

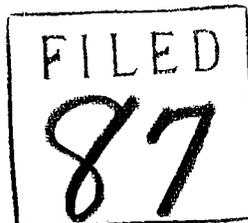
OPTOMETRY:  
REGULATIONS:

Validity of Proposed Regulations.

January 20, 1958

Filed: #87

Missouri State Board of Optometry  
Dale P. Summers, O. D., President  
200 Guitar Building  
Columbia, Missouri



Gentlemen:

This will acknowledge receipt of your request for an opinion to pass upon the validity of the following proposed rules which the Missouri State Board of Optometry plans to promulgate in the very near future. The proposed rules are as follows:

"1. An optometrist shall be deemed to be advertising, practicing or attempting to practice under a name other than his own name if he permits, allows or causes any advertisement of eyeglasses or optometric services to be published that gives greater prominence in said advertisement to the name of a person, who is not a registered optometrist or physician or surgeon, than it gives to the individual name of the optometrist.

"2. It shall be deemed 'dishonorable conduct in optometric practice' for an optometrist to permit, allow or cause a person, who is not a registered optometrist or a licensed physician or surgeon, to use said optometrist's prescription, or optometric findings to fit contact lenses upon a patient or member of the public.

"3. It shall be deemed 'dishonorable conduct in optometric practice' for an optometrist to enter into an agreement or arrangement whereby he permits, allows or causes a person, who is not a registered optometrist or a licensed physician or surgeon, to do any one or any combination of the following acts upon a patient or member of the public:

"1) examine the eye to ascertain the presence of defects or abnormal conditions of the eye;

- "2) take an impression mold of the eyeball;
- "3) determine the corrective qualities to be incorporated in a contact lens; or
- "4) adjust or fit a contact lens to the eye.

"4. It shall be deemed a combination of advertising by means of knowingly deceptive statements', 'advertising, practicing or attempting to practice under a name other than one's own', 'advertising, directly or indirectly prices or terms for optometric services', and 'dishonorable conduct in optometric practice' by 'employing what is known as procurers to obtain business', within the meaning of Section 336.110 (5), (6), and (7), Revised Statutes of Missouri, 1949, for a registered optometrist to enter into an agreement or arrangement with any person, firm or corporation that advertises prices or terms for eyeglasses, ophthalmic lenses or frames, whereby said optometrist:

- "1) Leases space from such person, firm or corporation; or
- "2) Uses, in his optometric practice, optical equipment, instruments, fixtures, furniture and furnishings owned or furnished by such person, firm or corporation; or
- "3) Receives a guaranty of income in his optometric practice from such person, firm or corporation; or
- "4) Receives reimbursement for business expenses, incurred in his optometric practice, from such person, firm or corporation."

In view of the fact your request relates to the authority of said Board to promulgate certain rules and regulations in administering the provisions of Chapter 336, RSMo 1949, we deem it advisable to first determine your statutory authority to make rules and regulations and, further, if you are vested with such authority, just how far can said Board proceed in adopting rules and regulations.

We find a very thorough discussion in Volume 73, C.J.S. Section 95, page 416-417, on just how far a public official may go in promulgating rules and regulations and reads, in part:

"A public administrative officer ordinarily has authority to make or promulgate such rules and regulations as may aid in enforcing or carrying into effect the law or statute which he is administering. The measure of his power is the amount adequate for the purpose for which it was delegated, and his discretion in promulgating regulations depends, to some extent, on the subject matter of the legislation which he is attempting to implement. In exercising his power to make or adopt rules and regulations a public administrative officer should not go beyond the authority vested in him, nor may he regulate matters expressly taken or removed from his supervision by the legislature. He may make or adopt only rules and regulations which will carry into effect the will of the legislature as expressed by the statute, and he may not enact a law under the guise of making an administrative rule or regulation."

Section 336.160, RSMo 1949, specifically vests in said Board authority to make rules and regulations within the scope and terms of Chapter 336, RSMo 1949, relating to licensing and administration of optometrists in this state.

Any such regulations that may be adopted by your Board shall take effect not less than ten days after same are duly filed in the office of Secretary of State (Sec. 16, Art. IV, Constitution of Mo.).

We shall consider the proposed regulations in the order stated in your request.

The regulations are based upon the provisions found in Section 336.110, RSMo 1949, which reads, in part:

"1. 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:

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

"(2) 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;

"(3) Malpractice;

"(4) Continued practice by a person knowingly having an infectious or contagious disease;

"(5) Advertising by means of knowingly false or deceptive statements;

"(6) Advertising, practicing or attempting to practice under a name other than one's own;

"(7) Advertising, directly or indirectly, prices or terms for optometric services;

"(8) Gross ignorance, gross inefficiency, or dishonorable conduct in optometric practice. Dishonorable conduct in optometric practice shall include, but shall not be limited to, employing what is known as procurers to obtain business; and the obtaining of any fee by fraud or misrepresentation;

"(9) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drugs;"

The first rule to be adopted is evidently to prevent one licensed to practice optometry from advertising the practice of optometry in the name of another person not licensed to practice optometry.

This does not present the question of a licensed optometrist in this state carrying on his profession entirely under the name of another, but in a combined effort, not only in the licensee's name, but to advertise under both names.

The decisions clearly hold under similar statutes that a licensed optometrist advertising under the sole name of another is doing so in violation of the law. Winslow vs. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 P. 308; State vs. Kindy Optical Co., 216 Iowa 1157, 248 N.W. 332.

It has been held that statutes regulating not only optometric practice, but other similar practices, are enacted for the purpose of aiding public health and the benefit was intended for the public, and not particularly for the optometrist or other professional licensees.

Therefore, we conclude that such advertising, including both the name of the licensed optometrist and the name of the unlicensed person, would be in violation of Section 336.110, subsection 6, RSMo 1949, and said proposed regulation properly follows the law and is a valid regulation.

Your second request is concerning the validity of the proposed regulation No. 2. Dishonorable conduct is defined in part, but not entirely, under Section 336.110, supra, as follows:

" \* \* \* Dishonorable conduct in optometric practice shall include, but shall not be limited to, employing what is known as procurers to obtain business; and the obtaining of any fee by fraud or misrepresentation;"

The action complained of in the foregoing proposal does not constitute the employment of procurers or obtaining a fee by fraud or misrepresentation.

In determining whether such action, at which said regulation is leveled, may be dishonorable conduct, we are not limited to the definition given in the foregoing statute for said definition specifically provides that it shall not be limited thereto. Therefore, we shall examine decisions construing dishonorable conduct. In State Board of Dental Examiners vs. Bohl, 174 P. 2d 998, 1001, 162 Kan. 156, the court held dishonorable conduct as respects dentistry, is that conduct opposed to the long-standing codes of ethics of the profession. In Crabb vs. Board of Dental Examiners, 235 P. 829, a statute for construction provided for the State Board to refuse or revoke licenses for certain specified causes and concluded "or for any other dishonorable conduct." Such grounds for refusing or revoking said license did not specifically include that of being drunk or intoxicated in public places or driving an automobile while under the influence of intoxicating liquor. Said complaint was filed against said licensed dentist of being drunk and also operating a motor vehicle while under the influence of intoxicating liquor. He pleaded guilty and paid fines. Thereafter, due notice was given said dentist to appear before the State Board of Dental Examiners for a hearing on his conduct.

The court in construing said statute concluded that the rule of ejusdem generis is not of itself a rule of interpretation, but only to interpret and must always yield to the manifest legislative intent. At said hearing said licensee again plead guilty to such acts complained of, however, he contended that it was not grounds for revocation of his license. The court held that such action did constitute dishonorable conduct and in sustaining the action of the Board in revocation of said license said, l. c. 829, 830:

"The contention of the plaintiff is that the Legislature, in enumerating the two specific grounds for refusing a license or revoking one that had been issued and adding the general words 'for any other dishonorable conduct,' intended that the general words should be restricted and include only conduct of the classes specifically mentioned, and that it must be conduct connected with the profession of dentistry or the practice thereof. The rule of ejusdem generis is invoked, and that rule is applicable where there is doubt as to the intention of the Legislature, but it is not of itself a rule of interpretation, but only an aid to interpretation, and must always yield to the manifest legislative intent. State v. Prather, 79 Kan. 513, 100 P. 57, 21 L.R.A. (N.S.) 23, 131 Am. St. Rep. 339. It will be observed that the specific terms of the statute refer to different and unrelated subjects. One of them is the obtaining of money or other thing of value by false and fraudulent representations which would include offenses or conduct not necessarily connected with the practice of dentistry. The other, which is practicing under a name other than his own, has relation to the practice. It appears that the two kinds of misconduct are materially different, and it has been held that when the specific words or subjects greatly differ from one another, the doctrine does not apply. Where such disparity exists, the general words are not restricted, but are to be given their natural and wider meaning. Brown v. Corbin, 40 Minn. 508, 42 N.W. 481; McReynolds v. People, 230 Ill. 623, 82 N.E. 945; State v. Eckhardt, 232 Mo. 49, 133 S.W. 321.

"We think that drunkenness in the circumstances stated involved dishonorable conduct, and that one who is drunk is unfit for the practice of dentistry. One in that condition has not the normal control of his physical and mental faculties. His judgment and fitness for professional work is not only impaired, but the charges to which the plaintiff has confessed constituted public offenses. \* \* \* \* "

Certainly, if such action constitutes dishonorable conduct under such statute when such action was not directly related at all times to his ability to practice his profession, then such proposed regulation is valid.

This Department rendered an opinion to the then Secretary of the Missouri State Board of Optometry under date of January 6, 1947, holding that such functions can only be performed by a registered optometrist or surgeon licensed to practice in this state. In view of the foregoing, we must conclude that said regulation is valid.

In replying to your third request to pass on the validity of proposal No. 3, we are of the opinion that the foregoing opinion rendered by this Department, and referred to in our answer in passing on the validity of the proposed second regulation, is sufficient to hold that the third proposal is valid.

We shall next consider your regulation No. 4. It is well established that a rule or regulation should be so clear that anyone interested should be able to determine his rights or exemption thereunder, and necessarily must follow the law that is being administered, otherwise it would amount to legislating. We have carefully examined said proposal and to say it is ambiguous is putting it mild. We find a very well established general principle of law applicable to construction of all rules and regulations, which reads in part, Vol. 73 C. J. S. Sec. 100, p. 418:

"A rule or regulation of a public administrative body or officer should be definite and, likewise, such rule or regulation should be certain. It should not be subject to the objection that it fails to lay down adequate legislative standards, since it must contain a guide or standard applicable alike to all individuals similarly situated so that anyone interested may be able to determine his own rights or exemptions thereunder. Moreover, an administrative rule or regulation should not violate a constitutional provision to the effect that no law shall pass which refers to more than one subject matter or which contains matter different from what is expressed in the title thereof."

See also in *Druzik vs. Board of Health vs. Haverhill*, 85 N.E. (2d) 232, 324 Mass. 129.

We are cognizant of the fact that said Board under Section 336.110, supra, may refuse to renew, may suspend, or revoke, any certificate of registration of anyone, or combination of causes enumerated under the various subsections of the foregoing statute. However, it appears that you have attempted to make this one regulation all-inclusive to cover the greater proportion of the field of violations under the optometry law in this state. It is possible that some kind of revision in said proposal may cure any ambiguity so as to bring it within the law and constitute a valid regulation.

In the present form we cannot help but be of the opinion that a court would declare it invalid. Therefore, we conclude that proposed regulation No. 4 is not a valid regulation.

CONCLUSION

It is the opinion of this Department that regulations No. 1, 2, 3, as set out in your request, when properly filed with the Secretary of State, as provided in Section 16, Article IV, Constitution of Missouri, will constitute valid regulations. It is our further opinion that your last proposed regulation No. 4 is too ambiguous and we must hold it invalid.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton  
Attorney General

ARH:mw/om