

1981 S.C. Op. Atty. Gen. 94 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-73, 1981 WL 96599

Office of the Attorney General

State of South Carolina

Opinion No. 81-73

August 12, 1981

***1 SUBJECT: Optometry and Optometrists; Medical Practitioners, Limited**

(1) R95–1P does not proscribe a strictly business relationship whereby a licensed optometrist merely leases office space and equipment to another optometrist for rent payment and the leasee optometrist practices under his or her own name, independent and unidentifiable with the lessor.

(2) The use of a tradename by an optometrist may not conflict with either R95–1P or R95–2. Its use may not be deceptive or misleading, and it may not be used to identify offices not under the direct supervision and control of the optometrist.

(3) A business corporation may lease office space [and probably equipment] to an optometrist provided the corporation does not interfere, or in any manner control the optometrist and provided the leased space is not in a business establishment.

(4) A partnership of three or more optometrists may not operate more than two branch offices.

To: Dr. Henry V. Sawyer

Secretary

South Carolina Board of Examiners in Optometry

QUESTIONS:

1. May an optometrist own the equipment of two or more offices and either hire for salary or commission other optometrists to operate the offices?
2. May an office owned by a licensed optometrist and leased to another optometrist be operated under a corporate or trade name?
3. Is it legal for a business corporation to lease optometric equipment and space to a licensed optometrist?
4. May a partnership of a number of optometrists three, four, or more, operate more than two satellites offices?

STATUTES AND CASES:

[Section 40–37–10, et seq., Code of Laws of South Carolina](#), 1976, as amended; R95–1 and R95–2, Rules of Practice, South Carolina Board of Examiners in Optometry; [Ezell v. Ritholz](#), 188 S.C. 39, 198 S.E.2d 419; [South Carolina Board of Examiners in Optometry v. Cohen](#), 256 S.C. 13, 180 S.E.2d 650; [State v. Zale Jewelry Co.](#), 298 P.2d 283; 61 AM.JUR.2d [Physicians and Surgeons](#); Black's Law Dictionary, (5th Ed. 1979).

DISCUSSION:

1. You have asked whether an optometrist may own the equipment of two of more offices and either hire for salary or commission other optometrists to operate the offices. R95–1P, Rules and Regulations of the South Carolina Board of Examiners

in Optometry, prohibits an optometrist from having more than one branch office, in addition, a branch office may not be operated by an optometrist in the employ of the owner of the branch office who is not a member of the partnership.

No optometrist in individual practice shall have more than one branch office. No association of two or more optometrists shall have more than two branch offices. A branch office may not be operated by an optometrist in the employ of the owner of the branch office and not a member of the partnership. R95–1P, Rules of Practice, South Carolina Board of Examiners in Optometry.

A ‘branch’ office is defined in Black's Law Dictionary at 170 (5th Ed. 1979) as a ‘division, office or other unit of business located at a different location from the main office or headquarters.’ Thus, a branch office is a division of the principal office and not a separate entity.

*2 Application of this definition is consistent with the purposes of R95–1P. In South Carolina Board of Examiners v. Cohen, 256 S.C. 1, 180 S.E.2d 650, the State Supreme Court noted in construing a similar regulatory provision, that such language was enacted in part so ‘. . . that people know the individual with whom they are doing business . . .’ This restriction on number of branch offices helps to prevent the public from being deceived as to who is the actual resident optometrist performing professional services within a particular office.

Another cogent reason behind R95–1P is the rejection of the multiple shop or chain store principal as alien to the practice of optometry. In South Carolina the practice of optometry involves the exercise of professional skill and judgment by trained and licensed individuals. Ezell v. Ritholz, 188 S.C. 69, 198 S.E. 419. Accordingly, it is reasonably conceivable that limitation of the number of branch offices was designed to ensure an appropriate manner of personal performance and supervision by the professional optometrist whose identity is associated with the practice.

Thus, R95–1P prohibits an optometrist from having more than one branch office, and requires that the optometrist retain control over the professional activities of the branch office since it is being held out to the public as a division of his or her main office. In addition, at no instance may another optometrist operate the branch office for salary or commission unless he or she is a member of a partnership of which the branch office is a division.

However, it cannot be said that R95–1P is intended to prohibit a bona fide lease arrangement, whereby a licensed optometrist leases equipment and premises to another optometrist not associated with his principal practice, so long as the lessee optometrist conducted the practice as his own and was not identified as being under the control or a part of the optometric practice of the lessor. As is more fully discussed infra at 5–8, the principal problem with such arrangements is that the leasing arrangement tends to partake of the characteristics of employer and employee—a prohibited relationship.

In conclusion, R95–1P restricts an individual optometrist to a limitation of one branch office which is a division or a unit of his or her optometric office, and the branch office must remain under the direction and control of the primary optometrist and may not be operated by an employee optometrist on salary or commission. This prohibition does not extend to a strictly business relationship whereby a licensed optometrist leases office space and equipment to another optometrist who operates the office in his or her own name, independent and unidentifiable with the lessor optometrist and simply pays rent to the lessor optometrist.

2. You have asked whether an office owned by a licensed optometrist and leased to another optometrist may be operated under a corporate or trade name. Attached is an opinion issued May 21, 1979, which concludes that the use of a trade or corporate name by an optometrist is no longer prohibited in this state. Though there is no longer a general prohibition against the use of a trade name, such a name cannot be used in a manner conflicting with R95–1P or R95–2. Thus, the same trade name or a deceptively similar trade name could not be used to denote optometric offices which are not part of the partnership or entity operating the principal office which is identified by the trade name. In respect to the individual optometrists, a trade name could be used for the main office and no more than one branch office and in the case of partnerships for the main office and no more than two branch offices. Any other use of a similar trade name to identify offices would deceive the public as to ownership and control of distant offices and connote the identification that the distant offices are operated by an individual or partnership which exercises no professional control, and merely collects the rent.

*3 3. You have asked whether it is legal for a business corporation to lease optometric equipment and space to a licensed optometrist. This question raises the issue of the unlawful practice of optometry without a license. See, § 40–37–20, [Code of Laws of South Carolina](#), 1976, as amended. The situation frequently arises where a dispensing optician and an optometrist enter into an arrangement whereby the optometrist leases facilities in or around the optician's facilities. As noted at 61 AM.JUR.2d 'Physicians and Surgeons, etc.', § 38:

Questions of unauthorized practice have frequently been raised in connection with arrangements designed to give a seller of optical goods a favored position to fill prescriptions issued by licensed optometrists. These arrangements usually involve the licensed practitioner's occupying office space on or near the seller's business premises, using his equipment, and frequently being guaranteed minimum income. . . . to the extent that optometry is regarded as a profession, the courts have held that insofar as such an arrangement permits the unlicensed party to control the professional activities of the optometrist, it involves unlicensed practice by such parties and cannot be sustained, whether it takes the form of an employment contract or a lease of the premises to be occupied.

In South Carolina the practice of optometry is regulated for the benefit of public health and welfare and is considered a profession requiring skilled and highly trained individuals. *Ezell v. Ritholz*, *supra*. In *Ezell*, the court examined the lease situation whereby physicians maintained their offices as a component part of certain business store rooms and in return therefor were guaranteed a minimum number of patients and fees by the business. Such a situation was deemed the unlawful practice of optometry by business entities.

The *Ezell* case does not conclude, however, that in no circumstance may optometric facilities be leased from a business corporation. The key revolves around the extent to which the lessor exercises control of the lessee optometrist. If the arrangement partakes of an employer-employee relationship rather than lessor-lessee, the corporation would be engaged in the unlawful practice of optometry. In addition, the mere presence of a lease will not in itself give rise to a lessor-lessee relationship. See, e.g. *State v. Zale Jewelry Co. of Wichita*, 298 P.2d 283.

In conclusion, it appears that absent a specific prohibition a corporation may lease facilities to a practicing optometrist so long as the corporation does not control any of the professional activities of the optometrist. It is reasonably certain that a bona fide lease arrangement simply for office space is acceptable and would not subject the corporation to the charge of unlicensed practice. However, when the corporation furnishes more than space (i.e. equipment) the picture becomes cloudy and the situation may partake of an employer-employee relationship rather than that of a bona fide lease.¹

*4 In addition, § 40–37–330 provides that 'the possession of optical supplies or instruments, equipment or appliances for the examination of the eye shall be prima facie evidence of working as an optometrist for conviction under the provisions of this chapter.' While the purpose of this provision would most probably not extend to a lessor/lessee situation, a corporate lessor should be aware of the provision and potential consequences.

4. You have asked whether a partnership of a number of optometrists, 3, 4, or more, can operate more than two satellite offices. This question appears to be conclusively answered by the language of R95–1P which restricts the partnership of two or more optometrists to operating a maximum of two branch offices. This prohibition applies regardless of the number of partners.

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Footnotes

¹ R95–IN with some qualification prohibits an optometrist from practicing his profession in a space leased or rented in a business establishment. This proscription does not extend to leased office space external to a business establishment.

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