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MEMBERS OF THE COMMITTEE

Lillian Wang, OD, Chair
Glenn Kawaguchi, OD, Vice President
David Turetsky, OD

**Legislation and Regulation Committee
APPROVED MEETING MINUTES**

Friday, September 18, 2020

This public meeting was held via WebEx Events.

Members Present	Staff Present
Glenn Kawaguchi, OD	Shara Murphy, Executive Officer
Lillian Wang, OD	Cheree Kimball, Assistant Executive Officer
David Turetsky, OD	Marc Johnson, Policy Analyst
	Natalia Leeper, Licensing Coordinator
	Rebecca Bon, Legal Counsel

Link to Meeting: <https://youtu.be/0o1pirlu6bU>

1. Call to Order / Roll Call

Audio of discussion: [0:03 / 1:18:55](#)

Dr. Wang called roll at 10:00 a.m. and all members were present. A 3-0 quorum was established.

2. Public Comment for Items Not on the Agenda

Audio of discussion: [0:20 / 1:18:55](#)

There were no public comments.

3. Discussion and Possible Action on January 31, 2020 Legislation and Regulation Committee Meeting Minutes

Audio of discussion: [1:31 / 1:18:55](#)

David Turetsky moved to approve the January 31, 2020 minutes as they have been presented. Glenn Kawaguchi seconded. The Committee voted unanimously (3-0) and the motion passed.

Member	Aye	N	Abstain	Absent	Recusal
Wang	X				
Turetsky	X				
Kawaguchi	X				

4. Discussion and Possible Action on Presentation by Adam Bentley (Chair, Dispensing Optician Committee) on Changes to Chapters 5.4, 5.45 and 5.5 of the Business and Professions Code (Optician Program Statutes)

Audio of discussion: [2:17 / 1:18:55](#)

Adam Bentley, Chair of the Dispensing Optician Committee (DOC), presented on optician program statute changes. Section 2550.1 (c) and (d) received a comment from the National Association of Optometrists and Opticians (NAOO) which stated that the definition does not make sense as written. It suggests that certain acts will be listed. The Board agreed to place the semicolon.

Immediately below was another comment from the NAOO that suggested removal of the terms “Registered Optician, and Registered Dispensing Optician as they are confusing. The NAOO recommends that the terms be removed from The statute and be replaced with the definitions from Subsection 1 through 4. As the DOC reviewed this, it declined to make a change because the language enabled the Board to list the RDO versus RSLD; defining the business registration from that of the individual. The Committee felt that it is necessary to have each of the titles.

Mr. Bentley reported that Dr. Kawaguchi did not feel that subsections 3 and 4 are needed as they make the statute a bit more confusing. As discussed during the DOC meeting, members felt that 3 and 4 provided the needed clarity for Registered Dispensing Opticians (RDOs) when directing staff that is not certified or registered regarding what they can do in California. Mr. Bentley noted that other states have very clear guidelines about what staff can and cannot do; within an RDO business the Board regulates certain acts and this, as written, defines those acts.

Dr. Kawaguchi believes it is regulation for the sake of regulation; he understands the intent but is not convinced it is necessary based on other standards in other standards. Dr. Wang requested clarification that he is basing this on what is written in other states; Mr. Bentley provided an example of Nevada which has a very clear explanation of what acts can and cannot be performed within an RDO business. Dr. Wang responded that what is listed is everything that can be performed under the supervision of an RDO? Mr. Bentley confirmed, “yes”.

Dr. Kawaguchi argued that, with this proposed change, it sounds like the Board is trying to regulate folks who are not registered, but the Board would have no power or

ability to enforce and infractions. Ms. Bon responded that if the intent is to carve out what tasks unregistered folks may perform, she does not see a problem with outlining what is allowed. Dr. Kawaguchi asked would be held accountable if there is a breach of professionalism or conduct; the Board does not have the power to go after the unregistered person.

Dr. Turetsky asked if the provision right underneath that states: "Anybody that is working under the supervision of an ophthalmologist or an optometrist," none of these regulations apply to them; so, would that not mitigate the entire circumstance if the Ophthalmologist says: "I am giving everything over to my SLD". Dr. Kawaguchi argued that this assumes that the doctor is the direct supervisor, but he knows that in many offices the doctor is not the direct manager of unregistered staff. Dr. Wang commented that if the doctor is asking staff to perform duties that are outside of the purview of an RDO, then that comes directly under the doctor's responsibility. Section (g) is referring to optician trainees that are doing RDO work without licensure. Anything else that is not something that an RDO would perform would then fall under the purview of the doctor.

Ms. Murphy explained that a situation such as in Dr. Kawaguchi's example would certainly be an issue and if a consumer were aware of that or if the SLD or contact lens dispenser (CLD) felt that they were put in a position where they were being asked to directly supervise, those are details that staff would investigate in an enforcement case. Ms. Murphy believes the text under (g) "the provision of this chapter does not apply" allows the industry to employ within offices professionals of all different levels; but in the case of an actual investigation of an enforcement issue or a consumer protection claim, then enforcement would take interviews to determine what the line of supervision was and whether an SLD or CLD was placed in a position to oversee duties that would not be appropriate.

Dr. Wang asked if it would be too vague to include an additional statement that talks about all other skills that an RDO is licensed to perform, to cover any extension of practice privileges by an optician. Mr. Bentley offered an example using the word dispense, which he feels is a broad word. This is where the Committee is trying to obtain a bit more clarity.

Ms. Murphy advised that the Committee be careful about trying to "future proof"; she noted that during the development of the CE regulation package, members and staff had a desire to ensure that new future technologies could be incorporated. This is difficult for a regulatory body. Ms. Murphy added that this discussion indicates the need to provide more specificity and it is the Board's continued job to review statutes and the industry to make adjustments that align with practice and provide consumers protection against new technologies or new duties.

Dr. Turetsky stated that Dr. Wang's point is very well taken. Things will change drastically in the next five years. He envisions opticians taking on far greater responsibilities and using new instrumentation and equipment that comes out. He

argued that we should not be too specific and leave some room for growth and development that will not have to go before the Legislature to be modified.

Dr. Wang clarified that since the Dispensing Optician Committee (DOC) feels that this is helpful, she is fine with keeping this. Her question is whether we can include an additional statement that opens the door or leaves room to include an expansion of skills. Ms. Bon replied that she understands the Members' idea that the more maneuverability the Board allows itself, the better because then the Board will have much greater ability in its regulatory capacity to deal with the nuances.

Ms. Murphy asked Mr. Bentley if, in his professional expertise, if he feels this is too prescriptive; too specific? She noted that three occupational analyses will be coming to bear in the next year; where the committee will be looking at what is happening in the industry and how folks are interacting within vision care. Mr. Bentley replied that he loves embracing change and believes that when he is in an RDO business it provides peace of mind knowing that the Board is regulating specific acts and saying that certain individuals perform certain acts; as well as what you can do if you are not a registered individual.

A public comment from Mr. William Kysella was made. Mr. Kysella is a member of the DOC. He believes part of the issue is that we are dealing with a substantive provision in a definition section. The substantive work under 1 and 2 of this definition is under the other sections (2559.15 and 2560); therefore, as times change, this work will change, which the cross-reference captures. He suggested cleaning the language up by saying that "the definition of an unregistered optician trainee means an individual who is not registered, under this chapter, who is performing work under the supervision of an SLD" (or whoever it is). This may eliminate the need for having to list specific duties. Anna Watts, also a member of the DOC making public comment, agreed with this statement. Committee agrees with the change.

Ms. Murphy requested confirmed that she is hearing that the Committee is comfortable with the reference to Section 2559.15 and the reference to Section 2560 that points back to the statutes which develop the practice act for a registered CLD or a registered SLD? Dr. Wang noted Mr. Kysella's other suggestion in stating that "the definition of an unregistered optician trainee means an individual who is not registered, under this chapter, who is performing work under the supervision of a registered SLD".

Mr. Bentley directed Members' attention to Section 2550(u) which states "*failure to refer a patient to an appropriate optometrist or physician and surgeon if the patient does not hold a current and unexpired prescription*". The DOC changed this proposed section making it unprofessional conduct for an optician failing to refer the patient to an optometrist or physician/surgeon if their prescription has expired. This change was based on task and knowledge statements from the SLD occupational analysis, which showed the failure to refer for a valid prescription as within the typical tasks of a registrant.

Dr. Wang recalled a comment from the last meeting that if there is a referral by the RDO it would have to be entered or written down somewhere for legal reasons.

Dr. Kawaguchi directed Members' attention to the number of unprofessional conduct cases. He stated that this is adding a new regulation and he feels this is more the responsibility of an optometrist or ophthalmologist. While an optician may choose to suggest to a patient with an expired prescription that they will need a new exam; he is not sure that it is appropriate to hold them accountable and to increase documentation. Dr. Kawaguchi understands and likes the point, but he also wants to be careful to not overregulate SLDs and CLDs. He agrees with this in concept but not in a new regulation. Mr. Bentley recalled in a previous discussion if an optician were to notice any problem with the eye, they would have to refer the patient back to the doctor. During this conversation the Committee wanted to say that it is not the optician's scope to identify an eye disease and refer; we settled on an expired prescription.

Dr. Turetsky recalled that the previous statute stated that if an optician were filling an expired prescription and it was an emergency, that it was acceptable, but the optician was supposed to advise the patient to return to their ophthalmologist or optometrist for an examination and send a written notice to the doctor that they have filled an expired prescription. He asked if this modifies that specific statute, 2541.1(b)? Mr. Bentley, Ms. Watts, and Dr. Wang agree that if this exists, it would eliminate the need for (u).

Ms. Murphy advised that she wants to ensure that before removing (u) that we are not trying to give clarity within the practice act for an SLD that currently did not appear and was just in general terms within prescription lens statutes. She reminded the Members that the importance of the proposed statutes is to provide a comprehensive practice act that provides clear direction and definitions for a cohesive and coherent discussion with everyone on the same page about the occupational analyses and what those do to inform a larger change of statutes. Dr. Turetsky asked that someone review this before removing section (u).

Public comment: Megan Loper, representing Luxottica, questioned if the Occupational Analyses (OAs) will be a part of the discussion before recommending that the Legislature consider changes to the statute, or if it will be a separate effort?

Public comment: Joe Neville with the NAOO, commented on 2550.1(g)(3) and (4) which was discussed. He cautioned that if the Committee intends to limit the number of people that an SLD can supervise (at the 3-to-1 ratio) they may be creating a third category individuals in an optical dispensary, which he referred to as a clerical person. The items in (3) and (4) are not regulated activities.

Mr. Neville also commented on 2555(u). He argued that as it is written right now, it creates a plaintiff's dream. Opticians will be subject to claims that if they did not make the statement "you need to see your doctor"; and they do not record and keep a record, they will be subject to lawsuits. They will not only be subject to prosecution from the

Board, but they will become subject to lawsuits. He suggested a stronger statement that an optician is not permitted to fill an expired prescription might be the better solution.

Mr. Kysella stated that for [2555\(u\)](#) the last comment can be combined with the provision Dr. Turetsky read. The unprofessional conduct to (u) should be filling an expired prescription. It shall not be unprofessional conduct to fill an expired prescription in an emergency where the prescribing doctor is notified. An exception to (u) can be created.

Ms. Murphy spoke to the time frame of the OAs, that it is the intention to make this change a separate item. The Board is in the beginning stages of developing the OA for unlicensed assistants; Therefore, it will be at least 6-8 months before that data will be available. The intention in asking the Legislature to implement these statute changes is to create a clear practice act with clear definitions and provisions that apply to businesses and that apply to individual licensees so that the Committee may have the next-step of the conversation from a very clear concise practice act.

Mr. Bentley presented on [Sections 2259.15 and 2559.2\(a\)](#). He explained that Section 2259.15 is removing the phrase *“allowing for usual and customary absences”*. If a registered SLD is not sick or late for work, there is room for them to operate the business. All optician tasks are permitted because of this, *“allowing for usual and customary absences”*. Since the Committee is trying to regulate RSLD’s, they must always be present to perform direct supervision. By having a supervising RSLD always present, the Committee is protecting the consumer from eyewear that is improperly fit, fabricated or adjusted. Mr. Bentley’s position is to remove *“allowing for usual and customary absences”* and replace it with *“there should always be a supervising RSLD present”*.

[Section 2559.2\(a\)](#) is regarding the number of years an applicant can go without practicing before he/she is required to retake the exam before applying for a new license. The addition of “has maintained their ABO, NCLE or practice within another state allows a CLD or SLD to not retake the exam. Mr. Bentley and Dr. Kawaguchi discussed this and came to the consensus on a 3-year requirement to align with the American Board of Opticianry (ABO) and National Contact Lens Examiners (NCLE) expiration dates and continuing education requirements. Eighteen other states require opticians to maintain ABO and NCLE certifications throughout the use of the state-issued license.

Mr. Bentley reported that feedback was received from the NAOO regarding [Section 2564.5](#), posing the requirement to have both hot and cold running water. Considering the burden placed on the business owner in having a new system installed that runs both hot and cold water, it was suggested to have the term *“clean running water”* rather than hot or cold. Ms. Murphy noted that staff confirmed compliance with the Centers for Disease Control (CDC) guidelines for sanitation, that hot water is not needed. Mr. Bentley stated that [Section 2560.70](#) is where members agreed the language should be expanded to *“all optical devices to be regulated by the state”*.

Dr. Kawaguchi noted broadly that he is not certain the intent of the DOC and the proposed language is matching all the time. He suggests continuing to work with staff to ensure the intent matches the way the language is drafted. Dr. Wang asked if the DOC will discuss their changes with staff and Legal Counsel and review those changes at the next Board meeting. Ms. Murphy announced that at the [October 23, 2020](#) Board meeting several public hearings must occur. Another future LRC meeting, which Mr. Bentley will present, will be scheduled to discuss the statutory review.

Mr. Bentley asked if the Members wish to touch on 2545(b)(1) which he purposely skipped over because it will be a larger conversation; Dr. Wang suggested discussing it at the next meeting due to tight time restraints.

5. Review, Discussion and Possible Action on Draft 2021 Optometry Board Strategic Plan

Audio of discussion: [1:14:30 / 1:18:55](#)

This item was not taken up.

6. Future Agenda Items

Audio of discussion: [1:16:55 / 1:18:55](#)

There were no public comments. No future agenda items were requested.

7. Adjournment

Meeting adjourned at 11:18 a.m.