

# NEVADA STATE BOARD OF OPTOMETRY



## MINUTES OF PUBLIC MEETING

May 30, 2024

- 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 816 1247 6114, Passcode 897761 were read into the record.
- Public Comment.** President Smith invited public comment. Dr. Girisgen explained the purpose of his letter in the meeting materials regarding NAC 636.250. Ron Voigt discussed the proposed sales tax code by the Department of Taxation being inconsistent with NRS 372.055(3) and that optometrists are not retailers of optometric products, and the Department of Taxation is mistaken that an optometrist and dispensing optician are the same, that the proposed change would impact economic growth of the optometry practice, and the change would encourage illegal business activity. Jennifer Letten, a Nevada licensed optician, read her email in the meeting materials regarding two-door configuration and concerns with anti-kickback law violations. Dr. Kopolow quoted his letter in the meeting materials about business associates, and the concern of those vested in the doctor's office and ones who are not, and the usage of shell entities for the perception of OD ownership. A concern is a comingling of funds and who is the custodian of records. Dr. Stephanie Lee discussed her interactions with the Department of Taxation that optometrists need to charge sales tax for optometric products, yet the statute says otherwise, and encouraged the Board to get clarification on what is a dispensing optician.
- Action Item- NRS 636.025(2) application to IPL.** Director Schneider reminded the Board this was a follow-up to the Board's decision at its 6/2023 meeting as memorialized in a letter to Dr. Bolenbaker in 8/2023, and Dr. Bolenbaker wants to revisit the decision. Director Schneider posed the question of what is considered to be an appendage or adnexa of the eye, and does the definition change for purposes of IPL to treat dry eye and ocular rosacea when standard treatment occurs from tragus to tragus. Director Schneider stated Dr. Bolenbaker provided materials in advance for the Board's review and is present at the meeting.

Dr. Austin stated he read the materials, and what the textbooks say as to eye appendage/adnexa includes the eyelid, lacrimal system, conjunctival sac, orbital contents excluding the eyeball and optic nerve and thus the extraocular muscles and orbital fat, and in limited circumstances the eyebrow, but never includes the cheek, forehead, temporal area of the face or any areas outside of the eyelid. Dr. Smith agrees that is the definition, but also noted that the risks with

IPL therapy is very minimal. Dr. Smith is not aware of what the device looks like, but suspects the applicator involves the cheek and brow when trying to treat from lid to lash, and suspects the Board would not penalize a license for treatment in that area. Dr. Austin stated even if the risk is low it would not make it legal based upon how the statute is written, the Board should not go outside the statute, and when a licensee is attempting to treat areas outside of the statute is not permissible. Dr. Smith asked if the treatment of crows' feet would be within the statute, which Dr. Austin stated is beyond the lateral canthus and thus not textbook appendage of the eye. Dr. Smith discussed for purposes of 2025 legislation any interest in expanding the statute to treatment of the skin around the eye in the interests of the patients having to then see a dermatology to treat a wider area. Dr. Austin stated an interest. Public Member Johnson inquired into the Dental Board statutes and what authorizes their dermatology-based procedures. Director Schneider did not know. DAG Weiss did not know. Dr. Alamo-Leon agreed with Dr Austin's summary of the statute, that optometrists have the capability of treating lateral of the eye, but there needs to be continuing education that goes into such treatments, but is an option for the future in the interests of the consumer to be able to be treated by the optometrist. Dr. Smith moved to maintain the definition of eye adnexa as-is, but wants to discuss in the Item for 2025 legislative goals to expand the definition. Dr. Alamo seconded.

After allowance by DAG Weiss, Dr. Bolenbaker's chat was read into the record "So essentially the board is saying the treatment of dry eye with IPL would only be allowed in an off label fashion?" Dr. Smith answered no, in that dry eye can be treated with IPL to the eye and adnexa and thus not off label and within the statutory allowed scope of practice. Treatment beyond the adnexa would also not be off label as much as it is illegal based upon how the laws are written currently and thus treatment from tragus to tragus would be impermissible even though that is how standard IPL is conducted. Motion passed unanimously.

4. **Action Item- NAC 636.250 and R066-19 Sec. 12(3) clarification.** Director Schneider provided the context of this topic is Drs. Kopolow and Girisgen's desire for clarification on the scope of duties mercantile businesses can provide to ODs. Director Schneider summarized the materials consisting of the Board's letter in 8/2023 to Dr. Horner, Drs. Kopolow and Girisgen's letter expressing their need for clarification and their perspective that there are different ways to read the statute, and relevant law including R066-19 Section 12 whose paragraph 3 lists what mercantile businesses can do and whose paragraph 4 lists what mercantile businesses cannot do.

Dr. Smith agreed with Director Schneider's comment about what paragraphs 3-4 state and is not ambiguous. Dr. Girisgen used Nationwide Vision as an example, and outsourcing in certain situations is fine but when the non-licensee has a vested interest in the performance of the optometrist is where the uncodified language needs to be refined. Dr. Smith asked Dr. Girisgen what his proposal would be to change the uncodified language bearing in the mind the Board is trying to prevent bad actors from violating the intent of the law when not a lot of other States have what Nevada law is trying to do. Dr. Kopolow suggested using conflict of interest law. Dr. Smith recommended any suggestions be sent to Director Schneider. Dr. Girisgen brought up Jennifer Letten's comments about Walmart staff scheduling as exposing the flaws in the uncodified law. Colloquy that R066-19 is with the Legislative Counsel Bureau. Jennifer Letten reiterated her suggestion that third-party businesses not affiliated with the corporation be hired to avoid violation of the law. Dr. Smith discussed that changing membership of the Board can come with it changes in the Board's prior decisions on similar

topics. Dr. Smith acknowledged the Board's letter to Dr. Horner would have been in conflict with past decisions of the Board with different members. Agreement to discuss as a possible 2025 legislative goal.

5. **Action Item- NRS 636.373(4) clarification.** Director Schneider posed a question from Dr. Hubbard- if there is no replacement for Dr. Michitsch as the OD name/leader of VSP Ventures in Nevada - what happens to the doctors under employment of VSP Ventures? It does not seem they could continue to practice under their contract. Dr. Smith commented that of the relevant law compiled by Director Schneider, NRS 636.300(2) is clear that it is unprofessional conduct for a licensee to accept employment from a person not licensed to practice optometry. Dr. Smith moved for Director Schneider to provide Dr. Hubbard a letter with the Board's decision. Dr. Austin seconded. Motion passed unanimously.

6. **Action Item- NAC 636.670(4) clarification.** Director Schneider posed a question from a licensee- can an OD fill a contact lens prescription issued by an international OD or OMD, presuming the prescription is current? Director Schneider summarized his communications with the licensee that there is no express prohibition on it in NRS 636 or NAC 636, and presumably the prescription needs to include the aspects of Nevada-compliant prescription, with the caveat that 670(4) has a proposed edit in R101-24 to remove as an aspect of the prescription the percentage of water content and thickness.

Dr. Smith discussed that other States or countries might have different laws on what is compliant to those jurisdictions, but that a Nevada licensee should be able to fill the prescription so long as abiding with an equivalent prescription. Dr. Alamo-Leon agreed. Dr. Austin agreed that Nevada licensees can be allowed to fill out of state or international vision prescriptions, but cautioned that the licensee must be aware of the liability and the lawsuit potential for doing so.

Dr. Smith moved that the Board has no say in what other States or countries have for their prescriptions to be valid, but Nevada licensees are allowed to fill those prescriptions so long as the prescription is valid and abiding by the parameters of the prescription. Dr. Alamo-Leon seconded. Motion passed unanimously.

7. **Action Item- 2025 legislative goals.** Director Schneider stated that Assemblyman Dr. Koenig needs a working bill by 7/1/2024, and that the Board has compiled a running list since his tenure. Director Schneider addressed each one by one-

- Additional board member (NRS 636.030 "The Nevada State Board of Optometry, consisting of four members appointed by the Governor . . .") If so, does the Board want geographic requirements. Dr. Smith acknowledged speaking with Dr. Koenig and this is something he wants, with a component that the member be an optometrist and from a specific geographic location. Dr. Smith expressed a concern of what would happen if nobody applies from those geographic areas, and that it is well-intentioned but difficult to implement. Public Member Johnson opposes a fifth member, but if so, the additional member should be a public member with perhaps an insurance background or healthcare background. Adding a 5<sup>th</sup> member to avoid ties is not useful when there has been only two ties in the past seven years one of which was through an inappropriate situation, and adding another optometrist would promote protectionism or cartelism. Dr. Austin agreed there is no need for an additional member. Dr. Alamo-Leon stated a 5<sup>th</sup> member makes sense, but it should be a licensee because this is the Board of Optometry. Colloquy on the frequency of tie votes, being two in the past seven years which Dr. Alamo-Leon said was two too many. Dr. Smith discussed obtaining authority

from the Board during sessions in Carson City. Public Member Johnson proposed Dr. Smith asking Dr. Koenig which one of the 12-15 rural ODs would be the 5<sup>th</sup> member.

- At Director Schneider's suggestion, with the last Board member salary increase occurring in 2007, to increase the 2007 \$150 equivalent to \$225 in 2024. Board stated the increase was unnecessary and declined to pursue in a bill.

- NRS 636.305 regards Board complaints. The statute would be amended to state: 1) the investigation may include, but is not limited to, compelling a licensee to appear before the Board; 2) "The proceedings of an investigative committee are confidential and are not subject to the requirements of NRS 241 and such proceedings are confidential between the licensee and the investigative committee members until such time as the investigative committee finds sufficient cause to recommend a formal complaint to the Board." Director Schneider discussed that the confidentiality could be a helpful tool to foster more honest discussions between the licensee and the Board when the licensee knows the hearing would not be public. Board agreed to pursue in a bill.

- Emergency powers for cease and desist and short-term summary suspension of license for conduct other than controlled substances prescriptions. At present NRS 636.339 allows for cease and desist, but only in the context of controlled substances prescription abuses. Director Schneider stated other fact patterns besides controlled substances abuses exist within the field, and the Board needs such powers. Board agreed to pursue in a bill.

- Expanded scope of practice within the definition of acts of optometry (NRS 636.025(1):

- 1) Elimination of 40 hour requirement for OMD training prior to ability to prescribe pharmaceutical agents (NRS 636.287(3). Dr. Smith commented about ophthalmology in the last cycle wanting to keep the 40 hour requirement in existence. Should the 40 hour requirement in NAC 636.730 be eliminated, there would be no need to seek a statute for OPAC endorsement akin the Glaucoma by endorsement. At minimum, add "In the event a licensee allows their license to expire and wishes to reapply, the licensee's prior approved OPAC training is valid for the life of the licensee, therefore, the applicant is not required to retake the 40-hour training to recertify." (NRS 636.287) Dr. Austin discussed licensees needing to pass the TMODs so the 40 hour requirement is moot at this point. Dr. Alamo-Leon discussed the history of the 40 hour requirement more so dealing with long-standing optometrists who were not trained on pharmaceuticals and not so much new graduates who were trained on such drugs. Dr. Austin agreed. Board agreed to pursue in a bill.
- 2) Allowance for glaucoma treatment upon the issuance of a license, graduation/licensure (NRS 636.2891, .2893., .2895) Board declined to pursue in a bill.
- 3) injections (lidocaine), lasers (YAG), chalazion removal. Board declined to pursue in a bill. Board discussed the subject matter would be better for the NOA to pursue and be supportive of the NOA in doing so.
- 4) expansion of appendage to be from tragus to tragus for purposes of IPL or RF or ZEST and any similar modality, bearing in mind the California Board allows for IPL and is in the process of adding RF officially. Dr. Alamo-Leon discussed the need for continuing education to current licensees for what is being taught in optometry schools. Director Schneider discussed the possible inclusion of certificates of training or CEs. Board agreed

to pursue in a bill.

- Family ownership of practice upon solo practitioner's death being expanded to permanent incapacitation (AB432 Section 14) Board agreed to pursue in a bill.
- Adding of "or optometric telemedicine" in the following statutes- "A licensee shall be authorized and entitled to practice optometry or optometric telemedicine in this State subject to the provisions of this chapter." (NRS 636.345) and "In any setting where optometry **or** optometric telemedicine is practiced . . ." (NRS 636.346(1) Director Schneider stated these are for clean-up, now that optometric telemedicine exists in AB 432, and to avoid any bad actors abusing telemedicine laws when the statutes would not apply to them because the statutes do not specifically state optometric telemedicine. Board agreed to pursue in a bill.
- AB 432 Section 16- As used in this section, "disciplinary action" means an action resulting in a report to the National Practitioner's Databank (NPDB) regarding patient care, or a finding of unprofessional conduct as defined in NRS 636.295. Director Schneider noted that other Boards, including California, differentiate between "disciplinary action" and "citation" for minor violations that would not necessarily warrant discipline to protect the public. This statute's purpose would be to avoid NPDB reporting on purely administrative actions, such as the denial of a license for failure to renew on time or pay the proper fee, and does not constitute discipline. Dr. Austin agreed an NPDB report is unnecessary for administrative actions. Dr. Alamo-Leon agreed. Board agreed to pursue in a bill.
- NRS 636.215 "1. The purpose of licensing optometrists is to protect the public health and safety and the general welfare of the people of this State. 2. Any license issued pursuant to this chapter is a revocable privilege." Director Schneider stated this is consistent with other healthcare providers' chapters, and has already passed legislative muster in the past with other healthcare providers' chapters. Dr. Austin agreed this is a good idea. Board agreed to pursue in a bill.
- Add the bolded font to AB432 19(9)(2) as follows- ("2. Except as otherwise provided in subsection 3, a licensee may engage in synchronous or asynchronous optometric telemedicine to provide health care services to a patient only if ~~the~~ **a licensee has completed a comprehensive examination on the patient within the immediately preceding 2 years and the examining licensee has access to and contemporaneously reviews such records of the prior two years)** Board agreed to pursue in a bill.
- NRS 636.300(2)(unprofessional conduct for accepting employment, directly or indirectly, from a person not licensed to practice optometry to assist the person in such practice or enable the person to engage therein) and NAC 636.250(2)(b) (A licensee shall not except as otherwise authorized by NRS 636.347, serve as an employee or independent contractor of any person who is not licensed to practice optometry). Director Schneider reminded the Board this was discussed at the end of the prior meeting where Dr. Kopolow expressed concern about independent contractors, potentially mislabeled as such when from an IRS perspective are actually employees, and the most traditional arrangement would through subleasing. Board agreed to hold these until the Board receives proposed changes from the membership, and then readdress at the Board's next meeting.
- NAC 636.250 (requires a licensee and non-optometrist business to maintain its own scheduling and computer system, have no influence on the licensee's staff, maintain clear

separation of physical space, etc.) and R066-19 Sec. 12(3) regards business relationships between optometrists and non-optometrists. Paragraph 3 states “An optometrist may form an association or other business relationship with a person, other than a physician, who is not licensed to practice optometry to perform duties concerning the operation of the business. Such duties must be limited to duties concerning the operation of the business and may include, without limitation, performing services related to payroll, human resources, real estate, regulatory matters not related to health care, banking, accounting, administration of benefits, marketing, merchandising, occupancy, accounts payable, accounts receivable, supply chain management, business development, business administration, labor, compliance with applicable laws and regulations, purchasing and medical billing.” Paragraph 4 lists what cannot be performed, i.e., “clinical decisions, scheduling of patients, any decision concerning scope of practice or use of facilities, equipment or drugs; or any other decision concerning the provision of care to a patient or the outcome of any treatment or other service provided to a patient, and ensure that any advertising, marketing and promotional materials accurately portray the position of the optometrist within the association or business relationship . . .” Consistent with Action Item 4, Board agreed to hold these until the Board receives proposed changes from the membership, and then readdress at the Board’s next meeting.

- Proposed legislation in 2023 session included a section for the prohibition of non-licensees holding ownership interest in optometry practice, accepting a position of authority via management services position, but was not submitted. The Board declined to re-pursue in a bill.

Upon DAG Weiss’s advice, the above list will be the subject of a vote at the Board’s next meeting.

8. **Action Item- Tax Commission proposed legislation re frames/lenses sales tax.** Dr. Smith commented that her initial reading of the proposed laws was consistent with her understanding of what optometry practices were already doing, but moved to authorize Director Schneider to write a letter to explain the difference between opticians and optometrists. Dr. Alamo seconded and agreed, and that the proposed Code misses the point that the products are medical devices. Motion passed unanimously. Director Schneider provided background that he and DAG Weiss have had a meeting with the Department of Taxation’s ED and DAG, and they are aware that the Board is aware of this proposed Code. Director Schneider commented the letter would have to be a formal petition pursuant to the relevant Code, and would be presented to the Board for approval at the next meeting.
9. **Action Item- Complaint 24-11 status.** DAG Weiss summarized his communications with the subject licensee’s counsel and ongoing negotiations, that the Complaint had been served, and he anticipated proposed Settlement Agreement terms at the Board’s next meeting.
10. **Action Item- Complaint 24-13 status.** Director Schneider stated this is a continuation of an Item from the 4/2024 agenda where the Board had sought the licensee’s employment contract. The licensee retained counsel and did not provide the contract because the contract had since been rescinded and voided and the licensee is no longer doing any business with the optical business. Director Schneider theorized that DAG Weiss would advise to close the investigation, but the question for the Board is what to do next. DAG Weiss advised the contract no longer has any legal effect, and recommended to close the investigation. Public Member Johnson moved to close the investigation. Dr. Austin seconded. Motion passed unanimously.

11. **Action Item- Consideration and approval of letter to Board of Dispensing Opticians.** Dr. Smith stated the draft was thorough and thought all about multiple scenarios, and moved to accept as proposed. Dr. Austin seconded. Motion passed unanimously.
12. **Action Item- Consideration and approval of April 25, 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.
13. **Public Comment.** Dr. Kopolow stated: 1) he will submit proposals for statutory revisions expeditiously; 2) the history of the sales tax issue that at one point in time optometrists preferred to be the end-user when the sales tax was 2%, but optometrists were caught in the mix when the 2% was eliminate and increased to approximately 7% and State sales tax agents and auditors who fail to understand that in addition to them not understanding the difference between an optician and an optometrist; and 3) the IRS testing is clear as to what constitutes independent contracts. Danny Thompson stated he is 73 years old, a native Nevadan and served in Nevada legislature for 10 years, been at the Nevada legislature for 44 years, has attended tens of thousands of board meetings, this is the second time attending this and finds it offensive that a member of the committee refers to the people being regulated as a protectionist cartel, if the committee lets such comments stand in a public hearing the committees loses credibility, the chairman of the committee needs to tell the member to keep their opinions to themselves and impugns the community's credibility and has never seen such comments be allowed. Jennifer Letten thanked President Smith for the opportunity to participate in the meeting, and for Director Schneider working with the Board of Dispensing Opticians.
14. **Action Item- Adjournment.** Dr. Smith moved to adjourn the meeting. Public Member Johnson seconded. Motion passed unanimously. The meeting adjourned at 1:45 p.m.

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**FY 2023-2024 Regular meeting schedule**

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  
Thursday 9/26/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom  
Wednesday 10/30/2024 12:00p.m. (pst) Reg. Bd. Meeting- phone or Zoom  
Wednesday 12/11/2024 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 June 27, 2024.

*/s/ Adam Schneider*

Adam Schneider, Executive Director