

Opinion No. 32.

Optometry—Optometrists—Employment of—Physicians and Surgeons—Police Powers.

HELD: A duly licensed optometrist is not prohibited by law from entering the employ of, or entering a partnership with a duly licensed physician or surgeon.

June 26, 1953.

Dr. E. B. Keller, O. D., President
Montana State Board of
Examiners in Optometry
303 Commercial Bank Building
Bozeman, Montana

Dear Doctor Keller:

You have requested an official ruling from this office as to the legality of a duly licensed optometrist either accepting employment from or entering a partnership with a duly licensed physician or surgeon. You state the question has arisen due to an uncertainty on the part of your board concerning the interpretation to be given Sections 66-1312 and 66-1316, R. C. M., 1947.

Section 66-1312, supra, relating to the revocation of certificates for cause by the state board of examiners in optometry provides in part as follows:

"Said board shall have the power to revoke any certificate of registration granted by it under this Act for . . . unprofessional conduct. Unprofessional conduct shall mean: . . . directly or indirectly accepting employment to practice optometry from any person not having a valid, unrevoked certificate of registration as an optometrist . . ."

Section 66-1316 supra, specifically exempts physicians and surgeons from the operation of the statutes regulating the practice of optometry. It reads:

"Act Not to Apply to Physicians and Surgeons. Nothing in this Act shall be construed to apply to physicians and surgeons authorized to practice under the laws of the state of Montana, nor to persons who sell spectacles or eye-glasses without attempting to traffic upon assumed skill in adapting them to the eye."

The question thus presents itself as to whether, in view of the exemption statute, the provisions of Section 66-1312, supra, would apply to an optometrist accepting employment from or entering a partnership with a physician or surgeon.

The regulation of the practice of optometry falls within the power which the legislature may exercise in the protection of the public health and welfare. *McNaughton v. Johnson*, 242 U. S. 344, 37 S. Ct. 178, 61 L. ed. 352; *Commonwealth v. Houtenbrink*, 235 Mass. 320, 126 N. E. 669; *State ex rel. Hallen v. Board of Examiners*, 37 Utah 339, 343, 108 Pac. 347; *Harris v. State Board of Optometrical Examiners*, 287 Pa. 351, 135 A. 237. The state of Montana has recognized the practice of optometry as a proper subject for the application of the state's police power. *Johnson v. City of Great Falls*, 38 Mont. 369, 99 Pac. 1059. The purpose of the legislature in the statutes was to guard the public against the practice of optometry by persons not properly qualified or against conduct by those who have qualified which is likely to be harmful in its result.

The exemption statute Section 66-1316, supra, was considered in the case of *Swanz v. Clark*, 71 Mont. 385, 229 Pac. 1108. With reference to the statute the court in that case said:

“ . . . the practice of medicine in this state includes, among other things, the cure, treatment or palliation of any ailment, disease or infirmity of the mind or body of another by directing for use any appliance, apparatus or other agency and by Section 3169 (66-1316), physicians and surgeons are specifically exempted from the operations of the statute regulating the practice of optometry. Apparently the legislature recognized optometry as a branch of the medical science, or, at least, a proper subject within the scope of the regular physician's practice.”

In pursuing his profession, the optometrist examines the eyes of those seeking his advice, with the object of determining whether they properly perform their functions. If he decides they do not, and determines that their failure to do so is due to disease, he advises that a physician or surgeon be consulted. If he decides the defect is not the effect of disease, and that it can be corrected by the use of lenses, he determines the character of lenses required.

It might be said that the evil which the legislature intended to provide against in enacting Section 66-1312, *supra*, was that duly licensed and qualified optometrists not be placed in such a position as to forfeit their independent judgment to the detriment of the public. Both the legislature and the Supreme Court of Montana have recognized optometry as a proper subject within the scope of the regular physicians practice. *Swanz v. Clark*, *supra*.

The power of the state to provide for the general welfare of its people authorizes it to make such rules and regulations as will tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. In the absence of such deception and fraud, it is not conceivable that a partnership arrangement entered into between an optometrist and a physician or surgeon or employment of an optometrist by a physician or surgeon would act to the public detriment.

It is therefore my opinion that a duly licensed optometrist is not prohibited by law from entering the employ of, or entering a partnership with a duly licensed physician or surgeon.