



ISSUE MEMORANDUM

DATE	March 11, 2022
TO	Members, California State Board of Optometry
FROM	Marc Johnson, Policy Analyst
SUBJECT	Agenda Item #6a - Discussion and Possible Action on 2022 Legislation - Proposed Changes to Business and Professions Code Sections 655, 2559, 3040 and 3094 (Optometry and Optician Practice Acts)

History: The LRC met on February 18, 2022 to discuss this issue. At that meeting, staff noted the below text, which was approved by the Board at the November meeting pending workgroup changes, was submitted to the Legislature. An author was not secured, but there may be an opportunity to work with Assemblymember Evan Low (no longer Chair of Assembly Business and Professions Committee, but past author to board-sponsored bills). The workgroup of Drs. Kawaguchi and Turetsky (staffed by Enforcement Analyst Cricket Borges, who has 20+ years in DCA enforcement) will continue to meet on the issue and staff will continue to work with stakeholders and the public to determine the next steps.

Background: Stanton Optical-related Changes to Optometry Practice Act

On September 10, 2021, the Legislature passed [AB 1534](#) to address the 21 amended citations filed by the Board against Stanton Optical. The Governor signed the bill into law on October 7, 2021. That bill implements new opticianry statutes effective on January 1, 2022 and revises BPC Section 655 to take effect on January 1, 2023.

Beginning September 23, 2021, the public record included the adoption by the Board of a Proposed Decision from an Administrative Law Judge regarding the 21 amended citations filed against Stanton Optical.

From that decision, this first factual finding and legal conclusion is clear:

1. All parties involved in the delivery of optometric services must enter into an agreement to ensure the independence of the practice of optometry. Stanton Optical used a business and management service agreement to contract with an ophthalmologist group that employed the optometrists in practice at Stanton Optical locations.
 - (a) Rewrite the introduction in subsection (d) to require inclusion of (d)(1)-(d)(15) in all agreements among ophthalmology groups, ophthalmic device dispensing businesses, optical companies, and optometrists when the

optometrist and the business or companies are co-located. (All agreements; not just lease agreements.)

- (b) Strike the text of subsection (d)(16) so that ophthalmology groups are no longer exempted from ensuring the independence of optometrists from business or companies with which optometrists are co-located.
- (c) Create a definition within subsection BCP 655(a)(7) which defines “co-location”.
- (d) Update reference within subsection BCP 655 (a)(5) to “ophthalmic device dispensing business” and add the correct reference to Article 2.7.

From the same adopted decision, this factual finding and legal conclusion is also clear:

2. The Optometry and Optician Practice Acts must clearly require compliance from individuals AND entities or corporations. Because current statutes are specific to individuals, the Board was unable to defend its claim that Stanton Optical illegally advertised the furnishing of optometric services.

- (a) BCP Section 2559: Add the words “or entity” as applicable throughout the section. This ensures the law applies to entities such as ophthalmic device dispensing businesses or optical companies, not just individuals.
- (b) BCP Section 3040: Add the words “or entity” as applicable throughout the section. This ensures the law applies to entities such as ophthalmic device dispensing businesses or optical companies, not just individuals.
- (c) BCP Section 3094: Add the words “or entity” as applicable throughout the section. This ensures the law applies to entities such as ophthalmic device dispensing businesses or optical companies, not just individuals.

With the authority of the board granted on Friday, November 19, 2021, the below amendments will be submitted to the Senate and Assembly Committees on Business, Professions and Economic Development.

Staff, the Legislation and Regulation Committee, and I will engage stakeholders to further analyze the Opticianry and Optometry Practice Acts and recommend additional revisions. There may be further proposed amendments to BPC 655(d) (1-16) to expand applicability to an array of business agreements, not just leases.

Once these proposals are entered into a legislative vehicle, the bill will be reviewed by the Committee and recommended to the full Board for support or opposition.

**Proposed Amendments to the Text of Business and Professions Code
(arising from the legal findings and conclusions of Stanton Optical cases)**

Business and Professions Code Section 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 **consumers**, physicians and surgeons, optometrists, health plans, or dispensing opticians of lenses, frames, optical supplies, or **optometric ophthalmic** 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 **ophthalmic device business**" means a person or entity licensed pursuant to **Chapter 5.5 Article 2.7** (commencing with Section **2550 2564.92**).

(6) "**Prescriptive or** Therapeutic ophthalmic **product device**" means lenses or other products that provide direct treatment or correction of eye disease, **refractive error**, or visual **conditions requiring** rehabilitation **for diseased eyes**.

(7) "Co-location" means any licensed or registered persons or entity which are located in the same property, building, office suite, or shared space.

(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 ophthalmic device business 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.

(2) The registered dispensing **optician ophthalmic device business** 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 an optometrist and a registered dispensing ophthalmic business are co-located, as defined in section (a)(7), any party involved in the delivery of the optometrist's services (i.e. registered dispensing ophthalmic **device** business, physician and surgeon or optical company) must establish a written agreement ensuring the independence of the practice of optometry. Each party will enter an agreement with the optometrist and include the following in that written agreement:

(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 ophthalmic device business**, 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.

(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 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 ophthalmic device business**, 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 and their optometric staff (i.e. contact and spectacle lens dispensers, optometric assistants, or administrative staff.)** ~~any optometrist employee and the employer medical group, or the relationship between a medical group exclusively contracted with a health plan regulated by the Department of Managed Health Care and that health plan.~~

(e) No registered dispensing **optician ophthalmic device business or** 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 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 2559:

2559. Whenever any person **or entity** has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, a violation of any provision of this chapter, or Chapter 5.4 (commencing with Section 2540), the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of the board, the Attorney General, or the district attorney of the county.

The proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure.

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.

Business and Professions Code Section 3094:

3094. In addition to other proceedings provided for in this chapter, whenever any person **or entity** has engaged, or is about to engage, in any acts or practices that constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining that conduct on application of the board, the Attorney General, the district attorney of the county, or on application of 10 or more persons holding licenses issued under this chapter.