



Proposed Regulation Agency Background Document

Agency name	Board of Optometry, Department of Health Professions
Virginia Administrative Code (VAC) citation	18 VAC 105-20
Regulation title	Regulations Governing the Practice of Optometry
Action title	Standards of conduct
Document preparation date	5/30/08

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The Board has amended and updated its standards of conduct and standards of practice to provide authority to address unprofessional actions or substandard patient care by optometrists. Amended will specify policy on patient records, continuity of care, prescribing for self or family, boundary violations, and compliance with law and regulations. The standard for content of a record during an eye examination is updated and clarified, and the specific requirements of federal rule for contact lens and eyeglass prescriptions are referenced.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Optometry the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

...

6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title. ...

The Code of Virginia has established grounds for disciplinary actions by the Board of Optometry against its licensees. Regulations on standards of conduct would expand and clarify the statutory provisions.

§ 54.1-3215. Reprimand, revocation and suspension.

The Board may revoke or suspend a license or reprimand the licensee for any of the following causes:

- 1. Fraud or deceit in his practice;*
- 2. Conviction of any felony under the laws of the Commonwealth, another state, the District of Columbia or any United States possession or territory or of any misdemeanor under such laws involving moral turpitude;*
- 3. Conducting his practice in such a manner as to endanger the health and welfare of his patients or the public;*
- 4. Use of alcohol or drugs to the extent such use renders him unsafe to practice optometry or mental or physical illness rendering him unsafe to practice optometry;*
- 5. Knowingly and willfully employing an unlicensed person to do anything for which a license to practice optometry is required;*
- 6. Practicing optometry while suffering from any infectious or contagious disease;*
- 7. Neglecting or refusing to display his license and the renewal receipt for the current year;*
- 8. Obtaining of any fee by fraud or misrepresentation or the practice of deception or fraud upon any patient;*
- 9. Advertising which directly or indirectly deceives, misleads or defrauds the public, claims professional superiority, or offers free optometrical services or examinations;*
- 10. Employing, procuring, or inducing a person not licensed to practice optometry to so practice;*
- 11. Aiding or abetting in the practice of optometry any person not duly licensed to practice in this Commonwealth;*
- 12. Advertising, practicing or attempting to practice optometry under a name other than one's own name as set forth on the license;*
- 13. Lending, leasing, renting or in any other manner placing his license at the disposal or in the service of any person not licensed to practice optometry in this Commonwealth;*
- 14. Splitting or dividing a fee with any person or persons other than with a licensed optometrist who is a legal partner or comember of a professional limited liability company formed to engage in the practice of optometry;*

15. Practicing optometry where any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § 54.1-3205, who is not licensed in Virginia to practice optometry or medicine directly or indirectly controls, dictates, or influences the professional judgment, including but not limited to the level or type of care or services rendered, of the licensed optometrist;

16. Violating other standards of conduct as adopted by the Board;

17. Violating, assisting, inducing or cooperating with others in violating any provisions of law relating to the practice of optometry, including the provisions of this chapter, or of any regulation of the Board.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

In its proposed regulatory action, the Board has clarified and amended certain provisions of the section on unprofessional conduct to address issues and licensee conduct that has been problematic. The Board added language relating to retention and destruction of patient records, disclosure of disciplinary actions in other states or malpractice judgments or settlements, prescribing and treating self or family members, practicing with an expired license or registration, sexual misconduct and other areas of practitioner conduct. Provisions are set out in regulation to ensure that the Board has the necessary authority to protect the public health and safety from unprofessional conduct or substandard care.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)

The Board reviewed unprofessional conduct regulations of other boards within the Virginia Department of Health Professions and the optometry regulations of other states. The following changes were made in the standards of conduct:

- 1) Adding language relating to treating self and family;
- 2) Adding language on record retention and a requirement to post or inform patients of patient record retention and destruction policies;
- 3) Adding a prohibition against failure to disclose disciplinary action in another state and malpractice cases;
- 4) Renaming of the section on Unprofessional Conduct to Standards of Conduct;
- 5) Including violation of Drug Control Act in the standards of conduct;
- 6) Requiring provisions for access to the practice for 24-hour patient care coverage;
- 7) Referencing §54.1-2405 (transfer of patient records, closure or sale of practice).

- 8) Including language regarding the practice on an expired or unregistered professional designation.
- 9) Including provisions for boundary violation or sexual misconduct as grounds for disciplinary action.
- 10) Including compliance with general provisions of law and law relating to controlled substances and patient confidentiality.
- 11) Revising and updating requirements for content of a patient record for consistency with current practice and federal rules.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

- 1) The advantage to the public may be that optometrists will become more aware of their professional responsibilities and compliance with state and federal law, relating to provision of prescriptions, maintenance of records, protection of patient confidentiality and continuity of care. Amended regulations will require that patients are informed about how long an optometrist will keep records, so a request for a patient record can be made and responded to in a timely manner. There are no disadvantages to the public.
- 2) There are no disadvantages to the agency or the Commonwealth. Clarification of the board’s intent and policies relating to professional conduct and standards of practice will enhance public protection.
- 3) There is no other pertinent matter of interest related to this action.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation; b) The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending notice of final regulations. Every effort will</p>
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	be made to incorporate those into anticipated mailings and Board meetings already scheduled. There are no on-going costs to the agency.
Projected cost of the regulation on localities	There are none.
Description of the individuals, businesses or other entities likely to be affected by the regulation	The individuals that may be affected by the regulation are optometrists.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	There are 1198 optometrists who are licensed with authority to prescribe and 238 who are licensed without prescriptive authority. It is estimated that the majority would be classified as small businesses.
All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.	Since amended regulations set out the accepted standards for practice as an optometrist, there should be no costs associated with the proposal. The requirement to post or otherwise notify patients about the maintenance and destruction of records may be accomplished by adding that information on patient consent forms or by posting a paper sign in the check-in area.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The Board has been aware that there was practitioner misconduct or substandard patient care not currently addressed in law or regulation. In some cases, current provisions are general enough to incorporate that conduct and establish grounds for disciplinary actions. However, there is a need to further specify certain provisions in order to give licensees a more precise regulatory standard by which to practice and to authorize the Board to act more decisively.

To assist board members in consideration of issues relating to unprofessional conduct, board staff compiled an extensive document consisting of regulations of other health profession boards (Medicine, Audiology & Speech-Language Pathology, Counseling, Physical Therapy, Psychology & Nursing) and of optometric regulations from most other states. From that document, the Board has identified a number of provisions that are necessary for public protection in Virginia. In the development of regulatory language, the Board has identified conduct that should be addressed in regulation and has utilized applicable language from other sources.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

The Notice of Intended Regulatory Action was published on March 17, 2008 with comment accepted until April 16, 2007. There was no comment was received

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

There is no impact of the proposed regulatory action on the institution of the family and family stability.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

Current section number	Current requirement	Proposed change and rationale
40	Sets out the standards for practice, a violation of which is deemed unprofessional conduct	Section 40 is amended in the following ways: <ul style="list-style-type: none"> • The title of the section is changed from “Unprofessional conduct” to “Standards of conduct” to affirmatively state the standards by which an optometrist is expected to practice. • Since the Code only specifies sanctions of revocation, suspension or reprimand, the regulation is clarified to be inclusive of the range of disciplinary actions, including denial of a license or renewal for violation of law or regulation. • Maintenance of records currently set out in #2 is included in a new subsection on records in section 45. • The proposal adds a requirement that a person disclose any disciplinary action taken by another board. This standard addresses a problem the Board has had with optometrists practicing in Virginia who have been sanctioned in another state. • An amendment in #4 adds a reference to the standards of practice set forth in section 45, which specify what must be documented in the patient record. • #5 is amended to include reference to a Virginia law recently enacted, which sets out the requirements for patient notification in the closure, sale or relocation of a practice. • #6 is added to address problems that have arisen when an optometrist practice is located in conjunction with a mall, big box store or other entity. The optometrist needs to ensure access to his records and practice location in case of

		<p>a patient emergency after hours.</p> <ul style="list-style-type: none"> • Continuity of care is an expectation in medical practices; this language was adopted from ethical standards in the regulations for doctors and is relevant to optometrists who may now be prescribing and providing follow-up care for conditions such as glaucoma or cataract surgery. • #8 was also adopted from the medicine regulations relative to compliance with Code requirements on patient confidentiality and access to patient records. • Since most optometrists now have prescriptive authority, a standard for treating or prescribing for self or family members was adopted. It requires adherence to legal requirements for a practitioner/patient relationship and recordkeeping and is similar to standards for other prescribers. This provision would replace Guidance Document 105-27 on prescribing for self and family. • This section had not been amended since optometrists were authorized to prescribe scheduled drugs; therefore it is important to set a standard for compliance with the law and regulation related to controlled substance to allow the Board to take disciplinary action for diversion, indiscriminate prescribing or other such violations. • The Board has had no standard that could be cited for a professional boundary violation in which the practitioner has used his professional position to take advantage of a patient. The language adopted is similar to the standard for doctors of medicine, osteopathic medicine, podiatry and chiropractic. • Refusal to provide records or cooperation with an investigator of the Department is a violation of law or regulation for most professions, so it is added to this section. • The Board has had difficulty in sanctioning an optometrist for practicing with an expired or unregistered professional designation, so this provision is added to address the problem. A professional designation must be registered if an optometrist practices under a name other than his own. • In recent years, violations of the general provisions governing professions or health professions found in Chapters 1 and 24 were added to the unprofessional conduct sections of law for several professions, including all of the practitioners of the healing arts, so it is added in this section governing the conduct of optometrists.
45	Sets out the standards of practice for an optometrist in conducting a patient examination or in the provision of prescriptions.	<ul style="list-style-type: none"> • Subsection A of section 45 was updated and clarified for greater consistency with current practice. Rather than the specific aspects of an eye examination found in some other state regulations, the Board chose to outline the general components of a routine or medical examination with additional requirements for prescribing and fitting contact lens. • Requirements for a contact lens prescription found in

		<p>subsection B have been superseded by federal rule, which is now referenced.</p> <ul style="list-style-type: none">• Requirements for spectacle lens found in subsection D have been superseded by federal rule, which is now referenced.• Subsection E was added to include the current requirement for maintenance of records for five years and to add two exceptions to that requirement. The language was adopted from the medicine regulations.• Subsection F was also adopted from the medicine regulations and specified some notice to patients on how long records are maintained or destroyed and to require destruction in a manner that protects patient confidentiality.
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