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To: Board Members

Date: November 3, 2017

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Subject: Agenda Item 10 - Discussion and Possible Action Regarding Business and Professions Code (BPC) § 3040: Unlicensed Practice and Advertising

BACKGROUND

In January 2016, BPC § 2556 was amended (AB 684) to prohibit an RDO from advertising the furnishing of optometrist and physician and surgeon services. However, the section does not expressly apply to unregistered/unlicensed individuals, corporations or firms that are not opticians.

As part of the Board's initial legislative proposal for its sunset bill to address this issue, the Board requested the following amendments to BPC § 3040, which regulates unregistered/unlicensed individuals:

3040. Unlicensed Practice

It is unlawful for a person to [advertise, offer, or provide any services set forth in Section 3041](#) ~~engage in the practice of optometry or to display a sign or in any other way to advertise or hold himself or herself out as an optometrist~~ without [a valid, unrevoked California optometrist license](#), ~~having first obtained an optometrist license from the board under the provisions of this chapter or under the provisions of any former act relating to the practice of optometry. The practice of optometry includes the performing or controlling of any acts set forth in Section 3041.~~

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.

These amendments were to clarify that unlicensed individuals (1) cannot advertise optometric services and also (2) cannot offer optometric services.

(1) Advertising Optometric Services

A stakeholder expressed concerns that the amendments had overbroad application, so legislative staff proposed exceptions clarifying who could provide or advertise eye exams:

(a) It is unlawful for a person to [advertise, offer, or provide any services set forth in Section 3041 unless the person meets one of the following:](#)

[\(1\) Possesses a license issued under this chapter.](#)

[\(2\) Is authorized to do so under Section 655.](#)

[\(3\) Is authorized to do so by a license issued under this division.](#)

(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.

However, the stakeholder continued to have concerns. In a letter to the Board outlining its concerns regarding the proposed amendments, National Vision Inc., a retail optical company, objected, stating in part, that the “existing statute already addresses the unlawful advertising and provision of optometry services.”¹

Thus, at its August’s meeting, the Board decided to remove BPC § 3040 from its sunset bill and discuss the issue in more detail during the November meeting.

Current law prohibits advertisements of the furnishing of optometric services, in that persons not licensed as optometrists:

- (1) cannot provide optometric services;
- (2) cannot hold themselves out as an optometrist; and
- (3) cannot advertise in a manner that implies that the unlicensed person is furnishing the services of an optometrist.

Therefore, the previously proposed changes to section 3040 intended to address unlicensed opticians advertising the furnishing of an optometrist may be more appropriate as an amendment to section 2556, as discussed below. However, the Board may want to consider making section 3040 more concise as follows:

3040. Unlicensed Practice

It is unlawful for a person to engage in the practice of optometry or to ~~display a sign or in any other way to~~ advertise or hold himself or herself out as an optometrist without a valid, unrevoked California optometrist license. ~~having first obtained an optometrist license from the board under the provisions of this chapter or under the provisions of any former act relating to the practice of optometry.~~ The practice of optometry includes the performing or controlling of any acts set forth in Section 3041.

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.

As referenced above, in order to address unlicensed opticians advertising the furnishing of an optometrist, the Board may want to consider the following amendments to BPC § 2556:

(a) Except as authorized by Section 655, it is unlawful for a registered dispensing optician, or one who engages in the business of, or holds oneself out to be a dispensing optician, to do any of the following: to advertise the furnishing of, or to furnish, the services of an optometrist or a physician and surgeon, to directly employ an optometrist or physician and surgeon for the purpose of any examination or treatment of the eyes, or to duplicate or change lenses without a prescription or order from a person duly licensed to issue the same. For the purposes of this section, “furnish” does not mean to enter into a landlord-tenant relationship of any kind.

(b) Notwithstanding Section 125.9, the board may, by regulation, impose and issue administrative fines and citations for a violation of this section or Section 655, which may be assessed in addition to any other applicable fines, citations, or administrative or criminal actions.

(Amended by Stats. 2015, Ch. 405, Sec. 7. Effective January 1, 2016.)