CHAPTER 19

Professional Corporation Supplement

ARTICLE 1

General Provisions

**SECTION 33‑19‑101.** Short title.

This chapter is known and may be cited as the South Carolina Professional Corporation Supplement.

HISTORY: Derived from 1976 Code Section 33‑51‑10 [1962 Code Section 56‑1601; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The Model Professional Corporation Supplement (1984) permits persons engaged in the rendition of professional services that traditionally were provided on an individual basis to form professional corporations to provide these services. Professional corporations enable these persons to obtain the employee tax benefits provided by the Internal Revenue Code. Professional corporations and professional corporation statutes are of relatively recent origin.

The Model Professional Corporation Supplement is an optional statute developed as a guide for states enacting or revising professional corporation statutes. This Supplement is not part of the Revised Model Business Corporation Act.

The Committee on Corporate Laws expresses no opinion as to the advisability of adopting the corporate form of organization or the federal income tax consequences of incorporation pursuant to this Supplement.

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SOUTH CAROLINA REPORTERS’ COMMENTS

1. Introduction.

Every state now has statutes authorizing professional persons to form a professional corporation. South Carolina enacted a professional association act in 1962. It was codified as Sections 33‑51‑10 through 33‑51‑120 of the 1976 Code and is referred to in the South Carolina Reporters’ Comments to this chapter as the 1962 South Carolina Professional Association Act.

A professional corporation differs from any other corporation in four important respects: (1) unless otherwise authorized by statute or regulation, a professional corporation can engage only in the practice of a single profession; (2) only licensed professionals can be shareholders of a professional corporation; (3) a shareholder in a professional corporation is liable personally for his own malpractice to the same extent as if he were a sole practitioner but is not liable for the malpractice of the other professionals in the professional corporation (as would be the case if the professional were a partner in a partnership) unless he is at fault in appointing, supervising, or cooperating with them; and (4) “professional corporation”, “professional association”, “service corporation”, or “chartered” must be used in the corporate name and included on all letterheads, contracts, and advertising materials.

Recently enacted tax legislation has reduced substantially the tax incentives for forming professional corporations. As a consequence, there are likely to be fewer professional corporations formed in the future than in the past twenty‑five years. Nevertheless, professional corporations still offer some residual tax advantages that may justify incorporation of a professional practice. See, e.g., Thompson and Nun, What Structure Is Best For Your Law Firm, 72 A.B.A.J. 53 (March, 1986). Moreover, professional corporations formed before the recent tax restrictions were enacted may be subject to significant tax liabilities if they attempt to liquidate and for this reason may decide to continue operation in a corporate format even though the tax incentives that led to incorporation no longer exist. Furthermore, there are important nontax reasons why a professional might want to incorporate as a professional corporation. Protection from liability for malpractice claims filed against other members of the firm on matters the professional has not personally handled or supervised is perhaps the principal nontax advantage of a professional corporation as compared to a general partnership. See, generally, H. Haynsworth, SELECTING THE FORM OF A SMALL BUSINESS ENTITY Sections 1.04(c), 4.07 (1985).

In short, there are likely to be a significant number of professional corporations operating in South Carolina indefinitely. Therefore, it is important to have a modern, statutory framework to govern these entities. The Professional Corporation Supplement to the Model Business Corporation Act is much more complete, particularly with respect to matters of corporate procedure, than the 1962 South Carolina Professional Association Act. However, it does not alter radically the basic rights of professional corporation shareholders or their clients.

2. Special Note on Terminology Used in the Comments and Cross References.

Several important terms used in the Comments and Cross References in this chapter are discussed in the South Carolina Reporters’ Comments to Section 33‑1‑101.

Two new terms are used in the Comments and Cross References in this chapter: (1) MBCA, which is an acronym for the Model Business Corporation Act of 1984 (sometimes referred to in the Official Comments as the Revised Model Business Corporation Act, which in Chapters 1 through 17 is referred to as the 1984 Model Act or Model Act); and (2) South Carolina Business Corporation Act, which refers to Chapters 1 through 17 of this title. Technically, this term applies to Chapters 1 through 20—see Section 33‑1‑101, but it is used in the more limited sense in this chapter and Chapter 18 for convenience. Chapters 18 and 19 are supplements that apply to special types of corporations and Chapters 1 through 17 constitute the general business corporation statute.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 1.

CROSS REFERENCES

Application of Business Corporation Act, see Section 33‑19‑102.

Application to existing corporations, see Section 33‑19‑700.

Close corporations, Statutory Close Corporation Supplement, see Sections 33‑18‑101 et seq., 33‑19‑102.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney and Client Section 4, Unauthorized Practice of Law.

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

LAW REVIEW AND JOURNAL COMMENTARIES

Limited liability law practice. 49 S.C. L. Rev. 359 (Spring 1998).

The professional association’s corporate tax status. 22 S.C. L. Rev. 73.

Tax considerations of professional associations. 17 S.C. L. Rev. 212.

**SECTION 33‑19‑102.** Application of South Carolina Business Corporation Act and Statutory Close Corporation Supplement.

(1) Chapters 1 through 17 apply to professional corporations, both domestic and foreign, to the extent not inconsistent with the provisions of this chapter.

(2) The Statutory Close Corporation Supplement (Chapter 18 of this title) applies to a professional corporation organized under this chapter whose articles of incorporation contain the statement required by Section 33‑18‑103(a), except insofar as this chapter contains inconsistent provisions.

HISTORY: Derived from 1976 Code Section 33‑51‑170 [1962 Code Section 56‑1617; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The Model Professional Corporation Supplement is a supplement to the Revised Model Business Corporation Act. Provisions of the Model Act apply to all professional corporations except to the extent they are not consistent with the provisions of this Supplement. The relationship between these two acts is analogous to the relationship between the Uniform Partnership Act and the Uniform Limited Partnership Act. Whenever this Supplement is silent on an issue, the corresponding provision of the Model Act applies. See the cross‑references following each section of this Supplement.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section explains the relationship between the Professional Corporation Supplement and the other chapters in the South Carolina Business Corporation Act. The rule set forth is similar to that governing the relationship between general and limited partnerships in the South Carolina Uniform Partnership Act and the South Carolina Uniform Limited Partnership Act. See Sections 33‑41‑210 and 33‑42‑2020 of the 1976 Code.

This section does not represent any change from the 1962 South Carolina Professional Association Act. See former Section 33‑51‑170 of the 1976 Code.

Subsection (b) is not part of the Model Act Official Text. It was added to point out the possibility of having a professional corporation that is also a statutory close corporation. If this is the case, because of the “inconsistent” provisions in this chapter, the professional corporation would (1) have to have share legends that comply with both Section 33‑18‑100 and Section 33‑19‑210; (2) alter Section 33‑18‑110 in order to have share transfer restrictions that meet the requirements of Section 33‑19‑200 (shares can only be transferred to qualified persons); and (3) if the statutory share purchase right in Sections 33‑18‑140 through 33‑18‑170 is elected, have to comply with the compulsory share purchase right provisions in Sections 33‑19‑230 through 33‑19‑270.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 2.

CROSS REFERENCES

Application of this chapter to existing professional corporations, see Section 33‑19‑700.

Close corporations, see Statutory Close Corporation Supplement, Sections 33‑18‑101 et seq.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

**SECTION 33‑19‑103.** Supplement definitions.

In this chapter:

(1) “Disqualified person” means an individual or entity that for any reason is or becomes ineligible under this chapter to be issued shares by a professional corporation.

(2) “Domestic professional corporation” means a professional corporation.

(3) “Foreign professional corporation” means a corporation or association for profit incorporated for the purpose of rendering professional services under a law other than the law of this state.

(4) “Law” includes rules promulgated in accordance with Section 33‑19‑630.

(5) “Licensing authority” means the officer, board, agency, court, or other authority in this state empowered to license or otherwise authorize the rendition of a professional service.

(6) “Professional corporation” means a corporation for profit, other than a foreign professional corporation, subject to the provisions of this chapter.

(7) “Professional service” means a service that may be rendered lawfully only by a person licensed or otherwise authorized by a licensing authority in this State to render the service and that may not be lawfully rendered by a corporation under chapters 1 through 17 of this title.

(8) “Qualified person” means an individual, general partnership, or professional corporation that is eligible under this chapter to be issued shares by a professional corporation.

HISTORY: Derived from 1976 Code Section 33‑51‑20 [1962 Code Section 56‑1602; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The definitions in section 3 (Section 33‑19‑103) are applicable only to professional corporations. They are supplemented, however, by the definitions in chapter 1 of the Model Act.

1. Qualified Person and Disqualified Person.

Section 20 (Section 33‑19‑200) of this Supplement permits shares of a professional corporation generally to be issued only to individuals licensed in this or another state to render a professional service, a partnership composed of these persons, or (on an optional basis) professional corporations composed of these persons. These persons are referred to as “qualified persons,” a term defined in section 3(8) (Section 33‑19‑103(8)). An individual or entity that is not within, or ceases to be within, this definition is referred to as a “disqualified person.” See section 3(1) (Section 33‑19‑103(1)). All shares owned by a disqualified person are subject to a compulsory option to repurchase under certain circumstances. See section 23 (Section 33‑19‑230).

The word “entity” in section 3(1) (Section 33‑19‑103(1)) is defined in section 1.40 (Section 33‑1‑400) of the Model Act to include, among others, corporations, partnerships, trusts, and governmental units.

2. Professional Corporation, Domestic Professional Corporation, and Foreign Professional Corporation.

The term “professional corporation” when used alone refers only to a domestic professional corporation subject to the provisions of this Supplement. See section 3(6) (Section 33‑19‑103(6). In some instances such a corporation is referred to as a “domestic professional corporation” when, for clarity, it is distinguished from a foreign professional corporation.

A “foreign professional corporation” is a corporation (or “association” as it is called in some states) formed to render professional services under a law of a state other than this state. See Section 3(3) (Section 33‑19‑103(3)).

3. Law.

The Model Professional Corporation Supplement grants the licensing authority power to promulgate rules. See section 63 (Section 33‑19‑630). Section 3(4) (Section 33‑19‑103(4)) defines “law” to include these rules as well as statutes and other types of law.

4. Licensing Authority.

The state agency or agencies with regulatory power over a particular professional service is referred to as the “licensing authority” for that service. See section 3(5) (Section 33‑19‑103(5)). The actual names of these agencies vary widely from state to state and from profession to profession within a single state. The power and jurisdiction of licensing authorities over professional corporations created under this Supplement are set forth in sections 60 through 65 (Sections 33‑19‑600 through 33‑19‑650).

5. Professional Service.

The definition of “professional service” in section 3(7) (Section 33‑19‑103(7)) limits and describes the purposes for which corporations may be organized under section 11 (Section 33‑19‑110). As a general proposition, corporations may not be formed under business corporation acts for the purpose of practicing a “profession” or rendering “professional services.” In the absence of a statutory definition, however, the courts have held that not all licensed services are “professional services.” As a result, the determination of whether particular licensed services may be rendered by corporations has been made on a case‑by‑case basis under the state business corporation act and the applicable licensing law.

The definition of “professional service” in section 3(7) (Section 33‑19‑103(7)) adopts the conclusions reached by courts in this litigation and defines a “professional service” as a licensed service that “may not be lawfully rendered by a corporation under the [Model] Business Corporation Act.” All professions that meet this standard may incorporate as professional corporations under this Supplement.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section contains special definitions that apply only to professional corporations formed under this chapter. The definitions in Section 33‑1‑400 also apply and should be consulted when the meaning of a particular term is in doubt.

No changes in the Model Act Official Text have been made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 3.

CROSS REFERENCES

“Domestic corporation” defined, see Section 33‑1‑400.

“Entity” defined, see Section 33‑1‑400.

“Foreign corporation” defined, see Section 33‑1‑400.

Issuance of shares by professional corporation, see Section 33‑19‑200.

“Person” defined, see Section 33‑1‑400.

South Carolina Business Corporation Act definitions, see Section 33‑1‑400.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

ARTICLE 2

Creation

**SECTION 33‑19‑109.** Election of professional corporation status.

(a) A person may incorporate a professional corporation by delivering to the Secretary of State for filing articles of incorporation that state (1) it is a professional corporation and (2) its purpose is to render the specified professional services.

(b) A corporation incorporated under a general law of this State that is not repealed by this chapter may elect professional corporation status by amending its articles of incorporation to comply with subsection (a) and Section 33‑19‑150.

HISTORY: Derived from 1976 Code Section 33‑51‑30 [1962 Code Section 56‑1603; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], Section 33‑51‑40 [1962 Code Section 56‑1604; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑130 [1962 Code Section 56‑1613; 1962 (52) 1911; 1984 Act No. 281; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Professional corporation status under this Supplement may be acquired in three ways:

(1) In the case of a new or existing but unincorporated business, by filing articles of incorporation with the secretary of state under section 10(a) (Section 33‑19‑100(a)). The articles of incorporation must conform with section 2.02 (Section 33‑2‑102) of the Model Act except to the extent this Supplement specifies otherwise. Section 10(a) (Section 33‑19‑100(a)) requires articles of incorporation of a professional corporation to state that the corporation is a professional corporation and that its purpose is to render the specified professional service or services. The professional services must be identified with sufficient specificity to permit identification of the licensing authority with jurisdiction over the service. See section 11 (Section 33‑19‑110). In addition, the name of the corporation must meet the requirements of section 15 (Section 33‑19‑150).

(2) In the case of an existing professional corporation formed under a statute repealed by this Supplement, the corporation must comply with section 70 (Section 33‑19‑700) of this Supplement.

(3) In the case of an existing corporation formed under a statute not repealed by this Supplement, the corporation may amend its articles of incorporation to bring them into conformity with this Supplement, including the requirements of sections 10(a) and 15 (Sections 33‑19‑109(a) and 33‑19‑150). The amendment must be approved and filed in accordance with chapter 10, Art. 1 of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section sets forth the statutory requirements for a newly formed corporation or an existing corporation that is not a professional corporation (a situation that will occur infrequently) to become a professional corporation.

In addition to satisfying the requirements of this section, a professional corporation must, “before it renders any professional services”, file a certified copy of its articles of incorporation with any administrative agency having licensing authority over the professionals in the corporation pursuant to Section 33‑19‑600.

The legal requirements for a professional corporation in existence before the effective date of this chapter are set forth in Section 33‑19‑700. In general, Section 33‑19‑700 states that all existing professional corporations will qualify automatically as professional corporations governed by this chapter and will have two years to file any amendments to their articles of incorporation necessary to comply with the provisions of this chapter. For example, the 1962 South Carolina Professional Association Act did not require specifically that a professional corporation state in the articles that it is a professional corporation and that its purpose is to render specified professional services. See former Section 33‑51‑30 of the 1976 Code. Failure to file the necessary amendments within the two‑year period, however, does not affect the potential liability of any shareholder or the right of the professional corporation to enforce any claims it might have against third parties.

No substantive changes in the Model Act Official Text were made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 4.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Application to existing corporations, see Section 33‑19‑700.

Articles of incorporation, see Section 33‑2‑102.

Corporate name of professional corporation, see Section 33‑19‑150.

“Deliver” includes mail, see Section 33‑1‑400.

Effective time and date of filing, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

“Person” defined, see Section 33‑1‑400.

“Professional service” defined, see Section 33‑19‑103.

Purposes, see Section 33‑19‑110.

Repeal of earlier statutes, see Section 33‑19‑700.

Library References

Corporations 3, 18, 40.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 5, 25 to 27, 33, 38, 41, 62, 559.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

South Carolina Legal and Business Forms Section 3:4 , Checklist‑Drafting Articles of Incorporation.

South Carolina Legal and Business Forms Section 3:7 , Articles of Incorporation‑General Form.

**SECTION 33‑19‑110.** Purposes.

(a) Except to the extent authorized by subsection (b), a corporation may elect professional corporation status under Section 33‑19‑109 solely for the rendering of professional services, including services ancillary to them, within a single profession.

(b) A corporation may elect professional corporation status under Section 33‑19‑109 for the rendering of professional services within two or more professions, and for engaging in any lawful business authorized by Section 33‑3‑101, to the extent the combination of professional purposes or of professional and business purposes is authorized by the licensing law of this State applicable to each profession in the combination.

HISTORY: Derived from 1976 Code Section 33‑51‑30 [1962 Code Section 56‑1603; 1962 (52) 1911; Repealed, 1988 Act No. 44, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

It is customary to limit the purposes of a professional corporation to the practice of a single profession. Section 11(a) (Section 33‑19‑110(a)) follows the large majority of existing state statutes in this respect. But the ethical canons of the various professions are not uniform in restricting the activities of a professional group to a single professional field. For example, engineers and architects are often permitted to carry on joint practice. In other fields, such as medicine and the allied health professions, the extent to which professional practices may be combined is an evolving subject. Accordingly, subsection (b) shifts the responsibility for determining the extent to which two or more professions may be combined in a single corporation, and the extent to which a professional corporation may engage in business activities outside of rendering professional services, to the licensing statutes and regulations governing each profession where variations in public policy and ethical requirements of the various professions may be appropriately considered.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Sections 33‑19‑110 through 33‑19‑140 regulate the purposes and powers of a professional corporation and its employees. In addition to being clearer and more precise, these sections change the former rules as set forth in Sections 33‑51‑30, 33‑51‑50, 33‑51‑60, and 33‑51‑160 of the 1962 South Carolina Professional Association Act in the following respects:

(a) Section 33‑19‑110(b) authorizes a professional corporation to practice more than one profession if authorized to do so by the requisite licensing authority. Under former Section 33‑51‑30, a professional corporation was authorized only to practice a single profession. As the Official Comment points out, some professions, e.g., architects and engineers, practice in the same firm and there should be no legal impediment to their practicing together as a professional corporation as long as the state regulatory bodies having licensing authority over each profession specifically authorize dual professional practices as a professional corporation.

(b) Section 33‑19‑120(b) specifically authorizes a professional corporation to be associated in various capacities (e.g., partner, promoter, or joint venturer) with other business entities so long as the other entities are engaged solely in rendering professional services or other authorized business activities. The ability to engage in such activities under the 1962 South Carolina Professional Association Act was unclear.

2. No substantive changes in the Model Act Official Text of this section were made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 11.

CROSS REFERENCES

Authority to transact business, see Section 33‑19‑500.

Corporate name, see Section 33‑19‑150.

Corporate purposes generally, see Section 33‑3‑101.

Corporate purposes for benefit corporations, see Section 33‑38‑300.

“Law” defined, see Section 33‑19‑103.

“Professional service” defined, see Section 33‑19‑103.

Rules of licensing authority, see Section 33‑19‑610.

Library References

Corporations 14(2).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 28.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Charities Section 43, Benefit Corporations‑Corporate Purposes.

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

Attorney General’s Opinions

Professional corporation authorized by its article of incorporation to engage in environmental remediation may and should subcontract the construction portion of those projects to a licensed contractor. S.C. Op.Atty.Gen. (April 24, 2017) 2017 WL 1717129.

**SECTION 33‑19‑120.** General powers.

(a) Except as provided in subsection (b), a professional corporation has the powers enumerated in Section 33‑3‑102.

(b) A professional corporation may be a promoter, general partner, member, associate, or manager of a partnership, joint venture, trust, or other entity only if the entity is engaged solely in rendering professional services or in carrying on business authorized by the professional corporation’s articles of incorporation.

HISTORY: Derived from 1976 Code Section 33‑51‑160 [1962 Code Section 56‑1616; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Under section 12 (Section 33‑19‑120) of this Supplement, professional corporations have all the powers of business corporations. Section 12(b) (Section 33‑19‑12(b)) restricts only the power to participate in partnerships and similar enterprises engaged in activities not permitted to the professional corporation. Investment in limited partnerships as a limited partner is not prohibited by this section. The extent to which professional corporations may make passive investments, such as investing in a limited partnership, is set forth in section 14 (Section 33‑19‑140).

SOUTH CAROLINA REPORTERS’ COMMENTS

See Comment 1 to the South Carolina Reporters’ Comments to Section 33‑19‑110.

No substantive changes in the Model Act Official Text have been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 12.

CROSS REFERENCES

Corporate powers generally, see Section 33‑3‑102.

“Entity” defined, see Section 33‑1‑400.

“Professional service” defined, see Section 33‑19‑103.

Prohibited activities, see Section 33‑19‑140.

Library References

Corporations 370 to 525.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 69, 77, 84 to 85, 554 to 688, 690 to 735.

C.J.S. Wills Sections 93 to 94, 96.

**SECTION 33‑19‑130.** Rendering professional services.

(a) A domestic or foreign corporation may render professional services in this State only through individuals licensed or otherwise authorized in this State to render the services.

(b) Subsection (a) does not:

(1) require an individual employed by a professional corporation to be licensed to perform services for the corporation if a license is not required otherwise;

(2) prohibit a licensed individual from rendering professional services in his individual capacity although he is a shareholder, director, officer, employee, or agent of a domestic or foreign professional corporation;

(3) prohibit an individual licensed in another state from rendering professional services for a domestic or foreign professional corporation in this State if not prohibited by the licensing authority.

HISTORY: Derived from 1976 Code Section 33‑51‑50 [1962 Code Section 56‑1605; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑60 [1962 Code Section 56‑1606; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 13(a) (Section 33‑19‑130(a)) makes clear that unlicensed employees of professional corporations are not authorized to render professional services on behalf of the corporation. Section 13(b)(1) (Section 33‑19‑130(b)(1)) ensures that the use of paraprofessionals and other assistants customarily employed by professionals is not adversely affected by section 13(a) (Section 33‑19‑130(a)). Section 13(b)(2) (Section 33‑19‑130(b)(2)) recognizes that a licensed employee of a professional corporation may also render services in his individual capacity rather than as an employee of the corporation, depending upon the circumstances of his employment. For example, an employee of a professional corporation may render professional services in his individual capacity in states in which the professional corporation is not qualified as a foreign corporation. Section 13(b)(3) (Section 33‑19‑130(b)(3)) recognizes the modern trend toward multi‑state professional practice by permitting individuals licensed in another state to practice for a professional corporation in this state—they are “otherwise authorized” within the meaning of section 13(a) (Section 33‑19‑130(a))—so long as this state’s licensing authority does not prohibit the practice.

SOUTH CAROLINA REPORTER’S COMMENTS

1. See Comment 1 to the South Carolina Reporters’ Comments to Section 33‑19‑110.

2. This section makes it clear that a professional who is a qualified shareholder in a professional association but who is not licensed to practice the profession in South Carolina may be able to render some professional services in this State to the extent permitted to do so by federal or state law. Lawyers not admitted to practice in South Carolina, for example, can handle transitory, incidental matters that do not involve significant sustained contact with South Carolina or matters that involve solely issues of federal law. The outer limits of such representation are not clear, however. See Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2nd Cir.), cert. denied, 385 U.S. 987 (1966); Florida Bar v. Savitt, 363 So.2d 559 (Fla. 1978); In re Estate of Waring, 47 N.J. 367, 221 A.2d 193 (1966).

3. Foreign professional corporations who maintain an office in South Carolina must qualify to conduct business in South Carolina pursuant to Sections 33‑19‑500 through 33‑19‑520.

No substantive changes in the Model Act Official Text were made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 13.

CROSS REFERENCES

“Employee” defined, see Section 33‑1‑400.

“Licensing authority” defined, see Section 33‑19‑103.

“Professional service” defined, see Section 33‑19‑103.

Rulemaking by licensing authority, see Section 33‑19‑610.

Library References

Corporations 370(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 554 to 555, 557, 567, 573.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

**SECTION 33‑19‑140.** Prohibited activities.

(a) A professional corporation may not render any professional service or engage in any business other than the professional service and business authorized by its articles of incorporation.

(b) Subsection (a) does not prohibit a professional corporation from investing its funds in real estate, mortgages, securities, or any other type of investment.

HISTORY: Derived from 1976 Code Section 33‑51‑50 [1962 Code Section 56‑1605; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The express statutory prohibition against ultra vires acts in this section is included to provide a basis on which the licensing authority may initiate enforcement action under section 42 (Section 33‑19‑420) to prevent a professional corporation from engaging in prohibited activities. In addition, the limited remedies against ultra vires actions set forth in section 3.04 (Section 33‑3‑104) of the Model Act are also available.

Section 14(b) (Section 33‑19‑140(b)) expressly permits a professional corporation to invest its funds “in real estate, mortgages, securities, or any other type of investment.” This section should be read in conjunction with section 11 and its Official Comment. Section 14(b) (Section 33‑19‑140(b)) was included to make clear that a professional corporation may invest its excess cash in investments of the type typically used for that purpose by general businesses. It also permits a professional corporation to invest in real estate or make other investments that are investments that are incidental to the rendering of the professional service for which it was formed, and which do not rise to the level of an independent business purpose.

SOUTH CAROLINA REPORTERS’ COMMENTS

See Comment 1 to the South Carolina Reporters’ Comments to Section 33‑19‑110. This section is quite similar to Section 33‑51‑50 of the 1962 South Carolina Professional Association Act.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 14.

CROSS REFERENCES

Articles of incorporation, see Section 33‑2‑102.

Corporate purposes: generally, see Section 33‑3‑101.

Corporate purposes: professional corporations, see Section 33‑19‑110.

“Professional service” defined, see Section 33‑19‑103.

Ultra vires, see Section 33‑3‑104.

Library References

Corporations 377, 382.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 560, 564.

**SECTION 33‑19‑150.** Corporate name.

(a) The name of a domestic professional corporation and of a foreign professional corporation authorized to transact business in this State, in addition to satisfying the requirements of Sections 33‑4‑101 and 33‑15‑106:

(1) must contain the words “professional corporation”, “professional association”, “service corporation”, or “chartered” or the abbreviation “P.C.”, “PC”, or “P.A.”, or “PA”.

(2) may not contain language stating or implying that it is incorporated for a purpose other than that authorized by Section 33‑19‑110 and its articles of incorporation; and

(3) must conform with any rule promulgated by the licensing authority having jurisdiction over a professional service described in the corporation’s articles of incorporation.

(b) Sections 33‑4‑101 and 33‑15‑106 do not prevent the use of a name otherwise prohibited by those sections if it is the personal name of a shareholder or former shareholder of the domestic or foreign professional corporation or the name of an individual who was associated with a predecessor of the corporation.

HISTORY: Derived from 1976 Code Section 33‑51‑40 [1962 Code Section 56‑1604; 1962 (52) 1911; Repealed; 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 15 (Section 33‑19‑150) assures that the name of every professional corporation identifies its status by requiring that its name include a distinctive word or its abbreviation. In other respects, the name provisions of the Model Act are applicable to professional corporations (see section 2 (Section 33‑19‑200)), except that section 15(b) (Section 33‑19‑150(b)) permits a professional corporation to use a name indistinguishable in the records of the secretary of state from another name currently in use if the sameness or similarity of names results from the use of the personal names of individuals associated with the enterprise.

In addition, the licensing authority is authorized by section 15(a)(3) and section 63 (Sections 33‑19‑150(a)(3) and 33‑19‑630) to impose by rule additional name requirements appropriate to a particular profession.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section authorizes more options for the designation of the corporation’s status as a professional corporation than did existing Section 30‑51‑40 of the 1962 Professional Association Act, which required the use of either “Professional Association” or “P.A”. There is no reason why the flexibility permitted by the Model Act should not be authorized. Moreover, the options will facilitate the ability of foreign professional corporations to qualify to do business in South Carolina without the necessity of changing their corporate name.

Three changes were made in this section from the Model Act Official Text: (1) authorization to use the abbreviations “PC”, “PA”; (2) deletion of “S.C.” or SC on the grounds this designation might be misinterpreted as connoting the professional corporation had some official connection with the State of South Carolina; and (3) authorization for the use of “chartered” as part of the name (several other states authorize this designation for professional corporations).

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 15.

CROSS REFERENCES

Authority to transact business foreign corporation, see Sections 33‑15‑101 et seq.

Authority to transact business generally, see Section 33‑19‑500.

Corporate name generally, see Sections 33‑4‑101 et seq.

Election of professional corporation status by corporation, see Section 33‑19‑109.

“Licensing authority” defined, see Section 33‑19‑103.

Purposes of professional corporation, see Section 33‑19‑110.

Rulemaking by licensing authority, see Section 33‑19‑610.

Library References

Corporations 45.

Westlaw Topic No. 101.

C.J.S. Corporations Section 98.

ARTICLE 3

Shares

**SECTION 33‑19‑200.** Issuance of shares.

(a) A professional corporation may issue shares, fractional shares, and rights or options to purchase shares only to:

(1) individuals who are authorized by law in this or another state to render a professional service described in the corporation’s articles of incorporation;

(2) general partnerships in which all the partners are qualified persons with respect to the professional corporation and in which at least one partner is authorized by law in this state to render a professional service described in the corporation’s articles of incorporation;

(3) professional corporations, domestic or foreign, authorized by law in this State to render a professional service described in the corporation’s articles of incorporation.

(b) If a licensing authority with jurisdiction over a profession considers it necessary to prevent violation of the ethical standards of the profession, the authority by rule may restrict or condition, or revoke in part, the authority of professional corporations subject to its jurisdiction to issue shares. A rule promulgated under this section does not, of itself, make a shareholder of a professional corporation at the time the rule becomes effective a disqualified person.

(c) Shares issued in violation of this section or rules promulgated under this section are void.

HISTORY: Derived from 1976 Code Section 33‑51‑100 [1962 Code Section 56‑1610; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑140 [1962 Code Section 56‑1614; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Unlike many existing state statutes, this Supplement permits shares of a professional corporation to be issued to persons licensed in states other than the state of incorporation to render the same professional service permitted by the articles of incorporation of the issuing corporation. It also permits shares to be issued to partnerships and other professional corporations authorized to render those services as well.

Many existing state statutes limit shareholders to natural persons. If shareholders are not personally liable for debts of the corporation, however, there is no policy reason against permitting another corporation that is subject to the same professional corporation requirements to acquire shares of the professional corporation. In addition, this gives professional corporations the same flexibility in planning the corporate structure as business corporations generally. On the other hand, if either alternative 2 or 3 of section 34 (Section 33‑19‑340) is adopted, so that shareholders are personally liable for the performance of professional services rendered on behalf of the corporation, then it is recommended that section 20(a)(3) (Section 33‑19‑200(a)(3)) be deleted so that the holding company device may not be used to avoid personal liability.

Section 20 (Section 33‑19‑200) applies to all classes of shares issued by a professional corporation. No qualifications are imposed by this Supplement on holders of debt securities. While a professional corporation may issue convertible debt, it is unlikely to do so since the corporation will not have power under section 20(a) (Section 33‑19‑200(a)) to issue its shares upon conversion unless the holder is a qualified person at the time the shares are to be issued.

In most states the interest of a partner in a professional partnership is exempted by definition or otherwise from the application of the state securities law. A few states have exempted shares of a professional corporation, but many states have ignored this problem in enacting professional corporation laws. Because the “one subject” requirement of state constitutions may prohibit amendment of the state securities law in a professional corporation act, this Supplement does not create a securities law exemption for shares of professional corporations. It is recommended, however, that shares of professional corporations be exempted from the state securities law by appropriate amendment of that law.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section makes it clearer than the 1962 South Carolina Professional Association Act that: (1) individuals who are licensed professionals in states other than South Carolina can be shareholders in a professional corporation organized in South Carolina, and (2) general partnerships and professional corporations can be shareholders in a foreign or South Carolina professional corporation organized in South Carolina. Compare former Section 33‑51‑100 (stock can be issued to “persons”, an undefined term, “who are duly licensed or otherwise legally authorized to render the same professional service as that for which the professional association was organized”) and Section 33‑51‑140 (transfers of stock in a professional association can be made only to another “individual” who is duly licensed . . .”).

Section 33‑51‑100 of the 1962 South Carolina Professional Association Act authorized nonstock professional corporations. Since there is no known use of this authorization, it is not included in this act.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 20.

CROSS REFERENCES

“Disqualified person” defined, see Section 33‑19‑103.

Fractional shares, see Section 33‑6‑104.

“Professional service” defined, see Section 33‑19‑103.

“Qualified person” defined, see Section 33‑19‑103.

Share issuance generally, see Sections 33‑6‑200 et seq.

Share rights and options, see Section 33‑6‑240.

Share transfer restrictions, see Section 33‑19‑220.

Library References

Corporations 74, 82.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 180, 185, 193 to 195.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

South Carolina Legal and Business Forms Section 3:5 , Checklist‑Drafting Bylaws.

South Carolina Legal and Business Forms Section 3:19 , Bylaws‑Management by Board of Directors.

South Carolina Legal and Business Forms Section 3:22 , Bylaws‑Provision‑Capital Stock‑Termination of Right to Own Stock.

LAW REVIEW AND JOURNAL COMMENTARIES

The Professional Association’s Corporate Tax Status. 22 S.C. L. Rev. 73.

Tax Considerations of Professional Associations. 17 S.C. L. Rev. 212.

**SECTION 33‑19‑210.** Notice of professional corporation status on shares.

(a) The following statement must appear conspicuously on each share certificate issued by a professional corporation:

“The transfer of shares of a professional corporation is restricted by the South Carolina Professional Corporation Supplement, Chapter 19 of Title 33, and may be subject to further restriction imposed by the licensing authority. Shares of a professional corporation are subject also to a statutory repurchase obligation.”

(b) Within a reasonable time after the issuance or transfer of uncertificated shares of a professional corporation, the corporation shall send the shareholders a written notice containing the statement required by subsection (a).

HISTORY: Derived from 1976 Code Section 33‑51‑100 [1962 Code Section 56‑1610; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑140 [1962 Code Section 56‑1614; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 21(a) (Section 33‑19‑210(a)) promotes uniformity and protects possible purchasers of shares by making the text of the share restriction notice a statutory requirement. It is contemplated that the statutory notice (suitably modified in each state’s professional corporation statute) will appear in haec verba on each share certificate. A reference to certificateless shares is also included in section 21(b) (Section 33‑19‑210(b)), even though these shares are not now commonly issued by professional corporations. They may become more widely used pursuant to section 6.26 (Section 33‑6‑260) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

The stock legend required by this section is similar to that required for close corporations governed by the Statutory Close Corporation Supplement. See Section 33‑18‑109. If a professional corporation elects to become a statutory close corporation (see Section 33‑19‑102(b)), the shares must contain both legends.

See Section 33‑19‑700 for the applicability of this section to the shares of professional corporations formed before the effective date of this act.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 21.

CROSS REFERENCES

Application of code provision to existing professional corporation, see Section 33‑19‑700.

Certificateless shares, see Section 33‑6‑260.

Compulsory acquisition of shares, see Section 33‑19‑230.

“Conspicuous” defined, see Section 33‑1‑400.

Restrictions on issuance of shares, see Section 33‑19‑200.

Share transfer restrictions: breach of prohibition against transfers, see Section 33‑19‑221.

Share transfer restrictions: generally, see Section 33‑6‑270.

Share transfer restrictions: professional corporation shares, see Section 33‑19‑220.

Shares certificates, see Section 33‑6‑250.

Library References

Corporations 95.

Westlaw Topic No. 101.

C.J.S. Corporations Section 174.

LAW REVIEW AND JOURNAL COMMENTARIES

The Professional Association’s Corporate Tax Status. 22 S.C. L. Rev. 73.

Tax Considerations of Professional Associations. 17 S.C. L. Rev. 212.

**SECTION 33‑19‑220.** Share transfer restriction.

(a) A shareholder of a professional corporation may transfer or pledge shares, fractional shares, and rights or options to purchase shares of the corporation only to individuals, general partnerships, and professional corporations qualified under Section 33‑19‑200 to be issued shares.

(b) A transfer of shares made in violation of subsection (a), except one made by operation of law or court judgment, is void.

HISTORY: Derived from 1976 Code Section 33‑51‑140 [1962 Code Section 56‑1614; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The statutory restriction on transfers of shares in section 22 (Section 33‑19‑220) is one of the unique characteristics that distinguish professional from business corporations. Unlike shares of business corporations, which are freely transferable in the absence of consensual restraints which themselves may not be unreasonable restraints on alienation, the shares of professional corporations are transferable only to a limited extent.

A restricted right of transfer is essential if operation of the professional corporation is to remain consistent with the ethical restraints applicable to a number of professions. In this respect a professional corporation more closely resembles a partnership than a traditional business corporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section authorizes transfers of shares in a professional corporation only to persons, including general partnerships and professional corporations, who are qualified to be shareholders under Section 33‑19‑200. Section 33‑51‑140 of the 1962 South Carolina Professional Association Act, however, only allowed transfers to be made to “individuals”. See also the South Carolina Reporters’ Comments to Section 33‑19‑200.

A professional corporation that elects to be a corporation governed by the Statutory Close Corporation Supplement (Chapter 18 of this title) will have to include in its articles of incorporation appropriate language modifying the statutory transfer restrictions in Section 33‑18‑110 so that the applicable share transfer restrictions are not in conflict with this section. See Section 33‑19‑102 and the South Carolina Reporters’ Comments thereto.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 22.

CROSS REFERENCES

Fractional shares, see Section 33‑6‑104.

Restrictions on issuance of shares, see Section 33‑19‑200.

Share rights and options, see Section 33‑6‑240.

Share transfer restrictions: generally, see Section 33‑6‑270.

Share transfer restrictions: statement on shares, see Section 33‑19‑210.

Library References

Corporations 113.

Westlaw Topic No. 101.

C.J.S. Corporations Section 220.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:5 , Checklist‑Drafting Bylaws.

South Carolina Legal and Business Forms Section 3:19 , Bylaws‑Management by Board of Directors.

South Carolina Legal and Business Forms Section 3:22 , Bylaws‑Provision‑Capital Stock‑Termination of Right to Own Stock.

LAW REVIEW AND JOURNAL COMMENTARIES

The Professional Association’s Corporate Tax Status. 22 S.C. L. Rev. 73.

Tax Considerations of Professional Associations. 17 S.C. L. Rev. 212.

**SECTION 33‑19‑221.** Attempted share transfer in breach of prohibition.

(a) An attempt to transfer shares in a professional corporation in violation of a prohibition against transfer binding on the transferee is ineffective.

(b) An attempt to transfer shares in a professional corporation in violation of a prohibition against transfer that is not binding on the transferee, either because the notice required by Section 33‑19‑210 was not given or because the prohibition is held unenforceable by a court, gives the professional corporation an option to purchase the shares from the transferee for the same price and on the same terms that he purchased them. To exercise its option, the corporation must give the transferee written notice within thirty days after they are presented for registration in the transferee’s name. The professional corporation may enforce specifically the transferee’s sale obligation upon exercise of its purchase option.

HISTORY: Derived from 1976 Code Section 33‑51‑140 [1962 Code Section 56‑1614; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

None. There is no Model Act counterpart to this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section provides protection to a professional corporation in the event the restrictions on transfer of its shares are ineffective. It parallels a similar provision governing statutory close corporations. See Section 33‑18‑130 and the South Carolina Reporters’ Comments thereto.

DERIVATION: New. This section has no 1984 Model Act Professional Corporation Supplement counterpart.

Library References

Corporations 119.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 234, 237, 248.

LAW REVIEW AND JOURNAL COMMENTARIES

The Professional Association’s Corporate Tax Status. 22 S.C. L. Rev. 73.

Tax Considerations of Professional Associations. 17 S.C. L. Rev. 212.

**SECTION 33‑19‑230.** Compulsory acquisition of shares after death or disqualification of shareholder.

(a) A professional corporation must acquire or cause to be acquired by a qualified person the shares of its shareholder, if and as of the date of death, disqualification, or transfer, if:

(1) the shareholder dies;

(2) the shareholder becomes a disqualified person, except as provided in subsection (c); or

(3) the shares are transferred by operation of law or court judgment to a disqualified person, except as provided in subsection (c).

(b) If a price for the shares is fixed in accordance with the articles of incorporation or bylaws or by private agreement, that price controls. If the price is not so fixed, the corporation shall acquire the shares in accordance with Section 33‑19‑240. If the disqualified person rejects the corporation’s purchase offer, either the person or the corporation may commence a proceeding under Section 33‑19‑250 to determine the fair value of the shares.

(c) This section does not require the acquisition of shares in the event of disqualification if the disqualification lasts no more than five months from the date the disqualification or transfer occurs.

(d) This section and Section 33‑19‑240 do not prevent or relieve a professional corporation from paying pension benefits or other deferred compensation for services rendered to a former shareholder if otherwise permitted by law.

(e) Unless the shareholders otherwise agree, this section does not apply to a shareholder who dies and by will leaves his shares in the corporation to one or more of the remaining shareholders.

HISTORY: Derived from 1976 Code Section 33‑51‑110 [1962 Code Section 56‑1611; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑120 [1962 Code Section 56‑1612; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

An essential feature of professional corporation acts is that the shares of a deceased or disqualified shareholder must be transferred to a qualified shareholder or purchased by the corporation within a specified period of time following the shareholder’s death or disqualification. Section 23 (Section 33‑19‑230) provides that the fair value of the shares is determined by (1) the price established in advance by agreement, or, if none, (2) by the corporation’s estimate of fair value if accepted by the shareholder or his representative, or, if not, (3) by a judicial determination of fair value as provided in section 25 (Section 33‑19‑250). This procedure parallels the procedure set forth in chapter 13 of the Model Act relating to dissenters’ rights. Shares of a deceased or disqualified shareholder that have not been transferred or purchased within the time limits specified in section 27 (Section 33‑19‑270) are cancelled and the shareholder’s interest becomes a creditor’s claim under that section.

Section 6.40 (Section 33‑6‑400) of the Model Act applies the equitable insolvency test to a professional corporation’s acquisition of its own shares. If this test limits the immediate power of a professional corporation to purchase the shares for cash, section 25 (Section 33‑19‑250) of this Supplement permits a court in an appraisal action to order the acquisition price to be paid in installments. Alternatively, the corporation may arrange for the shares to be acquired by a qualified person.

One of the troublesome aspects of the requirement that a shareholder of a professional corporation be licensed to practice the profession is the disposition of the corporate entity of a deceased sole practitioner. If the shares of a deceased shareholder are not transferred to a qualified person, the executor may vote the shares (under MBCA section 7.24 (Section 33‑7‑240)) to dissolve the corporation or to amend the articles of incorporation to change the corporation into a regular business corporation. If the executor elects to dissolve, a licensed member of the profession must act as director and president during the winding up of the corporation’s affairs. If the executor elects to amend the articles, he may do so himself by simply signing and filing articles of amendment pursuant to sections 7.04 and 10.6 (Sections 33‑7‑104 and 33‑10‑106) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. This section requires that a professional corporation purchase the shares of (1) a deceased shareholder unless the deceased shareholder leaves his or her shares by will to one or more of the remaining shareholders in the professional corporation; (2) a shareholder who is disqualified from practicing the profession which is practiced by the professional corporation, unless the disqualification will not last for more than five months; and (3) a disqualified shareholder who acquired the shares by operation of law or court order. Examples of the last‑mentioned circumstance include a court ordered transfer of shares in a professional corporation to a spouse incident to a divorce (see Udel v. Udel, 82 Misc.2d 882, 370 N.Y.S.2d 426 (Cir. Ct. 1975)) or a court ordered transfer of shares in a professional corporation to a trustee in bankruptcy or from a bankrupt shareholder to a disqualified shareholder. Under the federal Bankruptcy Code all property belonging to the bankrupt automatically becomes property of the estate but, in the absence of court order, title remains in the bankrupt. See 11 U.S.C. Sections 541, 1306, 1327(b); 4 COLLIER ON BANKRUPTCY Section 541.02 (15th ed. 1985). Therefore, bankruptcy of a professional corporation shareholder would not trigger the compulsory purchase right created by this section. However, a transfer of the bankrupt’s shares to the trustee or a third party who was not a qualified shareholder would trigger the purchase right. Since the bankrupt estate will receive the fair value of the shares, the exercise of this buy‑out right should not contravene the provisions of the Bankruptcy Code. See Board of Travel v. Johnson, 264 U.S. 1 (1924); Pioneer Ford Sales, Inc. v. Ford Motor Co., 11 BCD 1303 (1st Cir. 1984); In re: Bronx‑West Chester Nack Corp.; 9 BCD 50 (S.D.N.Y. 1982).

2. The obligation of a professional corporation to purchase the shares of a shareholder in these circumstances under the 1962 South Carolina Professional Association Act was much less clear. See Sections 33‑51‑110 and 33‑51‑120 of the 1962 Professional Association Act.

One major substantive change in this section from the 1962 South Carolina Professional Association Act is the use of a fair value statutory standard for the purchase as compared to the book value standard in former Section 33‑51‑120. Under both acts, the statutory standard can be varied by agreement between the shareholders. For an explanation of the application of this change on professional corporations formed before the effective date of this act, see infra Section 33‑19‑700 and paragraph 3 of the South Carolina Reporters’ Comments thereto.

3. Some professions have codes of ethics that prohibit the division of fees with a lay person. This prohibition should not prevent the payment for the interest of a decedent’s interest in a professional corporation to the estate or heirs. DR 3‑101 of the South Carolina Code of Professional Responsibility, for example, states that the prohibition against fee splitting “does not mean, however, that the pecuniary value of the interest of the deceased lawyer may not be paid to his estate or specified persons such as his widow or heirs.”

4. Subsection (e) is not included in the Model Act Official Text. This subsection will allow a shareholder in a professional corporation to will his shares to another shareholder in the corporation. It will be primarily of use in professional corporations where two or more members of the same family are shareholders at the time of the decedent’s death. Without this provision, the surviving family shareholders could not obtain the decedent’s shares unless all the remaining shareholders consented.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 23.

CROSS REFERENCES

Acquisition of own shares by professional corporation, see Section 33‑6‑400.

Appraisal proceeding, see Section 33‑19‑250.

“Disqualified person” defined, see Section 33‑19‑103.

Option to purchase shares of a terminated shareholder, see Section 33‑19‑231.

“Proceeding” defined, see Section 33‑1‑400.

“Qualified person” defined, see Section 33‑19‑103.

Voting by representatives, see Section 33‑7‑220.

Library References

Corporations 82, 111, 120.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 180, 193 to 195, 217, 234, 239 to 241.

**SECTION 33‑19‑231.** Option to purchase shares of a terminated shareholder.

(a) A professional corporation has a thirty‑day option to purchase the shares of any qualified shareholder whose employment with the corporation is voluntarily or involuntarily terminated unless the shares of the terminated shareholders are required to be purchased upon termination pursuant to an agreement among the shareholders of the corporation.

(b) To be exercised, the option must be approved by the affirmative vote of the holders of a majority of the shares entitled to vote thereon, excluding votes in respect of the shares owned by the terminated shareholder, and written notice of exercise of the option must be delivered to the terminated shareholder within thirty days after the shareholder’s employment is terminated.

(c) If the option is exercised, the terminated shareholder must sell all his shares to the professional corporation and the sale must be treated in the same manner as a compulsory sale made pursuant to Section 33‑19‑230.

(d) A professional corporation that exercises an option to purchase under this section may allocate some or all of the shares to be purchased to one or more of its shareholders or to other qualified persons if all the shareholders voting in favor of the purchase approve the allocation. If the professional corporation has more than one class or series of shares, the remaining holders of the class or series of shares being purchased are entitled to a first option to purchase the shares not purchased by the professional corporation in proportion to their shareholdings or in some other proportion agreed to by all the shareholders participating in the purchase.

HISTORY: Derived from 1976 Code Section 33‑51‑110 [1962 Code Section 56‑1611; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)], and Section 33‑51‑120 [1962 Code Section 56‑1612; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

None. There is no Model Act counterpart to this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Model Act does not have a statutory provision dealing with the purchase of shares from a qualified shareholder whose employment with a professional corporation has been voluntarily or involuntarily terminated. The 1962 South Carolina Professional Association Act was very ambiguous on this issue. Former Section 33‑51‑110 of the 1976 South Carolina Code appears to require purchase of the shares of a deceased or disqualified shareholder; and former Section 33‑51‑120, which sets forth the rules for determining the price of the shares to be purchased, speaks in terms of a “deceased, retired, expelled, or disqualified member or shareholder”. However, the end of the same sentence, which sets book value as the purchase price in the absence of a different price being established in the articles of incorporation or bylaws, states that the value must be determined at the end of the month preceding “the death or disqualification of the member or shareholder”.

Unless his shares are purchased, a terminated professional corporation shareholder who is not a disqualified person can exercise all the powers of a corporate shareholder, including the right to inspect the corporate books and records and the right to receive notice of and to attend shareholders’ meetings. Cf. Melba v. O’Melia, 93 Wis.2d 373, 286 N.W.2d 373 (Ct. App. 1979). Exercise of these rights at the very least would create an embarrassing situation for everyone concerned. Moreover, the continued association with the firm could create serious ethical problems involving conflicts of interest and improper disclosure of confidences; and any dividends paid to the terminated shareholder based on fees generated after the termination of the shareholder’s employment might be classified as an improper division of professional fees. See DR 2‑107, 4‑101, and 5‑105D of the South Carolina Code of Professional Responsibility, which is the ethical code that regulates the conduct of all lawyers practicing law in South Carolina. See also Vinall v. Hoffman, 133 Ariz. 322, 651 P.2d 850 (1982).

A carefully drafted share purchase agreement could provide for an optional or mandatory purchase of the terminated shareholders’ shares. Because many professional corporations do not have such agreements, however, a specific statute dealing with this issue is desirable. See Corlett, Killian, Hardeman, McIntosh and Levi, P.A. v. Merritt, 478 So.2d 828 (Fla. App. 1985); Melby v. O’Melia, supra.

This section gives a professional corporation a thirty‑day option to purchase the shares of the terminated shareholder. Section 33‑19‑230, on the other hand, provides for a compulsory purchase of the shares of a deceased or disqualified shareholder. The fact that there may be circumstances where the continuing shareholders want the terminated shareholder to remain as a shareholder in the professional corporation and the continuing shareholders may not have sufficient funds to purchase the shares justifies the difference in treatment. The shareholders, however, could broaden the purchase right granted by this section should they choose to do so. The shareholders, for example, could enter into an agreement creating an automatic mandatory purchase obligation effective upon termination. Alternatively, the shareholders could enter into an agreement giving the terminated shareholder an option to compel the professional corporation to purchase his shares in the event the corporation did not exercise the purchase option granted by this section. This section protects the remaining shareholders against potential unwanted interference by the terminated shareholder in the professional corporation’s affairs but does not provide any liquidity right should the professional corporation not exercise the statutory purchase right. See Corlett, Killian, Hardeman, McIntosh and Levi, P.A. v. Merritt, supra (in the absence of statute or a private agreement, a former employee has no right to compel a professional corporation to purchase his shares).

DERIVATION: None. This section has no 1984 Model Act Professional Corporation Supplement counterpart.

CROSS REFERENCES

Acquisition of own shares by a professional corporation, see Section 33‑6‑400.

Agreement defined, see Section 33‑1‑400.

Cancellation of disqualified shares, see Section 33‑19‑270.

Deliver defined, see Section 33‑1‑400.

“Disqualified person” defined, see Section 33‑19‑103.

“Qualified person” defined, see Section 33‑19‑103.

Library References

Corporations 82, 115.1, 120.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 180, 193 to 195, 234, 239 to 241.

**SECTION 33‑19‑240.** Acquisition procedures.

(a) If shares must be acquired under Section 33‑19‑230 or 33‑19‑231, the professional corporation shall deliver a written notice to the executor or administrator of the estate of its deceased shareholder, to the disqualified person or transferee or to the terminated shareholder, as the case may be (the selling shareholder), offering to purchase the shares at a price the corporation believes represents their fair value as of the date of death, disqualification, transfer, or termination. The offer notice must state that interest is paid on the shares from the valuation date until the date of payment, the rate of interest, and an explanation of why that rate was selected. The offer notice must be accompanied by the corporation’s balance sheet for a fiscal year ending not more than sixteen months before the effective date of the offer notice, an income statement for that year, a statement of changes in shareholders’ equity for that year, the latest available interim financial statements, if any, and an explanation of how the fair value was calculated.

(b) The selling shareholder has thirty days from the effective date of the notice to accept the corporation’s offer or demand that the corporation commence a proceeding under Section 33‑19‑250 to determine the fair value of the shares. Unless a later date is agreed on, if the offer is accepted, the corporation shall make payment for the shares within sixty days from the effective date of the offer notice upon the selling shareholder’s surrender of his shares to the corporation.

(c) After the corporation makes payment for the shares, the selling shareholder has no further interest in them.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

See the Official Comment to Sections 33‑19‑230 and 33‑19‑250.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which has no counterpart in the 1962 South Carolina Professional Association Act, sets forth the procedure for acceptance and rejection of the professional corporation’s share purchase obligation under Sections 33‑19‑230 and 33‑19‑231. The Model Act language has been modified to make it reasonably consistent with the procedures for dissenters’ rights cases in this act. See Sections 33‑13‑250, 33‑13‑260, and 33‑13‑280.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 24.

CROSS REFERENCES

Appraisal proceeding, see Section 33‑19‑250.

Cancelation of disqualified shares, see Section 33‑19‑270.

“Deliver” includes mail, see Section 33‑1‑400.

“Disqualified person” defined, see Section 33‑19‑103.

Effective date of notice, see Section 33‑1‑410.

“Notice” defined, see Section 33‑1‑410.

Library References

Corporations 115.1 to 120.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 233 to 248.

**SECTION 33‑19‑250.** Court action to appraise shares.

(a) If the selling shareholder does not accept the professional corporation’s offer under Section 33‑19‑240(b) within the thirty‑day period, the shareholder during the following thirty‑day period may deliver a written notice to the corporation demanding that it commence a proceeding to determine the fair value of the shares. The corporation may commence a proceeding at any time during the sixty days following the effective date of its offer notice. If it does not do so, the shareholder may commence a proceeding against the corporation to determine the fair value of his shares.

(b) The corporation or selling shareholder shall commence the proceeding in the circuit court of the county where the corporation’s principal office or, if none in this State, its registered office is located. The corporation shall make the selling shareholder a party to the proceeding as in an action against his shares. The jurisdiction of the court in which the proceeding is commenced is plenary and exclusive.

(c) The court may appoint appraisers to receive evidence and recommend decisions on the question of fair value. The appraisers have the power described in the order appointing them or in any amendment to it.

(d) The selling shareholder is entitled to judgment for the fair value of his shares determined by the court as of the date of death, disqualification, or transfer or termination together with interest from that date at a rate found by the court to be fair and equitable.

(e) The court may specify the terms of the purchase in the order of judgment including, if appropriate, terms for installment payments, subordination of the purchase obligation to the rights of the corporation’s other creditors, security for a deferred purchase price, a covenant not to compete or other restriction on the selling shareholder, and release or indemnification from any guarantees of obligations of the professional corporation made by the selling shareholder or his predecessor in interest.

(f) The court shall require the selling shareholder to deliver all his shares to the purchaser upon receipt of the purchase price or, if an installment purchase is ordered, upon receipt of the first installment of the purchase price.

(g) After the purchase order is entered, any party may petition the court to modify the terms of the purchase and the court may do so if it finds that changes in the financial or legal ability of the professional corporation or other purchases to complete the purchase justify a modification.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 25 (Section 33‑19‑250) provides for a judicial ascertainment of the fair value of shares in the absence of an agreement establishing a method of determining fair value and the refusal of the shareholder to accept the corporation’s estimate of fair value under section 24 (Section 33‑19‑240).

The corporation may institute a proceeding to determine the fair value of the shares at any time after the effective date of its purchase offer. The shareholder may institute suit only after the expiration of 30 days from the date he rejects the corporation’s offer.

The method of establishing fair value by judicial proceeding is closely modeled upon chapter 13 of the Model Act relating to dissenters’ rights.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which has no counterpart in the 1962 South Carolina Professional Association Act, sets out the procedure for a court action to determine the fair value of the shares if a selling shareholder rejects the corporation’s price determination. The language in subsection (e) of the Model Act has been modified and subsections (f) and (g) have been added to this section. These modifications, which are derived from Section 42 of the Statutory Close Corporation Supplement (Section 33‑18‑420), provide guidelines for issues a judge and the parties should consider for inclusion in the share purchase order.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 25.

CROSS REFERENCES

Acquisition of own shares by professional corporation, see Section 33‑6‑400.

Cancelation of disqualified shares, see Section 33‑19‑270.

Compulsory acquisition of shares after death or disqualification of shareholder, see Section 33‑19‑230.

Court costs and fees of experts, see Section 33‑19‑260.

“Deliver” includes mail, see Section 33‑1‑400.

Effective date of notice, see Section 33‑1‑410.

“Notice” defined, see Section 33‑1‑410.

“Principal office”: defined, see Section 33‑1‑400.

“Proceeding” defined, see Section 33‑1‑400.

Registered office: required, see Section 33‑5‑101.

Library References

Corporations 121(1).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 234, 249.

**SECTION 33‑19‑260.** Court costs and fees of experts.

(a) The court in an appraisal proceeding commenced under Section 33‑19‑250 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court, and shall assess the costs against the professional corporation. The court may assess costs against the selling shareholder, in an amount the court finds equitable, if the court finds the shareholder acted arbitrarily, vexatiously, or not in good faith in refusing to accept the corporation’s offer.

(b) The court may assess the fees and expenses of counsel and experts for the selling shareholder against the corporation and in favor of the selling shareholder if the court finds that the fair value of his shares substantially exceeded the amount offered by the corporation or that the corporation did not make an offer.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 26 (Section 33‑19‑260) is closely patterned after section 13.31 (Section 33‑13‑310) of the Model Act. As described in the Official Comment to that section, the purpose of the broad grants of authority to assess costs and attorneys’ fees against the party acting in bad faith is to encourage the establishment of fair value by agreement without resorting to a formal judicial proceeding.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which has no counterpart in the 1962 South Carolina Professional Association Act, sets out the rules for allocation of court costs and the fees of lawyers and experts in an action brought pursuant to Section 33‑19‑250 to determine the fair value of shares required to be purchased by a professional corporation. The rules are very similar to those applicable in dissenters’ rights cases. See Section 33‑13‑310.

No substantive changes in the Model Act Official Text language have been made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 26.

CROSS REFERENCES

Appraisal proceeding, see Section 33‑19‑250.

Offer to acquire shares, see Section 33‑19‑240.

Library References

Costs 58, 194.44.

Westlaw Topic No. 102.

C.J.S. Costs Sections 26, 128.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 39, Compulsory Purchase Right Actions Against Professional Corporations.

**SECTION 33‑19‑270.** Cancellation of disqualified shares.

If the shares of a disqualified person are not acquired under Section 33‑19‑240 or 33‑19‑250 within ten months after the death of the shareholder or within five months after the disqualification or transfer or, in the case of the exercise of the option to purchase the shares following termination of employment, pursuant to Section 33‑19‑231, the professional corporation shall cancel immediately the shares on its books and the disqualified or terminated person has no further interest as a shareholder in the corporation other than his right to payment of the fair value of the shares under Section 33‑19‑240 or 33‑19‑250.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 27 (Section 33‑19‑270) implements the basic policy of professional corporation statutes by changing the interest of a disqualified person in a professional corporation to a creditor’s claim after the expiration of a reasonable period of time after the disqualifying event. This section defines a reasonable time as 10 months in the case of the death of a shareholder and 5 months in the case of any other disqualifying event.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which has no counterpart in the 1962 South Carolina Professional Association Act, restricts a shareholder whose shares are required to be purchased under Section 33‑19‑230 or 33‑19‑231 to the right to receive the fair value of his shares after a designated date.

The Model Act language has been modified to take into account the share purchase right in Section 33‑19‑231, which is not part of the Model Act.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 27.

CROSS REFERENCES

Acquisition procedure, see Section 33‑19‑240.

Appraisal proceeding, see Section 33‑19‑250.

Compulsory acquisition of shares, see Section 33‑19‑230.

“Disqualified person” defined, see Section 33‑19‑103.

Library References

Corporations 83.

Westlaw Topic No. 101.

C.J.S. Corporations Section 206.

ARTICLE 4

Governance

**SECTION 33‑19‑300.** Directors and officers.

Not less than one‑half of the directors of a professional corporation, and all of its officers except the secretary and treasurer, if any, must be qualified persons with respect to the corporation.

HISTORY: Derived from 1976 Code Section 33‑51‑80 [1962 Code Section 56‑1608; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section strikes a middle ground by requiring that no less than one‑half the directors and all the officers other than the secretary and treasurer of a professional corporation be licensed professionals.

Although a professional corporation need not have an officer with the title of secretary or treasurer—see section 8.40 (Section 33‑8‑400) of the Model Act—this section’s exemption is intended to apply to the officer of a professional corporation with responsibility for carrying out the duties of secretary or treasurer. See the Official Comment to section 8.40 (Section 33‑8‑400) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1962 South Carolina Professional Association Act used the term “board of governors” rather than “board of directors” and did not require any member of the board of directors or any officer to be a qualified shareholder. The former statute, however, did state that only licensed professionals “shall participate in any decisions constituting the practice of the profession.” See Section 33‑51‑80 of the 1962 South Carolina Professional Corporation Act. The rules in this section and Section 33‑19‑310 regarding governance of a professional corporation provide operational flexibility and avoid a variety of interpretive problems that could arise under the wording of former Section 33‑51‑80.

Foreign professional corporations required to register to transact business in South Carolina under Section 33‑19‑500 must satisfy the requirements of this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 30.

Library References

Corporations 282.

Westlaw Topic No. 101.

C.J.S. Corporations Section 447.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

**SECTION 33‑19‑310.** Voting of shares.

(a) Only a qualified person may be appointed a proxy to vote shares of a professional corporation.

(b) A voting trust with respect to shares of a professional corporation is not valid unless all of its trustees and beneficiaries are qualified persons. If a beneficiary who is a qualified person dies or becomes disqualified, a voting trust valid under this subsection continues to be valid for ten months after the date of death or for five months after the disqualification occurred.

HISTORY: Derived from 1976 Code Section 33‑51‑80 [1962 Code Section 56‑1608; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 31 (Section 33‑19‑310) requires that the holders of proxies and the parties to a voting trust agreement be qualified persons as defined in section 3 (Section 33‑19‑300). Further, if shareholders are personally liable for the performance of professional services rendered on behalf of the corporation under section 34 (Section 33‑19‑340), voting trusts should be prohibited by statute to prevent their use to avoid personal liability. See the Official Comment to section 34 (Section 33‑19‑340). With regard to voting agreements, section 7.31 (Section 33‑7‑310) of the Model Act is not affected by this Supplement.

Pursuant to section 7.24(b) (Section 33‑7‑240(b)) of the Model Act, the shares of a professional corporation held by an administrator, executor, guardian, conservator, or other fiduciary, and shares held by a receiver or trustee in bankruptcy, may be voted by the fiduciary, receiver, or trustee without a transfer of the shares if evidence of this status satisfactory to the corporation is made available. Upon the death or insolvency of a major shareholder, it may be necessary to dissolve the corporation or amend its articles to change the corporation into a regular business corporation. The interest of the shareholder’s estate will be protected in this situation since the holder of his shares may vote on these proposals. Since section 30 (Section 33‑19‑300) requires that one‑half the directors and the principal officers of a corporation be qualified shareholders, there is no significant risk that a disqualified person may exercise control over the professional practice of the corporation during the period that shares of the corporation are owned by the estate or a receiver of a shareholder who is not a qualified person. Accordingly, the provisions of the Model Act relating to voting by administrators and receivers are applicable to professional corporations.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section deals with the use of voting agreements, proxies, and voting trusts in a professional corporation. These issues are not adequately covered in the 1962 South Carolina Professional Association Act. Cf. former Section 33‑51‑80 of the 1976 Code.

No change in the Model Act Official Text has been made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 31.

CROSS REFERENCES

Acceptance of votes, see Section 33‑7‑240.

Acquisition of disqualified shares, see Sections 33‑19‑230 through 33‑19‑270.

“Disqualified person” defined, see Section 33‑19‑103.

Proxies, see Section 33‑7‑220.

Voting agreements, see Section 33‑7‑310.

Voting entitlement generally, see Section 33‑7‑210.

Voting trusts, see Section 33‑7‑300.

Library References

Corporations 198 to 198.1.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 380, 385 to 394.

**SECTION 33‑19‑320.** Confidential relationship.

(a) The relationship between an individual rendering professional services as an employee of a domestic or foreign professional corporation and his client or patient is the same as if the individual were rendering the services as a sole practitioner.

(b) The relationship between a domestic or foreign professional corporation and the client or patient for whom its employees are rendering professional services is the same as that between the client or patient and the employee.

HISTORY: Derived from 1976 Code Section 33‑51‑70 [1962 Code Section 56‑1607; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 32 (Section 33‑19‑320) makes clear that any relationship of confidence that exists between a professional person and his client or patient is preserved and extends to both the professional corporation and the corporate employee rendering the service. See also section 33 (Section 33‑19‑330) and its Official Comment.

SOUTH CAROLINA REPORTERS’ COMMENTS

Although Section 33‑51‑70 of the 1962 South Carolina Professional Association Act incorporated the substance of subsection (a) reaffirming the existence of the traditional confidential relationship between a client or patient and a professional rendering services to that client or patient in a professional corporation, it did not provide, as does subsection (b) of this section, that the confidential relationship also extends to the professional corporation as an entity. The language in subsection (b) could be important in cases where confidential information files in the professional corporation’s office are sought by governmental agencies or third parties.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 32.

CROSS REFERENCES

“Employee” defined, see Section 33‑1‑400.

Privileged communications, see Section 33‑19‑330.

“Professional service” defined, see Section 33‑19‑103.

Responsibility for professional services, see Section 33‑19‑340.

Library References

Accountants 8.

Attorney and Client 63.

Health 108, 196.

Westlaw Topic Nos. 11A, 198H, 45.

C.J.S. Accountants Sections 11 to 13, 15.

C.J.S. Attorney and Client Sections 165 to 166, 179 to 180, 234.

LAW REVIEW AND JOURNAL COMMENTARIES

Note, Physician’s liability for breach of confidentiality: Beyond the limitations of the privacy tort, 49 S.C. L. Rev. 1271, Summer 1998.

**SECTION 33‑19‑330.** Privileged communications.

A privilege applicable to communications between an individual rendering professional services and the person receiving the services recognized under the statute or common law of this State is not affected by this chapter. The privilege applies to a domestic or foreign professional corporation and to its employees in all situations in which it applies to communications between an individual rendering professional services on behalf of the corporation and the person receiving the services.

HISTORY: Derived from 1976 Code Section 33‑51‑70 [1962 Code Section 56‑1607; 1962 (52) 1911; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Any privilege applicable to communications with a professional person is preserved by section 33 (Section 33‑19‑330) and covers both the professional corporation and the corporate employee rendering the service. Both section 32 (Section 33‑19‑320) and this section preserve the basic relationships that have long existed in the provision of professional service.

SOUTH CAROLINA REPORTERS’ COMMENTS

The evidentiary privilege against disclosure is different from the confidential relationship that exists between a professional and his client or patient. See Section 33‑19‑320 and the South Carolina Reporters’ Comments thereto. This section does not expand the South Carolina rules as to privilege; it simply states that, whatever privilege exists, it can be asserted by or on behalf of the client or patient even though the privileged communication was made to a professional practicing in a professional corporation.

No changes in the Model Act Official Text have been made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 33.

CROSS REFERENCES

Confidential relationship, see Section 33‑19‑320.

“Employee” defined, see Section 33‑1‑400.

“Person” defined, see Section 33‑1‑400.

“Professional service” defined, see Section 33‑19‑103.

Responsibility for professional services, see Section 33‑19‑340.

Library References

Witnesses 196.

Westlaw Topic No. 410.

C.J.S. Witnesses Sections 356 to 358, 369 to 371.

LAW REVIEW AND JOURNAL COMMENTARIES

Note, Physician’s liability for breach of confidentiality: Beyond the limitations of the privacy tort, 49 S.C. L. Rev. 1271, Summer 1998.

**SECTION 33‑19‑340.** Responsibility for professional services.

(a) Each individual who renders professional services as an employee of a domestic or foreign professional corporation is liable for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner. An employee of a domestic or foreign professional corporation is not liable, however, for the conduct of other employees of the corporation unless he is at fault in appointing, supervising, or cooperating with them.

(b) A domestic or foreign professional corporation whose employees perform professional services within the scope of their employment or of their apparent authority to act for the corporation is liable to the same extent as its employees.

(c) Except as otherwise provided by statute, the personal liability of a shareholder of a domestic or foreign professional corporation is no greater in any respect than the liability of a shareholder of a corporation incorporated under the South Carolina Business Corporation Act.

HISTORY: Derived from 1976 Code Section 33‑51‑70 [1962 Code Section 56‑1607; 1962 (52) 1911; Repealed, Act No. 444, Section 4(s)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

It is unclear in many existing statutes whether shareholders in a professional corporation have the limited liability of shareholders in general business corporations for conduct for which they bear no personal responsibility under section 34 (Section 33‑19‑340); whether they have the unlimited liability they would have if they were general partners in a partnership; or whether they have some degree of limited liability in between these polar extremes. The three alternative sections 34(c) and (d) are designed to give each state legislature a choice among these three alternatives.

The alternatives set forth in sections 34(c) and (d) relate only to the liability of shareholders for conduct for which they otherwise have no personal responsibility under section 34(a) (Section 33‑19‑340(a)). In any event, the professional corporation itself is liable for all conduct of professional employees within the scope of their employment or of their apparent authority under section 34(b) (Section 33‑19‑340(b)).

The three alternative provisions as to liability of shareholders proposed in sections 34(c) and (d) are limited liability as in a business corporation (alternative 1), unlimited personal liability as in a partnership (alternative 2), and personal liability limited in amount conditioned upon financial responsibility in the form of insurance or a surety bond (alternative 3). The last alternative would permit the licensing authority for each profession to establish the minimum amount of security required as a condition for limiting liability of shareholders and to impose requirements as to the coverage provided by the policy or bond representing the security. The minimum amount of security specified by the legislature in alternative 3 would apply only if no minimum has been fixed by the licensing authority; no attempt is made in this Supplement to specify either a minimum amount or minimum coverage requirements.

Each alternative recognizes by the phrase, “Except as otherwise provided by statute,” that more specific rules as to shareholder liability may be enacted with respect to a particular profession or professions. The rules for a particular profession may also change the minimum amount of security or coverage for the particular profession under alternative 3.

Limited liability for shareholders has historically been considered by courts and by the Internal Revenue Service as one of several characteristics that distinguish the corporation from the partnership. The choice of alternatives under this section may therefore affect the tax status of professional corporations formed under this Supplement.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which adopts Alternative 1 of subsection (c) in the Model Act Official Text (see the Official Comment), sets forth the rules governing the liability of a professional in a professional corporation for malpractice. It is consistent with the intent of Section 33‑51‑70 of the 1962 South Carolina Professional Association Act. Subsection (d) of the Model Act Official Text (see the Official Comment supra) was not included in this act because it is applicable only if Alternative 3 to subsection (c) of the Model Act is adopted.

Language similar to that in this section has been held to insulate qualified shareholders in a professional corporation against personal liability for malpractice committed by other professionals in the corporation. See, e.g., Grayson v. Jones, 710 P.2d 76 (Nev. 1985); Birt v. St. Mary Hospital of Gary, Inc., 175 Ind. App. 32, 370 N.E.2d 379 (1979). The professional corporation and all employees of the professional corporation rendering professional services in the matter that gives rise to the malpractice claim, of course, would be liable. A professional employee of a professional corporation can also be held liable for negligence in appointing, supervising, or cooperating with other employees of the corporation rendering professional services to clients or patients.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 34 (Alternative 1).

CROSS REFERENCES

Application of code provision to existing professional corporation, see Section 33‑19‑700.

“Employee” defined, see Section 33‑1‑400.

“Licensing authority” defined, see Section 33‑19‑103.

“Professional service” defined, see Section 33‑19‑103.

Rulemaking by licensing authority, see Section 33‑19‑610.

“Shareholder” defined, see Section 33‑1‑400.

Library References

Accountants 8.

Attorney and Client 109, 115.

Corporations 241, 397 to 399.

Health 622.

Westlaw Topic Nos. 101, 11A, 198H, 45.

C.J.S. Accountants Sections 11 to 13, 15.

C.J.S. Corporations Sections 586 to 587, 591, 593 to 595, 598.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:1 , Legal Principles.

LAW REVIEW AND JOURNAL COMMENTARIES

Limited liability law practice, 49 S.C. L. Rev. 359, Spring 1998.

ARTICLE 5

Reorganization and Termination

**SECTION 33‑19‑400.** Merger.

(a) If all the shareholders of the disappearing and surviving corporations are qualified to be shareholders of the surviving corporation, a professional corporation may merge with another domestic or foreign professional corporation or with a domestic or foreign business corporation.

(b) If the surviving corporation is to render professional services in this State, it must comply with this chapter.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 40 (Section 33‑19‑400) permits mergers among professional corporations and business corporations to the same extent that professional and business purposes may be combined under section 11 (Section 33‑19‑110). Further, domestic professional corporations may merge with foreign professional corporations incorporated for the purpose of rendering the same professional service or a permissible combination of services under section 11 (Section 33‑19‑330). If the surviving corporation is a foreign corporation, it must be admitted as a foreign professional corporation under section 51 (Section 33‑19‑510) if it is thereafter to render professional services in this state.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, describes the legal implications of a merger between professional corporations engaged in rendering the same types of professional services.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 40.

CROSS REFERENCES

Authority to transact business, see Sections 33‑19‑500 and 33‑19‑510.

Merger, see Sections 33‑11‑101 et seq.

Purposes, see Section 33‑19‑110.

Library References

Corporations 581.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 792 to 797.

**SECTION 33‑19‑410.** Termination of professional status.

If a professional corporation ceases to render professional services, it must amend its articles of incorporation to delete references to rendering professional services and to conform its corporate name to the requirements of Section 33‑4‑101. After the amendment becomes effective, the corporation may continue in existence as a business corporation under Chapters 1 through 17 of this title and it is no longer subject to this chapter.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section expressly permits a professional corporation to continue in existence under the general business corporation act after it has ceased to render professional services; it also avoids the possibility of a forced dissolution of a corporation whose shareholders have died or become disqualified since the corporation may amend its articles to become a general business corporation under this section. See the Official Comment to section 23 (Section 33‑19‑230).

A corporation that has ceased to render professional services but does not dissolve is required to amend its articles to comply with the general business corporation act. The manner of adopting this amendment is governed by chapter 10, Art. 1 of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, requires a professional corporation that has ceased to render professional services (for example, because the sole shareholder dies and no purchaser of the practice can be found) either to amend the articles or to delete the statement that it is a professional corporation required by Section 33‑19‑103 if it wants to continue in existence, or to dissolve.

No substantive change in the Model Act Official Text language has been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 41.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Corporate name, see Sections 33‑4‑101 et seq.

Effective date of amendment of articles of incorporation, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

“Professional service” defined, see Section 33‑19‑103.

Library References

Corporations 577.

Westlaw Topic No. 101.

**SECTION 33‑19‑420.** Judicial dissolution.

The Attorney General may commence a proceeding under Sections 33‑14‑300 through 33‑14‑330 to dissolve a professional corporation if:

(1) the Secretary of State or a licensing authority with jurisdiction over a professional service described in the corporation’s articles of incorporation serves written notice on the corporation under Section 33‑1‑300 that it has violated or is violating a provision of this chapter;

(2) the corporation does not correct each alleged violation, or demonstrate to the reasonable satisfaction of the Secretary of State or licensing authority that it did not occur, within sixty days after service of the notice is perfected under Section 33‑1‑300; and

(3) the Secretary of State or licensing authority certifies to the Attorney General a description of the violation, that it notified the corporation of the violation, and that the corporation did not correct it, or demonstrate that it did not occur, within sixty days after perfection of service of the notice.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The attorney general is authorized to enforce the requirements of this Supplement by bringing suit for judicial dissolution on the grounds of failure of the corporation to comply with any provision of this Supplement. Either the licensing authority or the secretary of state may initiate the proceeding by certifying the grounds for dissolution to the attorney general.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no direct counterpart in the 1962 South Carolina Professional Association Act, authorizes the Attorney General to file suit for dissolution of a professional corporation that violates any provision of this chapter. This right of dissolution is in addition to the right of the Secretary of State to institute dissolution proceedings against a corporation, including a professional corporation, under Sections 33‑14‑200 through 33‑14‑230 and the rights of shareholders and creditors to institute involuntary dissolution proceedings under Sections 33‑14‑300 through 33‑14‑330 and, if the professional corporation is a statutory close corporation governed by Chapter 18 of this act, the right of a shareholder to file a claim for relief pursuant to Sections 33‑18‑400 through 33‑18‑430.

No substantive change in the Model Act Official Text language has been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 42.

CROSS REFERENCES

Dissolution generally, see Sections 33‑14‑101 et seq.

“Licensing authority” defined, see Section 33‑19‑103.

Revocation of certificate of authority of foreign professional corporation, see Section 33‑19‑520.

Library References

Corporations 611.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 835 to 836, 840 to 851.

ARTICLE 6

Foreign Professional Corporations

**SECTION 33‑19‑500.** Authority to transact business.

(a) Except as provided in subsection (c), a foreign professional corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.

(b) A foreign professional corporation may not obtain a certificate of authority unless:

(1) its corporate name satisfies the requirements of Section 33‑19‑150;

(2) it is incorporated for one or more of the purposes described in Section 33‑19‑110; and

(3) all of its shareholders, not less than one‑half of its directors, and all of its officers other than its secretary and treasurer, if any, are licensed in one or more states to render a professional service described in its articles of incorporation.

(c) A foreign professional corporation is not required to obtain a certificate of authority to transact business in this State unless it maintains or intends to maintain an office in this State for conduct of business or professional practice.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Many small as well as large professional practices are conducted in more than one state by individuals licensed to practice in more than one state or by partnerships whose members are licensed to practice in various states. It is important, therefore, for a professional corporation act to make specific provision for the manner in which a foreign professional corporation may qualify to transact business in this state.

Under the foreign corporation provisions of state general business corporation laws, foreign corporations are generally admitted with few restrictions (other than restrictions as to the use of corporate names). In order to prevent a professional corporation from avoiding the professional corporation laws of the state in which it carries on its practice by incorporating in a state with more lenient professional corporation requirements, section 50 (Section 33‑19‑500) requires that foreign corporations comply with the domestic state law requirements concerning corporate purposes and qualification of shareholders, directors, and officers. Under section 13 (Section 33‑19‑130) a foreign professional corporation may render professional services only through individuals licensed to render the services in this or another state. Section 34 (Section 33‑19‑340), concerning responsibility for professional services and security for professional responsibility, is applicable to foreign corporations as well as domestic corporations; and foreign corporations are also subject to regulation by the licensing authority to the same extent as domestic corporations under sections 60 through 65 (Section 33‑19‑600 through 33‑19‑650).

Section 50(c) (Section 33‑19‑500(c)) requires that a professional corporation obtain a certificate of authority only if the corporation maintains an office in this state. This provision permits foreign professional corporations greater freedom in rendering professional services in this state, without complying with foreign corporation law requirements, than is permitted in the case of business corporations.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, requires a professional corporation that intends to maintain an office in this State to obtain a certificate of authority from the Secretary of State. The foreign professional corporation must meet the same name and other requirements as a professional corporation incorporated in South Carolina.

This section does not authorize professionals employed by a foreign professional corporation who are not licensed to practice the profession in question in South Carolina to conduct services for clients or patients in this State. Nonlicensed professionals, however, may be entitled to represent clients or patients in South Carolina in certain limited circumstances. See Comment 2 of the South Carolina Reporters’ Comments to Section 33‑19‑130.

No substantive change in the Model Act Official Text has been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 50.

CROSS REFERENCES

Application for certificate of authority, see Section 33‑19‑510.

Corporate name, see Section 33‑19‑150.

Foreign corporations, generally, see Sections 33‑15‑101 et seq.

“Foreign professional corporation” defined, see Section 33‑19‑103.

“Professional service” defined, see Section 33‑19‑103.

Purposes, see Section 33‑19‑110.

“Secretary” defined, see Section 33‑1‑400.

Library References

Corporations 642, 648, 654, 661.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 884, 900, 907 to 908, 911 to 921, 924 to 925, 936, 941.

**SECTION 33‑19‑510.** Application for certificate of authority.

The application of a foreign professional corporation for a certificate of authority to render professional services in this State must contain the information called for by Section 33‑15‑103 and, in addition, include a statement that all of its shareholders, not less than one‑half of its directors, and all of its officers other than its secretary and treasurer, if any, are licensed in one or more states to render a professional service described in its articles of incorporation.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The requirements of Model Act section 15.03 (Section 33‑15‑103) regarding the application by a foreign corporation for a certificate of authority are expanded to cover expressly the additional requirement for admission set out in section 50(b)(3) (Section 33‑19‑500(b)(3)). In other respects, the application must meet the requirements of section 15.03 (Section 33‑15‑103) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, describes the information that must be included in the application by a foreign professional corporation for authority to operate an office in South Carolina.

No substantive changes in the Model Act Official Text have been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 51.

CROSS REFERENCES

Application for certificate of authority, see Sections 33‑15‑103 and 33‑19‑500.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

“Professional service” defined, see Section 33‑19‑103.

Library References

Corporations 648.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

**SECTION 33‑19‑520.** Revocation of certificate of authority.

The Secretary of State administratively may revoke under Sections 33‑15‑300 through 33‑15‑320 the certificate of authority of a foreign professional corporation authorized to transact business in this State if a licensing authority with jurisdiction over a professional service described in the corporation’s articles of incorporation certifies to the Secretary of State that the corporation is in violation of a provision of this chapter and describes the violation in the certificate.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section permits the certificate of authority of a foreign corporation to be revoked for violations of the Supplement certified by a licensing authority in this state to the secretary of state. The corporation must be given at least 60 days to correct or contest the alleged violation (under section 15.31 (Section 33‑15‑310) of the Model Act) before the secretary of state may revoke. The certificate of authority of a foreign corporation may also be revoked on the grounds set forth in section 15.30 (Section 33‑15‑300) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, authorizes the Secretary of State, in certain circumstances, to revoke administratively the authority of a foreign professional corporation to operate an office in South Carolina.

No substantive changes in the Model Act Official Text have been made.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 52.

CROSS REFERENCES

Appeal from revocation, see Section 33‑15‑320.

Grounds for revocation, see Section 33‑15‑300.

“Licensing authority” defined, see Section 33‑19‑103.

Procedure for revocation, see Section 33‑15‑310.

Library References

Corporations 651.

Westlaw Topic No. 101.

C.J.S. Corporations Section 919.

ARTICLE 7

Miscellaneous Regulatory Provisions

**SECTION 33‑19‑600.** Annual report.

The annual report required by Section 33‑16‑220 for each domestic professional corporation and for each foreign professional corporation authorized to transact business in this State must include a statement that all of its shareholders, not less than one‑half of its directors, and all of its officers other than its secretary and treasurer, if any, are qualified persons with respect to the corporation.

HISTORY: Derived from 1976 Code Section 33‑51‑130 [1962 Code Section 56‑1613; 1962 (52) 1911; 1984 Act No. 281; Repealed, 1988 Act No. 444, Section 4(5)]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 7.

OFFICIAL COMMENT

The Model Act requirement for filing an annual report with the secretary of state is applicable to professional corporations. These corporations must also include a statement showing compliance with the requirement of section 30 (Section 33‑19‑300) as to qualification of shareholders, directors, and officers.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section requires that a professional corporation specify in the annual report required to be filed with the Tax Commission pursuant to Sections 33‑16‑220 and 12‑19‑20 that all of its shareholders, one‑half of its directors, and all the officers (other than the secretary and treasurer) are qualified to practice the professional services engaged in by the corporation. A somewhat similar certification was required by the 1962 South Carolina Professional Association Act. That act also required the names and address of each shareholder to be included on the annual report. See former Section 33‑51‑130 of the 1976 Code. No substantive change in the Model Act Official Text language was made in this section.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 62.

CROSS REFERENCES

Annual report, see Sections 12‑20‑30 and 33‑16‑220.

“Qualified person” defined, see Section 33‑19‑103.

“Secretary” defined, see Section 33‑1‑400.

Library References

Corporations 181(7).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

**SECTION 33‑19‑610.** Rulemaking by licensing authority.

Each licensing authority is empowered to promulgate rules expressly authorized by this chapter if the rules are consistent with the public interest or required by the public health or welfare or by generally recognized standards of professional conduct.

HISTORY: 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 7.

OFFICIAL COMMENT

This general grant of rulemaking authority is appropriate to ensure that the licensing authority possesses power to regulate all persons rendering professional services.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section and the next section, which had no counterparts in the 1962 South Carolina Professional Association Act, expressly state that every professional licensing agency in South Carolina has authority to promulgate rules consistent with this chapter regulating professional corporations and their employees.

No changes have been made in the Model Act Official Text.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 63.

CROSS REFERENCES

“Licensing authority” defined, see Section 33‑19‑103.

Rules: corporate name, see Section 33‑19‑150.

Rules: definition of “law” as within meaning of regulations, see Section 33‑19‑103.

Rules: rendering professional services, see Section 33‑19‑130.

Rules: security for professional responsibility, see Section 33‑19‑340.

Rules: qualification statement, see Section 33‑19‑610.

Library References

Accountants 3.

Attorney and Client 32(3).

Health 101.

Westlaw Topic Nos. 11A, 198H, 45.

C.J.S. Accountants Sections 4 to 6.

C.J.S. Attorney and Client Sections 6, 43 to 58, 86.

**SECTION 33‑19‑620.** Licensing authority’s regulatory jurisdiction.

This chapter does not restrict the jurisdiction of a licensing authority over individuals rendering a professional service within the jurisdiction of the licensing authority nor does it affect the interpretation or application of any law pertaining to standards of professional conduct.

HISTORY: 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 7.

OFFICIAL COMMENT

This section is also included to ensure that the licensing authority possesses power to regulate all persons rendering professional services.

SOUTH CAROLINA REPORTERS’ COMMENTS

See the South Carolina Reporters’ Comments to former Section 33‑19‑620 [now appended to Section 33‑19‑600].

No substantive changes have been made in the Model Act Official Text language.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 64.

CROSS REFERENCES

“Licensing authority” defined, see Section 33‑19‑103.

“Professional service” defined, see Section 33‑19‑103.

Library References

Accountants 3.

Attorney and Client 32(3).

Health 101.

Westlaw Topic Nos. 11A, 198H, 45.

C.J.S. Accountants Sections 4 to 6.

C.J.S. Attorney and Client Sections 6, 43 to 58, 86.

**SECTION 33‑19‑630.** Penalty for signing false document.

(a) A person commits an offense if he signs a document he knows is false in any material respect with intent that the document be delivered to the licensing authority for filing.

(b) An offense under this section is a misdemeanor punishable by a fine of not to exceed five hundred dollars.

(c) The offense created by this section is in addition to any other offense created by law for the same conduct.

HISTORY: 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 7.

OFFICIAL COMMENT

This section ensures that the same penalty is applicable to the delivery for filing of a document known to be false to a licensing authority as is applicable to the delivery for filing of such a document to the secretary of state.

The penalty provided is in addition to any other penalty provided by law for delivering a false document to the licensing authority.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section, which had no counterpart in the 1962 South Carolina Professional Association Act, parallels Section 33‑1‑290 which specifies the penalty for signing false documents that are to be filed with the Secretary of State.

No substantive changes have been made in the Model Act Official Text language.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 65.

CROSS REFERENCES

Delivery of false document to Secretary of State, see Sections 33‑1‑290 and 33‑15‑300.

Library References

Fraud 68.10 to 69.

Westlaw Topic No. 184.

ARTICLE 8

Transition Provisions

**SECTION 33‑19‑700.** Application to existing professional corporations.

(a) Except as set forth in subsections (b), (c), (d), and (e), this chapter applies to a professional corporation formed under Act 784 of 1962 in existence on its effective date.

(b) Section 33‑19‑109 does not apply to professional corporations formed prior to the effective date of this chapter unless and until its articles of association are amended.

(c) Section 33‑19‑210 does not apply to any share certificates that are issued and outstanding prior to the effective date of this chapter.

(d) Section 33‑19‑600 does not apply to any professional corporation in existence prior to the effective date of this chapter that was not on that date required to file its articles of association with a licensing authority. Any professional corporation qualifying for this exemption shall file its articles of association with the first annual report required to be filed pursuant to Section 33‑19‑610.

(e) Within thirty days after the effective date of this chapter, the Secretary of State shall send to the president of each professional corporation at the association’s address as shown in the association’s most recent annual report on file in the office of the Secretary of State a written notice stating that:

(1) the association is required to file with the Secretary of State on or before January 1, 1991, a copy of the association’s articles of association and all amendments to the articles;

(2) the articles of association may have to be amended on or before January 1, 1991, in order to comply with Chapter 19 of this title;

(3) all future amendments and restatements of the association’s articles of association must be filed with the Secretary of State and must comply with the requirements of this title; and

(4) no amendment or restatement of the association’s articles after the effective date of this chapter may be filed in the office of the clerks of court.

(f) A professional corporation in existence on the effective date of this chapter is not in violation of this chapter for failure to file its articles of association with the Secretary of State as required by subsection (e) or to make any amendments to its articles of association required by this chapter or Chapters 1 through 17 of the South Carolina Business Corporation Act of 1988 until January 1, 1991. The failure of a professional corporation to file its articles of association and any necessary amendments to its articles of association by that date does not:

(1) impair the validity of any contract or act of the professional corporation;

(2) prevent the professional corporation from maintaining or defending any action, suit, or proceeding in any court in this State; or

(3) result in any shareholder not being governed by Section 33‑19‑340 with respect to liability for professional services.

(g) This chapter does not affect an existing or future right or privilege to render professional services through the use of any other form of business entity.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The transition provisions of section 70 (Section 33‑19‑700) are designed to provide a simple method by which existing professional corporations formed under statutes repealed by this Supplement may comply with this Supplement. See in this connection section 10 (Section 33‑19‑109) and its Official Comment.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. This section deals with the applicability of this chapter to professional corporations in existence on the effective date of this act. There are three techniques that could be employed to deal with this situation: (1) grandfather all existing professional corporations so that they continue in perpetuity to be governed by the 1962 South Carolina Professional Association Act; (2) make the new act fully applicable to all professional corporations; (3) make most of the new act applicable to existing professional corporations but allow exceptions that might cause legal or practical difficulties. The third alternative was considered to be the best overall choice. The first was considered unwise given the incompleteness of the 1962 South Carolina Professional Association Act, the expected slowdown in the number of new professional corporations formed because of recent tax legislation (see the South Carolina Reporters’ Comments to Section 33‑19‑101), and the necessity of maintaining two sets of public filings, one in the offices of the various clerks of courts for professional corporations formed before the effective date of this act, and the other in the Office of the Secretary of State for professional corporations formed after the effective date of this act. The second, which is essentially the technique used in the Model Act, was thought to create potential practical problems because the lack of specific requirements in the 1962 South Carolina Professional Association Act made it difficult to predict how extensive the amendments to the articles of association would have to be to bring them into compliance with this act. See former Section 33‑51‑40 of the 1976 Code (“The Articles of Association may contain any provision not in violation of law or the public policy of this State as the members of the association may decide”). The third technique minimizes the amendment problems by giving existing professional corporations approximately two years to make any necessary amendments and by exempting them from certain requirements.

Subsection (b) exempts an existing professional corporation from the requirement in Section 33‑19‑109 that its articles of association state it is a professional corporation unless and until it amends its articles. Since the corporation is filing an amendment already, it is not unduly burdensome to require an additional minor amendment at that time. Subsection (c) exempts an existing professional corporation from the requirement that its outstanding share certificates contain the special legend required by Section 33‑19‑210. The share legend would have to appear, however, on any share certificates issued after the effective date of this act. Subsection (d) exempts an existing professional association from the requirement in Section 33‑19‑600 that it file its articles of association with any agency having licensing authority over the professionals practicing in the corporation before commencing business but requires the articles to be filed with the first annual report filed with the licensing agency pursuant to Section 33‑19‑610. Finally, subsection (f) states that a professional corporation has two years to make whatever adjustments are necessary to bring it in compliance with this act and further provides that the failure to do so within this time frame will not impair any contract or other rights of the corporation or its right to sue or be sued nor will the failure to file in and of itself adversely affect the potential personal liability exposure of a shareholder. This subsection is modeled upon Section 33‑42‑220(g) of the South Carolina Uniform Limited Partnership Act, which deals with the transition problems of limited partnerships formed prior to the adoption in 1984 of the Revised Uniform Limited Partnership Act.

2. An additional transition problem concerns the status of the existing filings in the office of the South Carolina clerks of court. Professional corporations are the only business entities that were required to file exclusively on a local level. The Model Act requires filing for professional corporations only in the office of the Secretary of State, which makes sense since all other business entity forms are filed with the Secretary of State. Subsection (e) deals with this issue by requiring the Secretary of State to send notice of the new law to the president of each professional association advising the corporation of the change in place of filing and the possible need to make amendments to the articles by January 1, 1991. Since professional corporations already are required to file an annual report with the Secretary of State, this procedure should not be overly burdensome on the Secretary of State.

3. The implications of the transition rules in this section need to be studied carefully prior to advising a professional corporation in existence on the effective date of this act what amendments to its articles and what additional documents or amendments to existing documents should be made. For example, the share purchase provisions of Sections 33‑19‑230 and 33‑19‑231 rather than Sections 33‑51‑110 and 33‑51‑120 of the 1962 South Carolina Professional Association Act govern when a professional corporation has a statutory share purchase right. Sections 33‑19‑230 and 33‑19‑231 provide for a broader buy‑out right than the equivalent provisions in the 1962 South Carolina Professional Association Act. These sections also specify that the shares will be purchased at their fair value unless a different value is fixed in the articles of incorporation, bylaws, or a private agreement whereas former Section 33‑51‑120 of the 1976 Code specified a book value unless the articles of association or bylaws fix a different price. The shareholders need to be made aware of these and other differences between the two acts.

DERIVATION: 1984 Model Act Professional Corporation Supplement Section 70.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney and Client Section 4, Unauthorized Practice of Law.