

NEVADA STATE BOARD OF OPTOMETRY



CHEN K. YOUNG, O.D.
Board President

MARIAH SMITH, O.D.
Board Vice-President

Post Office Box 1824
Carson City, Nevada 89702
Telephone: (775) 883-8367
Facsimile: (775) 305-0105

CAREN C. JENKINS, ESQ.
Executive Director
cjenkins@nvoptometry.org

JEFFREY AUSTIN, O.D.
Board Member

DREW JOHNSON
Public Board Member

MINUTES

THE NEVADA STATE BOARD OF OPTOMETRY REGULAR MEETING

University of Nevada Reno/System Computing Services Building, Room 47
1664 N. Virginia Street/Bldg. 133
Reno, NV

and by videoconference with:

University of Nevada Las Vegas/System Computing Services Building, Room 102
4505 S. Maryland Parkway
Las Vegas, NV

Tuesday, June 25, 2019 at 9:30 a.m.

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

President Young confirmed video and audio connection between Carson City, and Las Vegas, and video connection for member Drew Johnson from Montana. No public comment was offered from the North or the South.

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

Dr. Young called the meeting to order at 9:36 a.m. at the UNR System Computing Center in Reno. All Board members attended including Member Johnson via video, along with staff: Caren C. Jenkins, Executive Director, Laura Adair, Licensing Specialist, Senior Deputy Attorney General Sarah Bradley, Board Counsel and AG Interns Nikki Rossetta and Shannon Kallin.

Also present were optometrists Eric Brooker, O.D., Steve Girisgen, O.D. Harlan Kopolow, O.D., and Cheryl Adlington, O.D., members of the NV Optometric Association, Mike Hillerbee, NOA lobbyist, and member of the public Paul Heggen.

3. **For Possible Action- Minutes.** Consideration and approval of the minutes of Optometry Board meeting held on May 21, 2019. (Materials provided.)

Dr. Smith moved to approve the minutes as presented, seconded by Dr. Austin. Approved unanimously.

4.* **For Possible Action - Hearings.** (Materials provided.)

a.* **Determination of Just and Sufficient Cause to investigate and hear:**

i. Complaint No. 19-26

The redacted complaint was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Smith moved to dismiss Complaint No. 19-26 based on insufficient allegations, seconded by Dr. Austin. Approved unanimously.

ii. Complaint No. 19-27

The redacted complaint was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Austin moved to dismiss Complaint No. 19-27 based on insufficient allegations, seconded by Dr. Smith. Approved unanimously.

iii. Complaint No. 19-28

The redacted complaint was reviewed for just and sufficient cause to move forward to investigate this matter. Dr. Smith moved to dismiss Complaint No. 19-28 based on insufficient allegations, seconded by Mr. Johnson. Approved unanimously.

b.* **Rehearing of Case No. 18-19**, alleging that **Erik Brooker, O.D., Lic. No 439**, improperly represented himself in optometric advertising, promoted himself as a LASIK surgeon, and other matters relating to the Case on file. Rehearing granted May 21, 2019.

Ms. Jenkins gave a brief summary regarding the complaint and noted that she has been in discussion over a period of months with Dr. Brooker regarding the violations. Because Dr. Brooker has admitted to the violations, Ms. Jenkins determined that an evidentiary hearing was unnecessary. Dr. Brooker asked for an opportunity to explain his perspective on the matter.

Dr. Brooker addressed the board and stated that he misunderstood the complaint process, that he thought it had been dismissed. He apologized to the board, and acknowledged that the website was his responsibility, even though the information was posted without his knowledge. He offered a copy of the letter from the website producer taking responsibility. Dr. Brooker stated that he had his website revised since the initial notice and now has better control over its content. Ms. Jenkins offered to review his website to ensure that the representations conform to NRS 636 and NAC 636.

Dr. Brooker requested the Board reduce his penalty to either a warning or reduced fee.

Dr. Smith asked Dr. Brooker to clarify certain wording regarding LASIK surgery appearing on the website, as she found it misleading. Dr. Austin noted that the website identifies Dr. Brooker as a specialist and states that he is fellowship trained, though Dr. Austin confirmed that Dr. Brooker is not.

Dr. Brooker agreed to work with Ms. Jenkins to make the changes that had been

addressed.

Dr. Austin stated that even though the website has been updated since the meeting in January, it is still not completely truthful. For example, it appears that Dr. Brooker's colleague, Dr. Roth, is certified in glaucoma in NV. Although the website infers that he holds NV certification, he is, in fact, certified in glaucoma only in CA.

Dr. Brooker responded that some of the information from the prior version of his website was transferred over and he had not yet had the opportunity to review.

Dr. Young stated that it is not the board's intention to review every optometrist's website, but there are multiple areas that are in violation. He suggested to Dr. Brooker that he take the website offline and work with Ms. Jenkins to revise the material before going live.

Ms. Jenkins added that Advanced Vision Institute is Dr. Brooker's business name, however this is promoted as providing all services as listed on the website in conjunction with ophthalmologists.

Mr. Johnson stated that Dr. Brooker's web designer, NeONBRAND, does not specialize in websites for optometrists and would have needed to receive the wording directly from the optometrist. He added that Dr. Brooker seems to lack accountability for the advertising and promotion.

Dr. Smith moved that Dr. Brooker, based on the proposed stipulation:

- (1) Take his website offline and work with Ms. Jenkins on making changes as necessary;
- (2) Shall be assessed the same \$2,000 fine to be paid within 14 days of entry of the order, and;
- (3) No additional fine shall be imposed regarding additional violations. Revised website can then be placed back online once approved.

Dr. Brooker agreed to remove the website until changes are made and approved by the board. The motion seconded by Dr. Austin and passed unanimously.

5.* **For Possible Action - Board Reports & Actions.**

- a.* **Ch. 568, 2019 Statutes of Nevada (AB 77) and the Administrative Regulation Process** presented by Mariah Smith, O.D., Vice-President & Legislative Subcommittee Chair (Materials provided.)

President Young reminded the board of the regulatory reprieve imposed in January 2019 and the reprieve can be lifted once the regulations are revised. Ms. Jenkins estimated that the approval process for the proposed regulations will take about 6 months.

Dr. Smith summarized the changes to statute and the NAC regulation revisions proposed.

Ms. Jenkins asked if the board would benefit from defining "optometric examination" into the general provisions, as this is a term used in statutes. She

added the board needs to distinguish between a vision screening and an optometric exam, especially in light of the recent expansion of telemedicine.

Mr. Johnson suggested that instead of listing each service that may include an exam, to simply add a disclosure for services that do not fall under a full optometry test.

Dr. Austin clarified that screenings can be performed by a mobile van or school nurse, for example, however a full eye exam and treatment plan can only be performed by an optometrist.

Dr. Kopolow asked if the patient is screened and has no diagnosis would this still be considered an optometric exam.

Dr. Austin responded that each patient must have a diagnosis code, even if nothing abnormal is found and no treatment is required.

Dr. Cheryl Adlington asked if a screener is permitted to recommend anything over the counter such as artificial tears or blue-blocker readers.

Dr. Smith responded that these types of recommendations would be problematic and probably inappropriate without a diagnosis.

Ms. Bradley will review what the board scope is according to the LCB and make a recommendation regarding this. She also suggested new language be revised to say "he or she" or simply "applicant." Also she suggested a policy be drafted to direct Executive Director or designee to review, reject or approve license applications, with parameters.

Ms. Jenkins asked the board if optometrists need to define eyeglasses or lenses that may not meet current standards. Dr. Smith confirmed that this language is included in the regulations.

Dr. Austin suggested that the language "ocular solutions" be changed to "pharmaceutical agents".

Ms. Jenkins suggested signage posting requirements be revised to require full name that appears on his/her license for identification. After board discussion, the decision was made to just include at least the last name.

Dr. Adlington asked if it would be possible for the board to maintain a list of other names optometrists may use; for example aka nicknames and maiden names.

Also Ms. Jenkins asked if optometrist name must be listed for the purchase of eyeglasses. Dr. Smith clarified that fictitious name requirement only applies to the owner/optometrist and suggested doing some education on this for clarification. Ms. Jenkins confirmed that the full name or registered fictitious name is required for each optometrist.

Dr. Girisgen commented that if an optometrist is affiliated with another brand's logo that is larger than the name, this may pose an unfair competitive advantage with marketing. Mr. Johnson commented that there should not be size limitations on logo.

Ms. Ogden of the NOA added that most brands have standards and guidelines regarding size of the logo and other requirements.

Dr. Kopolow commented that the size limitation helps preserve optometrists' independence from other large brands.

Dr. Kopolow asked if there is a current standard with ANSI for retail eyeglasses. Dr. Smith confirmed that there is and language will be added into the regulations. Dr. Austin clarified that while it is not illegal to sell eyewear below standards, it is required to be disclosed to the patient.

Dr. Girisgen asked if all fees need to be disclosed in advertising, and is it permissible to indicate that fees may vary based on complexity. Dr. Smith responded that there can be a range of optometry service fees instead of listing individual fees, and will revise language.

Dr. Smith revised fill-in day language to clarify that optometrists have 14 fill-in days per year before displaying the required location card. Ms. Jenkins suggested wording be revised to 28 days per renewal period. Mobile optometry will be limited to serving specific patient populations per the new statute.

Ms. Jenkins asked if the employer/owner should be named as a Respondent, in addition to the optometrist, if the board receives a patient complaint. Dr. Young suggested new language to state that they may be responsible, and stressed that an individual licensee has a professional responsibility even if working as an employee.

Dr. Young stated fictitious name language needs to be clarified to state each owner registered with NV Secretary of State must hold certificate at each specific location.

Ms. Jenkins offered that a wall may not be necessary if there is a clear separation. Language can be revised to state "shall maintain a clear separation".

Dr. Girisgen suggested the board further define what separate is. The board has already ruled that main reception is not enough. A patient is either on the retail or doctor side, they cannot be both. Also HIPPA needs to be considered. Dr. Young suggested that clarification is required. Mr. Johnson suggested that the board research how other states have handled this issue, and perhaps ARBO may have some information.

Ms. Jenkins suggested new language regarding patient records. There have been incidents where an optometrist suddenly passes away or closes their

practice, making it impossible to obtain patient records. Ms. Bradley and others discussed possible encouragement rather than requirement.

Regarding the addition of glaucoma by endorsement, Dr. Austin asked how the board will determine what education is substantially similar to the Nevada requirements. Dr. Smith stated that new CA optometry school graduates are automatically glaucoma-certified and are no longer required to take the course. Ms. Jenkins suggested the board implement requirements similar to the current glaucoma requirements; co-management of a certain number of patients, etc. Ms. Bradley stated that other boards define substantially similar by listing accredited schools or specific education/training. Language should state patients can't be treated alone and must be co-managed with ophthalmologist in pursuit of their certificate.

Dr. Kopolow asked what percentage of optometrists are glaucoma certified. Ms. Jenkins responded currently it is approximately 15-20%. Dr. Austin commented that he would like to see the process of obtaining a glaucoma certificate less stringent, however unfortunately the board is limited by statute. Perhaps language can be revised to state that they can be treated in consultation with ophthalmologist, to be in accordance with the statute. Dr. Austin asked now that the board is offering glaucoma by endorsement, will the board need to verify endorsement applicants through the National Practitioner database?

Ms. Jenkins responded that the cost is about \$6 per applicant and can be added to the applicant fee. When glaucoma by endorsement was initially proposed, the language did not specify whether or not they are applying with 5 years of actively practicing in another state.

Dr. Smith noted that the section regarding new assistant language may not need to be broken down, but perhaps the board can communicate that certain tests such as the Goldman test, performed to check eye pressure, be noted as noninvasive.

Regarding mobile optometry clinic certification, applicants are not required to be a licensed optometrist, however any optometrist may name this as their practice location.

There was discussion of CE requirements, and whether the board should require a portion of CEs be live versus online, or interactive and set a maximum number of allowable hours within a 24 hour period. Ms. Jenkins suggested a policy to encourage interactive CEs. The board agreed to allow no more than 10 hours per day of CEs. The board also made the decision to reinstate Optocase and Queens University's continuing education.

Ms. Jenkins stated that the NV OSLE will need to be revised and Dr. Young requested that Dr. Austin begin the process. However, until the regulations are approved, the test cannot be finalized.

Ms. Jenkins will continue to work with Dr. Smith on regulation revisions and

will then compile a draft for a public regulation workshop.

b.* **Agency-related legislation from 2019 Legislative Session** presented by Board Counsel Deputy Attorney General Sarah Bradley, Esq. (Materials provided.)

Ms. Bradley summarized the handout regarding regulatory board-related bills that may have an effect on the optometry board. One bill pertains to public records requests and recovery of expenses; itemized list is required, overtime is an option. New legislation requires boards to maintain a list of what is determined as confidential that is not already confidential by statute. If board has litigation, the board can appeal a case. Ms. Bradley said that boards can now accept Taxpayer Identification Numbers and no longer require Social Security Numbers. Ms. Bradley advised the board to put together a public records policy.

Ms. Jenkins stated that Computer Corps is contracted with the State to accept used electronic computer equipment. They delete the information and either refurbish or recycle.

c.* **Board determination of 2019-2020 Fee Schedule** (Materials provided.)

Ms. Jenkins referred to page 97 of the meeting materials regarding current and proposed fee schedule, and there was discussion of what the most appropriate and fair fees may be. Ms. Jenkins added that the new legislation will now allow the board to prorate new license fees quarterly. The new statutes changed the renewal period to two years during even years, opposite from the legislative cycle. Dr. Smith gave a comparison of other states licensing fees. Ms. Bradley advised the board to place a list of fees in the regulations for the LCB. Mr. Johnson suggested that it would be helpful to review and compare other states fees regarding the new mobile optometry licensing.

d.* **Executive Director's Report**

i. Lifting the Regulatory Reprieve.

Ms. Jenkins requested the reprieve that was imposed in January of 2019 be lifted, however the board prefers to wait until the regulations are in place. This will be discussed further at the next board meetings scheduled for August and September.

ii. NBEO's NV OSLE (Online State Law Exam) project-approach?

Dr. Austin will work with Ms. Jenkins to begin revising certain sections of the exam to reflect the regulatory changes, to be continued as the regulations become approved. The board will continue testing on the current version until the regulations are approved.

iii. Ideas for outreach regarding statutory changes - What is the Board's Role?

Various options were suggested including workshops, emailing newsletters, placing AB77 on the website, working with the NOA and placing additional information on the website. Ms. Jenkins stated that it is important to note that interpretation is the role of attorneys.

iv. Website revision project.

Ms. Jenkins stated that significant revisions of the registration forms will need to be revised. Ms. Jenkins will be working with Ms. Adair on creating new forms in compliance with the law. Other website topics were discussed such as information regarding the employer/employee relationship, and misconduct. Mr. Johnson has begun the process by submitting his suggestions to the current website pages.

v. Staff direction re: expiration of Licensee work visas.

Ms. Jenkins asked Ms. Bradley for guidance on confirming whether a licensee is required to be a U.S. citizen. The board currently has a few licensees that have work Visas that will be expiring. Ms. Bradley responded that she will research whether a board is allowed to revoke a license due to citizenship status. Ms. Bradley responded that she will research whether the board is required to maintain citizenship, or if this is only an initial requirement.

vi. Authorization to change banks holding operating funds and Board reserves.

Ms. Jenkins stated that Heritage Bank and Nevada State Bank are charging an inactivity fee. Possible options were discussed including transfer to each other or change to another bank. Dr. Smith entertained a motion to authorize Ms. Jenkins to change to an FDIC banking entity located in NV, seconded by Dr. Austin, all approved.

Per the request of the board for information purposes only, Ms. Jenkins proposed four scenarios and estimated fee amounts to retain a lobbyist year round, versus paying out a one-time fee during the legislative session. This issue can be brought up in the future for a decision on whether there should be modification of the budget.

The next board meeting will be a regulatory workshop in July.

6. Announcements and **requests for future Board consideration** (No action to be taken).
a. 2019-2020 BOARD MEETING SCHEDULE.

Ms. Jenkins referred to last page of meeting materials with list of tentative possible future board meeting dates for 2019-2020. The next meeting is proposed for Tues. Sept. 10, 2019 at Noon. The next in-person live meeting is proposed for January 7, 2020 in LV.

7. **Public Comment.**

Dr. Kopolow asked if there is a written provision requiring an optometric assistant to be supervised by the optometrist. Also, regarding the optometrist being required to provide contact lens prescription, he noted that the FTC requires optometrist to allow 8 hours to respond to a contact lens Rx, however companies are not abiding by this and the FTC is not enforcing this.

Dr. Smith stated that this requirement is written in the statute. Ms. Jenkins stated that this can be discussed further at the stakeholders meeting.

