

**BOARD OF OPTOMETRY  
BOARD MEETING  
APRIL 21, 2009**

**TIME AND PLACE:** The meeting was called to order at 9:10 a.m. on Tuesday, April 21, 2009 at the Department of Health Professions, Perimeter Center, 9960 Mayland Drive, 2<sup>nd</sup> Floor, Room 4, Henrico, VA.

**PRESIDING OFFICER:** David H. Hettler, O.D, President

**MEMBERS PRESENT:** Paula H. Boone, O.D.  
Gregory P. Jellenek, O.D.  
Jonathan R. Noble, O.D.  
W. Ernest Schlabach, O.D.  
Jacquelyn S. Thomas, Citizen Member

**STAFF PRESENT:** Eric A. Gregory, Assistant Attorney General, Board Counsel  
Elizabeth A. Carter, Ph.D., Executive Director for the Board  
Emily Wingfield, Chief Deputy Director  
Elaine Yeatts, Senior Regulatory Analyst  
Terri Behr, Operations Manager

**OTHERS PRESENT:** Meade A. Spotts, Esquire, VOA  
Bruce Keeney, VOA  
Bo Keeney, VOA  
Cal Whitehead, VSO  
Edward Mullen, NAOO

**QUORUM:** With six members of the Board present, a quorum was established.

**AGENDA:** Dr. Hettler indicated that he would be addressing the Joint Board Certification Project Team as part of the President's Report.

**PUBLIC COMMENT:** Meade Spotts, Esquire, representing the Virginia Optometric Association, presented public comment regarding commercial practice complaints. His written comment is incorporated into the minutes as Attachment 1.

**APPROVAL OF MINUTES:** On properly seconded motion by Dr. Jellenek, the Board voted unanimously to approve the minutes of the January 29, 2009 meeting as amended.

**DEPARTMENT DIRECTOR'S  
REPORT:**

On Ms. Ryals behalf, Dr. Carter apprised the Board that the third quarter FY2009 statistics were not yet published but that she could advise that the Board had been remaining well-abreast of its disciplinary caseload and that they would be provided the quarterly results as soon as they were available.

**DHP LEGISLATIVE/REGULATORY  
UPDATE:**

**Regulatory Update**

Ms. Yeatts informed the Board of SB1282 enacted by the General Assembly that requires that the Board allow a person to give a second address to be used for public record. Further, that the Board approve the amendment.

On properly seconded motion by Dr. Jellenek, the Board voted unanimously to approve the amendment as enacted.

Ms. Yeatts updated the Board on its two proposed regulatory actions: 18VAC 105-20-70 CE Regulations and 18VAC 105-20-40 and 45 Standards of Practice.

**COMMITTEE REPORTS:**

**Credentials Committee**

Dr. Boone reported that three applications had been approved through the Credentials Committee since the Board's last meeting in January.

**Continuing Education Committee**

Dr. Carter reported that a CE random audit had been conducted based upon a statistical formula instead of a flat rate. The percentage of licensees audited was 6.8% for a total of 71 with seven (7) found to be non-compliant.

Dr. Schlabach informed the Board any licensee who signs up for the services of OE Tracker will be charged \$20.00 per year. He inquired as to whether the fees for Virginia licensees could be paid by the Board. Dr. Carter and Ms. Yeatts responded that revisions or additions to fees would require a regulatory change.

Dr. Schlabach requested that the Board consider accepting the OE Tracker CE printouts as proof of continuing education in place of individual CE certificates.

On properly seconded motion by Dr. Noble, the Board voted unanimously to accept OE Tracker CE printouts as proof of CE.

**DISCUSSION ITEMS:**

**Development of Proposed Bylaws**

Dr. Carter informed the Board that it had operated under "Roberts Rules of Order" rather than formal bylaws. She reported that the other boards within the Department had developed bylaws, some, such as the Board of Medicine of longstanding, while others such as the Board of Veterinary Medicine only recently. The various boards' bylaws were provided to the Board for reference. Dr. Carter indicated that they may want to consider starting with a simple framework, mirrored in those bylaws more recently developed. However, the choice would be up to the Board.

On properly seconded motion by Dr. Schlabach, the Board voted unanimously that the Legislative Regulatory Review Committee develop a draft of the bylaws. Additionally, that staff provide a very rough draft of the bylaws for review by the Committee.

#### **Professional Designation Regulations**

The item was moved to new business for discussion in closed session with Board Counsel. Dr. Hettler requested that staff identify any problems and complaints and present to Board.

#### **CE Audit Language in Confidential Consent Agreements**

To alleviate the burden of tracking, staff requested that the board consider revising the CE audit language to past years rather than future years.

On properly seconded motion by Dr. Boone, the Board voted unanimously that the CE audit language in CCA's should be specific and for three (3) years in the future.

### **PRESIDENT'S REPORT:**

#### **Board Certification**

Dr. Hettler apprised the Board of the activities of the Joint Board Certification Project Team. Comprised of members from the Association of Regulatory Boards of Optometry, American Academy of Optometry, American Optometric Association, Association of Schools and Colleges of Optometry, National Board of Examiners in Optometry and the American Optometric Student Association, the Team is proposing a model framework for board certification in optometry through a newly developed organization, the American Board of Optometry. This certification would be apart from state board licensure. The proposal is still a work-in-progress, with the most recent addition provisions for a *board eligible* status.

On properly seconded motion by Dr. Jellenek, the Board voted to reserve judgment pending further development and potential modifications.

Dr. Hettler shared his heartfelt appreciation to Dr. Boone for her eight years of service to the Board of Optometry.

**EXECUTIVE DIRECTOR'S  
REPORT:**

**Budget and Statistics**

Dr. Carter informed the Board that the Board remained well within its budget and currently had a cash balance of approximately \$233,000.

The Board is doing very well with Virginia Performs. The current open caseload is relatively light, with 32 open cases. The majority pertain to continuing education and business practice issues.

Dr. Schlabach requested a report on the compliance with existing Orders. Staff will present a report on this topic at the next scheduled full Board meeting.

**Board of Health Profession Report**

Dr. Carter apprised the Board on the status of the sunrise studies being conducted by the Board of Health Professions. She indicated that criticality rating by the Board of Medicine's and Board of Physical Therapy's representative on the degree of harm posed by unregulated orthotists and prosthetists has been done and will be presented to the Regulatory Research Committee on May 12, 2009. Additionally, staff reports on the research into medical interpreters and polysomnographers have been finalized and also will be presented to the Committee in May. She also indicated that a review into the need to regulate surgical assistants and surgical technologists has begun.


**NEW BUSINESS:**

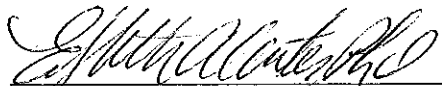
On a properly seconded motion by Dr. Jellenek, the Board went into closed session, pursuant to §2.2-3711A.7 of the *Code of Virginia*, to consult with legal counsel pertaining to the provision of legal advice on specific legal matters concerning commercial/mercantile practice and professional designations. Assistant Attorney General Eric Gregory, board counsel, attended the closed session to provide such consultation and Dr. Carter and Ms. Behr also attended as their presence was deemed necessary and their presence was to aid the Board in its consideration of the matter, pursuant to § 2.2-3712F.

On properly seconded motion by Dr. Jellenek, open session was resumed, pursuant to § 2.2-3712D. A roll call vote was taken, all board members unanimously certifying that to the best of their knowledge, only public business matters lawfully exempted from open meeting requirements under this chapter and only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting of this public body.

**ADJOURNMENT:**

The Board concluded its meeting at 11:20 a.m.

  
\_\_\_\_\_  
David H. Hettler, O.D.  
President

  
\_\_\_\_\_  
Elizabeth A. Carter, Ph.D.  
Executive Director

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April 21, 2009

Via Hand Delivery:

Dr. David Hettler, President  
Virginia Board of Optometry  
9960 Mayland Drive, Suite 300  
Richmond, VA 23233-1463

Re: *Lack of action by the Virginia Board of Optometry ("Board") relating to enforcement of Virginia Code § 54.1-3205(D) and other related statutes, as further defined by Attorney General McDonnell's Official Advisory Opinion dated October 26, 2006 ("Opinion").*

Dear Dr. Hettler:

This firm serves as counsel to the Virginia Optometric Association ("VOA"). By this letter delivered to the Board today we are requesting the Board review the issue of the Board's lack of enforcement of pertinent sections of the Code of Virginia as outlined in Attorney General McDonnell's Opinion, a copy of which is enclosed hereto, relating to provisions often referred to as "corporate practice prohibitions," including Va. Code §54.1-3205 and 54.1-3205.1. Since the delivery of the Opinion, and despite numerous documented complaints submitted to the Board regarding very specific violations of these laws, it seems as though no action has been taken against the offending optometrists. Furthermore, there have been no updated or conflicting Attorney General opinions, revisions to the Code of Virginia or judicial verdicts issued since the Opinion which would account for the absence of enforcement.

In July of 2007, on behalf of the VOA, this firm filed with the Board a number of complaints against specific Virginia licensed and practicing optometrists regarding their violation of these provisions of law. An example copy of one complaint has been enclosed, with redactions so as not to prejudice any future investigation by the Board. To substantiate the actions, the actual complaints included photographs and cited specific violations of both statute and specific findings contained in the Opinion of Attorney General McDonnell.

The most critical of the itemized violations involves licensed optometrists clearly engaging in the practice of optometry within a commercial establishment in violation of Va. Code §54.1-3205. This statute explicitly prohibits the practice of optometry "as a lessee of or in a commercial or mercantile establishment." Subsection (D) of §54.1-3205 specifically states that an optometrist shall be deemed to be practicing within a commercial or mercantile establishment if the practice location provides "direct access" to or from a commercial or mercantile establishment. In his Opinion, Attorney General McDonnell stated that where the practice of optometry is conducted in a kiosk type setting, a medical doctor's office, or other area that is

Dr. David Hettler, President  
Virginia Board of Optometry  
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physically located inside the same building as, and uses a common door with, a commercial or mercantile establishment, such practice violates §54.1-3205. The Attorney General further stated that "[w]here a practice is conducted in a location that uses a common door requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way, such practice clearly violates the prohibitions in §54.1-3205." The intent of the statute - to keep optometrists free from commercial influence - seems clear. The findings of the Opinion would seem to underscore such clarity.

A full eighteen months after these complaints were filed, the Executive Director responded with a one paragraph letter dated January 15, 2009, a copy of which is enclosed hereto, which stated "The Department, in consultation with Board Counsel of the Virginia Board of Optometry, reviewed the information/report you provided as well as any additional information obtained. Subsequent to this review, it is the decision that there is no apparent violation of laws or regulations pertaining to the practice of Optometry through which the Board's authority to discipline licensees rests."

This letter makes no reference to the fact that any member of the Board was consulted prior to dismissing these complaints. An additional and major concern is the absence of any rationale or justification for reaching a decision which appears to be in direct conflict with both existing state law and the Opinion. Some clarification is necessary in order to ascertain (i) if the Executive Director found no violations had occurred, or (ii) if there was some question as to the Board's authority to enforce pertinent state law which was the subject of the Opinion. Tom O'Brien of this firm, representing the VOA, did request some explanation from the Board's Counsel, but was advised your Counsel would need to first obtain permission prior to providing that information. He was assured your Counsel would present that request to the Board, which request we make again today.

Specifically, we ask that the Board today authorize and instruct your Counsel to discuss with Tom O'Brien and myself, as counsel to the VOA, his legal basis and reasons for the decision to essentially dismiss these complaints and refuse to enforce the Code of Virginia as interpreted by Attorney General McDonnell's Opinion. We are not asking the Board to discuss any particular complaint so as not to prejudice the Board at a future date.

Additionally, should it be determined that legal advice regarding enforcement of these laws is not in compliance with current law as addressed in the Opinion, we would then appreciate the opportunity to discuss this with the Board and its Counsel. The authority of the Department to enforce specific provisions of the Code of Virginia on behalf of the Board is well documented. Failure to exercise such authority would seem to be in direct conflict with both the Department's and the Board's duty to protect the Virginia consumer.

Dr. David Hettler, President  
Virginia Board of Optometry  
April 21, 2009  
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In general, we respectfully disagree with the decision made by the Department in consultation with Board Counsel, but we are not in a position to respond unless some explanation for the legal basis can be forthcoming. We hope the Board will agree that after an 18 month delay in responding to a number of complaints, some substantiated explanation would be appropriate.

Sincerely,



Meade A. Spotts

MAS/jtm  
Enclosures

cc: Members, Virginia Board of Optometry  
Dr. Elizabeth Carter, Executive Director,  
Virginia Board of Optometry  
Faye Lemon, Director of Enforcement,  
Virginia Board of Optometry  
Dr. Fred Goldberg, President, VOA  
Bruce B. Keeney, Sr., Executive Director, VOA  
J. Thomas O'Brien, Jr., Counsel to VOA





# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell  
Attorney General

October 26, 2006

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Richmond, Virginia 23219  
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Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable John S. Reid  
Member, House of Delegates  
P.O. Box 29566  
Richmond, Virginia 23242

Dear Delegate Reid:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask whether an optometrist, whose practice is conducted from a kiosk type setting, a medical doctor's office, or other area that physically is located inside the same building as, and uses a common door with, a commercial or mercantile establishment violates the prohibitions in § 54.1-3205 pertaining to the practice of optometry. You also ask whether § 54.1-3205.1 limits or qualifies § 54.1-3205(D).

## Response

It is my opinion that an optometry practice conducted in a kiosk type setting, a medical doctor's office, or other area that is physically located inside the same building and that uses a "common door" (requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way), violates § 54.1-3205. Furthermore, it is my opinion that where such a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates § 54.1-3205. Finally, it is my opinion that § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

## Background

You advise that a 2000 opinion of the Attorney General ("2000 Opinion") notes that the statutory prohibition against practicing optometry in a commercial or mercantile establishment has existed since 1938.<sup>1</sup> You observe that the 2000 opinion notes that the policy of the General Assembly is to maintain an "extrication" of the practice of optometry from commercial or mercantile establishments "to prevent commercial enterprises from exercising control over an optometrist's professional practice," and constitutes a "continuing legislative policy of preventing improper lay control over professional decisions."<sup>2</sup>

<sup>1</sup> See 2000 Op. Va. Att'y Gen. 174.

<sup>2</sup> *Id.* at 176.

You relate that a recent opinion of the Attorney General issued on January 9, 2006 ("2006 Opinion"), responds to the narrow inquiry of whether "an optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an ophthalmologic practice that has direct access to a commercial or mercantile establishment and that sells eyeglasses or contact lenses ancillary to the practice."<sup>3</sup>

You also observe that § 54.1-3205(D) appears to prohibit an optometrist from practicing in a physical location that has "direct access" to a commercial or mercantile establishment. Further, you state that § 54.1-3205.1 appears to prohibit an optometrist from practicing inside a commercial or mercantile establishment, regardless of the existence of an intervening employer or controlling entity, because such a physical setting results in the optometrist being supervised, either directly or indirectly, by an officer, agent, or employee of the commercial or mercantile establishment.

You assert that the General Assembly has determined, through committee and subcommittee hearings, that the mere presence of an optometrist inside a mercantile establishment is, in fact, placing an optometrist under the influence of the retail operator. This conclusion is based on the assertion that a retailer providing retail floor space would do so only if the presence of an optometrist will increase the sale of eyewear and related product under the control of the retailer. If such sales fail to materialize, you express the belief that it is not possible to determine the reason behind any subsequent firing of the optometrist or the termination of a lease for interior space.

You express the belief that the actions of the 2005 and 2006 Sessions of the General Assembly have made it clear that such a relationship would, in fact, place the optometrist under the supervision of the retailer. You, therefore, inquire whether an optometrist may be employed by an ophthalmology practice that physically is located inside of, or which has direct access to, a commercial or mercantile establishment.

Finally, you relate that the effective date of § 54.1-3205(D), December 30, 2005, would appear to supercede any previously existing statutory provision or regulatory guideline. Therefore, you also inquire regarding whether § 54.1-3205(D) is limited or qualified by § 54.1-3205.1, which prohibits an optometrist from being directly or indirectly supervised in the practice of optometry by any officer, employee, or agent of a commercial or mercantile establishment.

#### **Applicable Law and Discussion**

In § 54.1-3205(C), the General Assembly defines a "commercial or mercantile establishment" as "a business enterprise engaged in the selling of commodities." The 2000 Opinion considers the definition and meaning of the terms "commercial or mercantile establishment" in § 54.1-3205(A) and (C) in the context of a business engaging in the sale of prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products, including the business of a licensed optician, and an optometrist selling prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products out of an optical dispensary located within his professional optometric office.<sup>4</sup> The 2000 Opinion also declared the

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<sup>3</sup>See 2006 Op. Va. Att'y Gen. No. 05-076, at \*1 (Jan. 9, 2006), available at <http://www.vaag.com/OPINIONS/2006opns/05-076w.pdf>.

<sup>4</sup>See 2000 Op. Va. Att'y Gen., *supra* note 1, at 174.

legislative policy inherent in § 54.1-3205 to be "to maintain an extrication of the practice of optometry from commercial or mercantile establishments; and ... to prevent commercial enterprises from exercising control over an optometrist's professional practice."<sup>5</sup>

The 2006 Opinion concludes

that a licensed optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an independent ophthalmology practice that has direct access to a commercial or mercantile establishment and that sells eye glasses or contact lenses ancillary to its practice, provided that the majority of the beneficial ownership of the practice is owned by an ophthalmologic practice and/or one or more ophthalmologists.<sup>6</sup>

Section 54.1-3205(A) provides:

It shall be unlawful for any optometrist to practice his profession as a lessee of or in a commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a licensed practitioner and is practicing or will practice optometry as a lessee of or in the commercial or mercantile establishment.

The penalty for a violation of § 54.1-3205(A) is found in § 54.1-3215:

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

....

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 of services rendered, of the licensed optometrist[.]

The statutory prohibition against practicing optometry in a commercial or mercantile establishment has existed since 1938.<sup>7</sup> The statutory prohibition recently has been addressed by the General Assembly. The 2005 Session of the General Assembly amended § 54.1-3205<sup>8</sup> by adding a new subsection D to provide that after December 31, 2005, an optometrist is "*deemed to be practicing in a commercial or mercantile establishment if he practices ... in any location that provides direct access to or from a commercial or mercantile establishment.*"<sup>9</sup> The term "direct access" is defined to include

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<sup>5</sup> *Id.* at 176.

<sup>6</sup> See 2006 Op. Va. Att'y Gen. No. 05-076, *supra* note 3, at \*1.

<sup>7</sup> See 1938 Va. Acts ch. 442, at 995, 997-98 (amending § 1635, predecessor to § 54.1-3205, of which subsection k prohibited practice of optometry by direct or indirect employee of any commercial or mercantile establishment); see also 1985-1986 Op. Va. Att'y Gen. 235 (interpreting practice of medicine or optometry in commercial or mercantile establishment under former § 54-278.1).

<sup>8</sup> See 2005 Va. Acts chs. 711, 720, at 1042, 1042-43, 1131, 1131, respectively (amending § 54.1-3205 by adding subsection D and redesignating former subsection D as subsection E).

<sup>9</sup> *Id.* at 1042, 1131 (quoting § 54.1-3205(D)). The amendments to § 54.1-3205 became effective December 31, 2005. See *id.*, cls. 2, at 1043, 1131.

any entrance or exit, except an entrance or exit closed to the public and used solely for emergency egress pursuant to applicable state and local building and fire safety codes, that prohibits a person from exiting the building or structure occupied by such practice or establishment (i) onto an exterior sidewalk or public way or (ii) into a common area that is not under the control of either the optometry practice or the commercial or mercantile establishment, such as into the common areas of an enclosed shopping mall.<sup>10</sup>

"[T]he primary rule of statutory construction is to ascertain and declare the intention of the legislature and to carry such intention into effect to fullest degree."<sup>11</sup> Consequently, "[t]he rules of interpretation are resorted to for the purpose of resolving ambiguity, not for the purpose of creating it."<sup>12</sup> The Supreme Court of Virginia has stated that "[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied."<sup>13</sup>

The General Assembly clearly and unambiguously defines the term "direct access" in § 54.1-3205(D) to include *any* "entrance or exit ... that prohibits a person from exiting the building or structure occupied by [the optometry] practice or [commercial or mercantile] establishment" either "(i) onto an exterior sidewalk or public way or (ii) into a common area that is not under the control of either the optometry practice or the commercial or mercantile establishment, such as into the common areas of an enclosed shopping mall."<sup>14</sup> An optometrist practicing in a location that has direct access as defined in § 54.1-3205(D) is presumed to be practicing within a commercial or mercantile establishment.

Your specific inquiry involves an optometrist whose practice is conducted from a kiosk, a medical doctor's office, or other area that physically is located inside the same building as, and uses a common door with, a commercial or mercantile establishment. Where a practice is conducted in a location that uses a common door requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way, such practice clearly violates the prohibitions in § 54.1-3205. Furthermore, where a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates the prohibitions in § 54.1-3205.

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<sup>10</sup>VA. CODE ANN. § 54.1-3205(D) (2005). Section 54.1-3205(D) also contains two exceptions that are not applicable to your inquiry. "[N]either an optometric practice nor an ophthalmologic practice which sells eyeglasses or contact lenses ancillary to its practice shall be deemed a commercial or mercantile establishment. Further, any entity that is engaged in the sale of eyeglasses or contact lenses, the majority of the beneficial ownership of which is owned by an ophthalmologic practice and/or one or more ophthalmologists, shall not be deemed a commercial or mercantile establishment." *Id.*

<sup>11</sup>United States v. Jerge, 738 F. Supp. 181, 183 (E.D. Va. 1990).

<sup>12</sup>*In re Boggs-Rice Co.*, 66 F.2d 855, 858 (4th Cir. 1933).

<sup>13</sup>*Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)); *see also* 2001 Op. Va. Att'y Gen. 179, 180.

<sup>14</sup>The use of the word "or" evidences an intent that what follows the "or" is meant to be separate and independent from what preceded the "or." Indeed, "phrases separated by a comma and the disjunctive 'or' are independent." *Lampkins v. Commonwealth*, 44 Va. App. 709, 717, 607 S.E.2d 722, 726 (2005) (refusing to find that, where two phrases were separated by "or," first phrase modified second phrase); *see also* *Smoot v. Commonwealth*, 37 Va. App. 495, 501, 559 S.E.2d 409, 412 (2002) (noting that word "or" connects parts of sentence, but disconnects their meaning; disjunctive results in alternatives, which must be treated separately).

The Honorable John S. Reid  
October 26, 2006  
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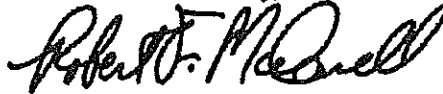
Section 54.1-3205.1 expressly prohibits commercial or mercantile interests from supervising or controlling optometrists.<sup>15</sup> Section 54.1-3205(D) contains language describing a *prima facie*<sup>16</sup> violation of an optometrist practicing in a commercial or mercantile establishment. Therefore, § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

#### Conclusion

Accordingly, it is my opinion that an optometry practice conducted in a kiosk type setting, a medical doctor's office, or other area that is physically located inside the same building and that uses a "common door" (requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way), violates § 54.1-3205. Furthermore, it is my opinion that where such a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates § 54.1-3205. Finally, it is my opinion that § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:213; 1:941/06-037

<sup>15</sup>"No optometrist shall be directly or indirectly supervised within the scope of the practice of optometry by any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § 54.1-3205, who is not a Virginia-licensed optometrist or physician. No officer, employee, or agent of a commercial or mercantile establishment, who is not a Virginia-licensed optometrist or physician, shall directly or indirectly control, dictate, or influence the professional judgment, including but not limited to the level or type of care or services rendered, of the practice of optometry by a licensed optometrist." Section 54.1-3205.1 (2005).

<sup>16</sup>The term "*prima facie*" means "[a]t first sight; on first appearance but subject to further evidence or information." BLACK'S LAW DICTIONARY 1228 (8th ed, 2004)

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July 25, 2007

(VIA HAND DELIVERY)

Sandra Whitley Ryals, Director  
Virginia Department of Health Professions  
6603 West Broad Street, 5<sup>th</sup> Floor  
Richmond, VA 23230-1712

Re: Drs. [REDACTED] (O.D.)  
License Numbers: [REDACTED] and [REDACTED]

Dear Ms. Ryals,

This firm represents the Virginia Optometric Association ("VOA"). On behalf of the VOA, please accept this letter as a formal complaint against Dr. [REDACTED], O.D. and Dr. [REDACTED], O.D. (collectively, "Drs. [REDACTED]"), licensed Virginia optometrists (Licenses # [REDACTED] and [REDACTED]).

It has been brought to the VOA's attention that Drs. [REDACTED] and [REDACTED] are currently engaging in the practice of optometry within a commercial or mercantile establishment in violation of Va. Code §54.1-3205. Accordingly, the VOA requests that, pursuant to Va. Code §54.1-2505(9), the Department of Health Professions provide any investigative or other service, as may be needed by the Board of Optometry, to investigate and review this matter so that the Board may take any appropriate and necessary action.

Va. Code §54.1-3205 explicitly prohibits the practice of optometry "as a lessee of or in a commercial or mercantile establishment." Subsection (D) of §54.1-3205 specifically states that an optometrist shall be deemed to be practicing within a commercial or mercantile establishment if the practice location provides "direct access" to or from a commercial or mercantile establishment. "Direct access" is defined by the statute to include "any entrance or exit... that prohibits a person from exiting the building or structure occupied by [the optometry] practice or [commercial or mercantile] establishment" either "(i) onto an exterior sidewalk or public way or (ii) into a common area that is not under the control of either the optometry practice or the commercial or mercantile establishment, such as into the common areas of an enclosed shopping mall."

Dr. [REDACTED] and [REDACTED] have established their practice within the [REDACTED] store located at [REDACTED], [REDACTED], VA [REDACTED] (the "Store"). As you will notice

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from the enclosed photographs, Dr. [REDACTED] and [REDACTED]'s practice is located on the main retail floor of the Store and is not separated or otherwise kept apart from the retail floor. The only access to the practice is through access that the practice shares with the Store.

Recently, the Attorney General of Virginia, Robert F. McDonnell, issued an official advisory opinion (a copy of which is enclosed) interpreting Virginia Code Section 54.1-3205(D). In his opinion, Attorney General McDonnell stated that where the practice of optometry is conducted in a kiosk type setting, a medical doctor's office, or other area that is physically located inside the same building as, and uses a common door with, a commercial or mercantile establishment such practice violates §54.1-3205. The Attorney General further stated that "[w]here a practice is conducted in a location that uses a common door requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way, such practice clearly violates the prohibitions in §54.1-3205."

Based on the facts, the unambiguous language of §54.1-3205 and this recent advisory opinion, Drs. [REDACTED] and [REDACTED] appear to be violating Virginia law. During its investigation, we urge the Virginia Department of Health Professions to examine, at a minimum:

- Any lease between Drs. [REDACTED] and [REDACTED] (or any entity the optometrists are associated with) and the Store;
- Any other agreements between Drs. [REDACTED] and [REDACTED] (or any entity the optometrists are associated with) and the Store;
- The floor plan of the Store as well as the layout of the optometrist's practice;
- The organizational documents (including by-laws and/or operating agreements) of any entity the optometrist is associated with;
- Any promotional materials prepared by Dr. [REDACTED] and [REDACTED] or the Store in advertising the optometrist's services.

The VOA further understands that employees of the Store will schedule appointments for eye exams when individuals call the main number of the Store. The VOA finds such a practice to be blatantly in violation of statutory requirements and restrictions and the public policy that optometrists conduct their practices free of any influence by commercial establishments. Additionally, although the name of Dr. [REDACTED] is apparently provided when calling the office, it is my understanding that his name is not listed or posted anywhere in the office indicating that he practices at that particular location. This would be a violation of 18 VAC 105-20-40.

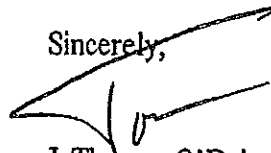
The VOA is an independent professional organization that represents and advocates the interests of actively practicing doctors of optometry within the Commonwealth of Virginia. The VOA is committed to ensuring that all doctors of optometry comply with the rules and

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regulations applicable to the profession. Based on the facts outlined, the VOA requests that the Department promptly and thoroughly investigate the actions of Drs. [REDACTED] and report to the Board of Optometry so that it may take any necessary action.

Thank you for your prompt attention to this matter. I ask that you keep me informed of the date, time and location of any special conference or hearing that may result from your investigation. Should you have any questions, or need further information, please do not hesitate to call me at (804) 697-2070.

Sincerely,



J. Thomas O'Brien, Jr.

cc: Faye Lemon, Director of Enforcement  
Department of Health Professions

Dr. Elizabeth Carter, Executive Director  
Virginia Board of Optometry

Bruce B. Keeney, Sr., Executive Director  
Virginia Optometric Association

Michael J. Rothermel, Esq.