

**OPINION
69-263**

August 19, 1969 (OPINION)

Dr. J. R. Gaustad

Secretary, State Board of Optometry

Grafton, North Dakota

RE: Optometrists - Professional Corporation Act - Application

This is in reply to your letter of August 15, 1969, in which you ask if one or more optometrists can form a professional corporation in accordance with section 10-31-01 of the North Dakota Century Code, and practice optometry, in view of section 43-13-28 of the North Dakota Century Code.

Chapter 10-31 of the North Dakota Century Code, as amended, is the Professional Corporation Act enacted by the North Dakota Legislature in 1963. Section 10-31-01 provides:

DEFINITIONS. As used in this chapter, the following words shall have the meaning indicated:

1. The term 'professional service' means the personal service to the public which requires a license as a condition precedent to the rendering of such service and which prior to the passage of this chapter could not be performed by a corporation.

2. The term 'professional corporation' means a corporation which is organized under this chapter for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional service as the corporation." (emphasis supplied)

Section 43-13-28 of the North Dakota Century Code is contained in the chapter governing the practice of optometry and provides as follows:

PROHIBITIONS. It shall be unlawful for any corporation, organization, association, group or individual who is not himself the holder of a certificate to practice optometry, to engage in the practice of optometry, directly or indirectly, by employing or hiring upon a salary, commission, or other basis or by associating upon a lease or any other profit sharing arrangement with a licensed optometrist or licensed physician. The provisions of this section shall not apply to co-operative or to nonprofit associations or nonprofit corporations."

The above quoted provision was enacted in 1947. While chapter 10-31 was enacted later than section 43-13-28, and a statute enacted later supersedes a prior statute if the two are in conflict, we have

adhered to the rule of statutory construction providing that the provisions of a special statute supersede that of a general statute if the two are in conflict. In this regard we would consider the provisions of the Professional Corporation Act a general statute since it purports to govern all professions which require a license as a condition precedent to the rendering of professional services. We would consider section 43-13-28 a special statute since it applies only to optometrists. However, this matter is not disposed of so easily. We note the definition in section 10-31-01, defining professional service, includes the statement that such service means personal service to the public "which prior to the passage of this chapter could not be performed by a corporation." There is no doubt but that the practice of optometry could not, prior to the enactment of the Professional Corporation Act, be performed by a corporation. A question remains whether this phrase was intended to include those services which could not, because of a specific prohibition such as that contained in section 43-13-28, be performed by a corporation or whether it was intended to apply only to those situations in which, because of the particular way in which the licensing law was drafted, a license could only be issued to a natural person thus impliedly prohibiting the issuance of a license to a corporation. In this regard we would further note section 43-13-28 appears to codify what had already been the existing law with regard to the issuance of professional licenses, i.e., they could be issued only to natural persons and not to artificial persons such as corporations, since the services performed by the licensee were of a personal nature which could only be performed by a natural person. If the provisions of section 43-13-28 are considered to be merely a codification of the existing law relative to issuance of professional licenses, it would appear the provisions of chapter 10-31 would supersede the provisions of section 43-13-28.

We would also note the provisions of section 10-31-14 of the North Dakota Century Code, as amended, which provides:

CITATION - CONSTRUCTION. This chapter shall be known and may be cited as the Professional Corporation Act, and shall be so construed as to effectuate its general purpose of making available to professional persons the benefits of the corporate form." (emphasis supplied)

It appears to us this provision, when considered with the fact the Professional Corporation Act was enacted subsequent to section 43-13-28 and that section 43-13-28 appears to be merely a codification of the law as it existed prior to the enactment of the Professional Corporation Act, is sufficient to overcome the rule that a special statute supersedes a general statute concerning the same subject matter.

It is therefore our opinion that one or more optometrists may form a professional corporation in accordance with the provisions of chapter 10-31 of the North Dakota Century Code, as amended, notwithstanding the provisions of section 43-13-28 of the North Dakota Century Code.

It is our further opinion that each shareholder or stockholder of a corporation must have met the licensure requirements and only such who have met the licensure requirements may practice optometry.

HELGI JOHANNESON

Attorney General