

NEVADA STATE BOARD OF OPTOMETRY



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Board President

JULIE C. ALAMO-LEON, O.D.
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Executive Director

JEFFREY AUSTIN, O.D.
Board Member

DREW JOHNSON
Public Board Member

Materials for

June 27, 2024

Board Meeting

Materials for Item No. 4 re

- 8/2023 Letter re: patient scheduling
- Dr. Horner emails

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August 29, 2023

Robert Horner, O.D.
7888 S. Hat Creek Ct.
Sparks, NV 89436
robertkhorner@yahoo.com
via email only

Dr. Horner:

During the course of its Board meeting conducted on June 22, 2023, the Nevada State Board of Optometry authorized its Executive Director to issue a letter regarding your inquiry about optical retailers providing certain administrative services to an optometric practice.

Your request stems from a corporate officer of Walmart in or about March 2023 stating to you that it is illegal in Nevada for Walmart staff to schedule your practice's patients. When you asked the corporate officer for the Nevada law to support the position, she was unable and/or refused to provide you with one.

For the Board's consideration, you represented that you have been paying Walmart employees to provide administrative services, separate and distinct from the contract to lease the space and equipment from Walmart as the practice's landlord. You represented that such administrative services consist of the optical department performing confirmation calls and scheduling patients when you and your staff are not present, e.g., during your closed hours and vacation. You further represented that the administrative service does not have any other access to your patient records and thereby access to private health information (PHI), and instead your practice has its own computer system and own scheduling books separate from Walmart.

Under the facts and circumstances that you presented to the Board, the Board voted unanimously that an optometrist may contract with an outside/non-licensee entity, be it an optical retailer or another third-party entity, to fill-in patient names on a schedule prepared by the optometrist. Your hiring of Walmart personnel, or another third-party entity, to schedule your practice's appointments in your practice's appointment book at your behest is not in violation of Nevada State Optometry laws. Within Nevada State Optometry laws, there is no prohibition of an optometrist hiring a third-party entity to provide such administrative services, i.e., scheduling appointments, confirmation calling, insurance billing, and billing.

The Board's vote is predicated upon the facts and circumstances that you presented to the Board including your representations that the optical staff does not have access to your practice's medical records, that

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your schedule and medical records are kept separate from the administrative service, that such scheduling occurs under your *complete control*, that there is no directive from Walmart dictating to you and your practice how many patients must be seen in a business day, that Walmart does not have control over *any* of your scheduling, and instead that the administrative service that you contact with Walmart to provide has the ability to only fill in the blanks for your patient schedule.

Such practices would be consistent with R066-19 Section 12(3) that an optometrist may form a business relationship with a person who is not licensed to practice optometry to perform duties concerning the operation of the business limited to duties concerning, e.g., the operation of the business and may include, without limitation, performing services related to business development, business administration, and medical billing.

The Board's vote, and consequently this letter conveying the results of the Board's vote, is not to be construed as an abrogation of, e.g.: 1) NRS 636.372(4) which prohibits an optometrist from entering into a lease unless, during the term of the lease, the optometrist maintains exclusive access to, and control and ownership of, the medical records of each patient of the optometrist; 2) NAC 636.240(1) which prohibits a licensee and a person who is not licensed pursuant NRS 636 from entering into a lease with terms that authorizes the person who is not licensed to exercise control over the operation of the licensee's practice; and 3) the intent of R066-19 Section 12(4) which requires an optometrist who forms a business relationship with a person who is not licensed to practice optometry, to maintain organizational and financial independence from the person who is not licensed to practice optometry and ensure that the person who is not licensed to practice optometry is not involved in clinical decisions and scheduling of patients, i.e., the mere administrative function of a non-licensee person or entity when contracted by the doctor and at the doctor's behest, to fill in the blanks of a doctor's schedule is not the actual scheduling of patients as used in the relevant sections of NRS 636 or NAC 636.

Sincerely,

/s/ Adam Schneider
Adam Schneider, Esq.
Executive Director
Nevada State Board of Optometry

Executive Director Schneide,

Thank you for your email about the up coming Board meeting. I also agree that the wording needs to be listed out better.

My problem that I had, and it never did come about, was that the area director for Wal-Mart health and wellness, misunderstood what Wal-Mart was telling her. I never did need to use that latter. Wal-Mart never did anything about it. It now been about 1 & ½ yrs since we were told by her about this, and nothing has happed (in a nutshell, it was dropped).

So, during that meeting, it was explained to me that, ie Wal-Mart, was able to schedule our patients as long as they were not dictating to me: 1) what days a week I worked, 2) what hours and how may a day, 3) how many patients a day, 4) what kind of exams I was performing.

This type of wording needs to be put in the laws to make it clear. As it is right now, all of the contracts between optometrists and the corporate entities (Wal-Mart, Sam's Club, Sears, Costco, Lens Crafters, Vision Works, Eye Zone etc.) state in them how many and what day's we are to be open, and how many hours a day we are to be seeing patients. In some cases, we can be penalized if we closed down for any vacations without finding another optometrist to fill in.

Most of these companies use a generic contract that is used in all 50 states. My current contract with Wal-Mart states what days a week and how many hours a day I will be open for patients. This has been the cases ever since I started practice in Nevada in 2013. In fact, it is the same contract that was used when I practiced in Utah and Idaho. There is no way around this. If we object or point out that this is contrary to Nevada law, they will not let us sign the contract with them or discontinue our contract them. I have never really had a lot of problems with Wal-Mart on this. They tend to look the other way when I deviate from what is stated in the contract. But I have had problems with other places (Sears and Sam's Club) enforcing this. That is why I am no longer with them. I do know of several doctors who have had major problems recently with these companies coming down on them or dictating to them how many patients they will see in an hour (example: told that they need to do 6 exams an hour). The ones that I know of right now are, Costco, Lens Crafters, and all the companies that have contracts with VSP (Vision works, and Eyes Zone).

It would be nice to have a law stating that there cannot be any contract between optometrists and non-licensed companies telling them what days a week, and how many hours we will be open. In fact, the contract should be that the optometrist will provide optometric care at a specific location according to what the optometrist deems necessary. So, if the licensed feels that they should only be open 3 days a week and those days change every week, that is the licensed choosing, not the non- licensed decision. Meaning that there will not be any contract between the non-licensed and the licensed stating to the licensed that: a) what days a week they will be open, b) what hours and how may hours a day they will be open, c) how many exams a day and what kind of exams will be performed. It is important that the board understands that having the non- licensed entities do the physical schedule of your patients is extremely important. It helps us out. And helps them better plan their staffing for the upcoming day's when they can see how busy the doctor side will be.

I personally would like to see that wording stated as presented in the yellow highlighted. This would help clear things up:

R066-19 SEC. 12

4. An optometrist who forms an association or other business relationship with a person who is not licensed to practice optometry pursuant to subsection 3 shall:

(a) Comply with any applicable requirements of the Internal Revenue Service;

(b) Maintain organizational and financial independence from the person who is not licensed to practice optometry and ensure that the person who is not licensed to practice optometry is not involved in:

(1) Clinical decisions;

(2) Scheduling of patients;

Meaning that there will not be any contract between the non-licensed and the licensed stating to the licensed that: a) what days a week they will be open, b) what hours and how many hours a day they will be open, c) how many exams a day and what kind of exams will be performed.

The actual physically scheduling of patients under the direction of the licensed individual may be performed by a non- licensed individual as long as a clear separation of the patients' medical records are maintained between the licensed and the non- licensed. All scheduling decisions are to be under the control of the licensed individual.

(3) Any decision concerning scope of practice or use of facilities, equipment or drugs;

or

(4) Any other decision concerning the provision of care to a patient or the outcome of any treatment or other service provided to a patient; and

(c) Ensure that any advertising, marketing and promotional materials accurately portray the position of the optometrist within the association or business relationship, including, without limitation, whether the practice of the optometrist is included within any assumed or fictitious name used by the association or other business relationship.

Again, thank you for reaching out to me on this. If you have any questions about what I have written down, please feel free to contact me by email or my personal phone (_____). I hope that this email is helpful for the board on this matter.

I have planned my schedule so that I will be free for the board meeting.

Dr. Robert K. Horner

Executive Director Schneide,

I just noticed and read the letter to the board by a Jennifer Letten, and want to share with the board a few of my comments about her letter pertaining to Walmart scheduling appointments of the doctors (ie boards decision on 6/2023).

I have been here in Nevada since 2013 and have always had Walmart, Sam's Club, and Sears schedule my appointments with me paying the company a fee. Jennifer addresses some points about having "Walmart" scheduling an optometrist's appointments, that in my opinion do not apply.

1) **two-door configuration between an optometry practice and any adjacent optical retail**

business- With an adjacent optical retail scheduling the appointment in a separate system which the doctor owns, not a system that the optical retailer owns, is maintaining the two-door configuration. The systems are separate and divided. The doctor owns the system and controls it, where the optical retailer does not have any access to the system except to enter in the patient's appointment and demographics. This was addressed by the NBO in the 6/2023 meeting, and they did agree that this maintained the two-door stance. I have worked in this situation for over 10 yrs in Nevada, and over 10 years in other states. Most of the public do not understand what this term means, "two-door configuration". They are constantly calling the optical retailer directly to get their appointments scheduled asking to have their appointments at that location with that doctor. The optical retailer staff is not hunting down the patient for the doctor; the patients have already made the decision to come and see the doctor at that location.

2) **no co-mingling of the two establishments** - This statement is not accurate. Out of all the years I have been involved in the optical retail chains, there must be co-mingling with the optical staff and the doctor. Communication between the two needs to occur to provide the best product for the patient. I have had many occasions where the optical retail staff has come to me with a question on an Rx or more information where the patient had not given in the exam that turned out to be important for what was best for the patient. Communication between both of our professions is very important for the benefit of the patient.

3) **federal anti-kickback laws pertaining to healthcare businesses** – again, this is not in violation of the anti-kickback laws. The anti-kickback laws are there to prevent a monopoly of patient care. Allowing the patients to make the choice of who they want to see and to prevent favoritism between professionals. As I stated in #1, patients are calling or asking for an appointment with the doctor at that specific location. They have already made the decision themselves that they want to see the doctor at that location, they are not looking or asking for suggestions for doctors. The optical retailer staff has not convinced the patient to see the doctor at their location, the patient has already made the decision. If you really want to get nit-picky about this, one could make the argument that just having an independent optometrist there at the location is already showing favoritism to that doctor and therefore a violation of its own, to the anti-kickback laws. Therefore, in this argument, all side-by-side situations are in violation of the federal anti-kickback law, which is clearly not the case.

4) **when Walmart staff are asked to perform administrative functions for the doctor, the patient perception is that there is no division between the two businesses, and this violates the spirit of these anti-kickback law** - again, this is not in violation of the anti-kickback laws. As I stated in #1 the general public does not understand or know what the separation of two businesses means. I as a doctor have constantly been told how helpful and beneficial and hard-working my optical staff is. I am constantly explaining to them that I am not part of the optical retailer, and they still do not understand this. The optical staff at the two locations I am at are constantly having to explain to the public that we are separate businesses. Jennifer's comments here does not really stand, because the general public's perception is already that there is no division between the two businesses, that we are all the same business. They assume that just because there is a doctor's clinic, that we are all one business.

5) **As employees of Walmart & Sam's Club, Nevada opticians are directed not to hand out independent optometrist's business cards or advertise inside the store for the independent optometrist, because the doctor is not a Walmart associate** - This is an incorrect statement. Over the 20 yrs (10 yrs here in Nevada) that I have worked side by side with Walmart, Sam's Club, and other optical chain's (10yrs in Nevada with Walmart and Sam's Club) the optical staff has contently been encouraged to get the doctors scheduled filled and have been told to do walk through through the store to capture patients. This is where the optical staff goes around the store and finds people to offer to clean their glasses and talk to them about when they had their last eye exam. Explains to them the importance of a yearly exam. The staff is then instructed to tell them that they "can go to any doctor for their eye exams, but we do have an independent doctor here in our store." They are then encouraged to get an eye exam. This is all done to increase business. Just by the comment "we have an independent doctor here in our store", counters Jennifer's statement that they are not encouraged to get patients for the doctor. Another comment on this fact, this is a Walmart policy, not a Nevada Board of Optometry or a Nevada Optical Board law. If Walmart felt that providing administrative services for the doctors is in violation of the "federal anti-kickback law", than Walmart would not provide this option in their doctors contact. It appears that if Jennifer Letten has an issue with this as a violation to the law, then she needs to address this with the Walmart legal team to see why they are allowing it.

6) **The fee is received by the corporation, not the personnel performing these additional tasks for the doctor, and the doctor has no authority to discipline or dismiss the personnel, as they are not employees of the doctor. This arrangement blurs the lines between the businesses. To keep the establishments separate, the doctors should hire a call center or other third-party entity outside of the corporation from which they are leasing space** – This is an incurred comment too. There is no difference of having Walmart provide the scheduling services compered to a 3rd party (as was determined by the NOB in 6/2023). In both cases, the doctor does not control the employees, has any way to fire or discipline the employees as was Jennifers comment. In a 3rd party, the employee does not answer the doctor, just like Walmart. If I have a problem with and of the optical employees for any reason, scheduling or any other, I address it with the optical manager, or the director of health and wellness as instructed to us doctors by Walmart. This would be no different than with a 3rd party.

As I recall, this was all addressed in the June 2023 meeting and the Board feel that it did not violate any of the state laws.

Again, if you have any question, feel free to contact me.

Dr. Robert Horner

Executive Director Schneide,

Here is my email in response to your request of evaluate and give you my thoughts pertaining to Dr.s' Kopolow & Girisgen letter dated May 22, 2024. It appears to me that they are addressing the same general topic that I was in June 2023, just over other administrative areas. As they pointed out and I do agree with, current Nevada optometry laws that describe the division between the functioning of a Licensed "optometrist" and a non-licensed business "optical retailer" are on well defined. In our state, we have had a large ingrowth in the number of these side-by-side chains. Just in the last 5 years, several companies have come in and bought up privet practices. Some examples in Northern Nevada area are, Eye Zone (by VSP), Pritchett, and Family Eye Care Ass. in Sparks (by VSP). I do see that this is going to be the current trend. Also, as is apparent in Jennifer Letten's letter, there is a lot of ambiguity in the wording of these laws which results in the interpretation

With these side-by-side chains increasing in our state, our laws need to have an allowance for some level of a "symbiotic relationship" to exist between the "independent optometrist" and the "optical retailer" to conduct business for the benefit of the general public. This addressed in Dr.'s Kopolow & Girisgens letter dated May 22, 2024. At the same time, the laws need to protect the "independent optometrist's" business from being controlled and over ran by the "optical retailer". Allowing the independence of the optometrist to exist and control is own business and clinical functions. Or as Dr.'s Kopolow & Girisgen's stated reduce abuse by the non-licensed business.

This is in the best interest of both the general public and the optometrist. Our current laws are very vague in spelling out the division between these two. If you really go with the strictest interpretation, then you can argue that the whole "side-by-side" contract is in violation of the law itself because the "optical retailer" will always have a "monetary stake in the performance of the licensee" just by the fact that they rent the space to the "independent optometrist". If you use an all or none concept to this "symbiotic relationship", then the extremes of both is devastating.

Example one: if you allow the "optical retailer" to have control, then the "independent optometrist" becomes just like an employee; having the "optical retailer making all the decisions, which is not in the general public's interest. Example two: If you have the strictest separation between the "independent optometrist" and the "optical retailer", then you are in a since stating that the two cannot function and support each other. When this happens, both businesses suffer dramatically. I have seen this occurred when there is no doctor next to or if the "independent optometrist" and the "optical retailer" do not get along. So, we must have the laws set and the wording in such a way that this symbiotic relationship can exist and at the same time protect the "independent optometrist" for any the "bad players" who may want to distort this independence of the optometrist. The current laws do not do this, which is why the board heard from me in June 2023 about the scheduling, and now, we are again revisiting this, but over other administrative services. As stated in Dr.'s Kopolow & Girisgen's letter to the board, there are many area's that need to be addressed. Examples are:

- 1) Billing, to what extent do we allow optical retailer collect doctor fees and keep them for dictating to the doctor what their fees should be.
- 2) Scheduling which was addressed prior and in my earlier letter to the board.
- 3) Physical separation. Are we to have a separate outside door, or just a wall. Does that wall also imply to the virtual world, i.e. can we shar websites – are the counted as advertisement of information sites, or classifieds.
- 4) Sharing of employees.
- 5) Is our space sacred, and the optical retailer not allowed to enter the doctors space when the independent doctor is not here, even for cleaning and maintenance.

6) What defines something as a medical record? Are all correspondence between doctors medical records, and are written glasses and contact lens prescriptions medical records?

These and more need to be addressed and evaluated. This is far more complex and extensive to be answered at a board meeting.

My recommendation to the board is to keep the current decision of Board in their June 2023 meeting stand. Then, the board can commission a committee of about 3 or so optometrists (mostly ones who work beside these "optical retailer" chains) to draft recommendations for changes and rewording to the Nevada optometry laws for the board to consider bring to the 2025 legislative session. This will help to make our laws more precise and spell out with is allowed and not allowed in these symbiotic relationships between the "independent optometrist" and the "optical retailer".

Please let me know if there is anything more that I can assist to help make our optometry laws better and easier to understand.

Dr. Robert Horner O.D.

Materials for Item No. 6 re

- 2025 list from 5/30/24 meeting with a TBD re R066-19(12)
- Dr. Christensen commentary
- Daly, Esq. letter
- NOA proposal

NRS 636.025(1)(c) (“The examination, evaluation, diagnosis and treatment of the human eye and its appendages **inclusive of tragus to tragus**, . . . or the diagnosis or determination of any visual, muscular, neurological, interpretative or anatomic anomalies or deficiencies of the eye or its appendages or visual processes.

NRS 636.305(2) (“As soon as practicable after a complaint is filed with the Board, the Executive Director or his or her designee shall review the complaint. If the Executive Director determines that the complaint is not frivolous and alleges one or more of the grounds for disciplinary action set forth in NRS 636.295, the Board, through the Executive Director, shall cause the complaint to be investigated. **The investigation may include, but is not limited to, compelling a licensee to appear before the Board’s investigative committee wherein the proceedings of an investigative committee are confidential and are not subject to the requirements of NRS 241 and such proceedings are confidential between the licensee and the investigative committee until such time as the investigative committee finds sufficient cause to recommend a formal complaint to the Board.**”)

NRS 636.341¹ Summary suspension of licensee’s **ability to practice optometry or optometric telemedicine**; issuance of order; formal hearing and decision.

1. If the Board **reasonably** determines from an investigation of a licensee that the health, safety or welfare of the public or any patient served by the licensee is at risk of imminent or continued harm because of the manner in which the licensee **practices optometry including but not limited to optometric telemedicine violations, systemic or repeated violations of acts constituting an act of optometry or acts prohibited as acts of optometry as defined in NRS 636.025, or any other systemic or repeated violations of any section of this chapter**, the Board may summarily suspend the licensee’s **ability to practice optometry** pending a determination upon the conclusion of a hearing to consider a formal complaint against the licensee. An order of summary suspension may be issued only by the Board, the President of the Board, the presiding officer of an investigative committee convened by the Board to conduct the investigation or the member of the Board who conducted the investigation.

2. If an order to summarily suspend a licensee’s **ability to practice optometry** is issued pursuant to subsection 1 by the presiding officer of an investigative committee of the Board or a member of the Board, that person shall not participate in any further proceedings of the Board relating to the order.

3. If the Board, the presiding officer of an investigative committee of the Board or a member of the Board issues an order summarily suspending a licensee’s **ability to practice optometry**, the Board must hold a hearing to consider the formal complaint against the licensee. The Board must hold the hearing and render a decision concerning the formal complaint within 60 days after the date on which the order is issued, unless the Board and the licensee mutually agree to a longer period, **to determine whether a reasonable basis exists to continue the suspension of the licensee pending the conclusion of a hearing to consider a formal complaint against the licensee. If no formal complaint against the licensee is pending before the Board on the date on which a hearing is held pursuant to this section, the Board shall reinstate the license of the licensee.**

¹ This is the next available number in NRS 636. The non-bolded font is identical to NRS 636.339 which codifies the same summary suspension powers of the Board but only in the context of controlled substances prescriptions violations.

4. If the Board issues an order suspending the license of the licensee pending proceedings for disciplinary action, including, without limitation, a summary suspension pursuant to NRS 233B.127(3)², the court shall not stay that order.

NRS 636.345 (“A licensee shall be authorized and entitled to practice optometry **or optometric telemedicine** in this State subject to the provisions of this chapter.”)

NRS 636.346(1) (“In any setting where optometry **or optometric telemedicine** is practiced . . .”)

AB432(14)(1) (“For not more than 1 year after the death **or permanent incapacitation** of a licensee who is the sole owner of an optometry practice, a surviving member of the licensee’s family, **or in the event of a licensee’s permanent incapacitation a guardian, or guardian ad litem appointed pursuant NRS 159, or equivalent chapter in NRS**, may own the optometry practice without being licensed pursuant to this chapter. Not later than 1 year after the death of the licensee, the surviving member of the licensee’s family shall transfer ownership of the optometry practice to a licensee or dissolve the optometry practice. **Not later than 1 year after a physician board-certified in neurology, neurosurgeon, critical care medicine, or intensive care medicine, expresses a documented opinion to a reasonable degree of medical probability that the licensee is permanently incapacitated, the guardian or guardian ad litem of the licensee shall transfer ownership of the optometry practice to a licensee or dissolve the optometry practice.**”)

AB 432(16) (“A licensee shall report to the Board within 30 days the revocation, suspension or surrender of, or any other disciplinary action taken against, a license, certificate or registration to practice any occupation or profession issued to the licensee by another state or territory of the United States, the District of Columbia or a foreign country. **The licensee is not required to report to the Board an administrative fine so long as there is no corresponding report in the National Practitioners Databank and that no Order for any formal disciplinary action exists from the non-Nevada regulatory board or equivalent administrative body who issued the administrative fine.**

² No revocation, suspension, annulment or withdrawal of any license is lawful unless, before the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. An agency’s order of summary suspension may be issued by the agency or by the Chair of the governing body of the agency. If the order of summary suspension is issued by the Chair of the governing body of the agency, the Chair shall not participate in any further proceedings of the agency relating to that order. Proceedings relating to the order of summary suspension must be instituted and determined within 45 days after the date of the order unless the agency and the licensee mutually agree in writing to a longer period.

AB 432(28)(2) (2. If the Board determines that a person has violated any provision of this chapter, the Board may issue a citation to the person. The citation may contain an order to pay an administrative fine of not more than \$1,000 for each violation or, for a violation described in subsection 1, \$5,000 for each such violation. A citation issued pursuant to this subsection must be in writing, describe with particularity the nature of the violation and inform the person of the provisions of this subsection. Each activity in which the person is engaged constitutes a separate offense for which a separate citation may be issued. **A citation for an administrative fine does not require the licensee to file a report to the National Practitioners Databank and does not constitute formal disciplinary action or a finding of unprofessional conduct as defined in NRS 636.295.** To appeal a citation, the person must submit to the Board a written request for a hearing not later than 30 days after the date of issuance of the citation. The Board shall provide notice of and conduct a hearing requested pursuant to this subsection in accordance with the provisions of chapter 622A of NRS.

Eliminate **NRS 636.287(3)**³ (“The successful completion of not fewer than 40 hours of clinical training in administering and prescribing pharmaceutical agents in a training program which is conducted by an ophthalmologist and approved by the Board.”) At minimum, add “In the event a licensee allows their license to expire and wishes to reapply for licensure in this State, the licensee’s prior-approved OPAC training is valid for the life of the licensee, therefore, the applicant is not required to retake the 40-hour training to recertify.”

R066-19(12)- to be discussed

³ Thereby eliminating **NAC 636.730(1)(c) and (2)-(3)** (“Submits a form which meets the requirements set forth in subsection 2 and which states that the optometrist successfully completed a training program of not less than 40 hours of clinical training in administering and prescribing therapeutic pharmaceutical agents . . .”)

From: [Jonathan Christiansen](#)
To: [Director](#)
Cc: mike@argentumnv.com
Subject: Upcoming Legislative Period
Date: Friday, June 21, 2024 12:25:34 PM
Attachments: [Nevada proposed reg.pdf](#)

Good afternoon Mr. Schneider,

I am writing in response to the topics discussed at the most recent state board of optometry meeting regarding suggestions on the introduction of language for the upcoming legislative session. A licensee raised the topic to consider an adjustment of the current language regarding managed service organizations and services they may provide to a practice. A particular note by the licensee concerned the scheduling of patients by a third-party entity. At the conclusion of that segment, it was suggested that licensees and members of the public submit suggestions prior to the upcoming board meeting on June 27th.

Related questions came up during the previous legislative session concerning changes to the current language. The suggested changes were found to be legally problematic by legislative counsel. The language was removed from the bill because of the concerns. I have reviewed this issue nationally to determine how it is addressed and managed elsewhere, and to suggest some alternatives. In reaching out to a colleague I received an opinion in the form of a letter from Mr. Thomas Daly, a healthcare and regulatory attorney well versed in healthcare, optometry, and this specific issue. He expressed concern that the suggested amendments may potentially create federal antitrust implications. I have included his opinion for your review. It seems this type of language is both unusual nationally and likely problematic legally.

Given the current uncodified language currently contains provisions which require that non licensed persons may not influence professional judgement and clinical decisions it appears that appropriate measures are in place to safeguard patients and the practice of optometry in Nevada. Efforts to mandate how a licensee manages a practice outside this regard appear to be anticompetitive in nature and not truly founded in patient care and safety. I request that the state board not move forward with previously discussed changes. Those changes do not aid in patient care and/or safety and could walk Nevada into territory that may bring federal antitrust concerns. I am hopeful that this opinion helps the board and licensees on current and future policy.

Thank you for your time and consideration,

Jon Christiansen, OD

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Admitted to DC and VA Bars

June 10, 2024

David A. Cockrell, O.D.
1711 West Sixth Avenue
Stillwater, OK. 74074

re: R066-19 Sec. 12 (4)(b)(2)
Scheduling of patients

Dear Dr. Cockrell,

This is in response to your question pertaining to the above proposed Nevada State Board of Optometry regulation and the application of antitrust scrutiny under the precedent set in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015) ("*North Carolina case*").

The controlling state law, as cited in the proposal, is NRS 636.373 prohibits interference with the professional judgement of an optometrist as follows:

"NRS 636.373 Associations or other business relationships with physicians; prohibition on supervision or control or influence over professional judgment of optometrist unless licensed to practice optometry.

1. An optometrist may form an association or other business relationship with a physician to provide their respective services to patients.

2. If such an association or business relationship is formed, the optometrist may:

(a) Locate his or her office in the same place of business as the physician without a physical separation between the office and the place of business.

(b) Authorize the physician to have access to any medical records in the possession of the optometrist relating to a patient who is being treated by both the optometrist and the physician.

(c) Advertise and promote the services provided by the association or business consistent with the restrictions on advertising set forth in NRS 636.302.

3. A person shall not directly or indirectly supervise an optometrist within the scope of his or her practice of optometry unless the person is licensed to practice optometry pursuant to this chapter.

4. A person, including an officer, employee or agent of any commercial or mercantile establishment, shall not directly or indirectly control, dictate or influence the professional judgment of the practice of optometry by a licensed optometrist, unless the person is licensed to practice optometry pursuant to this chapter.

5. This section does not authorize an optometrist to employ or be employed by a physician.

(Added to NRS by 1995, 2564; A 2019, 3653) (emphasis added)”

The proposed regulation, as it pertains to the administrative and clerical process of “Scheduling of patients”, would establish procedures, requirements and limitations not related to the “professional judgment” of an optometrist and therefore is beyond the scope of NRS 636.373. As such, it also raises potential federal antitrust implications.

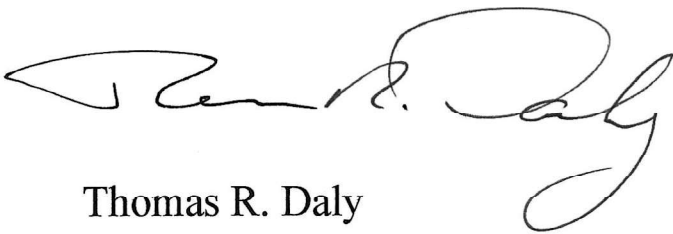
The Northern Carolina case stands for the proposition that a state regulatory board is not immune from antitrust liability for anticompetitive actions which do have the “clear articulation” of policy established by the state. That is, licensing board members are protected from federal antitrust liability only if there is “clear articulation” of a state policy to displace or adversely affect competition, and “active supervision” by the state.

The above regulation has the potential to limit competition since, as I understand it, it is aimed at prohibiting the ability to contract between licensed and non-licensed individuals. This may or may not be a worthy goal, but it should be a policy set by the Nevada legislature and not by members of the state licensing board.

It is also my understanding that the current proposal would adversely affect 10 to 20% of the 500-560 licensed Nevada optometrists. That only underscores the proposal's potential anticompetitive effect and the need for articulation of policy by the state in order to avoid federal antitrust liability.

Please let me know if I can be of any other assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas R. Daly". The signature is fluid and cursive, with a large loop at the end of the last name.

Thomas R. Daly

1. If an optometrist forms an association or other business relationship with a physician pursuant to NRS 636.373, the optometrist must:

- (a) Comply with any applicable requirements of the Internal Revenue Service;
- (b) Maintain financial and organizational independence from any person who is not licensed to practice optometry; and
- (c) Ensure that any advertising, marketing, and promotional materials accurately portray the position of the optometrist within the association or business relationship, including, without limitation, whether the practice of the optometrist is included within any assumed or fictitious name used by the association or other business relationship.

2. If an optometrist forms an association or other business relationship with a physician pursuant to NRS 636.373, the optometrist may:

- (a) Utilize mutual clinical staff members to deliver clinical care to patients receiving both optometric and ophthalmological care at the same facility, so long as an appropriate and commensurate amount of the optometrist's revenues are apportioned to those clinical staff members supporting both optometric and ophthalmological services; and
- (b) Utilize mutual billing staff members to prepare and file insurance claims under the optometrist's NPI, so long as an appropriate and commensurate amount of the optometrist's revenues are apportioned to those billing staff members supporting both optometric and ophthalmological billing services.

3. An optometrist shall not employ or be employed by a physician (M.D. or D.O.).

4. An optometrist may form an association or ~~other~~ a business relationship with a person, other than a physician, who is not licensed to practice optometry to perform duties ~~concerning the operation of the business~~ **that may provide operational support to the licensee and their business.** ~~Such duties must be limited to duties concerning the operation of the business and may include, without limitation, performing services related to payroll, human resources, real estate, regulatory matters not related to health care, banking, accounting, administration of benefits, marketing, merchandising, occupancy, accounts payable, accounts receivable, supply chain management, business development, business administration, labor, compliance with applicable laws and regulations, purchasing and medical billing.~~ **Such a relationship shall not be intended or designed to obfuscate any provisions pursuant to NRS 636 that involve the practice of optometry as defined in NRS 636.025, optometric practice ownership, medical records custodianship, co-habitation with optical retailers, or financial and organizational independence, even if such a business associate operates within the private equity or venture capital industry. Such supportive duties must be limited to the operation of the business. They may include performing services related to payroll, so long as the licensee's payroll remains financially separated from the business associate's payroll, including the use of separate Federal Tax ID numbers, medical and vision plan billing, so long as claims filed on behalf of the licensee are not combined or bundled with those of the business associate's claims resulting in bulk payments that require subsequent separation of funds. Management of a licensee's insurance accounts receivable may be included in such services, pursuant to 12(1)(b) above. Since submitting claims using a common Servicing Provider NPI number indicates joint ownership, claims submitted on behalf of each business associate must remain independent of one another, rent, pursuant to NRS 636.372. A business associate may provide bookkeeping services, pursuant to 12(1)(b) above, and human resources for regulatory and compliance support and not for the purpose of employing a licensee's staff, banking, pursuant to 12(1)(b) above, accounting, pursuant to 12(1)(b) above, administration of benefits, pursuant to 12(1)(b) above, marketing, in accordance with 12(1)(c) above, merchandising, supply chain management, and business development, all pursuant to 12(1)(b) and 12(1)(c) above, purchasing, pursuant to 12(1)(b) above.**

5. An optometrist who forms an association or other business relationship with a person who is not licensed to practice optometry pursuant to subsection 3 shall **not associate with any business associate entity created to deliver optometric services, as defined in NRS 636.025 of which 100% of its shareholders are not a Nevada optometric licensee, even if a licensee is a named officer, director, or has any other affiliation with that entity.**

6. An optometrist who forms an association or other business relationship with a person who is not licensed to practice optometry pursuant to subsection 3 shall:

(a) Comply with any applicable requirements of the Internal Revenue Service **and Federal Trade Commission;**

(b) Maintain organizational and financial independence from the person who is not licensed to practice optometry and ensure that the person who is not licensed to practice optometry is not involved in:

(1) Clinical decisions **and medical decision-making.**

(2) Scheduling of patients **and/or office flow;**

(3) Any decision concerning the scope of practice or use of facilities, equipment ~~or drugs,~~
pharmaceuticals, nutraceuticals, functional vision therapy, or

(4) Any other decision concerning the provision of care to a patient or the outcome of any treatment or other service provided to a patient; and

(c) Ensure that any advertising, marketing, and promotional materials accurately portray the position of the optometrist within the association or business relationship, including, without limitation, whether the practice of the optometrist is included within any assumed or fictitious name used by the association or other business relationship.



June 11, 2024

Adam Schneider, Esq.
Executive Director
Nevada State Board of Optometry
P.O. Box 1824
Carson City, NV 89702

Dear Mr. Schneider,

The Nevada Optometric Association (NOA) is pleased to have an opportunity to comment on several topics discussed during the Nevada State Board of Optometry (NSBO) meeting on May 30, 2024. Also, please find copies of pertinent sections of the meeting minutes from October 1, 2019, and R066-19.

Regarding The Board's response to Dr. Horner's letter inquiring about Walmart staff scheduling patients during the doctor and/or the staff's absence. As you may recall, a Walmart associate and officer of the Nevada State Board of Dispensing Opticians asked NSBO to clarify the statutes pertaining to maintaining separation between retail optical stores and licensees. Members of the NOA found the circumstances addressed by the Board's letter and the Walmart associate's description of what was happening to be inconsistent. While the NOA has no issue with the Board's response per se, it appeared to be working from inaccurate representations made by Dr. Horner in his original inquiry. NSBO's letter clearly outlined the lawful payment arrangement and employee/employer relationship between the Walmart associate and the adjacent independent doctor. The NOA is of the opinion that the arrangement, as described by the Walmart associate, violates multiple statutes and remains adjudicated.

Regarding R066-19 and its relationship to Dr. Tonya Hubbard's letter submitted to the NSBO, your research on this matter was invaluable in helping the NOA identify its concerns with the changes made to Section 12-3 and Section 12-4 of R066-19. A review of the minutes of the October 1, 2019, NSBO meeting memorialized a conversation between Dr. Chen Young, Dr. Mariah Smith, and Dr. Ken Kopolow involving relationships with licensees and private equity groups. During that exchange, Dr. Young expressed his confidence that the then-current law was sufficient to prevent private equity firms from exerting extraordinary control over a licensee. The Board moved to strike the passage. The problem, however, is that only the second paragraph was stricken, while paragraph (a) was modified into its present form and not stricken. (See attached section of R066-19 with paragraph (b) removed). The NOA is of the opinion that paragraph (b) was a critical counterpart to paragraph (a) and served to describe what such conduct of a business associate would look like in practice. Combining striking paragraph (b) AND keeping paragraph (a) increases ambiguity and sacrifices necessary "checks and balances," especially when the business associate has an equity interest in the greater enterprise. Dr. Kopolow's recollection of the exchange was that the entire "Private Equity" section was to be stricken, which would have preserved clarity of then-current law. (See *Dr. Smith's recommendation on page 39/95 of the minutes draft from the October 1, 2019, Regulatory Workshop*).

The NOA believes Dr. Hubbard's predicament results from a private equity partner creating an entity that appears to be owned by a licensee but may not. Over time, the business associate systematically takes more control of the licensee's practice methods through financial incentives, financial disincentives, and other means. Dr. Hubbard's NSBO inquiry raises several important concerns. The NOA found it unusual for a practice owner to leave their practice. Such behavior creates suspicion about who is the actual owner.

Nevada Optometric Association
1344 Disc Drive #185 | Sparks, NV 89436
p: 702.220.7444 | f: 702.974.4446
nvoptometric.com

Further, who has taken custodianship of the patient files? As you know, the owner is responsible for those files. Thirdly, the NOA found it clear that Dr. Hubbard does not understand for whom she works. The arrangement between the two business associates appears anything but traditional or even lawful.

As Dr. Young correctly stated during the October 2019 NSBO meeting, NRS 636.373 describes the manner in which optical retailers co-exist with licensees by way of fair leases, separation of space, separation of finances, etc. R066-19, without including paragraph (b), causes the proposed NAC section to run contrary to the safeguards created by NRS. To avoid ambiguity in the future, the NOA respectfully requests changes be made to NAC 636.373 to align more closely with its NRS counterparts. Specifically, eliminate paragraph (a) of R066-19 section 12-3 or reinsert the previously stricken paragraph (b). The NOA is of the opinion that private equity arrangements with optometrists represent fundamental conflicts of interest and should be closely regulated or eliminated.

The NOA stands ready to participate with NSBO in working toward a stronger optometric community that provides the best possible care to our patients.

Sincerely,



Steve Girisgen, OD
President



Troy Ogden, OD
President-Elect



H. Kenneth Kopolow, OD
Secretary/Treasurer



Spencer Quinton, OD
Immediate Past President

designation used in advertising, marketing, or promotion.

If such an association or business relationship is formed, the optometrist may:

(a) Locate his or her office in the same place of business as the physician without a physical separation between the office and the place of business, so long as the primary activity of the host physician is the practice of ophthalmology and the Principal owner(s) of the host ophthalmology are primarily engaged in the clinical practice of ophthalmology onsite.

(b) Authorize the physician to have access to any medical records in the possession of the optometrist relating to a patient who is being treated by both the optometrist and the physician.

(c) Advertise and promote the services provided by the association or business consistent with the restrictions on advertising set forth in NRS 636.302.

This section prohibits an optometrist from employing or being employed by a physician. This section does not prohibit a Licensee from entering a partnership, joint venture, or other equity arrangement with a Nevada licensed ophthalmologist, so long as such arrangements do not diminish the Licensee's operational control of the optometric portion of the joint venture.

Associations or other business relationships with physicians (Private Equity).

An optometrist may form an association or other business relationship with a Private Equity firm to benefit from economies of scale and increased equity value. If such an association or business relationship is formed, the Licensee and the contractual relationship must:

(a) Limit Equity Partner's role to business operational management duties including payroll, human resources, real estate, non-health care related regulatory matters (business licensing, sales/use tax and permitting), banking, accounting, benefits administration, marketing, merchandising, occupancy, accounts payable & receivable, supply chain management, business development, administration, labor, compliance, purchasing, and medical billing.

(b) Expressly exclude Equity Partner's involvement with clinical decision making, patient scheduling, office flow management, pace, scope of practice, medical facilities, medical equipment acquisition and utilization, pharmaceutical utilization, and any other decision involving the patient health care experience and the outcome of any treatment or other encounter.

NAC 636.380 Service upon attorney. ([NRS 636.125](#)) Pursuant to NRS 636.375, following the entry of an appearance by an attorney for a party, all notices, pleadings and orders must be served upon the attorney and such service is effective for all purposes upon the party represented by the attorney.

NEVADA STATE BOARD OF OPTOMETRY



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Public Board Member

MINUTES - DRAFT

Nevada State Board of Optometry telephonic meeting Regulatory Workshop October 1, 2019 at 11 a.m.

1. **Call to Order** by Optometry Board Vice-President Mariah L. Smith, O.D., Chair, Subcommittee on Legislative and Regulatory Changes.

Dr. Smith called the workshop to order at 11:01 p.m. via telephone conference. Board members Young and Johnson were in attendance, along with staff: Caren C. Jenkins, Executive Director, Laura Adair, Licensing Specialist. Also in attendance were Senior Deputy Attorney General Sophia, Jeannette Belz, Lobbyist, and Terri Ogden of NOA, Kenneth Kopolow, O.D., Steve Girisgen, O.D., Shannon Chandler, O.D. Spencer Quinton, O.D., Tim Elson, Esq. and Chaz Hernandez.

2. **Public Comment.** There was no public comment.
3. **Open Public Workshop** to discuss proposed changes to NAC 636 to implement various provisions of NRS Ch. 636 and consideration of the Small Business Impact of proposed regulations.

Dr. Young stated that because current law permits an optometrist to work either for themselves or another optometrist, the proposed section regarding private entities may not be applicable or necessary. Dr. Young referred to and read a comment submitted to the board that the section on private equity would allow entities not licensed to practice in NV to employ NV optometrists. Because of the intense commercial competition the private equity involvement would create, solo practices may not be able to survive.

Dr. Kopolow agreed with Dr. Young that no changes are necessary if the current

regulations are left intact. Dr. Kopolow asked how the statute has held up in its current form to the pressure that has already come about, and asked whether any complaints have been filed to challenge this.

Dr. Young responded that the Board would treat any injury just like any other complaint, and the matter would be investigated to determine if there is a violation.

Deputy Attorney General Sophia Long, Esq. stated for clarification that any complaint that may have already been filed with the board would need to remain confidential.

Dr. Smith recommended, in light of this discussion, that the new section regarding private equity be removed at the board meeting to follow.

Dr. Smith stated that the board received written comments regarding co-management fees with multifocal contacts. There is an optometrist who argues that premium IOL's require optometrists to invest additional time and therefore should be allowed more reimbursement, which is still below what Medicare allows. Also if a patient requires Lasik or PRK after cataract surgery, this additional co-management would fall on the optometrist without any available additional compensation beyond the initial agreement.

Dr. Young noted that the board may have already established that optometrists could not charge more for certain types of cataract surgery several years ago. However, he noted, in terms of follow up for patients if they need PRK or Lasik after cataract surgery for example, co-management fees only cover a 90 day period. If postop care is required long after after surgery, it should be a completely separate fee.

Dr. Smith commented that an ophthalmologist may view this postop period differently than an optometrist.

Dr. Kopolow asked if there are any Federal statutes or laws that prohibit or reinforce this new section on co-management and asked what the intent is on this section.

Dr. Smith responded that the only law she is aware of is through Medicare. She noted that Dr. Austin proposed this as he believes optometrists are getting lured to certain ophthalmologists for co-management due to higher reimbursement for the upgraded implants; that the optometrist would be paid a higher co-management fee due to the higher cost for upgrades that the patient commits to.

Ms. Jenkins stated if the board took action at a prior meeting regarding a specific set of facts and circumstances, it is not precedential as a general rule, and that this is an opportunity to incorporate this policy into regulation. If the board wishes to make this policy enforceable to all rather than only as it applies to a particular set of circumstances, it needs to be placed into regulations or statutes.

Dr. Young stated he recalls at least a couple years ago the board had discussion that the optometrist would have to prove he or she undertook extra procedures to justify the

6. Except as otherwise provided in NRS 636.372, authorizes or requires the amount of rent to be determined on any basis other than the fair rental value of the premises to be leased and any equipment to be leased.
7. Violates any provision of NRS or NAC which relates to the practice of optometry.

NAC 636.250 Separation between office of optometry and other businesses required. ([NRS 636.125](#), [636.300](#))

1. A licensee who locates his or her office in a part of a building where a person who is not licensed pursuant to the provisions of chapter 636 of NRS conducts business shall:
 - (a) Construct and maintain a partition or wall in such a manner as to ensure a clear separation between his or her office and the business of the person who is not licensed; and
 - (b) Maintain a separate reception area, cash drawer, scheduling system, staff, computerized system and physical space from those of the business of the person who is not licensed.
2. A licensee shall not:
 - (a) Use legal representation paid for or arranged by a person who is not licensed pursuant to the provisions of chapter 636 of NRS in any proceeding before the Board concerning the business relationship between the licensee and other person; or
 - (b) Except as otherwise authorized by NRS 636.347, serve as an employee or independent contractor of any person who is not licensed to practice optometry.

NAC 636.xxx Business relationships between optometrists and non-optometrists.

1. If an optometrist forms an association or other business relationship with a physician pursuant to NRS 636.373, the optometrist must:
 - (a) Comply with any applicable requirements of the Internal Revenue Service;
 - (b) Maintain financial and organizational independence from any person who is not licensed to practice optometry, other than the physician; and
 - (c) Ensure that any advertising, marketing and promotional materials accurately portray the position of the optometrist within the association or business relationship, including, without limitation, whether the practice of the optometrist is included within any assumed or fictitious name used by the association or other business relationship.
2. An optometrist shall not employ or be employed by a physician.
3. An optometrist may form an association or other business relationship with a person, other than a physician, who is not licensed to practice optometry to perform duties concerning the operation of the business. Such duties must be limited to duties concerning the operation of the business and may include, without limitation, performing services related to payroll, human resources, real estate, regulatory matters not related to health care, banking, accounting, administration of benefits, marketing, merchandising, occupancy, accounts payable, accounts receivable, supply chain management, business development, business administration, labor, compliance with applicable laws and regulations, purchasing and medical billing.
4. An optometrist who forms an association or other business relationship with a person who is not licensed to practice optometry pursuant to subsection 3 shall:
 - (a) Comply with any applicable requirements of the Internal Revenue Service;
 - (b) Maintain organizational and financial independence from the person who is not licensed to practice optometry and ensure that the person who is not licensed to practice optometry is not involved in:
 - (1) Clinical decisions;
 - (2) Scheduling of patients;
 - (3) Any decision concerning scope of practice or use of facilities, equipment or drugs; or
 - (4) Any other decision concerning the provision of care to a patient or the outcome of any treatment or other service provided to a patient; and

UNOFFICIAL DOCUMENT

This is an unofficial document integrating R066-19 (2019 amendments to Nevada Administrative Code (NAC) 636) into then-existing NAC 636. The "xxx" represents a presently unknown official citation of a new section in NAC 636 found in R066-19. The titles associated with each "xxx" are provided for guidance only, and are subject to change. The present location/sequence of any new section into NAC 636 are subject to change.

Materials for Item No. 8 re

- Inquiry letter to Licensee (redacted)
- Response from Licensee's Custodian of Records and Licensee (redacted)
- Patient A medical records and billing records (redacted)
- Patient B medical records and billing records (redacted)
- Relevant law

NEVADA STATE BOARD OF OPTOMETRY



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Board President

JULIE C. ALAMO-LEON, O.D.
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ADAM SCHNEIDER, ESQ.
Executive Director

JEFFREY AUSTIN, O.D.
Board Member

DREW JOHNSON
Public Board Member

June 11, 2024

via email only

Re: NSBO Complaint# 24-21

Dear Dr. -

This office on June 10, 2024 received information from the Nevada State Board of Pharmacy by and through its Prescription Monitoring Program (PMP) wherein your prescriptions were identified, and may constitute unprofessional conduct as defined in Nevada Revised Statute (NRS) 636.295 and Nevada Administrative Code (NAC) 636.230. It is alleged:

1. Your Drug Enforcement Administration prescriber number is .
2. Your Controlled Substances number is .
3. Your OPAC allows for the prescription of analgesics within the parameters of NRS 636.0215 and NRS 636.2882.
4. Testosterone is a schedule III drug.
5. Testosterone is not an analgesic.
6. On June 23, 2023, you prescribed testosterone with a diagnosis code of H16.103.
7. H16.103 is the diagnosis code for "unspecified superficial keratitis, bilateral."
8. On January 9, 2024, you prescribed testosterone with no associated diagnosis code.
9. On February 7, 2024, you prescribed testosterone with a diagnosis code of H16.103.

Pursuant to NRS 636.305(3) and NRS 636.338, in order to determine whether or not there has been a violation of NRS/NAC 636, please provide a written response to each allegation noted above, as well as a full and complete copy of your healthcare records, billing, invoices, and communications to and from the aforesaid patient(s) on the above-listed dates. Please include any further information you believe would be useful for the Board to make a determination in this matter.

While the Board has the discretion to issue an order to cease and desist pursuant to NRS 636.290(2)(b), your reply to director@nvoptometry.org will be due on or **by the end of business**

June 21, 2024. In light of the Board's next meeting on June 27, 2024, **your response deadline will not be extended/continued.**

Your response will be presented to the Board in a double-blind manner on June 27, 2024, i.e., the Board is not being told who the subject licensee is. Moreover, the materials associated with the presentation will be redacted to eliminate any identification of party identities, gender, locality, whether the practice is commercial or private, or whether the licensee is new to Nevada or not, etc. The Board will then determine next steps, if any.

Please return the healthcare records and billing with the signed Custodian of Records Declaration, enclosed herewith. If you are not the custodian of records, please indicate where the healthcare records can be obtained.

The Nevada State Board of Optometry investigates all information received concerning possible violations of NRS/NAC 636/AB 432. This letter is not to be construed as a determination as to whether or not there has been a violation of such laws until a thorough investigation is completed. This correspondence is sent pursuant to NRS 636.305(2), NRS 636.310(3), and NRS 636.338, and the accompanying subpoena is sent pursuant to NRS 636.141 and NRS 629.061(1)(g). As a licensee subject to an investigation, you are required by law to timely provide the requested information.

Please be advised that if the particular allegations referenced above did occur, and depending on the facts and circumstances, then you may have violated the law, specifically including but not limited to:

- NRS 636.0215 (prohibition on prescriptions of non-analgesic drugs);
- NRS 636.2882(2) (prohibition on prescriptions of controlled substances unless in an amount that does not exceed 90 morphine milligram equivalents per day and will not last more than 72 hours);
- NRS 636.295(9) (any violation of NRS 636 or NAC 636);
- NRS 636.295(11) (failure to comply with regulations adopted by the State Board of Pharmacy);
- NRS 636.338(4) (disciplinary conduct for the issuance of an illegal, unauthorized or otherwise inappropriate prescription for a controlled substance listed in schedule III);
- and in the event the testosterone was injected NRS 636.025(2)(a) (prohibition of any procedure using a needle in which human tissue is cut by injection).

Respectfully,

/s/ Adam Schneider
Adam Schneider, Esq.
Executive Director

Good afternoon Adam,

Please review the attached documents requested. These are the patients we believe this request is for since patient names were not listed in the order for medical records. Please advise if these are not the patients in question.

Per [Licensee], [Licensee] first started using compounded testosterone cream in 2018 when [Patient A] came in to see [Licensee] to assume [patient A]'s care. [Patient A] had previously seen [LASIK eye surgeon] in Los Angeles who had prescribed [Patient A] the testosterone cream after failed trials of multiple conventional dry eye medications. [Patient A] reported tremendous success with this and wanted a local doctor to resume her care. [Licensee spoke to [LASIK eye surgeon in Los Angeles] about his protocol and dosing that has been effective for his patients before approving the prescription. Based on his success and recommendation, [Licensee] has since tried this treatment for a few other patients who have failed on conventional therapy, and those with a successful outcome have resumed use. Please feel free to review the links in this email reviewing the theory behind this treatment per [Licensee].

<https://www.healio.com/news/ophthalmology/20160603/testosterone-cream-may-provide-relief-from-mgdrelated-dry-eye>

<https://iovs.arvojournals.org/article.aspx?articleid=2414256>

<https://www.reviewofcontactlenses.com/article/its-time-for-testosterone#:~:text=Transdermal%20testosterone%20promotes%20increased%20tear,thereby%20reducing%20dry%20eye%20symptoms.&text=Although%20testosterone%20is%20a%20steroid,intraocular%20pressure%20after%20longterm%20use.>

Sincerely,

(Custodian of Records)

and

[Licensee] (cc'd on this email)

Relevant law for Complaint 24-21

21 CFR 1300.01(b) (anabolic steroid means any drug or hormonal substance, chemically and pharmacologically **related to testosterone** (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone), and includes (but is not limited to) those substances listed in § 1308.13(f) of this chapter) (emphasis added)

21 CFR 1308.13(f)(84) (Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section . . . **testosterone**) (emphasis added)

NRS 453.126(7) (defining “Practitioner” as “an optometrist who is certified by the Nevada State Board of Optometry to prescribe and administer pharmaceutical agents pursuant to NRS 636.2882, when the optometrist prescribes or administers pharmaceutical agents within the scope of his or her certification.”)

NRS 636.0215 (defining “Pharmaceutical agent” as “any topical or oral drug used or prescribed by a licensee for the examination, management or treatment of an abnormality, disease or condition of the eye or its appendages, including, without limitation, **any analgesic drug subject to the requirements of NRS 636.2882 or added to schedule III**, schedule IV or schedule V by the State Board of Pharmacy by regulation pursuant to NRS 453.146. . . .) (emphasis added)

NRS 636.2882(2) (prohibition on prescriptions of controlled substances unless in an amount that does not exceed 90 morphine milligram equivalents per day and will not last more than 72 hours)

NRS 636.2882(3) (an OPAC-certified optometrist shall not prescribe a controlled substance unless the optometrist “Sets forth in the prescription for the controlled substance that the prescription may not be refilled without a subsequent examination of the patient by the optometrist.”)

NRS 636.295(9) (any violation of NRS 636 or NAC 636)

NRS 636.295(11) (failure to comply with regulations adopted by the State Board of Pharmacy)

NRS 636.338(4) (disciplinary conduct for the issuance of an illegal, unauthorized or otherwise inappropriate prescription for a controlled substance listed in schedule III)

Materials for Item No. 9 re

- Petition for Advisory Opinion (proposed)
- Dr. Lee letter as exhibit to Petition

NEVADA STATE BOARD OF OPTOMETRY



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Board President

JULIE ALAMO-LEON, O.D.
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ADAM SCHNEIDER, ESQ.
Executive Director

JEFFREY AUSTIN, O.D.
Board Member

DREW JOHNSON
Public Board Member

June 28, 2024

Nevada Department of Taxation
700 E. Warm Springs
2nd Floor
Las Vegas, Nevada 89119
tpadovano@tax.state.nv.us
via email only

Re: R043-24I

Dear Director Hughes:

This petition for an advisory opinion is submitted pursuant to NAC 360.190 and by and through the unanimous vote of the Nevada State Board of Optometry (the "Board") to request an advisory opinion on R043-24I. As way of background, the underlying purpose of this petition is to assist the Board in its efforts to ensure that our members comply with relevant tax laws and that the Department's interpretation or revision of relevant tax *codes* does not conflict with relevant tax *statutes* which are *specific* to optometrists.

Through information provided by and through a former member of the Board, the Board has become aware of the aforementioned issues within the Department. (See attached letter from former Board member Stephanie Lee, O.D. which the Board incorporates as if fully set forth herein.)

The Board understands the Department's stated goals to the public include the stable administration of tax statutes, improvement of compliance through education, information and enforcement, cooperation with other agencies and entities to better serve taxpayers. But as you may or may not know, and despite optometrists being directly involved in the subject code of R043-24I, the Department elected not to approach the Board about it or seek any input from the Board into how optometric businesses function. Without knowing the Department's intent or purpose behind the revision efforts, and without any communication from the Department, the Board felt the need to seek an advisory opinion at this time.

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STATEMENT OF FACTS

The Board of Optometry consists of hundreds of members who sell ophthalmic products to patients. Optometrists do so upon initially paying a use tax for these products.

However, R043-24I's proposed revision to NAC 372.320 appears to directly contradict NRS 372.055(3). Moreover, the use of a code to fundamentally alter the nature of the statute appears to be improper. *The Nev. Independent v. Whitley*, 138 Nev. 122, 126, 506 P.3d 1037, 1042 (2022) ("regulations cannot contradict or conflict with the statute they are intended to implement") (internal quotation marks omitted).

ISSUE OR QUESTION TO BE RESOLVED

What tax (*i.e.*, use or sales) do Nevada-licensed optometrists need to pay/charge for ophthalmic materials in adherence to relevant tax laws that are *specific to optometrists*?

RELEVANT STATUTES, RULES, AGENCY DECISIONS OR OTHER AUTHORITIES

NRS 372.055 "Retailer" defined.

3. A licensed optometrist . . . is a consumer of, and shall not be considered, a retailer within the provisions of this chapter, with respect to the ophthalmic materials used or furnished by him in the performance of his professional services in the diagnosis, treatment or correction of conditions of the human eye, including the adaptation of lenses or frames for the aid thereof.

(Prior existing) NAC 372.320(2)

2. The tax applies to the entire charge made by a dispensing optician for eyeglasses and related products furnished in filling a prescription of an . . . optometrist.

(Presently existing) NAC 372.320 Oculists, optometrists and dispensing opticians.

1. Oculists and optometrists are the consumers of ophthalmic materials including eyeglasses, frames and lenses used or furnished in the performance of their professional services in the diagnosis, treatment or correction of conditions of the human eye. The tax applies to the sale of the materials to oculists and optometrists.
2. The tax applies to the entire charge made by a dispensing optician for eyeglasses and related products furnished in filling a prescription.

(Proposed via R043-24I) NAC 372.320

2. The tax applies to the entire charge made by a dispensing optician for eyeglasses and related products furnished in filling a prescription, *whether the dispensing optician is licensed or not.* (emphasis in original)

State of Nevada ex rel Department of Taxation v. Lohse, DDS, Docket No. 49001 (Order of Affirmance, July 24, 2008) (unpublished disposition) (Nevada Supreme Court affirming

district court's interpretation of NRS 372.283 in favor of respondent orthodontists that orthodontic braces and materials are a statutory "medicine" exemption.)

ARGUMENTS AND AUTHORITIES RELIED UPON

Nevada imposes a sales tax upon retailers for the privilege of selling tangible personal property at retail within the state of Nevada. NRS 372.105. A sale is defined generally as the transfer of tangible personal property for consideration. NRS 372.060(1). Nevada law also imposes a complimentary use tax to be paid "on the storage, use or other consumption in this State of tangible personal property purchased from any retailer" outside Nevada. NRS 372.185(1). The sales tax is imposed on gross receipts from retail sales and is typically collected by the retailer from the consumer. NRS 372.110. The Board understands that "Not everyone is required to pay sales tax though. There are exemptions."¹ Among the exemptions are the numerous provisions identifying when a party is a consumer of tangible personal property, and not a retailer.

Examples of statutory provisions identifying when a party is a consumer and not a retailer include NRS 372.7293 (a licensed veterinarian to be a consumer and not a retailer of the tangible personal property used, furnished or dispensed for care or treatment) and NRS 372.7261 (if property is purchased by an aircraft business for use in the performance of a contract, the business is deemed the consumer).

Further examples of being a consumer rather than a retailer can be found in the Department's regulations, including NAC 372.130(2) (an advertising agency is the consumer of all the tangible personal property used in the normal course of the business); NAC 372.140(1) (barbers, beauty shop operators, bootblacks, launderers and cleaners are the consumers of the supplies and other property used in performing their services); NAC 372.200(1) (a construction contractor is the consumer of all the tangible personal property purchased for use in improving real property pursuant to a construction contract); and NAC 372.330 (a photographer is the consumer of property used in rendering their professional services).

Because both Nevada statute and the existing code state that a licensed optometrist is the consumer of and not a retailer of tangible personal property, the consistency of these provisions has helped provide guidance to our members.

However, adopting a new, different regulation that does not address the statutory exemption for licensed optometrists would actually do little to properly clarify, or even correct, any understanding of the current regulation.

On its face, the Department may be headed to another adverse decision from the Nevada Supreme Court akin to *Lohse*. The Nevada Legislature has promulgated separate chapters for separate professions to protect the public from unsafe vision care, *i.e.*, NRS 636 for *optometrists* and NRS 637 for dispensing *opticians*. Proof positive of this distinction is in the prior version of NAC 372.320(2)'s usage of the phrase "prescription of an . . . optometrist" which demonstrates

¹ Andrea Nichols, *Some Food for Thought on Nevada Sales and Use Tax*, Volume 26, Issue 12, Nevada Lawyer, pg. 14 (December 2021)

that a dispensing optician is not an optometrist. *See Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 727 (Iowa 2014) (applying the canon that “the expression of one thing of a class implies the exclusion of others not expressed.”)

By virtue of the above-described clause being removed several years ago, the Department appears to believe that an optometrist and/or an optometrist’s employees whom many times are not licensed dispensing opticians can now be classified on the whole as dispensing opticians for purposes of when sales tax should be charged to patients for ophthalmic products. But NRS 372.055(3) plainly states that an optometrist is not a retailer. And NAC 372.320(1) likewise plainly states that an optometrist is a consumer of ophthalmic products, *e.g.*, glasses and lenses used or furnished in the performance of their professional services in the diagnosis, treatment or correction of conditions of the human eye. Conversely a licensed dispensing optician cannot provide such professional services, nor are considered a provider of healthcare in other chapters such as NRS 41A. In other words, the Department, particularly with never contacting the Board about the subject code, appears to not understand the differences in these professions including that optometrists have a tax statute specific to optometrists.

The Department implementing R043-24I, and thereby requiring optometrists to charge sales tax will have a negative economic impact on locally and privately owned optometrist practices. An unintended consequence of R043-24I would be providing large national or international optical corporations with an advantage through online sales located outside of Nevada. As the Department may or may not know, locally and privately owned optometric practices continue to be hurt with online optical businesses located outside of Nevada. Yet in the Department’s Notice pertaining to small business impact, it lists none.

Another concern is the Department’s possible determination that any time an optometrist’s employee transacts a sale of ophthalmic products a sales tax would need to be charged to the patient, and if not charged at the time, a violation of relevant tax law would occur. Should that be the Department’s position, it bears noting that the transaction is not by and through the employee and/or optician (whether licensed or not) but instead by and through the optometric practice which is not a retailer per a plain reading of NRS 372.055(3).

Be it before or after the issuance of the advisory opinion, the Board additionally invites an audience with you, the Department’s attorney, or member of the Department who initially proffered the subject code. A discussion about this issue at the Board’s next public meeting would be in the best interests of the persons affected by this code, *i.e.*, Nevada licensed optometrists as well as transparency owed to the public/consumers.

Respectfully,

/s/ Adam Schneider, Esq.
Executive Director

Enclosures as listed

cc: Deputy Attorney General Todd Weiss, Esq.

May 13, 2024

Dear Sirs:

I am writing to you in concern with the recent interpretation of NAC 372.320:

NAC 372.320 Oculists, optometrists and dispensing opticians. ([NRS 360.090](#), [372.055](#), [372.725](#))

1. Oculists and optometrists are the consumers of ophthalmic materials including eyeglasses, frames and lenses used or furnished in the performance of their professional services in the diagnosis, treatment or correction of conditions of the human eye. The tax applies to the sale of the materials to oculists and optometrists.

2. The tax applies to the entire charge made by a dispensing optician for eyeglasses and related products furnished in filling a prescription.

[Tax Comm'n, Combined Sales and Use Tax Ruling No. 10, eff. 3-1-68]

Definitions;

Oculist_Ophthalmologist.or.Optometrists;_a.person.skilled.in.testing.for.defects.of.vision.in.order.to.prescribe.corrective.glasses;

Dispensing.Optician_a person qualified and licensed to fit and supply eyeglasses

I have been in the optometric industry since 1985 here in Las Vegas. I started as an assistant/optician in 1985. I graduated from Optometry school in 1992 with my doctorate. I have worked in multiple settings, including the HMO (Sierra Health Services), Commercial/ Retail (Lenscrafters and Walmart), and eventually in a group private practice. I feel the need to express my concern over the recent interpretation of NAC 372.320.

There is a clear delineation of professions between an Oculist, Optometrist and a dispensing optician. Each of the professions are separate in their education, training and licensing. We work together in referring to each other for our expertise for the benefit of the patients and the public. This has worked in our state for decades, and I see that from NAC 372.320 which went into effect on 3-1-1968.

Oculists and Optometrists are medical professionals and have been deemed consumers of ophthalmic materials as clearly indicated in NRS 372.055 section 3. We use these related materials to help diagnose, treat or correct conditions of the human eye. We create customized prescriptions for our patients. We do that within our licensed practices with the aid of our clinical staff. These employees are under our supervision, direction and control. Our staff cannot create anything without the optometrists being responsible. So our optical staff are not licensed

opticians, they are staff trained by optometrists to work in fulfilling the prescriptions we, optometrists, create.

Dispensing opticians are a separate licensing as they exist with the Nevada State Board of Dispensing Opticians. These opticians are licensed by the state to provide the ability to fill or create a prescription lens or glasses under their own will, without the guidance or supervision of an Optometrist or Ophthalmologist. These professionals have been trained and educated in their field such as a pharmacist is in their expertise. These professionals can operate their own businesses or work for other corporations, such as Lenscrafters, Pearle Vision, or Walmarts.

The Nevada legislators of our past had the wisdom to understand the differences in our professions and as such created NAC 372.320.

Section 1, explains that Oculists and Optometrists are consumers of the materials so we have a Use tax that applies to materials oculist and optometrists use.

Section 2, explains the tax that is applied to the entire sales made by a dispensing optician.

It is for this reasoning that my concern was raised by the recent interpretation of NAC 372.320. There should not be a sales tax applied to prescriptions created in Oculists or Optometrists offices.

Thank you for your consideration,

Stephanie Lee, OD

Materials for Item No. 10 re

- FY2024-2025 budget (proposed)
- past Board Minutes re COLA

**BUDGET COMPARISONS AND PROPOSAL
NEVADA STATE BOARD OF OPTOMETRY**

JUNE 27, 2024

	A	B	C	D	E	F
1	CHART OF ACCOUNTS	2021-22 ACTUAL	2022-23 ACTUAL	2023-24 ACTUAL	2024-25 PROPOSED	Explanation of proposed column
2						
3	INCOME					Heritage (for 13 months operating reserves) \$202K + NSB \$37.3K + BofA \$67K as of 6/20/2024
4	New license applications	\$ 31,829	\$ 21,041	\$ 19,575	\$ 19,400	Gross average of 2022-23 and 2023-24 minus 3% credit card service charges
5	Certifications, add location, change addr.	\$ 46,637	\$ 14,872	\$ 32,656	\$ 14,550	Based upon prior non-renewal year minus 3% credit card service charges
6	License renewals	\$ 164,006	\$ 250	424,500 (566 lic	\$ -	Biennial renewals end in February of even-numbered years; hence \$0.00 for FY2025
7	SUBTOTAL: LICENSE FEE-RELATED REVENUES	\$ 242,472	\$ 36,163		\$ 33,950	
8	Merchant fees	\$ 919	\$ 562		\$ -	Discontinued per statute
9	Penalties (See line 46)	\$ 2,000	\$ 6,852		\$ -	Penalties are always a pass through (see line 46)
10	Interest earned	\$ 180	\$ 649		TBD	pending Certificate of Deposit with First Independent Bank at 5% Annual Percentage Yield
11	SUBTOTAL: IRREGULAR SOURCES OF INCOME	\$ 3,099	\$ 8,063	\$ 6,200	\$ -	Refund from Thentia
12	TOTAL INCOME	\$ 245,571	\$ 44,226		\$ 33,950	
13						
14						
15	EXPENDITURES					
16	OPERATIONS					
17	Bank charges	\$ 107	\$ 53	\$ -	\$ -	
18	Org. Memberships	\$ 1,000	\$ 1,000		\$ 1,000	ARBO
19	Office Equipment	\$ 750	\$ 50		\$ 750	possible new laptop + software installs
20	Computer hardware & software	\$ 750	\$ 838		\$ 3,503	Inclusive of Adobe \$816, Advantage Computers \$2076, Microsoft \$450, Zoom \$159.90
21	Office Supplies & Expenses	\$ 1,236	\$ 1,767		\$ 120	office paper (\$40/box x3)
22	Shipping, postage, delivery	\$ 908	\$ 537		\$ 381	Stamps.com (\$20 x 12 months) + PO Box \$141/year
23	Printing & copying	\$ 275	\$ 269		\$ 50	printer toner
24	Quickbooks Merch Processing	\$ 19,190	\$ 1,538			Accounted for in Income section; hence \$0.00
25	Website creation and updating	\$ 7,055	\$ 5,021		\$ 2,770	Reno Techs website maintenance package \$2570 + GoDaddy \$199.98
26	Misc. Expense	\$ 244	\$ 5,356		\$ 7,800	ADA compliance website package- (120 hours x \$65/hour for 40-45 published pages)
27	SUBTOTAL OPERATIONS	\$ 31,515	\$ 16,429		\$ 16,374	
28	PERSONNEL COSTS					
29	Wages	\$ 151,603	\$ 139,879		\$ 155,000	ED \$100,000; LM \$55,000; increases to \$161,200 if 4% COLA for ED \$104,000 + LM \$57,200 (inclusive of utility stipend \$300/month per employee)
30	Taxes	\$ 109	\$ -		\$ -	
31	Company PERS contribution	\$ 35,160	\$ 39,385		\$ 51,925	33.5% of gross wages x rate identified above; increases to \$54,002 if 4% COLA
32	Company Health Subsidy, Medicare	\$ 23,058	\$ 21,606		\$ 23,000	
33	Other EE Compensation	\$ 9,830	\$ 4,804			

JUNE 2024
FINANCIAL REPORT AND PROPOSED 2024-25 BUDGET

...	Cost of Payroll	\$ 100	\$ -	\$ 3,540		Carson Tahoe Tax Services (avg. \$295 x 12 months)
...	Workers Comp Insurance	\$ 583	\$ 2,388	\$ 794		via Hartford
...	SUBTOTAL PERSONNEL	\$ 220,443	\$ 208,062	\$ 234,259		
...	FACILITIES COSTS					
...	Rent/Lease	\$ 14,164	\$ 14,605	\$ 650		Administrative Collaborative joint tenancy lease
...	Utilities	\$ 5,575	\$ 6,324	\$ 600		RingCentral yearly fee
...	Liability Insurance	\$ 371	\$ 27,492	\$ 1,067		CNA \$398 + AG Tort Claim Fund \$669.36
...	SUBTOTAL FACILITIES	\$ 20,110	\$ 48,421	\$ 2,317		
...	OUTSIDE CONTRACTS					
...	Audit & Bookkeeping Svcs	\$ 12,927	\$ 15,900	\$ 15,000		
...	Lobbying & Legal Fees	\$ 9,000	\$ 18,000	\$ 48,000		DAG (avg. \$2.5K/month x 12) + \$18K lobby fees for 2025 session
...	Other Services Cost	\$ 2,049	\$ -			
...	SUBTOTAL OUTSIDE CONTRACTS	\$ 23,976	\$ 33,900	\$ 63,000		
...	COMPLAINTS, MEETINGS & TRAVEL					
...	Travel - Board & Staff	\$ 2,437	\$ 4,283	\$ 5,025		ARBO Annual Meeting (if no scholarship awarded) + 1 Reno in-person meeting + 1 Las Vegas in-person meeting
...	Investigations and Hearings costs	\$ -	\$ 1,852	\$ 1,852		Based upon past hearing costs
...	Penalties to State General Fund (See line 9)	\$ 2,000	\$ 5,000	\$ -		
...	Board Pay	\$ 2,400	\$ 4,283	\$ 6,000		\$150/meeting x 4 members x 10 meetings
...	SUBTOTAL MEETINGS, BOARD & TRAVEL	\$ 6,837	\$ 15,418	\$ 12,877		
...	TOTAL EXPENDITURES	\$ 302,881	\$ 322,230	\$ 328,827		
...	NET OPERATING INCOME	\$ (57,310)	\$ (278,004)	\$ (294,877)		

NEVADA STATE BOARD OF OPTOMETRY



MINUTES OF PUBLIC MEETING

November 28, 2023

...

9. **Action Item 10. Consideration of Agency Budget, with review for transition to Administrative Collaborative office in Reno, NV and termination of lease at present physical location.**

... Member Johnson expressed concern that such an action could be seen as a bonus, government should not be giving bonuses, and that Ms. Padilla is paid in line with other State workers at other State agencies, and will receive a 4% COLA when that occurs for all other State workers, plus can make overtime. Member Johnson commented as aspect of the Board is as the overseer of funds from its optometrist members. Member Johnson suggested possible shared employment with another State agency if Ms. Padilla needed additional money. Member Johnson moved to increase Ms. Padilla's pay by \$2.50/hour starting on next payroll check, while maintaining the ability for overtime pay at or after 40 hours per week. Dr. Smith seconds. Motion approved unanimously.

...

NEVADA STATE BOARD OF OPTOMETRY



MINUTES OF PUBLIC MEETING

June 22, 2023

...

4. **Overview of general government measures passed in the 2023 Legislative Session that may affect the Board, including 2022-23 and 2023-24 grant of Employee retention pay, State employee pay adjustments, open meeting law changes, establishment of position within Department of Business & Industry regarding Boards, and more.**
5. **Comprehensive report regarding measures passed in the 2023 Legislature Session that may affect the Board, including AB 432 of the 2023 Legislative Session, Chapter 230 Effective October 1, 2023; Discussion of outreach, education, and enforcement; Formulate plans to develop related regulations; OSLE update and other next steps.**

... Dir. Jenkins also reported on AB522 – Compensation of State Employees, the classified pay Bill. Governor Lombardo proposed and implemented a cost-of-living adjustment of 8-10% to all classified employees. Dir. Jenkins indicated that at the next Board meeting, someone be assigned the responsibility for the implementation and education of AB432 and NAC 636 regulations. Drew Johnson commented on Governor Lombardo's executive order to eliminate Boards and Commissions that are regulated in fewer than half of the states. Drew indicated that the only Board affected that relates to optometry is the Board of Dispensing Opticians.

...

9. **Consideration of Agency Budget; Review of 2020-2023 Income and Expenditures; Consideration and decisions regarding proposed budget and factor for 2023-2024, including contribution requirement for PERS, Staff salaries and office space, among others.** Director Jenkins provided a line-item explanation of the budget including contingent costs due to possible remote office transition, website updates, personnel, and compensation changes, and future legal fees. Drew Johnson recommended that all the retention bonuses from Gov. Lombardo be paid to both Caren Jenkins and Nancy Padilla, and to apply an 8% cost-of-living adjustment (AB522) starting in the new fiscal year, beginning July 1, 2023. Drew Johnson additionally recommended that the Board investigate shared staffing with other smaller Boards. Mariah Smith made a motion to approve the budget minus the rent, salaries, and remote-at-home expenditures lines. Stephanie Lee seconded motion. Motion passed unanimously.

...

Materials for Item No. 11 re

- 5/30/2024 Board Meeting Minutes (proposed)

NEVADA STATE BOARD OF OPTOMETRY



MINUTES OF PUBLIC MEETING

May 30, 2024

1. **Action Item 1. Roll Call, Call to Order, Welcome, Introductions.** President Mariah Smith, O.D. opened the live meeting at 12:03 p.m. President Smith and Board members Jeffrey Austin, O.D., Julieta Alamo-Leon, O.D, and Drew Johnson were present via Zoom. Executive Director Adam Schneider attended via Zoom. Deputy Attorney General (DAG) Todd Weiss, Esq. attended via Zoom. Pursuant to AB219, public telephonic access number 669-444-9171, meeting ID 816 1247 6114, Passcode 897761 were read into the record.
2. **Public Comment.** President Smith invited public comment. Dr. Girisgen explained the purpose of his letter in the meeting materials regarding NAC 636.250. Ron Voigt discussed the proposed sales tax code by the Department of Taxation being inconsistent with NRS 372.055(3) and that optometrists are not retailers of optometric products, and the Department of Taxation is mistaken that an optometrist and dispensing optician are the same, that the proposed change would impact economic growth of the optometry practice, and the change would encourage illegal business activity. Jennifer Letten, a Nevada licensed optician, read her email in the meeting materials regarding two-door configuration and concerns with anti-kickback law violations. Dr. Kopolow quoted his letter in the meeting materials about business associates, and the concern of those vested in the doctor's office and ones who are not, and the usage of shell entities for the perception of OD ownership. A concern is a comingling of funds and who is the custodian of records. Dr. Stephanie Lee discussed her interactions with the Department of Taxation that optometrists need to charge sales tax for optometric products, yet the statute says otherwise, and encouraged the Board to get clarification on what is a dispensing optician.
3. **Action Item- NRS 636.025(2) application to IPL.** Director Schneider reminded the Board this was a follow-up to the Board's decision at its 6/2023 meeting as memorialized in a letter to Dr. Bolenbaker in 8/2023, and Dr. Bolenbaker wants to revisit the decision. Director Schneider posed the question of what is considered to be an appendage or adnexa of the eye, and does the definition change for purposes of IPL to treat dry eye and ocular rosacea when standard treatment occurs from tragus to tragus. Director Schneider stated Dr. Bolenbaker provided materials in advance for the Board's review and is present at the meeting.

Dr. Austin stated he read the materials, and what the textbooks say as to eye appendage/adnexa includes the eyelid, lacrimal system, conjunctival sac, orbital contents excluding the eyeball and optic nerve and thus the extraocular muscles and orbital fat, and in limited circumstances the eyebrow, but never includes the cheek, forehead, temporal area of the face or any areas outside of the eyelid. Dr. Smith agrees that is the definition, but also noted that the risks with

IPL therapy is very minimal. Dr. Smith is not aware of what the device looks like, but suspects the applicator involves the cheek and brow when trying to treat from lid to lash, and suspects the Board would not penalize a license for treatment in that area. Dr. Austin stated even if the risk is low it would not make it legal based upon how the statute is written, the Board should not go outside the statute, and when a licensee is attempting to treat areas outside of the statute is not permissible. Dr. Smith asked if the treatment of crows' feet would be within the statute, which Dr. Austin stated is beyond the lateral canthus and thus not textbook appendage of the eye. Dr. Smith discussed for purposes of 2025 legislation any interest in expanding the statute to treatment of the skin around the eye in the interests of the patients having to then see a dermatology to treat a wider area. Dr. Austin stated an interest. Public Member Johnson inquired into the Dental Board statutes and what authorizes their dermatology-based procedures. Director Schneider did not know. DAG Weiss did not know. Dr. Alamo-Leon agreed with Dr Austin's summary of the statute, that optometrists have the capability of treating lateral of the eye, but there needs to be continuing education that goes into such treatments, but is an option for the future in the interests of the consumer to be able to be treated by the optometrist. Dr. Smith moved to maintain the definition of eye adnexa as-is, but wants to discuss in the Item for 2025 legislative goals to expand the definition. Dr. Alamo seconded.

After allowance by DAG Weiss, Dr. Bolenbaker's chat was read into the record "So essentially the board is saying the treatment of dry eye with IPL would only be allowed in an off label fashion?" Dr. Smith answered no, in that dry eye can be treated with IPL to the eye and adnexa and thus not off label and within the statutory allowed scope of practice. Treatment beyond the adnexa would also not be off label as much as it is illegal based upon how the laws are written currently and thus treatment from tragus to tragus would be impermissible even though that is how standard IPL is conducted. Motion passed unanimously.

4. **Action Item- NAC 636.250 and R066-19 Sec. 12(3) clarification.** Director Schneider provided the context of this topic is Drs. Kopolow and Girisgen's desire for clarification on the scope of duties mercantile businesses can provide to ODs. Director Schneider summarized the materials consisting of the Board's letter in 8/2023 to Dr. Horner, Drs. Kopolow and Girisgen's letter expressing their need for clarification and their perspective that there are different ways to read the statute, and relevant law including R066-19 Section 12 whose paragraph 3 lists what mercantile businesses can do and whose paragraph 4 lists what mercantile businesses cannot do.

Dr. Smith agreed with Director Schneider's comment about what paragraphs 3-4 state and is not ambiguous. Dr. Girisgen used Nationwide Vision as an example, and outsourcing in certain situations is fine but when the non-licensee has a vested interest in the performance of the optometrist is where the uncodified language needs to be refined. Dr. Smith asked Dr. Girisgen what his proposal would be to change the uncodified language bearing in the mind the Board is trying to prevent bad actors from violating the intent of the law when not a lot of other States have what Nevada law is trying to do. Dr. Kopolow suggested using conflict of interest law. Dr. Smith recommended any suggestions be sent to Director Schneider. Dr. Girisgen brought up Jennifer Letten's comments about Walmart staff scheduling as exposing the flaws in the uncodified law. Colloquy that R066-19 is with the Legislative Counsel Bureau. Jennifer Letten reiterated her suggestion that third-party businesses not affiliated with the corporation be hired to avoid violation of the law. Dr. Smith discussed that changing membership of the Board can come with it changes in the Board's prior decisions on similar

topics. Dr. Smith acknowledged the Board's letter to Dr. Horner would have been in conflict with past decisions of the Board with different members. Agreement to discuss as a possible 2025 legislative goal.

5. **Action Item- NRS 636.373(4) clarification.** Director Schneider posed a question from Dr. Hubbard- if there is no replacement for Dr. Michitsch as the OD name/leader of VSP Ventures in Nevada - what happens to the doctors under employment of VSP Ventures? It does not seem they could continue to practice under their contract. Dr. Smith commented that of the relevant law compiled by Director Schneider, NRS 636.300(2) is clear that it is unprofessional conduct for a licensee to accept employment from a person not licensed to practice optometry. Dr. Smith moved for Director Schneider to provide Dr. Hubbard a letter with the Board's decision. Dr. Austin seconded. Motion passed unanimously.

6. **Action Item- NAC 636.670(4) clarification.** Director Schneider posed a question from a licensee- can an OD fill a contact lens prescription issued by an international OD or OMD, presuming the prescription is current? Director Schneider summarized his communications with the licensee that there is no express prohibition on it in NRS 636 or NAC 636, and presumably the prescription needs to include the aspects of Nevada-compliant prescription, with the caveat that 670(4) has a proposed edit in R101-24 to remove as an aspect of the prescription the percentage of water content and thickness.

Dr. Smith discussed that other States or countries might have different laws on what is compliant to those jurisdictions, but that a Nevada licensee should be able to fill the prescription so long as abiding with an equivalent prescription. Dr. Alamo-Leon agreed. Dr. Austin agreed that Nevada licensees can be allowed to fill out of state or international vision prescriptions, but cautioned that the licensee must be aware of the liability and the lawsuit potential for doing so.

Dr. Smith moved that the Board has no say in what other States or countries have for their prescriptions to be valid, but Nevada licensees are allowed to fill those prescriptions so long as the prescription is valid and abiding by the parameters of the prescription. Dr. Alamo-Leon seconded. Motion passed unanimously.

7. **Action Item- 2025 legislative goals.** Director Schneider stated that Assemblyman Dr. Koenig needs a working bill by 7/1/2024, and that the Board has compiled a running list since his tenure. Director Schneider addressed each one by one-

- Additional board member (NRS 636.030 "The Nevada State Board of Optometry, consisting of four members appointed by the Governor . . .") If so, does the Board want geographic requirements. Dr. Smith acknowledged speaking with Dr. Koenig and this is something he wants, with a component that the member be an optometrist and from a specific geographic location. Dr. Smith expressed a concern of what would happen if nobody applies from those geographic areas, and that it is well-intentioned but difficult to implement. Public Member Johnson opposes a fifth member, but if so, the additional member should be a public member with perhaps an insurance background or healthcare background. Adding a 5th member to avoid ties is not useful when there has been only two ties in the past seven years one of which was through an inappropriate situation, and adding another optometrist would promote protectionism or cartelism. Dr. Austin agreed there is no need for an additional member. Dr. Alamo-Leon stated a 5th member makes sense, but it should be a licensee because this is the Board of Optometry. Colloquy on the frequency of tie votes, being two in the past seven years which Dr. Alamo-Leon said was two too many. Dr. Smith discussed obtaining authority

from the Board during sessions in Carson City. Public Member Johnson proposed Dr. Smith asking Dr. Koenig which one of the 12-15 rural ODs would be the 5th member.

- At Director Schneider's suggestion, with the last Board member salary increase occurring in 2007, to increase the 2007 \$150 equivalent to \$225 in 2024. Board stated the increase was unnecessary and declined to pursue in a bill.

- NRS 636.305 regards Board complaints. The statute would be amended to state: 1) the investigation may include, but is not limited to, compelling a licensee to appear before the Board; 2) "The proceedings of an investigative committee are confidential and are not subject to the requirements of NRS 241 and such proceedings are confidential between the licensee and the investigative committee members until such time as the investigative committee finds sufficient cause to recommend a formal complaint to the Board." Director Schneider discussed that the confidentiality could be a helpful tool to foster more honest discussions between the licensee and the Board when the licensee knows the hearing would not be public. Board agreed to pursue in a bill.

- Emergency powers for cease and desist and short-term summary suspension of license for conduct other than controlled substances prescriptions. At present NRS 636.339 allows for cease and desist, but only in the context of controlled substances prescription abuses. Director Schneider stated other fact patterns besides controlled substances abuses exist within the field, and the Board needs such powers. Board agreed to pursue in a bill.

- Expanded scope of practice within the definition of acts of optometry (NRS 636.025(1):

- 1) Elimination of 40 hour requirement for OMD training prior to ability to prescribe pharmaceutical agents (NRS 636.287(3). Dr. Smith commented about ophthalmology in the last cycle wanting to keep the 40 hour requirement in existence. Should the 40 hour requirement in NAC 636.730 be eliminated, there would be no need to seek a statute for OPAC endorsement akin the Glaucoma by endorsement. At minimum, add "In the event a licensee allows their license to expire and wishes to reapply, the licensee's prior approved OPAC training is valid for the life of the licensee, therefore, the applicant is not required to retake the 40-hour training to recertify." (NRS 636.287) Dr. Austin discussed licensees needing to pass the TMODs so the 40 hour requirement is moot at this point. Dr. Alamo-Leon discussed the history of the 40 hour requirement more so dealing with long-standing optometrists who were not trained on pharmaceuticals and not so much new graduates who were trained on such drugs. Dr. Austin agreed. Board agreed to pursue in a bill.
- 2) Allowance for glaucoma treatment upon the issuance of a license, graduation/licensure (NRS 636.2891, .2893., .2895) Board declined to pursue in a bill.
- 3) injections (lidocaine), lasers (YAG), chalazion removal. Board declined to pursue in a bill. Board discussed the subject matter would be better for the NOA to pursue and be supportive of the NOA in doing so.
- 4) expansion of appendage to be from tragus to tragus for purposes of IPL or RF or ZEST and any similar modality, bearing in mind the California Board allows for IPL and is in the process of adding RF officially. Dr. Alamo-Leon discussed the need for continuing education to current licensees for what is being taught in optometry schools. Director Schneider discussed the possible inclusion of certificates of training or CEs. Board agreed

to pursue in a bill.

- Family ownership of practice upon solo practitioner's death being expanded to permanent incapacitation (AB432 Section 14) Board agreed to pursue in a bill.
- Adding of "or optometric telemedicine" in the following statutes- "A licensee shall be authorized and entitled to practice optometry or optometric telemedicine in this State subject to the provisions of this chapter." (NRS 636.345) and "In any setting where optometry **or** optometric telemedicine is practiced . . ." (NRS 636.346(1) Director Schneider stated these are for clean-up, now that optometric telemedicine exists in AB 432, and to avoid any bad actors abusing telemedicine laws when the statutes would not apply to them because the statutes do not specifically state optometric telemedicine. Board agreed to pursue in a bill.
- AB 432 Section 16- As used in this section, "disciplinary action" means an action resulting in a report to the National Practitioner's Databank (NPDB) regarding patient care, or a finding of unprofessional conduct as defined in NRS 636.295. Director Schneider noted that other Boards, including California, differentiate between "disciplinary action" and "citation" for minor violations that would not necessarily warrant discipline to protect the public. This statute's purpose would be to avoid NPDB reporting on purely administrative actions, such as the denial of a license for failure to renew on time or pay the proper fee, and does not constitute discipline. Dr. Austin agreed an NPDB report is unnecessary for administrative actions. Dr. Alamo-Leon agreed. Board agreed to pursue in a bill.
- NRS 636.215 "1. The purpose of licensing optometrists is to protect the public health and safety and the general welfare of the people of this State. 2. Any license issued pursuant to this chapter is a revocable privilege." Director Schneider stated this is consistent with other healthcare providers' chapters, and has already passed legislative muster in the past with other healthcare providers' chapters. Dr. Austin agreed this is a good idea. Board agreed to pursue in a bill.
- Add the bolded font to AB432 19(9)(2) as follows- ("2. Except as otherwise provided in subsection 3, a licensee may engage in synchronous or asynchronous optometric telemedicine to provide health care services to a patient only if ~~the~~ **a** licensee has completed a comprehensive examination on the patient within the immediately preceding 2 years **and the examining licensee has access to and contemporaneously reviews such records of the prior two years)** Board agreed to pursue in a bill.
- NRS 636.300(2)(unprofessional conduct for accepting employment, directly or indirectly, from a person not licensed to practice optometry to assist the person in such practice or enable the person to engage therein) and NAC 636.250(2)(b) (A licensee shall not except as otherwise authorized by NRS 636.347, serve as an employee or independent contractor of any person who is not licensed to practice optometry). Director Schneider reminded the Board this was discussed at the end of the prior meeting where Dr. Kopolow expressed concern about independent contractors, potentially mislabeled as such when from an IRS perspective are actually employees, and the most traditional arrangement would through subleasing. Board agreed to hold these until the Board receives proposed changes from the membership, and then readdress at the Board's next meeting.
- NAC 636.250 (requires a licensee and non-optometrist business to maintain its own scheduling and computer system, have no influence on the licensee's staff, maintain clear

separation of physical space, etc.) and R066-19 Sec. 12(3) regards business relationships between optometrists and non-optometrists. Paragraph 3 states “An optometrist may form an association or other business relationship with a person, other than a physician, who is not licensed to practice optometry to perform duties concerning the operation of the business. Such duties must be limited to duties concerning the operation of the business and may include, without limitation, performing services related to payroll, human resources, real estate, regulatory matters not related to health care, banking, accounting, administration of benefits, marketing, merchandising, occupancy, accounts payable, accounts receivable, supply chain management, business development, business administration, labor, compliance with applicable laws and regulations, purchasing and medical billing.” Paragraph 4 lists what cannot be performed, i.e., “clinical decisions, scheduling of patients, any decision concerning scope of practice or use of facilities, equipment or drugs; or any other decision concerning the provision of care to a patient or the outcome of any treatment or other service provided to a patient, and ensure that any advertising, marketing and promotional materials accurately portray the position of the optometrist within the association or business relationship . . .” Consistent with Action Item 4, Board agreed to hold these until the Board receives proposed changes from the membership, and then readdress at the Board’s next meeting.

- Proposed legislation in 2023 session included a section for the prohibition of non-licensees holding ownership interest in optometry practice, accepting a position of authority via management services position, but was not submitted. The Board declined to re-pursue in a bill.

Upon DAG Weiss’s advice, the above list will be the subject of a vote at the Board’s next meeting.

8. **Action Item- Tax Commission proposed legislation re frames/lenses sales tax.** Dr. Smith commented that her initial reading of the proposed laws was consistent with her understanding of what optometry practices were already doing, but moved to authorize Director Schneider to write a letter to explain the difference between opticians and optometrists. Dr. Alamo seconded and agreed, and that the proposed Code misses the point that the products are medical devices. Motion passed unanimously. Director Schneider provided background that he and DAG Weiss have had a meeting with the Department of Taxation’s ED and DAG, and they are aware that the Board is aware of this proposed Code. Director Schneider commented the letter would have to be a formal petition pursuant to the relevant Code, and would be presented to the Board for approval at the next meeting.
9. **Action Item- Complaint 24-11 status.** DAG Weiss summarized his communications with the subject licensee’s counsel and ongoing negotiations, that the Complaint had been served, and he anticipated proposed Settlement Agreement terms at the Board’s next meeting.
10. **Action Item- Complaint 24-13 status.** Director Schneider stated this is a continuation of an Item from the 4/2024 agenda where the Board had sought the licensee’s employment contract. The licensee retained counsel and did not provide the contract because the contract had since been rescinded and voided and the licensee is no longer doing any business with the optical business. Director Schneider theorized that DAG Weiss would advise to close the investigation, but the question for the Board is what to do next. DAG Weiss advised the contract no longer has any legal effect, and recommended to close the investigation. Public Member Johnson moved to close the investigation. Dr. Austin seconded. Motion passed unanimously.

11. **Action Item- Consideration and approval of letter to Board of Dispensing Opticians.** Dr. Smith stated the draft was thorough and thought all about multiple scenarios, and moved to accept as proposed. Dr. Austin seconded. Motion passed unanimously.
12. **Action Item- Consideration and approval of April 25, 2024 Board Meeting Minutes.** Dr. Smith confirmed all Board members had looked over the proposed Minutes. Dr. Austin moved to accept as proposed. Dr. Alamo-Leon seconded. Motion passed unanimously.
13. **Public Comment.** Dr. Kopolow stated: 1) he will submit proposals for statutory revisions expeditiously; 2) the history of the sales tax issue that at one point in time optometrists preferred to be the end-user when the sales tax was 2%, but optometrists were caught in the mix when the 2% was eliminate and increased to approximately 7% and State sales tax agents and auditors who fail to understand that in addition to them not understanding the difference between an optician and an optometrist; and 3) the IRS testing is clear as to what constitutes independent contracts. Danny Thompson stated he is 73 years old, a native Nevadan and served in Nevada legislature for 10 years, been at the Nevada legislature for 44 years, has attended tens of thousands of board meetings, this is the second time attending this and finds it offensive that a member of the committee refers to the people being regulated as a protectionist cartel, if the committee lets such comments stand in a public hearing the committees loses credibility, the chairman of the committee needs to tell the member to keep their opinions to themselves and impugns the community's credibility and has never seen such comments be allowed. Jennifer Letten thanked President Smith for the opportunity to participate in the meeting, and for Director Schneider working with the Board of Dispensing Opticians.
14. **Action Item- Adjournment.** Dr. Smith moved to adjourn the meeting. Public Member Johnson seconded. Motion passed unanimously. The meeting adjourned at 1:45 p.m.

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FY 2023-2024 Regular meeting schedule

Thursday 6/27/2024 12:00p.m (pst) Reg. Bd. Meeting- phone or Zoom

FY 2024-2025 Regular meeting schedule

Wednesday 7/31/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom
Wednesday 8/28/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom
Thursday 9/26/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom
Wednesday 10/30/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom
Wednesday 12/11/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom

These minutes were considered and approved by majority vote of the Nevada State Board of Optometry at its meeting on June 27, 2024.

/s/ _____
Adam Schneider, Executive Director