

N.D.A.G. Letter to Meier (Nov. 1, 1988)

November 1, 1988

Honorable Ben Meier
Secretary of State
State Capitol
Bismarck, ND 58505

Dear Secretary of State Meier:

I am responding to a letter written to this office by attorney Gordon W. Schnell concerning professional corporations. Mr. Schnell asks for an opinion concerning two or more licensed medical specialties, such as optometry and ophthalmology, within a single professional corporation.

As you know, I am unable to provide an official opinion to Mr. Schnell because of the restrictions provided by N.D.C.C. § 54-12-01. Opinions of the Attorney General may only be issued to state officials, state's attorneys, city attorneys and members of the legislature.

However, I have been told that you have orally agreed to the opinion request of Mr. Schnell. As a result, I will treat Mr. Schnell's opinion request as originating with you and will respond accordingly. I am sending a copy of my response to Mr. Schnell.

There are numerous references within N.D.C.C. ch. 10-31 providing that a professional corporation and its shareholders are restricted to a specific professional service. N.D.C.C. § 10-31-04 provides that a professional corporation may be organized only for the purpose of "rendering one specific type of professional service and services ancillary thereto and shall not engage in any business other than rendering the professional service for which it was organized to render." N.D.C.C. § 10-31-01(1) defines a professional corporation as a corporation which is organized for the sole and specific purpose of rendering a professional service which has as its shareholders only individuals who are themselves duly licensed or authorized to render the same professional service as the corporation may render. Finally, N.D.C.C. 10-31-07 states that a professional corporation may issue shares of stock only to persons who are duly licensed to render "the same specific professional services" as those for which the corporation was organized.

North Dakota's restriction of a professional corporation to a single professional service appears to be in line with the restrictions of other states which have enacted professional corporations statutes. The Model Professional Corporation Supplement to the Model Business Corporation Act, upon which N.D.C.C. ch. 10-31 appears to be based, notes that "[i]t is customary to limit the purposes of a professional corporation to the practice of a single professional." Model Professional Corporation Supplement to Model Business Corp. Act 11 at 1891 (1984). However, the commentary to the Model Professional

Corporation Supplement notes that in some fields "such as medicine and the allied health professions" the extent to which professional practices may be combined is an evolving subject. Id. Although the supplement did not provide any case citations discussing multiple professional practices within a single professional corporation, the supplement does provide for an optional statutory form allowing professional corporations to provide services within two or more professions to the extent that the licensing laws affecting those professions will allow such multiple services. This optional statutory form has not been adopted by North Dakota.

The current statutes in N.D.C.C. ch. 10-31 restrict a professional corporation to a single and specific type of professional service, and any service ancillary thereto. These statutes do not allow a single professional corporation to perform multiple professional services which may be similar in nature, except as noted below.

This conclusion is supported by a review of the action taken by the legislature in 1971. During the 1971 session, an amendment was enacted to N.D.C.C. § 10-31-04 allowing a single professional corporation to perform both architectural and engineering services. 1971 N.D. Sess. Laws ch. 116. This legislative exception is now found within the last sentence to N.D.C.C. § 10-31-04 and reveals the legislative intent to restrict a professional corporation to a single professional service except when the legislature Provides otherwise.

I am enclosing a copy of a letter opinion provided to Senator Jens Tennefos on July 14, 1987. In this opinion, I concluded that it is possible that a psychologist could be a member of a professional corporation engaged in the practice of medicine. The basis for my conclusion in that opinion was that the practice of psychology could be ancillary to the practice of medicine. Thus, depending upon the individual circumstances, a single medical professional corporation could provide both of these services in compliance with N.D.C.C. § 10-31-04. That letter opinion should not be read to allow a professional corporation to engage in multiple, non-ancillary professional services.

Similarly, it is possible that the practice of optometry could be considered to be ancillary to the practice of ophthalmology. The individual circumstances of a proposed professional corporation that would include both optometrists and ophthalmologists as shareholders should be reviewed to determine whether the proposed corporation is permitted by the law.

Mr. Schnell's letter also inquires of the ability of members of a professional corporation to render services where they are not licensed to render such service within North Dakota. N.D.C.C. § 10-31-01(1) clearly requires shareholders of a professional corporation to be licensed and otherwise legally authorized "within this state" to render the same professional service as the corporation may render. A similar requirement exists for shareholders of a foreign professional corporation N.D.C.C. § 10-31-13.1.

I hope this information is helpful to you and to Mr. Schnell.

Sincerely,

Nicholas J. Spaeth

vkk

cc: Mr. Gordon W. Schnell