



ISSUE MEMORANDUM

DATE	November 19, 2021
TO	Members, California State Board of Optometry
FROM	Shara Murphy, Executive Officer
SUBJECT	Agenda Item #6 – Discussion and Possible Action on Legislative Proposals and Priorities for 2022

The 2022 Legislative session is scheduled to convene on January 3, 2022. If desired, the Board will need to submit any bill proposals to the Legislature no later than December. The Legislative and Regulation Committee, at the October 22, 2021 public meeting, reviewed the below and voted to recommend full Board adoption of these proposals.

Suggested Motion:

I move to approve the below legislative proposals as presented and discussed here today and direct the Executive Officer to submit the text to the Legislature for the 2022 session.

Changes to Business and Professions Code Section 655 and 3040(Attachment A):

655: As a [result of AB 1534](#), BPC section 655 will be revised effective January 1, 2023. The introduction in subsection (d) would be rewritten to better define that all parties must first establish a written agreement which contains all requirements as set out in (d)(1) – (d)(16). This change would provide more clarity to the statutes by better defining that an agreement is required.

3040:

Staff proposes a minor addition to the section, which add the words “or entity” as applicable throughout the section. This ensures the law applies to entities such as optometry or optical companies, not just individuals.

Special Faculty Permit (Attachment B):

Staff was directed at the August 2, 2019 public meeting to review the possibility of a special permit being granted by the Board for foreign-trained optometrists who teach at a school of optometry in California. This permit would allow holders to perform the full optometry scope of practice within the clinics of the school by which they are employed. At a September 13, 2019 public meeting, the Legislative and Regulatory Committee approved the proposed statutory language with minor changes and recommended it to the full Board, which approved it at the [October 25, 2019 public meeting](#). Staff attempted to find an author for the bill in 2020 but was unsuccessful.

Other Suggestions for Legislative Proposals

- As a result of [public comment received](#), the LRC discussed possibly removing fees for optometry and optician licensees who are active duty military, not just “recalled to duty” reservists. [Present law](#) allows for waiver of renewal requirements (including fees) for reservists called to active duty but is silent on fees for active duty-military restationed outside of California. The Legislative Committee of the California Optometric Association is reportedly developing a legislative proposal.

The Board may wish to discuss its intended outcomes for a proposal of this kind. After discussion, the Board could direct staff to engage in discussions with COA and/or direct the Legislation and Regulation Committee to develop proposed statutory language with assistance from legal counsel. Staff, in conjunction with DCA staff, is planning a presentation to the Board in early 2022 on military licensure in California.

- Other proposals suggested by the Board, staff or the public during this agenda item.

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Proposed Amendments to the Text of Business and Professions Code Sections 655 (Effective January 1, 2023) and 3040

655.

(a) For the purposes of this section, the following terms have the following meanings:

(1) "Health plan" means a health care service plan licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(2) "Optical company" means a person or entity that is engaged in the manufacture, sale, or distribution to physicians and surgeons, optometrists, health plans, or dispensing opticians of lenses, frames, optical supplies, or optometric appliances or devices or kindred products.

(3) "Optometrist" means a person licensed pursuant to Chapter 7 (commencing with Section 3000) or an optometric corporation, as described in Section 3160.

(4) "Physician and surgeon" means a person licensed by the Medical Board of California or the Osteopathic Medical Board of California under Chapter 5 (commencing with Section 2000) or a medical corporation that is authorized to render professional services, as defined in Section 13401 of the Corporations Code.

(5) "Registered dispensing optician" means a person or entity licensed pursuant to Chapter 5.5 (commencing with Section 2550).

(6) "Therapeutic ophthalmic product" means lenses or other products that provide direct treatment of eye disease or visual rehabilitation for diseased eyes.

(b) No optometrist may have any membership, proprietary interest, coownership, or any profit-sharing arrangement, either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with any registered dispensing optician or any optical company, except as otherwise permitted under this section.

(c) (1) A registered dispensing optician or an optical company may operate, own, or have an ownership interest in a health plan so long as the health plan does not directly employ optometrists to provide optometric services directly to enrollees of the health plan, and may directly or indirectly provide products and services to the health plan or its contracted providers or enrollees or to other optometrists. For purposes of this section, an optometrist may be employed by a health plan as a clinical director for the health plan pursuant to Section 1367.01 of the Health and Safety Code or to perform services related to utilization management or quality assurance or other similar related services that do not require the optometrist to directly provide health care services to enrollees. In addition, an optometrist serving as a clinical director may not employ optometrists to provide health care services to enrollees of the health plan for which the optometrist is serving as clinical director. For the purposes of this section, the health plan's utilization management and quality assurance programs that are consistent with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code) do not constitute providing health care services to enrollees.

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(2) The registered dispensing optician or optical company shall not interfere with the professional judgment of the optometrist.

(3) The Department of Managed Health Care shall forward to the California State Board of Optometry any complaints received from consumers that allege that an optometrist violated the Optometry Practice Act (Chapter 7 (commencing with Section 3000)). The Department of Managed Health Care and the California State Board of Optometry shall enter into an Inter-Agency Agreement regarding the sharing of information related to the services provided by an optometrist that may be in violation of the Optometry Practice Act that the Department of Managed Health Care encounters in the course of the administration of the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

~~(d) An optometrist, a registered dispensing optician, a physician and surgeon, an optical company, or a health plan may execute a lease, sublease, or other written agreement with an optometrist, if all of the following conditions are contained in a written agreement establishing the landlord-tenant relationship:~~

~~(d) When sharing a location with an optometrist or involved in the delivery of the optometrist's services, any registered dispensing ophthalmic business, physician and surgeon, optical company, or health plan must first establish a written agreement that contains the following:~~

(1) (A) The practice shall be owned by the optometrist and in every phase be under the optometrist's exclusive control, including the selection and supervision of optometric staff, the scheduling of patients, the amount of time the optometrist spends with patients, fees charged for optometric products and services, the examination procedures and treatment provided to patients and the optometrist's contracting with managed care organizations.

(B) Subparagraph (A) shall not preclude a lease from including commercially reasonable terms that: (i) require the provision of optometric services at the leased space during certain days and hours, (ii) restrict the leased space from being used for the sale or offer for sale of spectacles, frames, lenses, contact lenses, or other ophthalmic products, except that the optometrist shall be permitted to sell therapeutic ophthalmic products if the registered dispensing optician, physician and surgeon, health plan, or optical company located on or adjacent to the optometrist's leased space does not offer any substantially similar therapeutic ophthalmic products for sale, (iii) require the optometrist to contract with a health plan network, health plan, or health insurer, or (iv) permit the landlord to directly or indirectly provide furnishings and equipment in the leased space.

(2) The optometrist's records shall be the sole property of the optometrist. Only the optometrist and those persons with written authorization from the optometrist shall have access to the patient records and the examination room, except as otherwise provided by law.

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(3) The optometrist's leased space shall be definite and distinct from space occupied by other occupants of the premises, have a sign designating that the leased space is occupied by an independent optometrist or optometrists and be accessible to the optometrist after hours or in the case of an emergency, subject to the facility's general accessibility. This paragraph shall not require a separate entrance to the optometrist's leased space.

(4) All signs and displays shall be separate and distinct from that of the other occupants and shall have the optometrist's name and the word "optometrist" prominently displayed in connection therewith. This paragraph shall not prohibit the optometrist from advertising the optometrist's practice location with reference to other occupants or prohibit the optometrist or registered dispensing optician from advertising their participation in any health plan's network or the health plan's products in which the optometrist or registered dispensing optician participates.

(5) There shall be no signs displayed on any part of the premises or in any advertising indicating that the optometrist is employed or controlled by the registered dispensing optician, health plan, or optical company.

(6) Except for a statement that an independent doctor of optometry is located in the leased space, in-store pricing signs and as otherwise permitted by this subdivision, the registered dispensing optician or optical company shall not link its advertising with the optometrist's name, practice, or fees.

(7) Notwithstanding paragraphs (4) and (6), this subdivision shall not preclude a health plan from advertising its health plan products and associated premium costs and any copayments, coinsurance, deductibles, or other forms of cost sharing, or the names and locations of the health plan's providers, including any optometrists or registered dispensing opticians that provide professional services, in compliance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(8) A health plan that advertises its products and services in accordance with paragraph (7) shall not advertise the optometrist's fees for products and services that are not included in the health plan's contract with the optometrist.

(9) The optometrist shall not be precluded from collecting fees for services that are not included in a health plan's products and services, subject to any patient disclosure requirements contained in the health plan's provider agreement with the optometrist or that are not otherwise prohibited by the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(10) The term of the lease shall be no less than one year and shall not require the optometrist to contract exclusively with a health plan. The optometrist may terminate the lease according to the terms of the lease. The landlord may terminate the lease for the following reasons:

(A) The optometrist's failure to maintain a license to practice optometry or the imposition of restrictions, suspension or revocation of the optometrist's license, or if the optometrist

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or the optometrist's employee is or becomes ineligible to participate in state or federal government-funded programs.

(B) Termination of any underlying lease where the optometrist has subleased space, or the optometrist's failure to comply with the underlying lease provisions that are made applicable to the optometrist.

(C) If the health plan is the landlord, the termination of the provider agreement between the health plan and the optometrist, in accordance with the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

(D) Other reasons pursuant to the terms of the lease or permitted under the Civil Code.

(11) The landlord shall act in good faith in terminating the lease and in no case shall the landlord terminate the lease for reasons that constitute interference with the practice of optometry.

(12) Lease or rent terms and payments shall not be based on number of eye exams performed, prescriptions written, patient referrals or the sale or promotion of the products of a registered dispensing optician or an optical company.

(13) The landlord shall not terminate the lease solely because of a report, complaint, or allegation filed by the optometrist against the landlord, a registered dispensing optician, or a health plan, to the California State Board of Optometry or the Department of Managed Health Care or any law enforcement or regulatory agency.

(14) The landlord shall provide the optometrist with written notice of the scheduled expiration date of a lease at least 60 days prior to the scheduled expiration date. This notice obligation shall not affect the ability of either party to terminate the lease pursuant to this section. The landlord may not interfere with an outgoing optometrist's efforts to inform the optometrist's patients, in accordance with customary practice and professional obligations, of the relocation of the optometrist's practice.

(15) The California State Board of Optometry may inspect, upon request, an individual lease agreement pursuant to its investigational authority, and if such a request is made, the landlord or tenant, as applicable, shall promptly comply with the request. Failure or refusal to comply with the request for lease agreements within 30 days of receiving the request constitutes unprofessional conduct and is grounds for disciplinary action by the appropriate regulatory agency. This section shall not affect the Department of Managed Health Care's authority to inspect all books and records of a health plan pursuant to Section 1381 of the Health and Safety Code.

Any financial information contained in the lease submitted to a regulatory entity, pursuant to this paragraph, shall be considered confidential trade secret information that is exempt from disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(16) This subdivision shall not be applicable to the relationship between any optometrist employee and the employer medical group, or the relationship between a medical group

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exclusively contracted with a health plan regulated by the Department of Managed Health Care and that health plan.

(e) No registered dispensing optician may have any membership, proprietary interest, coownership, or profit-sharing arrangement either by stock ownership, interlocking directors, trusteeship, mortgage, or trust deed, with an optometrist, except as permitted under this section.

(f) Nothing in this section shall prohibit a person licensed under Chapter 5 (commencing with Section 2000) or its professional corporation from contracting with or employing optometrists, ophthalmologists, or optometric assistants and entering into a contract or landlord-tenant relationship with a health plan, an optical company, or a registered dispensing optician, in accordance with Sections 650 and 654 of this code.

(g) Any violation of this section constitutes a misdemeanor as to such person licensed under Chapter 7 (commencing with Section 3000) of this division and as to any and all persons, whether or not so licensed under this division, who participate with such licensed person in a violation of any provision of this section.

(h) (1) Notwithstanding any other law and in addition to any action available to the California State Board of Optometry, the California State Board of Optometry may issue a citation containing an order of abatement, an order to pay an administrative fine, or both, to an optical company, an optometrist, or a registered dispensing optician for a violation of this section. The administrative fine shall not exceed fifty thousand dollars (\$50,000) per administrative action. Notwithstanding any other law and in addition to any action available to the Medical Board of California or the Osteopathic Medical Board of California, the Medical Board of California or the Osteopathic Medical Board of California may issue a citation containing an order of abatement, an order to pay an administrative fine, or both, to a physician and surgeon for a violation of this section. In assessing the amount of the fine, the board shall give due consideration to all of the following:

(A) The gravity of the violation.

(B) The good faith of the cited person or entity.

(C) The history of previous violations of the same or similar nature.

(D) Evidence that the violation was or was not willful.

(E) The extent to which the cited person or entity has cooperated with the board's investigation.

(F) The extent to which the cited person or entity has mitigated or attempted to mitigate any damage or injury caused by the violation.

(G) Any other factors as justice may require.

(2) A citation or fine assessment issued pursuant to a citation shall inform the cited person or entity that if a hearing is desired to contest the finding of a violation, that hearing shall be requested by written notice to the board within 30 days of the date of issuance of the citation or assessment. If a hearing is not requested pursuant to this

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section, payment of any fine shall not constitute an admission of the violation charged. Hearings shall be held pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(3) The board shall adopt regulations to implement a system for the issuance of citations, administrative fines, and orders of abatement authorized by this section. The regulations shall include provisions for both of the following:

(A) The issuance of a citation without an administrative fine.

(B) The opportunity for a cited person or entity to have an informal conference with the executive officer of the board in addition to the hearing described in paragraph (2).

(4) The failure of a licensee to pay a fine within 30 days of the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the board. Where a citation is not contested and a fine is not paid, the full amount of the assessed fine shall be added to the fee for renewal of the license. A license shall not be renewed without payment of the renewal fee and fine.

(5) Notwithstanding any other law, if a fine is paid to satisfy an assessment based on the finding of a violation, payment of the fine shall be represented as satisfactory resolution of the matter for purposes of public disclosure.

(i) Administrative fines collected pursuant to this section shall be deposited in the fund of the board that has issued the fine. It is the intent of the Legislature that moneys collected as fines and deposited in the fund be used by the board primarily for enforcement purposes.

(j) Any complaints against a physician and surgeon for violations of this section shall be referred to the physician and surgeon's licensing board.

(k) This section shall become operative on January 1, 2023.

Business and Professions Code Section 3040:

(a) It is unlawful for a person **or entity** to engage in the practice of optometry or to advertise or hold himself or herself out as an optometrist without a valid, unrevoked California optometrist license. The practice of optometry includes the performing or controlling of any acts set forth in Section 3041.

(b) In any prosecution for a violation of this section, the use of test cards, test lenses, or of trial frames is prima facie evidence of the practice of optometry.

ATTACHMENT B

California State Board of Optometry Proposed Statutory Text – Special Faculty Permits As approved by Board at the 10-25-19 public meeting

Add §3042.55 to Article 4 of Chapter 7 of Division 2 of the Business and Professions Code:

(a) The Board may issue a special faculty permit for the practice of optometry, as defined in Section 3041, only within an California accredited school of optometry and any affiliated institution in which the faculty permit holder is providing instruction as part of the optometry school's educational program and for which the optometry school has assumed direct responsibility. The holder of a such a faculty permit shall not engage in the practice of optometry except as provided above.

(1) Any person who meets all of the following eligibility requirements may apply for a special faculty permit:

(A) Holds or has been offered an appointment at the level at the academic rank of professor, associate professor, or clinical professor, except that the status of adjunct or affiliated faculty member shall not be deemed sufficient.

(B) Has a degree as a doctor of optometry issued by an accredited school or college of optometry in another state, country or jurisdiction;

(C) Has successfully passed the licensing examination for an optometric license in another state, country or jurisdiction.

(D) Possesses a current valid license in good standing to practice optometry issued by another state, country, or other jurisdiction. The term "in good standing" means the same as in section 3057, subsection (e).

(E) Meets the requirements of section 3057, subsection (a), paragraphs (4), (5), (7), (9) and (10).

(F) Has successfully passed the board's jurisprudence examination.

(2) The Board may establish a review committee comprised of two members of the Board, one of whom shall be a licensed optometrist and one of whom shall be a public member. The committee may review and make recommendations to the full Board regarding the applicants applying pursuant to section. Any member of the Board who is currently employed by an accredited school of optometry shall not be appointed to the committee, and may not vote on the recommendation as part of the full Board vote. At the Board's discretion, an existing subcommittee under the Board may act as the review committee.

(b) Any person who meets the requirements specified above shall complete an application on a form prescribed by the board prior to being issued a special faculty permit. This information shall include, but is not limited to, the following:

(1) A signed statement from the president or dean of the optometry school at which the applicant will be employed describing the applicant's qualifications and justifying the president's determination that the applicant satisfies the requirements above.

(2) A signed statement by the president or dean of the optometry school listing every affiliated institution in which the applicant will be providing instruction as part of the optometry school's educational program and justifying any clinical activities at each of the institutions listed by the president.

(3) An acknowledgment by the person executed under penalty of perjury and automatic forfeiture of license, of the following:

(a) That the information provided by the person to the board is true and correct, to the best of his or her knowledge and belief.

(b) That the person has not been convicted of an offense involving conduct that would violate Section 810.

(4) Any other information the Board deems necessary in order to verify applicant's background and qualifications for the permit.

(c) The applicant shall pay an application fee in an amount prescribed pursuant to subdivision (u) of Section 3152.

(d) A special faculty permit may be denied, suspended, or revoked for any violation that would be grounds for denial, suspension, or revocation of a optometrist license, or for violation of any provision of this article. The holder of a special faculty permit shall be subject to all the provisions of this chapter applicable to the holder of an optometry license.

(e) A special faculty permit expires and becomes invalid at midnight on the last day of the month in which the permit was issued during the second year of a two-year term commencing from the date of issuance, if not renewed. A person who holds a special faculty permit shall show at the time of license renewal that he or she continues to meet the eligibility criteria set forth in subsection (a) and (b)(1) and (b)(2) above.

(f) A person who holds a special faculty permit shall meet the continuing education requirements of section 3059 and shall be renewed in the same manner as an optometrist's license. The fee for renewal shall be an amount prescribed pursuant to subdivision (v) of Section 3152.

(g) The Board shall adopt regulations in furtherance of this section.

Amend §3152 to Article 7 of Chapter 7 of Division 2 of the Business and Professions Code:

(u) The application fee for a special faculty permit is five hundred dollars (\$500). The board may increase the fee to not more than six hundred dollars (\$600).

(v) The renewal fee for a special faculty permit is four hundred dollars (\$400). The board may increase the fee to not more than five hundred dollars (\$500).