NEVADA STATE BOARD OF OPTOMETRY

MINUTES OF
WORKSHOP RE: R066-19 SECTION 12
July 31, 2024

1. Action Item 1. Roll Call, **Call to Order**, President Mariah Smith, O.D. opened the live meeting at 4:06 p.m.[1]

2. Public Comment. President Smith invited public comment. Dr. Kopolow read a statement on behalf of the NOA, since posted on the Board's website and incorporated as if fully set forth herein. Dr. Christensen read a statement, since posted on the Board's website and incorporated as if fully forth herein. Dr. Joe Fermin stated he has worked in Nevad since 2006, and with Clear Vision since 2008, and stated he has not experienced any private equity (PE) or Managed Services Organization (MSO) influence. Jennifer Letten, a licensed optician, spoke about her experiences working at Lenscrafters. She commented about a two-door policy, that Optometry law is messy, that Dr. Horner has been violating the law since he has been in Nevada, and wanted to know what the official two-door policy is for Nevada optometry laws. Dr. Girisgen read a statement on behalf of the NOA, since posted on the Board's website and incorporated as if fully set forth herein.

Dr. Kopolow stated that the law allows bad actors to come into Nevada, although not in Nevada right now. There are problems with the model of Clear Vision, but not Clear Vision per se. He is hurt and betrayed that the proposal in 2019 after the October 2019 meeting was removed from the final language.

Colloquy regarding Legislative Counsel Bureau's (LCB) process and procedures, and differences between 2019 proposed language versus post-LCB revisions.

Danny Thompson spoke about his experiences regarding the LCB, and has never before seen a regulation being 180 degrees different than that made known five years later.

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[1] Pursuant to AB219, Meeting ID: 889 4214 6264, Passcode: 420960 Telephone: 1 669 900 6833 were read into the record for the start of the Board's regular meeting at 3p.m. and is the identical information for this meeting.

Dr. Chen Young stated he is a former Board member and the decisions made were not done to create any anti-competitive atmosphere. The questions posed at that time were do you work for yourself, are you the name on the check or is someone paying you to be the name on the check, and when selling the practice do you still own your practice or is there instead an employment contract. The laws at present are that a non-licensee cannot own an optometry practice, the rationale being that the Board wanted every licensee to have a fiduciary responsibility to the patient during the course of treating the patient. He suggested maybe it is time for the Board to evaluate the tax records and sales contracts of such corporations to find out who actually owns the practice.

Dr. Belaustegui spoke about the sale of her practice, and questioned who has the authority to oversee the corporations when the larger corporations overstep their bounds. An optometrist owning an MSO 100% makes no sense.

Dr. Christiansen stated it is the responsibility of the licensee to ensure his or her compliance with the law, which is the basis of his suggested language from other kinds of healthcare provider organizations in Nevada regarding this type of structure when it comes to exercising control and authority over professional judgments.

Dr. Young stated the focus needs to be on who owns the practice and who owns the charts, because if the MSO owns the charts then the doctor does not own the clinical side of the practice. Dr. Kopolow agreed.

Dr. Horner proposed a law about penalties for corporations, despite current laws that non-licensees cannot own optometry practices. Colloquy regarding without such a law the only recourse is for the optometrist to quit.

Dr. Girisgen stated current law does not allow for non-OD entities to own optometry clinics. Dr. Girisgen stated prior comments were contrary to law as to MSOs being allowed to partially own optometry clinics. Even when the licensee is 100% owner of the MSO, another corporation may own a fraction or portion of it or an aspect of it, that is where problems exist and becomes contrary to law.

Dr. Kopolow quoted NRS 636.240(2), and another law that upon the death of the licensee the family has to sell the practice in a year. This is strong evidence that non-licensees cannot own optometry practices. MSOs were proposed as outsourcing, but it really is ownership. Dr. Kopolow is fine with moving forward to find ways that works for Dr. Christensen's group and other groups, but the membership cannot just let it happen, and nothing in Dr. Christiansen's proposal prohibits a large optical retailer from forming an MSO and forcing its licensees to abide by the MSO.

Dr. Jonathan Mather questioned the law and its lack of penalties for fining the corporations.

Dr. Smith questioned if a non-licensee can be penalized by the Board. DAG Weiss stated the jurisdiction is upon licensees, and no others, and such a change of an expansion of jurisdiction can occur only through the legislative process.

Dr. Christiansen expressed concern that there is a misunderstanding of an MSO. Dr. Kopolow discussed his review of the Kelpr website.

Dr. Spencer Quinton stated it is incumbent upon the licensee to know the law and not enter into agreements contrary to the law.

Maria Nutile, Esq. stated she represents Dr. Christiansen and Clear Vision and Pritchard Eye Care, and not Keplr-corporate, and that Dr. Christiansen owns the charts and the practice. She is disappointed in the Workshop thus far, when she provided over 3000 documents to Caren Jenkins in 2008 when Caren Jenkins wanted to investigate Pritchard Eye Care's business practices, and requested that the attacks upon Dr. Christiansen stop.

Dr. Horner stated he went through the same thing with Sears and Sam's Club. His only recourse to maintain good standing in the law was to leave the contract. No law is effective without enforcement.

Dr. Smith posed the question to the group on their perspective as to whether the law should be revised to allow ODs to work for ophthalmologists (OMDs), so long as the OMD works at the same site as the OD regularly. Colloquy on how "regularly" would be defined. Dr. Smith suggested removal of section (c) in the NOA's proposal from the June 27, 2024 meeting.

Dr. Kopolow commented about Dr. Abrams' job posting for an independent contractor relationship, which creates a competitive disadvantage when benefits are offered as if it were an employment agreement. A known tactic is to pay the doctor with a 1099, then with other compensation classified as administration. Dr. Austin stated he saw the advertisement as well and if the optometrist is not an independent contractor then the optometrist should not be accepting any benefits except for what they actually bill. Dr. Kopolow expressed concern about the comingling of money and he does not recall where the proposals in R066-19 occurred regarding OD and OMDs although he might have missed one meeting. President Smith stated the topic will be agendized for its next meeting.

Dr. Smith discussed the California laws, section 655 of Business and Professions Code, and the California Board's litigation with Stanton Optical.

Dr. Christiansen noted other States have OD-OMD working relationships, and has no problems with making that available here.

Dr. Kopolow got his contacts from 1-800 Contacts after a substandard exam, and his prescription was from a provider in Illinois. Therefore there are businesses that will take advantage of the holes in the law.

Dr. Adlington agreed that ODs should be able to work for OMDs and MDs, and it is not upon the Board to look at where ODs get their paycheck but instead on the ODs' professionalism. Dr. Austin commented that this fight has been fought for years, but maybe it is time to make a change. The focus needs to be on the OD following OD law, then it should not matter where the paycheck comes from to a certain extent, and if the employer forces the OD to do something they do not want to do or should not do, then the OD needs to quit. Dr. Kopolow disagreed, and discussed the pharmacist industry where many pharmacists used to be independent and now many work for CVS or Walgreens. Dr. Austin commented his about familiarity with the pharmacy industry as well.

Attorney Nutile stated in 1995, a senate bill 557 was introduced for ODs to work with OMDs and was not passed. But should it be passed, then NRS 89 needs to be considered. In 2019, NRS 89 was changed for chiropractors (DCs) and MDs and DOs can now own a corporation together. Therefore if ODs get to the point that they can be employed OMDs, they should be able to own a corporation with OMDs as well.

Dr. Quinton spoke about his experience being approached to go into business with OMDs.

Dr. Girisgen interpreted NRS 89 that non-ODs can own optometry practices. Attorney Nutile disagreed, and invited a conversation outside of the workshop with Dr. Girisgen because she was not familiar with what language Dr. Girisgen was referencing.

Colloquy regarding NOA's proposal regarding R066-19 section (12)(3). Dr. Girisgen stated in 2019, the Board voted to remove R066-19 section 12(3), and asked if it could be removed again. Dr. Christiansen questioned the removal of section 12(3) which at present expressly allows MSO structure. He discussed the regulation being written that specifically does not disallow it. He stated in his research looking across the United States, that is the pattern in most States that it is not specifically prohibited, and questioned what removing section 12(3) accomplishes. Dr. Girisgen reiterated to keep section 12(4) which speaks to organizational independence, and with that in place the removal of section 12(3) would not prohibit any licensee from outsourcing the items listed in section 12(3) to a non-licensee.

Dr. Christiansen again questioned what the removal of section 12(3) accomplished to further the goal of keeping out bad actors. Dr. Kopolow responded that putting any private equity language would open a can of worms. But if the OD is the sole owner of the practice, and physically and financially separated from any non-license then there should be no issue.

Dr. Christiansen questioned that the removal of section 12(3), which does nothing other than engaging in a service and does not change anything, when what is agreed is important is maintaining organizational and financial independence whether the section is there or not. Dr. Girisgen responded that section 12(3) may allude to the erosion of organizational independence because it allows to enter into certain agreements for an organization to handle certain duties and therefore the organization makes decisions for all those duties and not the owning optometrist. The concern is when that happens, that impacts the practice of optometry and the care model. So by removing section 12(3), the law that remains is organizational and financial independence which is all that is being asked for.

Dr. Mather commented that the removal of section 12(3) allows the Board to move forward to address the bad actors without them having an exclusion. So by neither saying the organizations can do certain things or cannot do other things, should the situation arise then the Board can deal with individual situations without having to say what you can do and what you cannot do over and over again.

Dr. Alamo-Leon stated that this Board is the only Board that can regulate optometrists, and many physician groups are owned by private equity. So by allowing an MD or an OMD or other entity to be able to own optometry practices, the Board's ability to regulate optometrists would be compromised because those private equity firms are now changing the structure of the OMD groups. Therefore doing a comingling is not allowing the Board to do what it is intended to do which is to regulate optometrists for the good of the public. Optometrists not being allowed to be employees of any physician or any non-licensee entity makes sense at this point. Dr. Kopolow does not disagree, but is not prepared to give up autonomy. Dr. Alamo-Leon discussed non-compete agreements. Dr. Kopolow noted the Board has no jurisdiction over employment advertisements.

Jennifer Letten stated that the Board cannot allow the optical staff members adjacent to the optometrist to do any of the administrative work, and there needs to be clear delineation between the two businesses.

Dr. Quentin stated clinical decisions should be covered in section 12(3)-(4).

Colloquy on the phrase "without limitation" in section 12(3). Dr. Smith confirmed that section 12(3) was being removed. Dr. Christiansen stated the "without limitation" phrase is used when the person drafting it cannot possibly entertain all of the ways in which a person might enter into a business arrangement. He suggested language for what constitutes exercise or authority or control over professional judgment, and how to define exerting control. Colloquy that section 12's section 4(1)-(3) states the OD is in charge of their schedule and that non-licensees are not involved in scheduling or directing or dictating of patient scheduling.

Dr. Kopolow discussed Dr. Christiansen's proposal at its section 2, and stressed the importance of ownership and a separate scheduling system. Dr. Christiansen responded it came from the Dental Board's laws and he adopted it into optometry law, and stressed the need to avoid law that is anti-competitive.

Dr. Girisgen suggested using the phrase "not dictating" in section 12(4).

Jennifer Letten stated what is being missed is that opticians are licensees, practice ophthalmic dispensing separately, and are a separate business, and the doctors are subleasing. When the optical staff is allowed to administrative work, how are they not getting involved in the optometrist's business? She summarized NAC 636.250 regarding the separation of between the office of the optometrist and other businesses are required and its section (b) says to maintain a separate reception area and scheduling system and computerized system, and physical space from those of a business of a person who is not licensed. Dr. Smith questioned why couldn't the opticians decline to do the work asked by the optometrist. Ms. Letten described her experiences with other optometrists where the opticians are not asked to do the optometrists' administrative work.

Dr. Hubbard stated in VSP, it is very blurred where VSP owns the Eyefinity software for scheduling and the like. It is one practice, but not a two-door system. In Reno, half of the practices are private equity so the OD would be leaving more private equity and encountering the same issues at another private equity.

Jennifer Letten stated her hope for language about separation between the businesses, and the only real way to protect optometrists is to make sure that the optical staff has nothing to do with their scheduling, therefore no interference with the MSOs. Dr. Smith invited Ms. Letten to provide specific words and the specific placement of the proposed words in the regulation. Ms. Letten was not prepared to do so, would need time to review the laws, and could provide suggestions after the workshop.

Dr. Evan Marchant stated he has been associated with VSP Ventures, and would like to see something about scheduling in the regulation and that "not dictating" solves that issue.

Discussion between Dr. Kopolow and Dr. Christiansen regarding Dr. Christiansen's suggestion of subsection (k) regarding being hired and fired, and the definition of "advice."

Dr. Smith brought up the California code regarding the Board's access to the commercial lease, and a potential goal for the next legislative session.

Dr. Troy Ogden discussed the need to include in the contracts that the corporation will not manipulate the way the optometrists see patients. Ultimately this is not a Board of Optometry issue, but probably a Nevada Optometric Association issue to help doctors negotiate better contracts.

Colloquy as to the phrase "not dictate or control."

Agreement to remove section 12(3), then under 12(4)(b) provide a phrase to the effect of "shall not dictate or control." Board will await Jennifer Letten suggestions.

Dr. Quinton asked in addition to the Board seeking authority to obtaining lease agreements that business agreements also be added.

Meeting adjourned at 6:48p.m.

41 persons attended, inclusive of Board members, Executive Director, and Deputy Attorney General.

These minutes were considered and approved by majority vote of the Nevada State Board of Optometry at its meeting on August 28, 2024.

/s/ Adam Schneider

Adam Schneider, Executive Director