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**To:** Dispensing Optician Committee Members      **Date:** August 18, 2017

**From:** Board Legal Counsel      **Telephone:** (916) 575-7170

**Subject:** **Agenda Item 8 - Update, Discussion and Possible Action Regarding Valid Business Relationships, Decoupling, and Registration Mobility; Potential Recommendation to Full Board**

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## Background

During the last DOC meeting, Board staff identified an emerging matter relating to a perceived “valid relationship” requirement between a registered dispensing optician (RDO), spectacle lens dispenser (SLD), and/or a contact lens dispenser (CLD), namely, that, for a SLD/CLD registration to be considered “valid,” it must be tied to a current and valid RDO registration and vice versa.

The current registration applications further imply such a relationship is required. For example, section 7 of the [RDO application](#) requires the applicant to identify the SLD/CLD “responsible for overseeing the fitting and adjusting of the [RDO].” Applications are not processed without this information.

In addition, the [SLD](#) and [CLD](#) applications ask if the applicant is employed by an RDO; if the answer is “No,” the applicant is told not to continue with the application, stating “you are not eligible for registration.” The applications require specific RDO information “in order to assure compliance with” BPC § [2559.1](#).

Further, according to some, a registrant cannot be employed by an optometrist. If a registrant becomes employed by an optometrist, the registration is no longer valid and cannot be renewed. Supporting this interpretation, the California Association of Dispensing Opticians offered a written statement during the July 14, 2017 committee meeting (Attachment 1).

However, the National Association of Optometrists and Opticians (NAOO) does not believe the statutes support such coupling. In a letter dated August 9, 2017 (Attachment 2), the NAOO found “no requirement for this coupling in law” and claimed that such requirement “creates an unnecessary hardship for both the prospective employee seeking employment and the RDO that needs to hire registered opticians.”

## Analysis

The relevant statutes do not require that an applicant for an SLD or CLD be employed by an RDO to be issued a registration or a renewal by the Board. See, Business and Professions Code (BPC) §§ [2550-2569](#). BPC section [2559.2](#)(a) states that the Board “*shall* register an individual as a registered spectacle lens dispenser *upon* satisfactory proof that the individual has passed the registration examination of the American Board of Opticianry or any successor agency to that board.” (Emphasis added.) Failure to pass the exam, as well as circumstances that are grounds for denial of a license under the BPC section [480](#) (BPC section 2559.2(b)), are the sole reasons for a registration denial expressed in statute. Similarly, BPC

section [2561](#) states that the Board “shall register” an individual as a registered CLD upon proof of exam passage and where denial is not warranted under BPC section 480.

Regarding renewals of SLD/CLD registrations, BPC sections 2559.2(a) and 2561 only state that a reexamination may be required if the applicant has not within the past 5 years engaged in the practice of fitting and adjusting lenses. As such, these reexamination provisions signal that the Legislature intended that an SLD or CLD would be allowed to hold a valid registration even though not practicing, or by extension, being employed to practice. Accordingly, as with the registration requirements, there is no required RDO relationship specified in statute as a prerequisite for a renewal.

BPC section [2559.2](#)(e) does not lead to the opposite conclusion. Under that provision, “[a] [SLD] is authorized to fit and adjust spectacle lenses at any place of business holding a certificate of registration under Section [2553](#) provided that the certificate [...] is displayed [...]”. This is not a prohibition against registration or renewal if there is no RDO relationship at the time of such registration or renewal. Rather, it is a limitation on the practice of fitting and adjusting lenses to those locations holding RDO registrations, and only where the SLD’s certificate is posted.

Moreover, while RDOs are authorized to *engage in the business* if they have registered CLD/SLD employee(s) per BPC section 2553, it does not follow that a CLD/SLD must be working for an RDO to be renewed. Further, pursuant to BPC sections [2551](#) and [2552](#), there is no requirement that an RDO applicant identify SLD or CLD employees at the time of submission of the RDO application.

Also, there is nothing in statute expressly preventing a registered SLD or CLD from working for an optometrist or ophthalmologist in a private office, or preventing them from working as assistants under BPC sections [2544](#) and [2564](#), or preventing renewal because of such employment.

In sum, the plain language of the statutes is not ambiguous as to whether working for an RDO is a requirement for an SLD/CLD registration or renewal. Based on BPC sections 2559.2 and 2561, the only grounds for denial of a registration or renewal are examination failures or those listed under BPC section 480. Accordingly, an SLD/CLD registration may be considered “valid” even if it is not tied to a current and valid RDO registration, and vice versa.

#### Recommended Next Steps

1. Remove “coupling” requirements from the registration and renewal applications.
2. Adopt regulations for the form applications.

#### Attachments

1. CADO Statement
2. NAOO Letter

**CALIFORNIA ASSOCIATION OF DISPENSING OPTICIANS POSITION ON PHYSICIAN AND OPTOMETRIST/  
DISPENSING OPTICIAN RELATIONSHIPS, ADVERTISING AND SCOPE OF PRACTICE**

Under California law physicians and surgeons and optometrists may not employ a registered dispensing optician and may not advertise or otherwise hold themselves out as providing optician services to the public. Although physicians and surgeons may fill prescriptions for prescriptions lenses written by other prescribers as long as they are not exclusively engaged in the business of filling such prescriptions, they may not use the services of others in their employ, including but not limited to technicians and assistants, in filing the prescriptions written by others. Although physicians and surgeons may employ technicians or assistants who in other settings may be registered dispensing opticians, such individuals are not and may not be represented to patients or the public as registered dispensing opticians while performing services in the employ of physicians and surgeons or optometrists. The authorities for these positions are various legal opinions issued by the California Attorney General, the Department of Consumer Affairs Legal Office, and the Office of Legislative Counsel, among others, interpreting those provisions of the California Business and Professions Code relating to prescription lenses and registered dispensing opticians. (See 50 Ops. Cal. Atty. Gen. 100; DCA Legal Office Legal Op. No. 79-38; and Leg. Counsel October 25, 1989 letter from Eugene L. Paine, Esq. to the Honorable Sunny Mojonnie; Bus. & Prof. Code secs. 2540 et. seq., 2550 et seq.)

1 of 100 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Opinion No. 67-230

*1967 Cal. AG LEXIS 27; 50 Ops. Cal. Atty. Gen. 100*

November 9, 1967

**SYLLABUS:**

[\*1]

OPTOMETRISTS -- An optometrist cannot legally be listed in the classified section of a telephone directory under the caption "Opticians -- Dispensing."

**REQUESTBY:**

SECRETARY, STATE BOARD OF MEDICAL EXAMINERS

**QUESTION:**

The Honorable Wallace W. Thompson, Secretary, State Board of Medical Examiners, Department of Professional and Vocational Standards, has requested our opinion on the following question:

Is it lawful for an optometrist to be classified in the yellow pages of the telephone directory under the caption "Opticians -- Dispensing"?

The conclusion is:

It is not lawful for an optometrist to be classified in the yellow pages of the telephone directory under the caption "Opticians -- Dispensing."

**OPINIONBY:**

THOMAS C. LYNCH, Attorney General; Anthony S. Da Vigo, Deputy

**OPINION:**

ANALYSIS

In 1939 (Stats. 1939, Ch. 955) the Legislature enacted Chapter 5.5, entitled Registered Dispensing Opticians, of Division II of the Business and Professions Code. n1 Sections 2550, 2557 and 2558 respectively of said act provide in part as follows:

2550. "Individuals and firms filling prescriptions of physicians and surgeons licensed by the Board of Medical Examiners for prescription lenses and kindred products, and, as incidental to [\*2] the filling of such prescriptions, doing any or all of the following acts, either singly or in combination with others, taking facial measurements, fitting and adjusting such lenses and fitting and adjusting spectacle frames, shall be known as dispensing opticians and shall not engage in such business unless registered with the

Board of Medical Examiners."

2557. "This chapter shall not affect any person licensed as an optometrist under Chapter 7 of Division II of this code, or any physician and surgeon licensed under Chapter 5 of Division II of this code. Such exemption shall not apply to any optometrist or physician and surgeon exclusively engaged in the business of filling prescriptions for physicians and surgeons . . . ."

2558. "Any person who violates any of the provisions of this chapter is guilty of a misdemeanor. . . ."

n1 All references are to the Business and Professions Code unless otherwise indicated.

It would appear that the provision exempting optometrists and physicians and surgeons was an [\*3] expression of legislative cognizance that the functions described in section 2550 fall also within the scope of the practice of optometry and of the practice of medicine (section 3041; 16 Ops. Cal. Atty. Gen. 93 (1950)). Thus section 3042 provides in part:

"The provisions of this chapter do not prevent a duly licensed physician and surgeon from treating or fitting glasses to the human eye, or from doing any act within the practice of optometry, or a duly licensed physician and surgeon *or optometrist from filling prescriptions or orders*, nor do they prevent the replacing, duplicating or repairing of ophthalmic lenses or the frames or fittings thereof by persons qualified to write or fill prescriptions or orders under the provisions of this chapter, . . . ." (Emphasis added.)

Section 2543 provides:

"No one other than a physician and surgeon, *optometrist* or registered dispensing optician as provided in this division *may dispense, sell, or furnish prescription* lenses." (Emphasis added.)

The import of the exemption provision (section 2557) would appear to be that to the extent that the functions described in section 2550 fall within or are incidental [\*4] to the practice of optometry and medicine, no restriction of such functions was intended by section 2550. But the exemption is clearly limited to such functions as are incidental to a broader scope of authority and expressly excludes from its application the exclusive engagement in the business of filling prescriptions for physicians and surgeons by an optometrist or physician and surgeon. Such exclusive engagement therefore falls solely within the province of the dispensing optician.

The fundamental issue with which we are presently concerned however is whether the *representation* per se by an optometrist that he is a dispensing optician is lawful. We have interpreted the exemption provision with reference to the *business or practice* of dispensing. Assuming that the representation or holding out are acts which are essentially included within the concept of practical engagement, the subject representation would appear to fall within the express limitation to section 2557, since the representation that one is a dispensing optician is tantamount to a representation of authority to engage exclusively in that practice. Such an implication is clearly consistent with the provision [\*5] of section 2550 that persons licensed pursuant to chapter 5.5 *shall be known* as dispensing opticians.

In any event, approximately fourteen years subsequent to the enactment of the foregoing provisions, the Legislature added section 2556.5 to chapter 5.5 as follows:

"Any person who holds himself out as a dispensing optician' or registered dispensing optician' or who uses any other term or letters indicating or implying that he is registered and holds a certificate under the terms of this law without having at the time of so doing a valid, unrevoked certificate, as

provided in this chapter, is guilty of a misdemeanor" (Stats. 1953, ch. 1144). (Emphasis added.)

This section pertains directly to the question of representation of title and clearly recognizes that the term "dispensing optician" as well as the term "registered dispensing optician" indicates or implies that the individual to whom it relates is registered and holds a certificate under chapter 5.5. In view of the specific reference of this section to the issue of representation of title, we think that it was not intended to fall within the purview of section 2557 which, as we have stated, relates [\*6] to the business or practice of dispensing. Thus, the Legislature elected to address itself to each concept independently of the other.

We do not think that the Legislature intended to permit optometrists or physicians and surgeons to misrepresent the title under which they are authorized to dispense, regardless of whether they are exclusively or incidentally engaged in such business. A contrary conclusion would not support any distinction between exclusive and incidental engagement, i.e., there would appear to be no logical basis for permitting such misrepresentation by one incidentally engaged and forbidding it on the part of one exclusively engaged in the business of dispensing.

The title of Dispensing Optician, therefore, being a specific statutory creation, should apply exclusively to that occupation as distinguished from any other, the legitimate purpose being to protect the individual identity of each professional or occupational status so created. Thus, it has been said that the Legislature intended every person engaged in professional activities properly to represent himself in his true capacity by *appropriate title*. *Lawton v. Board of Medical Examiners*, 143 Cal. App. 2d 256, 261 (1956); [\*7] cf. also § 17500; *Garvai v. Board of Chiropractic Examiners*, 216 Cal. App. 2d 374 (1963). In *Lawton, supra*, the court expressed itself as follows:

"The Legislature intended every person engaged in professional activities properly to represent himself in his true capacity by appropriate title. (*Berry v. Alderson*, 59 Cal. App. 729, 732 . . .) This simple requirement, so easily complied with, was not aimed particularly at the person who was willing to incur the odium of actual fraud, but was designed to offer a much wider protection to the public by assuring to it a reasonable certainty of knowing in every case precisely with whom it was dealing.' (Ibid.)" 143 Cal. App. 2d at 261.

In view of the foregoing it is our opinion that the Legislature intended that only persons registered under chapter 5.5 should use the designation of dispensing optician and therefore, it is improper within the purview of these statutes for an optometrist to hold himself out as a registered dispensing optician or dispensing optician. Nor may he cause his name to be listed in [\*8] the yellow pages of the telephone directory under the caption "Opticians -- Dispensing," since the sight and sound of that term is so similar to that of "dispensing optician" as to create within the public view an identical interpretation and understanding. The possibility of such confusion should be avoided by responsible individuals and depending on all the circumstances, specific violations may form the basis for appropriate action pursuant to sections 2555, 2556.5 or 2558.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

Healthcare Law Business Administration & Organization Licenses General Overview Torts Business Torts Fraud & Misrepresentation Actual Fraud General Overview

State of California

## Memorandum

To : Helen Gray  
Consumer Service Representative  
Board of Medical Quality Assurance

Date: September 27, 1979  
Subject: Optical Prescriptions

Legal Op. No. 79-38

From : **Department of Consumer Affairs**  
Legal Office

You have asked for our opinion on the following questions:

- 1) May a physician and surgeon who specializes in ophthalmology fill prescriptions for corrective lenses which are issued by other physicians or optometrists?
- 2) May a technician who is supervised by a physician and surgeon who specializes in ophthalmology fill prescriptions for corrective lenses which are issued by physicians or optometrists not employing and supervising such technician?

### CONCLUSIONS

- 1) An ophthalmologist may personally fill prescriptions for corrective lenses issued by other physicians or optometrists without being registered as a dispensing optician so long as he or she does not exclusively engage in that business.
- 2) A technician employed by a physician or optometrist may not fill prescriptions issued by physicians and optometrists not employing and supervising such technician unless that technician is registered as a dispensing optician.

### ANALYSIS

#### I

We begin our discussion of the first question with pertinent provisions of the State Medical Practice Act (Section 2000 et seq. of the Business and Professions Code; all section references shall be to that Code) and provisions of the dispensing opticians registration law (Section 2550 et seq. of the Business and Professions Code.)

Section 2137 sets forth the practice authorized by a physician's and surgeon's certificate.

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"2137. The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissue of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities or other physical or mental conditions."

A physician's authority to practice medicine is plenary. A physician may engage in general practice, or he may limit his practice to a certain portion of the entire field. 57 Ops.Cal. Atty.Gen. 79.

Section 2550 provides:

"2550. Individuals and firms filling prescriptions of physicians and surgeons licensed by the Division of Licensing of the Board of Medical Quality Assurance or optometrists licensed by the State Board of Optometry for prescription lenses and kindred products, and, as incidental to the filling of such prescription, doing any or all of the following acts, either singly or in combination with others, taking facial measurements, fitting and adjusting spectacle frames, shall be known as dispensing opticians and shall not engage in such business unless registered with the Division of Allied Health Professions of the Board of Medical Quality Assurance."

The question posed is whether Section 2550 requires a physician to be registered as a dispensing optician to so fill prescriptions for lenses. Statutes should be construed with due regard to the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part, Taylor v. McKay 125 Cal.Rptr. 300.

Section 2557 provides exemptions to the dispensing opticians registration law. It states in pertinent part:

"2557. This chapter shall not affect any person licensed as an optometrist under Chapter 7 of Division II of this code, or any physician and surgeon licensed under Chapter 5 of Division II of this code. Such exemption shall not apply to any optometrist or physician and surgeon exclusively engaged in the business of filling prescriptions for physicians and surgeons. \* \* \*"  
(Emphasis added.)

It is apparent in enacting Section 2557 that the Legislature recognized that physicians possessed the authority to fill prescription lenses; however, the Legislature also expressed its intent in obvious language that should a physician engage in the business of exclusively fitting prescription lenses, not as part of his or her total medical practice, then the physician must register as a dispensing optician and otherwise meet the requirements of that law.

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Therefore, a physician may fill prescriptions for lenses for other physicians and optometrists, but if he or she engages exclusively in that business then the physician must be registered with the Board as a dispensing optician.

II

The second question relates to the use of a technician employed and under the supervision of a physician or optometrist to fill optical prescriptions for other physicians and optometrists who do not employ and supervise that technician.

Section 2544 authorizes the employment of a technician to fit prescription lenses.

"2544. A technician in the office of a physician and surgeon or optometrist acting under the direct responsibility and supervision of the physician and surgeon or optometrist may fit prescription lenses."

We believe it is implicit in Section 2544 that the technician is fitting prescription lenses which are prescribed by the physician or optometrist which is supervising him or her; otherwise, the technician would necessarily have to be registered as a dispensing optician pursuant to Section 2550. To hold otherwise would render Section 2550 and the dispensing opticians registration law meaningless. In interpreting statutes absurd consequences are to be avoided. In re Cregler 56 Cal.2d 308.

Further Section 2553.6 prohibits a physician from having a proprietary interest in a person or firm employing a person who is a registered dispensing optician.

"2553.6. The board shall deny any application for registration under this chapter if any person licensed under Chapter 5 . . . of this division, for whom the applicant [dispensing optician], in accordance with Section 2550, proposes to fill any prescription, has any proprietary interest, or has designated or arranged for any other person to have any proprietary interest in or with the applicant.

"The board may, in accordance with Section 2555, suspend, revoke or refuse to renew the certificate of any individual or firm under this chapter, if such individual or firm, after the effective date of this section, fills, or has filled, while holding a certificate issued pursuant to this chapter, any prescription issued by any person licensed under Chapter 5 . . . who has any proprietary interest, or has designated or arranged for any other person to have any proprietary interest, in or with such individual or firm.

" \* \* \*

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"Proprietary interest", for purposes of this section, means any membership, coownership, stock ownership, legal or beneficial interest, any other proprietary interest, or profit-sharing arrangement, designated or arranged or held, directly or indirectly in any form, in or with any individual or firm applying for registration or registered under this chapter,  
.....

"This section shall apply to a dispensing optician, required to be registered . . . , and shall not be construed to modify Section 2557, or to affect the fitting of prescription lenses by a technician pursuant to Section 2544." (Emphasis added.)

By its terms it is clear the Legislature intended to prohibit any business arrangement or proprietary relationship between a person who fills prescription lenses for physicians and optometrists, other than a technician, who must be registered as a dispensing optician, and a physician. If a person fills such prescriptions they must be registered pursuant to Section 2550; if they are registered they may not have a proprietary arrangement with a physician. The only exception to this rule is the employment of a technician. If it were held that a technician were allowed to fill prescriptions for other physicians, then this, too, would violate the plain intent of Section 2553.6.

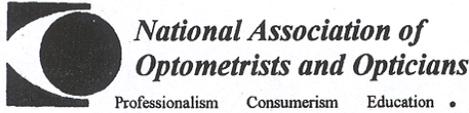
Therefore, we conclude, that a technician employed by a physician or optometrist to fit prescription lenses may not fill prescriptions for other physicians and optometrists, and if he or she does so, must be registered as a dispensing optician and may not remain in the employ of the physician.

GUS E. SKARAKIS  
Chief Counsel

By GREGORY GORGES  
Staff Counsel

GG:vl

cc: Foone Louie  
Aldo Avellino  
Debra Hertoghe



August 9, 2017

**CALIFORNIA BOARD OF OPTOMETRY**

2450 Del Paso Road, Suite 105  
Sacramento, CA 95834

Sent via email: [optometry@dca.ca.gov](mailto:optometry@dca.ca.gov)

Dear Executive Officer Siefertman and Members of the Board:

At the recent Dispensing Optician Committee meeting and that of the full State Board of Optometry, the issue of the need for an individual seeking to be registered to be tied to a Registered Dispensing Optician (RDO) was discussed. The Board calls this issue “coupling” as we understand it. The purpose of this letter is to request that the coupling requirement be eliminated.

The NAOO, founded in 1959, is a national trade organization representing the retail optical field. NAOO has always been consumer-service oriented, with a focus on consumer protection.

More specifically on the coupling issue, in order for an individual to become registered as a Spectacle Lens Dispensing Optician or Contact Lens Dispensing Optician, the current process requires a tie between an optician applying to register as an individual and the requirement that such optician have a place of employment in order to register. At the DOC meeting in July, it seemed that the only rationale for this tie was historical, and further discussion would occur. We offer our perspective for your consideration.

We can find no requirement for this coupling in the law. The statute (B&P §§ 2559.1-2559.2 and 2561) does not require that the applicant have a place of employment at the time of applying for registration, only that the registrant apply on forms prescribed by the [Board] and provide evidence of having passed the American Board of Opticianry (ABO) registry exam. The statute goes on to say that dispensing may only take place at a registered location (per B&P § 2550), but that is not a limitation on registration, only on the act of fitting and adjusting spectacle lenses or contact lenses, as appropriate. This interpretation is ratified by B&P § 2559.2(e) which states that a registered spectacle lens dispensing optician is authorized to dispense “at any place of business holding a certificate of registration under Section 2553” (RDO registration), provided that the certificate is displayed conspicuously. This model, where an individual practitioner who meets the requirements of law can obtain licensure, registration, or certification without a specific place of employment, is commonplace for most individuals regulated by the state. It is common for the individual practitioner to inform the regulating body where they are practicing (when that begins or changes), but we are not aware of the situation

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where a practitioner's licensure or registration is held until they have demonstrated or declared a location to practice.

In requiring the tie, or coupling, a chicken-or-egg scenario is created. Employers want to hire registered opticians. A prospective employee, who is newly certified by the ABO, cannot be hired without a registration, which registration cannot be obtained until the person is hired. This creates an unnecessary hardship for both the prospective employee seeking employment and the RDO that needs to hire registered opticians. We urge the Board to change this immediately by eliminating the coupling requirement. We do not think a statutory or regulatory change is required.

Thank you for the opportunity to contribute to the discussion and, again, we respectfully urge the Board to remove the coupling requirement found in in the individual registration process today.

Very truly yours,

*Joseph B. Neville*

Joseph B. Neville  
Executive Director

cc: NAOO Board of Directors