

NEVADA STATE BOARD OF OPTOMETRY



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MINUTES

Nevada State Board of Optometry telephonic meeting Regulatory Workshop October 1, 2019 at 11 a.m.

1. **Call to Order** by Optometry Board Vice-President Mariah L. Smith, O.D., Chair, Subcommittee on Legislative and Regulatory Changes.

Dr. Smith called the workshop to order at 11:01 p.m. via telephone conference. Board members Young and Johnson were in attendance, along with staff: Caren C. Jenkins, Executive Director, Laura Adair, Licensing Specialist. Also in attendance were Senior Deputy Attorney General Sophia, Jeannette Belz, Lobbyist, and Terri Ogden of NOA, Kenneth Kopolow, O.D., Steve Girisgen, O.D., Shannon Chandler, O.D. Spencer Quinton, O.D., Tim Elson, Esq. and Chaz Hernandez.

2. **Public Comment.** There was no public comment.
3. **Open Public Workshop** to discuss proposed changes to NAC 636 to implement various provisions of NRS Ch. 636 and consideration of the Small Business Impact of proposed regulations.

Dr. Young stated that because current law permits an optometrist to work either for themselves or another optometrist, the proposed section regarding private entities may not be applicable or necessary. Dr. Young referred to and read a comment submitted to the board that the section on private equity would allow entities not licensed to practice in NV to employ NV optometrists. Because of the intense commercial competition the private equity involvement would create, solo practices may not be able to survive.

Dr. Kopolow agreed with Dr. Young that no changes are necessary if the current

regulations are left intact. Dr. Kopolow asked how the statute has held up in its current form to the pressure that has already come about, and asked whether any complaints have been filed to challenge this.

Dr. Young responded that the Board would treat any injury just like any other complaint, and the matter would be investigated to determine if there is a violation.

Deputy Attorney General Sophia Long, Esq. stated for clarification that any complaint that may have already been filed with the board would need to remain confidential.

Dr. Smith recommended, in light of this discussion, that the new section regarding private equity be removed at the board meeting to follow.

Dr. Smith stated that the board received written comments regarding co-management fees with multifocal contacts. There is an optometrist who argues that premium IOL's require optometrists to invest additional time and therefore should be allowed more reimbursement, which is still below what Medicare allows. Also if a patient requires Lasik or PRK after cataract surgery, this additional co-management would fall on the optometrist without any available additional compensation beyond the initial agreement.

Dr. Young noted that the board may have already established that optometrists could not charge more for certain types of cataract surgery several years ago. However, he noted, in terms of follow up for patients if they need PRK or Lasik after cataract surgery for example, co-management fees only cover a 90 day period. If postop care is required long after after surgery, it should be a completely separate fee.

Dr. Smith commented that an ophthalmologist may view this postop period differently than an optometrist.

Dr. Kopolow asked if there are any Federal statutes or laws that prohibit or reinforce this new section on co-management and asked what the intent is on this section.

Dr. Smith responded that the only law she is aware of is through Medicare. She noted that Dr. Austin proposed this as he believes optometrists are getting lured to certain ophthalmologists for co-management due to higher reimbursement for the upgraded implants; that the optometrist would be paid a higher co-management fee due to the higher cost for upgrades that the patient commits to.

Ms. Jenkins stated if the board took action at a prior meeting regarding a specific set of facts and circumstances, it is not precedential as a general rule, and that this is an opportunity to incorporate this policy into regulation. If the board wishes to make this policy enforceable to all rather than only as it applies to a particular set of circumstances, it needs to be placed into regulations or statutes.

Dr. Young stated he recalls at least a couple years ago the board had discussion that the optometrist would have to prove he or she undertook extra procedures to justify the

additional charges.

Dr. Spencer Quinton asked for clarification on who the board is referring to when the language states “it has been determined”.

Dr. Young asked on standard Medicare postoperative patient where the patient chooses to get a multifocal IOL, whether the optometrist is permitted to charge a higher amount or will Medicare allow additional charges to be billed for co-management.

Dr. Young stated that all comments discussed thus far will be taken into account and can be further discussed at the next board meeting.

Dr. Young asked Ms. Jenkins if the board had received any complaints from patients not receiving their contact lens prescription after a complete exam and fitting occurred.

Ms. Jenkins responded she is only aware of one patient who did not receive a contact lens Rx prior to the fitting, and she explained that an optometrist is only required to release the Rx following completion of exam including the fitting.

There was discussion regarding proposed new section on mobile optometry certification and defining “underserved population”. Ms. Jenkins stated this change came from the NV LCB, as they require a specific source be designated. She confirmed underserved is everywhere and defined as medically, however the data is not available specifically for optometry.

Ms. Jenkins stated that “medically underserved” is defined by the State of NV demographer, who is the hub that collects data from all resources including UNR and publishes it. For our statute we can specify medically underserved for vision care and the board can periodically review and revise its determination based on new data. Ms. Jenkins confirmed the medically underserved “as determined by state demographer” regulation would be reliant upon a third party rather than the board.

Ms. Jenkins clarified that mobile optometry does not allow an optometrist to be a maternity leave- fill-in or a retiree to only be a rotating fill-in, and suggested that the board include language to accommodate these type of optometrists rather than serving specific mobile optometry providers. The board should not discourage an optometrist to fill in. Dr. Smith suggested that the board continue further discussion on this at next board meeting.

4. **Public Comment.** There was no public comment.
5. **Adjournment.** Dr. Young thanked the optometrists in attendance for their input. The workshop was adjourned at 11:30 a.m.

REGULAR MEETING

1. **Welcome, Introductions and Public Comment.**

There was no public comment.

2. **Call to Order, Roll Call.**

Board President Dr. Chen Young called the meeting to order at 12:02 p.m. via telephone conference. All Board members were in attendance, along with staff: Caren C. Jenkins, Executive Director, Laura Adair, Licensing Specialist. Also in attendance were Senior Deputy Attorney General Sophia Long, Board Counsel, Jeannette Belz, Lobbyist, and Terri Ogden of NOA. Also in attendance were Kenneth Kopolow, O.D., Steve Girisgen, O.D., Shannon Chandler, O.D. Spencer Quinton, O.D., Tim Elson, Esq. and Dr. Chaz Hernandez.

3. ***For Possible Action.** Consideration and approval of the **minutes** of June 25, 2019 and August 5, 2019 Optometry Board meetings. (Materials provided)

Mr. Johnson requested that August 5, 2019 date needs to be corrected going forward to say August 8, 2019; correction noted and will be made prior to posting.

Dr. Austin made a motion to accept meeting minutes of 6/25/19 and 8/8/19 as corrected. Dr. Smith seconded, all in favor, motion carried.

4. ***For Possible Action. Reports and Recommendations.**

- a. Consideration and approval of proposed modifications to NAC Chapter 636, and Small Business Impact Statement, Mariah Smith, O.D., Chair, Subcommittee on Legislative and Regulatory Changes.

Dr. Smith summarized the following changes which were discussed and agreed upon by the board. These changes will be made once the LCB returns the draft of the regulations;

- 636.210: have item 1) a) say that, at a minimum, the optometrist's last name as it appears on the license is required.
- In section under this, regarding separation of optometrist from unlicensed adjoined business, state that the employees assisting the OD must be under the employ of the O.D.
- AFTER/UNDER 636.250 - the new section regarding Custodians for records - strike this section; this will be a recommendation in Board Policies but not a requirement.
- AFTER/UNDER 636.310 for the new section regarding Private Equity groups - strike the section.

- 636.674 – Regarding co-management, no recommendation will be made as this needs further discussion.

Dr. Austin commented that if a surgeon is offering Lasik or PRK as a package, the surgeon should then do postoperative care, not the optometrist. Otherwise, the surgeon can pay optometrist normal postoperative fee.

Dr. Young asked what the time period is after cataract surgery, and should an ophthalmologist consider Lasik after cataract surgery.

Dr. Austin replied it is usually 60-90 days and at 91 days after surgery it would then be a billable office visit. He added that Medicare reimburses the same amount and does not allow for additional postoperative care.

The board was in agreement that the section regarding co-management will remain as is.

There was further discussion regarding mobile optometry. Ms. Jenkins stated that in order to have a mobile optometry practice, services must be provided only to underserved (as defined by geography, mobility impairment or economically disadvantaged). Nonprofits/government agencies may apply for mobile optometry and need not be licensed optometrists. Dr. Young asked if an optometrist is seeing patients at casinos, for example, would be considered mobile optometry. He is concerned about optometrists who may not have accountability and be potentially harmful to the public.

Ms. Jenkins stated that this type of practice would not be defined as mobile optometry unless the optometrist was seeing only the defined populations. However there is no prohibition in statute on an optometrist providing the board with a physical address and changing this multiple times. Mr. Johnson commented that the current laws in place allow patients to pursue recourse if that happens.

Ms. Jenkins added that there was one entity that moved from place to place, and was able to do so under existing statute by listing additional practice locations. Dr. Austin added that this is something that might be brought up for future legislative sessions, to add language that would prevent this. Ms. Jenkins stated the legislature declined to allow mobile optometry for the general population, allowing only for a specific population.

Dr. Chandler commented that she had received notices through LinkedIn about tele-optometry and asked if there is any way this can be regulated.

Ms. Jenkins stated that if the board wishes to develop a regulation, the NV LCB may or may not approve. Her preference is to take the clearer route and change

statute to a limit the practice of optometry to a fixed location for a period of time, if necessary. Ms. Jenkins asked Ms. Long if the board has a legal basis in order to further define what is and is not permitted in the definition of mobile optometry.

Ms. Long responded that the board may do this, adding that the NV Dental Board and NV Optometry Board both have regulations regarding mobile optometry which may be helpful to the board with drafting language. Ms. Long also stated that the board could limit the number of practice location changes. She further confirmed that the board is currently restricted to what is defined in the statute.

- Based on this discussion, the board will add a new section on mobile optometry: redefine "underserved" to be defined by the State of Nevada State Demographer.
- Regarding the new section regarding policy 7 and 11 on the last paragraph "year" will be revised to "renewal period".

b. Report on Education & Outreach Efforts, Jeffrey Austin, O.D., Chair.

Dr. Austin stated he emailed a document to licensees summarizing the changes currently in effect under AB77. Also he and the Executive Director discussed a possible white paper to attach to the website to address some areas of concerns for the public. Dr. Austin will be working on updating the NV online law exam and will be working with Ms. Jenkins on making the changes.

c. Report on Website Revision, Drew Johnson, Chairperson.

Mr. Johnson stated that he previously made recommendations and that he had no new updates.

d. Executive Director's Report, Caren C. Jenkins, Esq., Executive Director.

1. Revision of forms & website by December 1, 2019.

Ms. Jenkins stated that she and Ms. Adair will be working with the web developer to make changes to improve readability and clarity, especially with the guidance from Mr. Johnson, and reflect the regulation changes all at the same time. She expects this to be completed within the next Quarter.

Ms. Jenkins summarized the required Small Business Impact Statement which was sent out via email to every 7th licensee and had a 10.7% return. She referred to the attached handout with the responses. She stated the majority of the comments were positive.

2. FARB Forum, Colorado Springs, Jan 23-26. 2020.

Ms. Jenkins encourages board members attend this forum, in particular regarding the regulatory training, however unfortunately the budget will not allow the costs to be covered.

3. Proposal for revision to Board Policies regarding continuing education.

Dr. Austin brought to the attention of Ms. Jenkins that there is nothing to prevent a licensee from repeating the same course multiple times within a license period, and suggested that language be added to the regulations to address this.

Ms. Jenkins suggested that the board could make a policy to discourage licensees from repeating the same course during the same renewal period. Ms. Jenkins will place this on the next meeting agenda to allow for further discussion and give Dr. Austin the opportunity to make a motion.

NOTE: Please see action taken on page 8 under Agenda Item 5 (f).

5. ***For Possible Action. Complaints before the Board.** (Materials provided)

a. Complaint No. 20-01 Consideration of just & sufficient cause to investigate.

The redacted complaint and declaration from the physician was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Austin moved to dismiss Complaint No. 20-01 based on insufficient allegations, seconded by Dr. Smith. Approved unanimously.

b. Complaint No. 20-02 No Jurisdiction (Executive Director recommendation).

The redacted complaint pertaining to a sanitation issue was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Austin moved to dismiss Complaint No. 20-02 based on a jurisdictional basis, seconded by Dr. Smith. Approved unanimously.

c. Complaint No. 20-04 No Jurisdiction (Executive Director recommendation).

The redacted complaint regarding HIPAA and billing was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Austin moved to dismiss Complaint No. 20-04 based on a jurisdictional basis, seconded by Dr. Smith. Approved unanimously.

d. Complaint No. 20-06 Proposed Stipulated Settlement.

The partially redacted complaint regarding an unregistered fictitious name certificate was brought forth by Ms. Jenkins regarding optometrist "A". A

settlement was negotiated to correct issues.

However, as the regulatory reprieve is still in effect until the regulations are fully adopted, and the licensee has made the necessary changes, Dr. Austin moved to dismiss Complaint No. 19-26, seconded by Dr. Smith. Approved unanimously.

- e. Case No 20-07, Petition for Declaratory Order regarding the propriety of optometrists engaged in advertising & promotion opportunity.

Shannon Chandler, O.D. submitted this request for an order regarding a proprietary/promotional advertising opportunity and exhibits were reviewed and discussed.

Dr. Young expressed concerns about jointly advertising with a non-optometry business. Mr. Johnson believes the public would be able to distinguish between the optometrist and outside advertising. Dr. Austin expressed concern about how this may be perceived, however he did not believe this would be in violation of regulations. Ms. Jenkins added that there have been prior discussions regarding the size of logos and advertising, and in this case the sizes are the same.

Mr. Johnson made the motion that based on the sample in Exhibit 1 and landing page in Exhibit 2, the advertising appears to be in compliance on the current statutes and fall within the board's regulations. Dr. Austin seconded, Dr. Young voted in opposition; Motion carried.

- f. Amendment of Stipulated Settlement, Consolidated Case Nos. 19-05 and 19-11.

Ms. Jenkins, upon reading the signed stipulation previously entered in 19-05 and 19-11, found that the deadline was not met and the penalty should have been paid. However, the stipulation contained an error. The licensee proposed correction to the dates imposed; changing March of 2019 to March of 2020.

Dr. Austin moved to accept the revised agreement, seconded by Mr. Johnson. All in favor, none opposed, motion carried to amend the stipulated settlement.

Mr. Johnson requested a status update on Complaint No. 18-17 which was discussed at the prior board meeting. Ms. Jenkins confirmed that the fine was paid in full along with the penalty and the matter was resolved shortly after the meeting. Additionally, she confirmed the action was reported to the National Practitioner Database and the board recently received a query confirming that it had been posted on the Database's website.

Dr. Smith made a motion to accept the regulations with the changes as noted above on Agenda Item No. 4 as discussed at this meeting, seconded by Dr. Austin. All were in favor, none opposed, motion carried.

Ms. Jenkins noted once the regulations are adopted she will no longer be bringing complaints before the board unless the body's jurisdiction over a matter is unclear.

6. Announcements and requests for **future Board consideration.** (No action shall be taken on these matters at this meeting)

A poll will be taken and sent to the board to confirm proposed future board meetings. The next board meeting is scheduled for 10/11/19.

Remaining board meetings tentatively scheduled for 2019: 11/5/19 and 12/3/19 via teleconference.

Board meetings tentatively scheduled for 2020: 1/7/20 (live from LV, 3/19/20, 4/14/20, 5/19/20 telephonically, and 6/16/20 live from Reno.

Dates will be revised accordingly, as some of these meetings may be cancelled based on the status of the regulations. Meeting in Reno will be held on 6/16/20.

7. **Public Comment.** There was no public comment.
8. **Adjournment.** The meeting was adjourned at 2:00 p.m.

These minutes were approved unanimously at the Nevada State Board of Optometry meeting on December 3, 2019.

Dated 12/03/2019

_____/s/_____
By Caren C. Jenkins, Executive Director