

## Opinion No. 65-102

June 21, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

**TO:** Alexander F. Sceresse, District Attorney, Second Judicial District, Second Floor County Courthouse, Albuquerque, New Mexico

### QUESTION

#### FACTS

House Bill No. 95, Twenty-seventh Legislature, First Session, amends Section 67-7-13, N.M.S.A., 1953 Compilation to provide:

"67-7-13. Each of the following acts is unlawful . . . N. Selling of prescriptions eyeglasses or contact lenses, frames, or mounting for lenses, in an establishment in which the majority of its income is not derived from being engaged in that endeavor."

Criminal penalties are provided for a violation of this law.

A registered pharmacist operates a drugstore within the Second Judicial District. The pharmacist operates a pharmacy at the drugstore and sells a wide variety of goods at the drugstore. The pharmacist also engages in business as an optician, and operates an optical dispensary within the drugstore. He does not grind or manufacture lenses or glasses, but he does sell prescription eyeglasses and frames. A majority of his gross income is derived from operation of the drugstore and pharmacy.

In order to comply with Section 67-7-13 (N), as enacted by House Bill No. 95, the pharmacist intends to set up his optician business as a separate "establishment". The optical dispensary will be located in one corner of the drugstore, but separated from the remainder of the premises by a wall. The public will have no access from the drugstore to the optical dispensary but will enter the optical dispensary from a separate entrance opening onto the street. The pharmacist, who will also operate the optical dispensary, will have access to the dispensary by means of a private door leading from the pharmacy to the optical dispensary. Separate books and records will be kept for the optical dispensary, and it will be separately licensed for the payment of taxes. The optical dispensary may hire employees, but employees of the drugstore may also be employed in the optical dispensary. The optical dispensary will have a different name than the drugstore.

#### QUESTION

Based on the foregoing facts, and assuming that the operation of the optical dispensary is otherwise in compliance with law, will the operation of the optical dispensary violate Section 67 -- 7-13 (N), as enacted by House Bill No. 95?

## CONCLUSION

See Analysis:

## OPINION

### {\*173} ANALYSIS

In order to reach a conclusion we must first ascertain the meaning the legislature intended for the word "establishment" in Subsection N of Section 67-7-13 New Mexico Statutes Annotated, 1953 Compilation. The wording of the statute is such that we believe "establishment" is synonymous with "place of business" as opposed to an institution or type of business. The important wording is ". . . **in an** establishment in which the majority of **its** income . . ." (Emphasis added.) The emphasized language clearly implies a place of business. We have been unable to locate any legal decisions helpful to our conclusion but one of the definitions of "establishment" in Webster's Third New International Dictionary is:

". . . A more or less fixed and usu. sizeable place of business or residence together with all the things that are an essential part of of it (as grounds, furniture, fixtures, retinue, employees) . . ." In addition, our conclusion is supported by the fact that there is no prohibition against selling the items listed in Subsection N in any establishment regardless of the type of business carried on therein if the establishment realizes a majority of its income from such sales. We must, therefore, conclude that "establishment" means a particular place of business, i.e., a particular physical location.

Your question is now reduced to whether or not the proposed remodeling of the drugstore will create a separate place of business for the purpose of selling prescription eyeglasses or contact lenses, frames, or mountings for lenses.

On at least one occasion the New Mexico Supreme Court has considered the definition of "place of business". In **R. V. Smith Supply Co., v. Black**, 43 N.M. 177, 180, the Court quoted from 2 Bouv. Law Dict., Rawle's Third Revision, p. 2596 as follows:

"The place where a man usually transacts his affairs or business.

"When a man keeps a store, shop, counting-room, or office, independently and distinctly from all other persons, that is deemed his place of business; and when he usually transacts {\*174} his business at the countinghouse, office, and the like, occupied and used by another, that will also be considered his place of business, if he has no independent place of his own. But, when he has no particular right to use a place for such private purpose, as in an insurance-office, an exchange-room, a banking-room, a

post-office, and the like, where persons generally resort, these will not be considered as the party's place of business, although he may occasionally or transiently transact business there."

The New Mexico case like so many others that define "place of business" are no real help in answering your question. The question in the cases we have found has been whether or not a particular location was a place of business as opposed to some other locality, for instance a residence.

Under the facts set forth in your question there can be little doubt that both the drugstore and the optical dispensary will constitute places of business. Therefore, your question is further reduced to whether or not there is a sufficient physical separation between the two businesses.

As far as the public is concerned there appears to be complete physical separation. We think this is sufficient so long as all optical sales are made in the dispensary. No doubt, mental separation will not be achieved. Certainly, the optical dispensary customers will know that they can contact the operator of the dispensary in the drugstore if they fail to find him in the dispensary. The operator will, of course, then arrange to meet the dispensary customer in the dispensary for the purpose of making a sale. The customer must then leave the drugstore and return to the optical dispensary and so must the operator. If the two businesses were on opposite sides of the street, could anyone argue they were not separate? We think not. If this is so, what difference does it make how the dispensary operator enters the store? We believe none. Likewise, we see no evil in the fact that the initial contact, described above, took place in the drugstore. As noted earlier, Subsection N of Section 67-7-13, does not prohibit sales where any particular type of endeavor is carried on, but is merely directed at sales in a place where the majority of the gross income of such place is not realized from the sale of these articles enumerated in Subsection N.

The factual situation presented just above need not necessarily be the case, however. If the optical dispensary has at least one employee, the customer need not enter the drugstore for any reason. In such a case all the business including the sale should be conducted in the dispensary.

In our opinion the facts you set out in your question show a sufficient physical separation of the two businesses. The other important aspect of your question concerns, of course, sufficient fiscal separation. Your facts recite that separate books and records will be kept for the dispensary and it will be separately licensed for the payment of taxes. We believe these arrangements are more than adequate to insure compliance with the statute. We must again point out that in our opinion Subsection N requires only that the sales covered thereby not be conducted in the same physical location as another business if the other business accounts for fifty (50) percent of the total income to the two businesses. It would seem, therefore, that if you have in fact physical separation, the bookkeeping method of two allied businesses would be of little consequence.

In conclusion, we believe the facts you have outlined with one exception would allow the pharmacist to operate the optical dispensary in the manner described. Because of the definition of "establishment" quoted above, we believe drugstore employees should not be used in the optical dispensary <sup>{\*175}</sup> business. The essence of that definition of establishment as applied to the situation here is that the business have as its own all those things necessary to function as a place of business. For this reason we believe an employee of the drugstore should not work in or for the dispensary.

Your office should inspect the premises when the remodeling is completed to ascertain whether there is, in fact physical separation of the two establishments.