

NEVADA STATE BOARD OF OPTOMETRY



MINUTES OF PUBLIC MEETING

April 25, 2024

1. **Action Item 1. Roll Call, Call to Order, Welcome, Introductions.** President Mariah Smith, O.D. opened the live meeting at 12:03 p.m. President Smith and Board members Jeffrey Austin, O.D., Julieta Alamo-Leon, O.D, and Drew Johnson were present via Zoom. Executive Director Adam Schneider attended via Zoom. Deputy Attorney General (DAG) Todd Weiss, Esq. attended via Zoom. Pursuant to AB219, public telephonic access number 669-444-9171, meeting ID 898 7147 5470, Passcode 276684 were read into the record.
2. **Public Comment.** President Smith invited public comment. All Board members confirmed they had read the meeting materials in advance. The following persons expressed opposition to proposed NAC 636.670(5): Kent Wellish, M.D., Stephanie Lee, O.D., Chen Young, O.D., Jacquey Julio, O.D., and Danny Thompson.
3. **Action Item- NAC 636.670(5) discussion and vote for submission of 1/2024 NAC Workshop results to Legislative Counsel Bureau.** At Dr. Smith's invitation, Dr. Austin discussed removal of proposed NAC 636.210(1)(b) about licensees representing themselves as specialists unless approved by the Board, and instead be converted to a Board policy.

Next discussed was proposed NAC 636.670(5) about spectacle lens prescription expirations. Dr. Smith commented about the lack of submitted proof any adverse effects one way or another, that less rules tend to be better than more rules, that there have been no reports of licensees abusing the prescription length, and to keep as-is the prescription length being at the doctor's discretion.

Dr. Austin noted the 670(5) does not take away doctor discretion, but the membership feels differently and that must be taken into account. 670(5) is not anti-consumer or a burden upon healthy patients, that there have been no complaints as to prescription length based upon inquiry into past Board members over the past 20 years during their tenures. It is a well-intentioned solution, but solves a problem that does not exist nor is there any public outcry as to glasses prescription expiration lengths. There are plenty of opportunities for any patient to get glasses produced at any optician business. There is professional consensus on this, which must be taken into account. The intent was not to take away doctor discretion. Additional research into the website worldpopulation review.com showed not 29 States, but only 4 States of which Nevada is not one of those

four, that had mandatory 2-year prescription lengths. The proposal would be of minimal help to consumers, but has high likelihood of harm to public harm. The proposal should be dropped, and left to the doctor's discretion.

Dr. Alamo-Leon concurs with Drs. Smith and Austin. It is not a public health issue in this State or other States, and that 670 as-is is the best we can obtain in Nevada.

Public Member Johnson stated Nevada law does not speak to doctors' discretion, and the proposal does not impact doctors' discretion. His initial interest in the proposal was to ensure that patients present to optometry offices for proper care, and help avoid young and healthy people looking to less effective online service for their eye care. The intent is not about taking power away from the doctors, and that it still allows doctors within their professional judgment to encourage their patients to present more often. He encouraged the membership to attend the Board's meetings more often. He disagreed with the opposition arguments that the proposal was politically motivated, when he first raised this issue in June 2020, and to counter against protectionism when the Board's interest should be in the interests of public health and safety. The markets with 2-year lengths do not have worse eye care outcomes or increased blindness. The opposition does not address that many patients have contact lenses, which those patients will present for annual examinations anyway.

Dr. Smith noted Public Member Johnson as an ethically sound and good person, and the proposal was well-intentioned. Public Member Johnson noted he intentionally did not write an op-ed or actually make it a campaign issue of his.

Dr. Austin moved to remove 210(1)(b) as an administrative code and instead make it a Board policy, and to remove 670(5) before submission of the workshop results to the Legislative Counsel Bureau. Dr. Smith seconded. Dr. Alamo-Leon voted in favor. Public Member Johnson voted in opposition. Dr. Austin noted that Public Member Johnson has been raising this issue for many years, it is not related to his political aspirations, and was well-intentioned but not the right time.

4. **Action Item- Certificates of Deposit.** Director Schneider noted this item comes at the urging of Public Member Johnson to help reduce operating costs of the Board and pass those savings onto the membership by lessening their dues by using FDIC-insured vehicles like certificates of deposits to help monetize the Board's cash on hand. Director Schneider reminded the Board that: 1) R066-19 section 3 says the Board has to have 13 months of operating budget at all times, which as a gross approximation is \$200,000 and that the Board has been in compliance with that since his tenure; and 2) the Board is self-funded, so the Board has to live on the influx of funds after the end of February in even-numbered years all the way into Q4 of even numbered years, i.e., for the next 20 months. The proposals are all FDIC-insured so long as under \$250,000. As additional vetting, the Board of Opticians, Accountancy, Landscaping, Architecture, and Engineering all use this same bank and its instruments. The three-month term at present is the better return on investment.

Director Schneider recommended: 1) the Board vote yes, use funds from the accounts receivable account; 2) appoint a Board member tasked with oversight of himself and the

funds to show the membership that checks and balances are being implemented; and 3) the Board authorizes the banker's checklist provided in the meeting materials. Director Schneider answered Board Member Johnson's question that the motion can be self-executing and continual so as to avoid special meetings every 85 days on what to do about the funds when a CD's term is about to end.

Dr. Austin moved to legally and prudently to invest the funds into CDs, have Board Member Johnson and Director Schneider jointly manage the funds and report back to the Board on the statuses. Dr. Smith seconded. Motion passed unanimously. Director Schneider commented for the membership's knowledge that these instruments do not lose principle.

5. **Board of Dispensing Opticians cross-over issues.** Director Schneider reminded the Board this was brought up at the prior meeting that the Board of Dispensing Opticians' Executive Director is encountering similar issues and public complaints as this Board, and would be providing a list of questions for this Board's perspective. Director Schneider noted: 1) there are 7 overarching topics that the Optician Board wanted the Board's perspective; and 2) as opening salvos, AB 432 needs to be read as a whole, nothing in AB 432 abrogates already existing law, AB 432 presupposes licensees adhere to the standard of care, and that the questions are not specific enough to provide responses as truisms, but the Board as a gesture of good faith should answer these questions to the best of their ability.

Dr. Smith noted that a comprehensive eye examination has to be done in person, and synchronous telehealth would be for non-comprehensive exams where the doctor has seen the patient in the past two years and has access to the records of a comprehensive exam in the prior two years. An example would be obtaining an update on a contact lens fit to then order the contacts. Telehealth is not to replace the standard of care. Asynchronous telehealth is for consultations only, when requested by a different provider such as being requested to look at a retinal photo, and are not allowed to make a diagnosis or treatment plan.

As to AB 432(19)(9), a vision prescription using only an autorefraction or manifest refraction is not standard of care whether in-person or telehealth.

As to AB 432(18) regards restrictions on prescriptions. The Board confirmed valid prescriptions from one optometrist can be filled by another optometrist.

As to AB 432(19), there is no specification on where the prior comprehensive examination records comes from, so the records can be provided to the examining optometrist by the patient or the prior optometrist.

As to whether an MD can fill in at an optometrist clinic, the MD or DO practices medicine whereas the optometrist practices optometry. An ophthalmologist has the ability to perform all of the care an optometrist could, so long as duly licensed. In any physician-optometrist relationship, there cannot be an employment contract. The optometrist has his or her role and cannot exceed their statutory scope of practice, which is separate from the ophthalmologist's role in treating the patient.

"Direct responsibly" mentioned in section 346 does not mean that the optometrist has to oversee the entire process, but must perform the final examination before discharge.

As the corporate pressures, there is a statute on point that non-optometrists cannot influence optometrist judgment. The person in trouble in this scenario is the optometrist for not following optometry law. This would not be a joint jurisdiction all the time, but would instead depend on the facts.

As to an educational campaign, the Board already has an NAC that the membership is well aware of to use to ask the Board about its interpretation of its laws applied to specific scenarios. DAG Weiss commented that there is nothing to allow multiple Boards preparing a joint policy. Dr. Smith welcomed education to both Boards, especially in light of the new laws. A proposed letter answering the Board of Dispensing Opticians' questions will be part of the Board's next meeting for Board approval.

6. **Action Item- Complaint 24-11 hearing scheduling** Colloquy as to Board hearing options for July 31, 2024 or August 28, 2024. DAG Weiss commented he is in touch with counsel who could become the licensee's counsel, and who had asked for something three to four months away due to a busy summer trial schedule. Dr. Smith moved for DAG Weiss to issue an Order to conduct the hearing on July 31, 2024. Board Member Johson seconded. Motion passed unanimously.

7. **Action Item 16. Complaint 24-13.** Director Schneider read a statement in the record:

NRS 636.310)(3) authorizes the Executive Director to notify the Board of an investigation for further consideration by the Board if deemed necessary by the Board after an investigation.

This public complaint submitted on or about April 15, 2024 is being presented in a double-blind manner, i.e., the Board is not being told during the course of this agenda item who the complainant is or who the subject licensee is.

The materials associated with this agenda item are redacted to eliminate any identification of party identities, gender, locality, whether the practice is commercial or private, or whether the licensee is new to Nevada or not.

I am requesting the Board not ask any questions of me about such information as this is immaterial to the Board's evaluation of the allegations, the licensee's response and the licensee's submitted documents in support of the response. As I have made the licensee aware telephonically on April 22nd and in writing on April 16, the purpose of this double-blind presentation is to afford the licensee due process and avoid any undue influence upon the Board by mere virtue of who the complainant may or may not be or who the licensee may or may not be, and in order to balance the statutory directives of protecting the public while balancing the licensee's due process rights.

The allegations regard an advertisement for free examinations at the licensee's then-future primary practice location. It is the licensee's then-future location because the licensee has since retracted the location as the primary location in light of the business's advertisement.

Both the optical business and the licensee separately state that the licensee did not know about advertisement and the optical business has stated that all responsibility lies with it and not the licensee.

The licensee acknowledges her knowledge that advertisements for free services are illegal within Nevada optometry laws. The licensee has since confirmed that not only has the original post been taken down, but the posts which the optical business controls have been taken down and no longer exists on social media according to her and her counsel.

I will now ask the Board to deliberate and discuss what it wants to do next in this matter. Options available to the Board include closure of the investigation, issuance of a letter of concern then closing the investigation, authorization of the Executive Director to issue additional subpoenas and/or request a supplemental response from the licensee, or request that the Attorney General's office pursue a formal complaint against the licensee and prosecute the matter as provided under NRS 636.325. If the Board votes for authorizing a formal complaint, which the Executive Director is not advocating for one way or another, it will be up to the Attorney General's Office to apply laws to facts and decide what specific charges should be included in the formal complaint.

Dr. Smith noted the licensee made a good faith effort in complying with the investigation. The issue is if the optical business is advertising for the optometrist to perform free examinations, this suggests that the optometrist would be paid by the optical business. The materials produced thus far do not answer those questions. Dr. Smith commented that under the circumstances there may be a contract between the licensee and the optical business. Colloquy and agreement for a letter of concern and to request the contract, particularly when the licensee may be associating with the optical business in the future. Such concerns include is the licensee an actual independent contractor, how the licensee had planned on being paid, and this investigation remains open. Dr. Smith moved for a letter of concern and to request a copy of the executed contract be provided presuming the licensee executed one, and no formal hearing at this point in time. Dr. Austin seconded. Motion passed unanimously. DAG Weiss noted disciplinary action for a contract that never occurred and was essentially only an idea would be difficult to be actionable.

8. **Action Item- Consideration and approval of March 28, 2024 Board Meeting Minutes.** Dr. Smith confirmed all Board members had looked over the proposed Minutes. Dr. Austin moved to accept as proposed. Dr. Alamo-Leon seconded. Motion passed unanimously.
9. **Public Comment.** Dr. Smith invited Public Comment. Dr. Kopolow expressed concern about independent contractors, potentially mislabeled as such, when actually are employer-employee and from an IRS perspective would not be deemed as true independent contractors. The most traditional arrangement would through subleasing, and is not a substitute for the independent contractor relationship. Dr. Smith requested of Director Schneider to place the independent contractor related laws be placed on the Board's running list for 2025 legislative session.
10. **Action Item- Adjournment.** Dr. Smith moved to adjourn the meeting. Public Member Johnson seconded. Motion passed unanimously. The meeting adjourned at 1:32 p.m.

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FY 2023-2024 Regular meeting schedule

Thursday 5/30/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom

Thursday 6/27/2024 12:00p.m (pst) Reg. Bd. Meeting- phone or Zoom

FY 2024-2025 Regular meeting schedule

Wednesday 7/31/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom

Wednesday 8/28/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom

These minutes were considered and approved by majority vote of the Nevada State Board of Optometry at its meeting on May 30, 2024.

/s/ Adam Schneider

Adam Schneider, Executive Director