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To: Board Members **Date:** April 20, 2018

From: Jessica Sieferman **Telephone:** (916) 575-7184
Executive Officer

Subject: **Agenda Item 10 – Update, Discussion and Possible Action Regarding BPC §3109 Related to Optometrists Accepting Employment**

Background

Currently, optometrists can accept employment from another optometrist, an ophthalmologist, or a health care service plan, pursuant to BPC § 3109:

Directly or indirectly accepting employment to practice optometry from any person not having a valid, unrevoked license as an optometrist or from any company or corporation constitutes unprofessional conduct. Except as provided in this chapter, no optometrist may, singly or jointly with others, be incorporated or become incorporated when the purpose or a purpose of the corporation is to practice optometry or to conduct the practice of optometry.

The terms “accepting employment to practice optometry” as used in this section shall not be construed so as to prevent a licensed optometrist from practicing optometry upon an individual patient.

Notwithstanding the provisions of this section or the provisions of any other law, a licensed optometrist may be employed to practice optometry by a physician and surgeon who holds a license under this division and who practices in the specialty of ophthalmology or by a health care service plan pursuant to the provisions of Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code.

(Amended by Stats. 2013, Ch. 473, Sec. 16. (SB 821) Effective January 1, 2014.)

A member requested this section be discussed with the Board and consider whether the limitation on physicians and surgeons – that they practice in the “specialty of ophthalmology” – should be eliminated.

The statute was enacted in 1937 as BPC § 3103 (renumbered in 2005 to 3109). The last paragraph was added by Stats. 1974, Ch. 874, and it postdates an August 18, 1972 opinion of the Attorney General (55 Ops.Cal.Atty.Gen. 324) which concluded, among other things, that a “partnership between an optometrist and a physician is prohibited unless the physician is also licensed as an optometrist by the Board of Optometry”.

The decision noted, “The clear import of section 310[9] is that licensed optometrists may only practice optometry jointly with other licensed optometrists...Obviously this section has been enacted for the purpose of preventing the practice of optometry either through a corporation, company, partnership or with another individual who is unlicensed.”

While physician and surgeons are licensed, the Legislature presumably concluded through the last paragraph that it was not good policy to have a physician and surgeon with no eye care expertise employ (including supervise) an optometrist. However, similar restrictions do not apply to ophthalmologists, as they can be employed by any other physician and surgeon.

With that said, optometrists can be professionally employed by professional corporations. Corporations Code (CORP) § [13401.5](#) allows licensed optometrists to be “...*professional employees of the professional corporations designated in this section so long as the sum of all shares owned by those licensed persons does not exceed 49 percent of the total number of shares [...].*”

For optometrists, these professional corporations include medical, podiatric medical, psychological, nursing, optometric, chiropractic, acupuncture, and naturopathic doctor corporations.

Update:

During the January 26 meeting, the Board requested this issue be discussed at the next meeting after additional feedback from stakeholders was received.

The LRC discussed potential changes with stakeholders during their March 23 committee meeting. Concerns were raised that there is not an identified issue impacting consumer or licensees. Stakeholders cautioned the Board on making significant policy decisions based on rare and/or hypothetical situations.

Additional stakeholders advised the Board that proposing amendments to BPC § 3109 would result in significant controversial discussions – much like those included in AB 684. The Board is currently taking on significant workload, and amending this statute will take additional resources.

In addition, the LRC discussed the ability for any physician and surgeon to contract with optometrists to provide optometric services. While independent contractors may be limited in their locations based on the 50% restriction in BPC § 3077 (BOL), this is still an avenue for physician and surgeons to have optometrists provide optometric services in clinics if necessary.

Action Requested

Please consider the LRC discussions with stakeholders and determine whether the Board would like to use resources over the next year holding stakeholder meetings and developing legislation for the 2019 session.