictitious or assumed name, in which case the board must be shown that the name has been registered with the Secretary of State in compliance with the law of this state, which is embodied in Section 417.200, RSMo 1949. The inclusion of the words "and Company" in a partnership name, so long as the true names of the partners are included, probably does not necessitate the registration of such name with the Secretary of State as a fictitious name under Section 417.-200, supra, although there is no authority on the point in Missouri and the cases in other states are divided. See 65 C.J.S., Names, Sec. 9, N. 51. The requirement of compliance with the law relating to registration appears to be the only limitation upon the right to use a fictitious name. That having been done, Section 362.040, RSMo 1949, Subsection 5, provides, "a firm or partnership may make use of a fictitious name." The board has no authority to limit the law in this respect.

Second, we concern ourselves with the power of the board to promulgate a rule forbidding the use of the words "and Company" in the name of a partnership practicing public accountancy.

We think no such power is vested in the Board. The rule-making power of the Board is provided by Section 326.170, Subsection 1, RSMo 1949, which gives the power "to make and amend all rules deemed necessary for the proper administration of this chapter." We think this rule is not necessary to the administration of the chapter.

Nor do we think such a rule--or policy--could be related to the power "to do and perform all other acts and things herein committed to their charge and administration, or incidental thereto," contained in Section 326.170, Subsection 1, RSMo 1949. This evidently does not refer to rule making, since that has been previously covered in the same section. The rule under consideration would seek to limit Section 326.040, RSMo 1949, in that it would purport to impose an additional condition upon permit and registration. This is beyond the power of any administrative agency.

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"Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a 'regulation' which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmakers' intent in other statutes." 42 Am. Jur., Public Administrative Law, Sec. 53.

CONCLUSION

It is the opinion of this office that the Missouri State Board of Accountancy has no power with or without a rule to that effect to prohibit the use of the words "Company" or "and Company" in the name of a partnership practicing public accountancy; nor does it have any power to refuse, on that ground alone, to register the name of a partnership or issue a permit to practice.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. W. Don Kennedy.

Yours very truly,

JOHN M. DALTON  
Attorney General

WDK/fh