

OPTOMETRY BOARD:

Fourteen different questions
answered with reference to the
practice of Optometry in the
State of Missouri.

Acc 13501-03-09 - 3878 RS mo 1929

Acc 13501, H&W 31

December 29, 1933



Dr. F. J. Guilbault
President State Board of Optometry
423 North Broadway
St. Louis, Missouri

Dear Dr. Guilbault:

This office acknowledges receipt of your
letter dated December 2, 1933, as follows:

"For the guidance of the State Board
of Optometry, we desire your opinion
on the following questions, in the
light of Chapter 101, Article 1,
Revised Statutes of Missouri 1929,
relating to the practice of Optometry,
as follows:

(1) May corporations practice the
profession of Optometry in the State
of Missouri?

(2) Are corporations exempt from
the operation of the Optometry Law
under Section 13502 and Session Acts
of 1931, page 283, if such corpora-
tions sell eye glasses and spectacles
at a permanent place of business on
prescriptions?

(3) Does Sub-section C of Section
13502, as amended by Session Acts of
1931, page 283, exempt corporations,
who manufacture or deal in eye glasses
or spectacles in a store, shop or
other permanently established place
of business, from the operation of the
law, or does it prohibit it from the
practice of Optometry?

(4) Does Sub-section B, Section 13502, exempt corporations who sell eye glasses or spectacles, on prescription, in a store, shop or other permanently established place of business, from the operation of the Optometry law, or does it authorize such corporation to practice Optometry?

(5) Are the several subdivisions of Section 13503, relating to who is qualified to receive a certificate of registration, in the disjunctive or conjunctive?

(6) If your answer to Question No. One is in the affirmative, and it is your opinion that corporations can practice Optometry, then do such corporations violate Sub-section F of Section 13509, Revised Statutes of Missouri 1929, by advertising their Optometry Department under the name of individual optometrists holding a license?

(7) Is the board empowered to revoke a license of an optometrist under Sub-section F of Section 13509, who permits a corporation to advertise its department under his name?

(8) If your answer to Question No. One is in the negative, then is a corporation practicing Optometry who uses its own assets, business facilities and employees, in promoting for finance or other profit, a department in its business where the practice of Optometry is carried on through individual Optometrists holding licenses?

(9) If it is your opinion that corporations may not practice the profession of Optometry, is it a violation of the Optometry law of Missouri for corporations to establish a department in its business

where the practice of optometry is carried on through optometrists regularly licensed, but who are under the control and supervision of the corporation itself, and who is actually an employee of the corporation?

(10) What is meant in Sub-section C of Section 13509 by the words "gross malpractice"?

(11) Is it necessary, under Sub-section E of Section 13509, Revised Statutes of Missouri 1929, to prove actual knowledge of the deceptive statements on the part of a respondent who is being tried for his license?

(12) Is the Optometry Board, as such, empowered with the authority to administer oath to a witness which would support an indictment for perjury should said witness purposely swear falsely after taking such oath, under the power given it by Section 13509, Revised Statutes of Missouri 1929?

(13) Can the Circuit Court, at the instance of the Board of Optometry, punish witnesses or persons who refuse to obey subpoenas issued by the Board or punish for contempt such witnesses who fail to obey a subpoena duces tecum issued by the Court at the instance of the Board, notwithstanding the apparent authority in Section 13509?

(14) What is meant by Section 13512, wherein the Board seems to be authorized to make and adopt reasonable rules and regulations for the enforcement of the provisions of Article 1, Chapter 101, already referred to?

This is the request of the State Board of Optometry."

In arriving at a correct answer to the questions propounded we are enjoined by the decisions of the appellate courts of this State to keep in mind the purpose and intent of the statute or statutes under construction. On the question of the purpose of the enactment of Chapter 101 Revised Statutes Missouri 1929, we quote from State v. Etzenhouser 16 S. W. (2nd) 656, which case involved the prosecution for practice of Optometry without a license. The Kansas City Court of Appeals at page 659 of the opinion said:

"The object of the law, in protecting the unwary from being imposed upon with glasses which would not only fail to serve the purpose expected of them, but which may be the cause of actual injury to health and nerves, is a beneficent and proper one. Such statutes should be liberally construed to carry out their purposes. 29 C. J. 243. Price v. State, supra."

The paragraph numbers in this letter will compare to the paragraph numbers in your letter and our answers to the respective questions accordingly.

(1) Section 13497 Revised Statutes Missouri 1929, in part reads:

"After the 1st day of October, 1921, it shall be unlawful for any person to practice, or attempt to practice optometry without a certificate of registration as registered optometrist issued by the board of optometry.***"

Section 13499 in part is as follows:

"It shall be the duty of the board to examine all applications for registration submitted in proper form; to

grant certificates of registration to such persons as may be entitled to the same under the provisions of this chapter; to cause the prosecution of all persons violating its provisions; * * * * "

Section 13504 provides,

"Every person who desires to obtain a certificate of registration shall apply therefor to the state board of optometry, in writing, on blanks prepared and furnished by the state board of optometry. Each application shall contain proof of the particular qualifications required of the applicant, shall be verified by the applicant under oath and shall be accompanied by the required fee. "

Section 13509 in part is,

"The state board of optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes:

(a) Conviction of a felony, as shown by a certified copy of the record of the court of conviction.

(b) The obtaining of or an attempt to obtain, a certificate of registration, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentation.

(c) Gross malpractice.

(d) Continued practice by a person knowingly having an infectious or contagious disease.

(e) Advertising by means of knowingly false or deceptive statements.

(f) Advertising, practicing or attempting to practice under a name other than one's own.

(g) Habitual drunkanness, or habitual addiction to the use of morphine***".

Section 13511 provides:

"Each of the following acts constitutes a misdemeanor, punishable, upon conviction, by a fine of not less than \$25.00 nor more than \$200.00; * * * "

Section 13503 states the qualifications that a person must have before he is qualified to receive a certificate of registration as an optometrist, among which is that he shall be at least twenty-one years of age and be possessed of a good moral character and temperate habits.

The use of the word 'person' in the sections above quoted, as well as some of the grounds stated in Section 13509, for which the Board of Optometry may refuse to issue, renew or on which the board may suspend or revoke certificates of registration, as well as the required qualifications of those who desire to register as optometrists, clearly show it was the intention of the Legislature to authorize individuals only to engage in the practice of optometry. For instance a corporation could not very well contract or have an infectious or contagious disease nor could it be the subject of habitual drunkness or addiction to the use of morphine. It is said in 14 C. J. page 52, Section 5, that a corporation is,

"* * * * entirely distinct from its members and officers * * * * ".

The definition of what constitutes the practice of optometry as set out in Section 13501 clearly shows that such practice involves a certain degree of skill and knowledge of human anatomy that could only be possessed or acquired by an individual. There is no basis or reason for construing the word person, as that word is used in the foregoing quoted sections, to include corporations. From the quotation in the succeeding paragraph from the Laws of Missouri 1931, page 283, as well as subdivision (c) of Section 13511, hereinafter quoted, we think it was not the intention

of the Legislature to grant certificates of registration to corporations for the purpose of engaging in the practice of optometry.

What we have said in this paragraph, in order to avoid re-statement, should be read in connection with what is said in the succeeding paragraphs.

We, therefore, are of the opinion that corporations are not entitled to be issued certificates of registration for the practice of optometry in the State of Missouri.

(2) In answering the question embodied in paragraph (2) of your request we quote Section 13502 as amended by Laws of Missouri 1931 page 283:

"The following persons, firms and corporations are exempt from the operation of this act:

'(a) Physicians or surgeons of any school lawfully entitled to practice in this state.

'(b) Persons, firms and corporations who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery.

'(c) Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop or other permanently established place of business, and who neither practice nor attempt to practice optometry, and who do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses.'

Approved May 4, 1931. "

It will be observed that subdivision (b) of Section 13502, above quoted, specifically exempts corporations who sell eye glasses or spectacles in a store, shop or other perman-

only established place of business on prescription, when such prescriptions are issued by persons authorized so to do under the laws of this State, from the operation and provisions of Chapter 101 providing for the State Board of Optometry. What is said in this paragraph should also be read in connection with what is said in the foregoing paragraph and in subsequent paragraphs.

It is our opinion that corporations selling eye glasses or spectacles in a store, shop or other permanently established place of business on prescription issued by such persons authorized under the laws of this State to practice either optometry or medicine and surgery, are exempted from all of the provisions of Chapter 101 Revised Statutes Missouri 1929.

(3) We have set out in the foregoing paragraph (2) the amendment to Section 13502 Revised Statutes 1929 as made by Laws of Missouri 1931 at page 283. Subdivision (c) of Section 13502 as it read prior to the amendment made by Laws 1931 was as follows:

"Persons, firms and corporations who manufacture or deal in eye-glasses or spectacles in a store, shop or other permanently established place of business."

As such subdivision (c) of Section 13502 stood prior to the amendment, the case of State v. Knapp 327 Mo. 24 was tried and finally determined on December 31, 1930. The defendant in that case was at the time of the filing of the charge against him the proprietor of a jewelry shop and store in Kansas City, it being a permanently established place of business at which he kept for sale eye glasses, jewelry and other articles of merchandise. He did not have a license or certificate of registration as an optometrist. He used in his store a device, by the use of which, a customer could determine the kind and character of glasses his eyes required. The customer used this device himself. The defendant was prosecuted for the practicing of optometry without a license or registration therefor. Appellant contended he was exempt under Subdivision (c) of Section 13502. The judgment of conviction was reversed. The court at page 27 of the opinion holding:

"We think appellant's contention must be sustained. It is and of course must be conceded that 'the statute exempts from the op-

tomety law persons who deal in eyeglasses in a store, shop or other permanently established place of business. ' That appellant was and is such dealer is also admitted."

Subsequent to the coming down of the decision in the Knapp case, and doubtless as a result thereof, Section 13502 Revised Statutes 1929 was amended by the Laws of 1931, as above set out. You will note that the court in the Knapp case upheld the exception from the operation of the optometry law as to persons who were dealing in eye glasses or spectacles in a permanently established place of business. Subdivision (c) of Section 13502 as amended still exempts from the operation of Chapter 101

"Persons, firms and corporations who manufacture or deal in eye glasses or spectacles in a store, shop, or other permanently established place of business,"

If such corporations

"Neither practice nor attempt to practice optometry, and do not use a trial case, trial frame, test card, vending machine or other mechanical means to assist the customer in selecting glasses,"

So that corporations who deal in eye glasses or spectacles at an established place of business or in other words, corporations that merely carry such eye glasses or spectacles in stock and permit the customer to make his own selection of such eye glasses or spectacles, without engaging in the practice of optometry as the same is defined in Section 13501, above set out, and without using any of the prohibited devices mentioned in subdivision (c) of Section 13502, as amended by Laws 1931, are exempted from the provisions of Chapter 101 and may lawfully deal in or sell eye glasses or spectacles, as herein limited and such is our opinion. The sale of such eye glasses is not the practice of optometry. In the case of State v. Etzenhouser, supra, the defendant was prosecuted for a violation of the State

Optometry Law. One ground of defense was that the transaction was a sale in interstate commerce. On that point the court, at page 658 of the opinion said:

"The defense is made that appellant cannot in any event be prosecuted under this statute, because the transaction was a sale in interstate commerce, not subject to the provisions of the local law. The act for which defendant is being prosecuted is not the sale of the glasses, but the acts which preceded the sale and from which the patient or customer would determine whether or not he should make a purchase at all, and if so determined, what the particular article should be."

In cases of sale of eye glasses or spectacles by corporations the examination and determination as to the kind and character of glasses required, if such examination be made, would be the practice of optometry and would precede the sale made by the corporation.

(4) The sale of eye glasses or spectacles by corporations, under the provisions of Subdivision (b) of Section 13502, as amended, is specifically exempted from the operation of the optometry law and such sale does not constitute the practice of optometry, as the same is defined in Chapter 101.

(5) Section 13503 provides that,

"A person is qualified to receive a certificate of registration as a registered optometrist;

(a) Who is at least twenty-one years of age.

(b) Who is of good moral character and temperate habits* * * *."

Then follows other requisite qualifications that must be possessed by a person before he is entitled to receive a certificate of registration as a registered optometrist.

There can be no question but what the different subdivisions of this section are used in the conjunctive, and that an applicant for registration as an optometrist must possess each and every qualification and meet all of the requirements set out and provided for in such section.

(6) Since our answer to your question number (1) was in the negative the question propounded in your paragraph (6) drops out.

(7) The matter submitted for answer in paragraph (7) of your letter is so vague and indefinite we are unable to tell what you mean nor is the form of advertisement referred to submitted to us. We suppose you mean that where a department store, for instance, advertises an eye glass or spectacle department, and that a certain person, registered optometrist, is in charge thereof may the license of the optometrist be revoked. A registered optometrist is entitled to sell his services to any person, firm or corporation desiring to use the same, so long as he keeps within the bounds of the Optometry Act. If we understand your question we see no ground on which a license of an optometrist could be revoked upon the premise stated by you.

(8) - (9) The questions embodied in paragraphs (8) and (9) of your letter are similar in essentials and in principles involved, and we answer the same accordingly.

Section 7 of Article XII of the Constitution of Missouri reads:

"No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized. * * "

In *Lewis Publishing Company v. Rural Publishing Company* 181 S. W. 103, the Supreme Court of the State of Missouri,

en banc, in its opinion said:

"The law is well settled, and it might with a considerable degree of precision be stated that it is elementary that a corporation derives its being and life from the state of its creation, through its charter, and that it possesses only such powers and authority as are granted to it by the express provisions thereof, and all such implied powers and authority which are necessary for it to exercise in order to perform the express purposes so granted. (See State ex inf. v. Lincoln Trust Co. 144 Mo. 562, loc. cit. 586, 46 S. W. 593.)

'Of course, there is a further limitation upon the right of a corporation to exercise powers even though expressly granted by its charter, namely, the laws of the state, should there be a conflict between the powers of the corporation, as expressed in its charter, caused by mistake, ignorance, or by any other means of the officials incorporating the company, and the laws of the state, then the former must yield to the supremacy of the latter- the laws of the state.' "

With reference to corporations and officers and agents 14A C. J. page 347, Section 2209, states:

"Since a corporation can act, only through its officers and agents, all acts within the powers of a corporation may be performed by agents of its selection; and except in so far as limitations or restrictions may be imposed by special charter, by-law, or statutory provisions, the same general principles of law which govern the relation of agency for a natural person

govern the officer or agent of a corporation, of whatever station or rank, in respect to his power to act for the corporation; and agents, when once appointed, or members acting in their stead, are subject to the same rules, liabilities, and incapacities as are agents of individuals and private persons. But since a corporation has not all the rights and powers of an individual, it cannot delegate its duties to others, with the freedom of an individual. By some authorities a distinction is drawn between a corporate act performed through the intermediation of a person specially empowered to act as its agent or its attorney and an act done immediately by the corporation through its own administrative officers constituting its inherent agencies. "

And at page 349, Section 2211, as follows:

"The powers of the officers or agents of a corporation are necessarily limited to such acts or contracts as are within the purposes for which the corporation was organized and the powers conferred upon it, as it cannot be presumed that an agent has authority to transact business which the corporation is not by its charter authorized to engage in; and this rule applies to acts or contracts of the corporate trustees or directors since they are but agents of the corporation. Where the power of the corporation to do a given act ceases, as by its dissolution, the power of an agent of the corporation to bind it or its funds in liquidation by doing the prescribed act necessarily ceases also. "

While, as is stated in Corpus Juris, the corporate entity is separate and apart from its members or officers, it is equally true that a corporation can only act by and through its officers, agents, employees and servants. The acts of such officers, agents, employees and servants, within their authority, become the acts of the corporate entity for which it is at all times liable and responsible. The officers, agents, employees or servants, of course, could not engage in a business or practice, beyond the charter or lawful powers of a corporation, so far as the corporation is concerned, because they act, for it, not as individuals but as a corporation. Since a corporation cannot be licensed to practice optometry, it has no authority to engage in such practice by means of employees who act for it. There is another thing that is important to keep in mind. Thompson on Corporations, Vol. 3, Section 2188, page 843 states:

"It is another statement of the principle to say that corporations may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to the powers expressly granted, provided they do not violate the charter, the public policy of the state, or any statute."

The questions presented by you in paragraphs (8) and (9) of your letter are similar in principle to the situation discussed by the court in Matter of Cooperative Law Company, 198 N. Y. 479, 92 N. E. 15. The court in the course of the opinion said:

"The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent and it cannot exist between an attorney employed by a corporation to practice law for it and a client of the corporation, for he would be subject to the directions of the corporation and not to the directions of the client. There would be neither contract nor privity between him and the client, and he would not owe even the duty of counsel to the actual litigant. The corporation would control the litigation, the money earned would belong to

the corporation and the lawyer would be responsible to the corporation. His master would not be the client but the corporation, conducted, it may be, wholly by laymen, organized simply to make money and not to aid in the administration of justice which is the highest function of an attorney and counsellor-at-law. The corporation might not have a lawyer among its stockholders, directors or officers. There would be no remedy by attachment or disbarment to protect the public from imposition or fraud, or no stimulus to good conduct from the tradition of an ancient and honorable profession, and no guide except the sordid purpose to earn money for stockholders. The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the State."

One licensed to practice optometry takes on, to a degree, some of the same responsibilities and obligations to their customers as have been so faithfully borne and kept by physicians and surgeons through all the years. The duty of the optometrist to the customer calls for recognition of the old truism that one should not blow both hot and cold; the command that we cannot worship both God and mammon nor can we faithfully serve two masters, with conflicting interests. We think an optometrist employed by a corporation, whose sales depended on the determination of the necessities by its employee, would be torn between such distractions in serving his employer's financial interest and acting with fidelity to the person whose eyes were being examined that it would come dangerously close to being a violation of public policy on the part of the corporation and, for that reason, a violation of its corporate powers.

We are of the opinion under either hypothesis submitted in your paragraphs (8) and (9), that the corporation would be engaged in the practice of optometry and that such practice is beyond the powers that may be granted to a corporation in this State.

(10) Webster defines the word "malpractice" to be:

"The treatment of a case by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient; hence, any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties; wrong doing. A question of professional malpractice or negligence is determined by what might be reasonably required under the circumstances of the case."

Webster also defines the word "gross", as we think in the sense in which it is used in the optometry law, as:

"Out of all measure; beyond allowance; not to be excused; flagrant; shameful; as, a gross dereliction of duty; a gross injustice; gross carelessness. "

By the use of the word "gross", in connection with the word "malpractice", the Legislature evidently intended, in providing that the State Board of Optometry might refuse to issue, renew or might suspend or revoke any certificate of registration for the practice of optometry for gross malpractice, to convey the idea that the subject must have committed acts of a more serious nature than that conveyed by the use of the word "malpractice" standing alone. As the definition of the word "gross" states, the malpractice committed by the practitioner must be of an inexcusable, flagrant or shameful character or a gross dereliction of duty or gross carelessness in the performance of services under his certificate of registration.

Not having any particular facts before us, we can only give you an answer to your question in general terms and every case would be determined upon its peculiar facts and a determination of those facts would be for the Board under the rules laid down above.

(11) Section 13509 provides that the State Board of Optometry may refuse to issue, renew or may suspend or revoke a certificate of registration for, among other reasons;

"(e) Advertising by means of knowingly false or deceptive statements."

We assume the subdivision last set out contemplates advertising by the practitioner himself. If that is done we do not understand on what theory it could be contended that the practitioner would not have actual knowledge of the statements made by him in an advertisement. If you mean advertisements made by another with reference to a practitioner that would doubtless call for proof of knowledge on the part of the practitioner as to the advertisements made and proof of his consent to such advertisement. The latter would be true if advertisement was made with reference to a practitioner where the name of no one was signed to the advertising.

(12) Section 3878 Revised Statutes Missouri 1929 provides:

"Every person who shall wilfully and corruptly swear, testify or affirm falsely to any material matter, upon any oath or affirmation, or declaration, legally administered, in any cause, matter or proceeding, before any court, tribunal or public body or officer, and whoever shall falsely, by swearing or affirming, take any oath prescribed by the Constitution of

this state, or any law or ordinance thereof, when such oath shall be legally administered, shall be deemed guilty of perjury."

Subdivision (g) of Section 13509 contains in part the provision following;

"The state board of optometry may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke, any certificate of registration, however, for any of these causes, unless the person accused has been given at least 20 days' notice in writing of the charge against him and a public hearing by the state board of optometry. Upon the hearing of such proceeding, the state board of optometry may administer oaths, and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. * * * *"

The last quoted portion of the statute empowers the state board of optometry to hold hearings, upon proper notice given, and provides that at such proceeding or hearing the board may administer oaths to those testifying before it. Section 3878 includes wilful and corrupt swearing or testifying by a person under oath, and as to any material matter at the hearing, in any cause, matter or proceeding before any tribunal or public body. Undoubtedly a hearing before the board, on a matter properly before it, would be a matter or proceeding and the state optometry board is certainly a tribunal or public body within the meaning of Section 3878 and we therefore answer your question number (12) in the affirmative.

(13) Subdivision (g) of Section 13509 contains the further provision,

"Any circuit court or any judge of a circuit court, either in term time or in vacation, upon application either of the accused or of the state

board of optometry may, by order duly entered, require the attendance of witnesses and the production of relevant books and papers before the state board of optometry in any hearing relating to the refusal, suspension or revocation of certificate of registration. Upon refusal or neglect to obey the order of the court or judge, the court or judge may compel, by proceedings for contempt of court, obedience of its or his order. "

If proper application is made to the circuit court or any judge of a circuit court, either in term time or vacation, in any matter or proceeding properly before the board, and after notice of the filing and hearing on the application is given to the adverse party, we see no reason why the court or judge could not proceed, as for contempt, in case of disobedience of the order of the court. In other words the court or judge may exercise the powers as the same are provided in the last quoted portion of Section 13509.

(14) The rules and regulations that the state board of optometry are authorized to make are only such rules and regulations as will enable the board to carry out the purposes of the act. For instance, the board could provide the forms of applications and all papers required to be filed with the board, it may fix the time and places of its meetings, when not contrary to the statutes, but the board can not, for instance, provide a ground for the refusal to issue or revocation of a license in addition to or different from those grounds provided in the statute. The board can not make law but it can make such reasonable rules and regulations as will make practical the carrying into effect and the operation of Chapter 101.

Very truly yours,

GILBERT LAMB
Assistant Attorney General,

APPROVED:

ROY McKITTRICK
Attorney General.