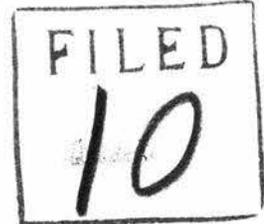


OPTOMETRY:

An optometrist is forbidden by law to advertise directly or indirectly prices or terms for optometric services.

Filed No. 10

June 8, 1950



Mr. J. R. Bockhorst, O.D., Secretary
Missouri State Board of Optometry
136 North Second Street
St. Charles, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion upon three purported violations of the Missouri Optometry Law, the details of which are set forth by you.

One of these cases is that a Doctor A, whose advertisement appears in an issue of a newspaper. That portion of his advertisement in question reads: "Convenient Credit Terms. Free Parking."

Another is that of the firm of X and Y. This firm mailed to a prospective customer an advertisement which included a credit card to be signed by the recipient. This credit card states that the signer "is a member of our credit honor roll and privileged to all credit courtesies - 10% discount member for 1949." This advertisement further states: "Your charge account is already open - easy terms, no interest, no carrying charges, take a year to pay! Just say 'charge it.' We now have a complete optical department - Doctor B in charge."

Another is that of Doctor C, whose advertisement appears in a circular which contains the advertisement of numerous other items. His advertisement reads in part: "Complete optical service. Just add it to your account. Omnibus makes it easy to buy, easy to pay, easy terms. * * *"

Section 10121 Laws Missouri, 1947, Volume I, page 414, states:

"The State Board of Optometry may either refuse to issue, or may refuse to renew,

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or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes.

* * * * *

"(g) Advertising, directly or indirectly, prices or terms for optometric services."

Let us first consider the case of Doctor A, whose advertisement reads: "Convenient credit terms. Free Parking." In an opinion rendered by this office on January 6, 1948, to Dr. George A. Winterer, we stated:

"When used in connection with prices or conditions of payment, the courts have held that the word 'terms' means the time and manner of payment. Nakdemen v. Ft. Smith and Van Buren Bridge Dist., 115 Ark. 194, 172 S.W. 272. Carson v. Smith, 5 Minn. 78. Such definition would seem to carry out the intention of the legislature in adopting the section in question; the purported intention being to prevent reference in advertising to either the price or the manner of payment for optometric services."

The conclusion of the above opinion was that "the advertisement of optometric services on credit is the advertisement of 'prices or terms for optometric services' under Section 10121(g) Mo. R.S.A., 1939, as amended."

This opinion we deem to be consonant with an opinion rendered to Dr. J. R. Bockhorst by this office on June 29, 1948, holding that an advertisement reading "prices are reasonable" is not in violation of Section 10121(g).

In the case of City of Clovis v. Southwestern Public Service Co., 161 Pac. (2d) 878, the court stated that the word "terms" has reference to the "time and amount of money paid."

The same definition of the word "terms" was made by the court in the case of Federal Land Bank of New Orleans v. Miller, 25 Southern (2d) 11.

The advertisement of Doctor A quoted above, uses the words "convenient credit terms." In view of the definitions of the word

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"terms" both in the quoted opinion and out of it, and in view of the opinion itself, it is our belief that in so advertising Doctor A is in violation of Section 10121(g) which prohibits advertising, directly or indirectly, price or terms for optometric services.

We will now consider the case of the firm of X and Y, whose manner of advertising is set forth above. From the advertisement, it is apparent that these two men operate a jewelry store of which the optical department is but a part. If the advertisement of Doctor A set forth and discussed by us above, is in violation of Section 10121(g), which we have held it to be, then so also is that of the firm of X and Y, whose advertisement goes much further in its extension of credit terms than does the advertisement of Doctor A.

The advertisement of Doctor C, set forth above, appears in a circular among the advertisements of many other things such as lamps, dishes, dresses, suits, furniture, et cetera. The circular is issued by a store known as Omnibus.

In this case, as in that of X and Y, the optical is but one of several departments. Also in this case, as in that of X and Y, the advertising is in violation of Section 10121(g), if the advertisement of Doctor A is in violation of it, which we have held it to be, because obviously it goes considerably further than does the advertising of Doctor A in extending credit terms.

There is no showing in the case of Doctor B, who has charge of the optical department in the X and Y store, and of Doctor C, who is in charge of a similar department in Omnibus store, what the arrangements are between the doctors and the stores. We do not know whether these doctors are purely salaried employees, or whether they simply have space in the stores for which they pay a fixed monthly rental. It is clear from the advertisements in both cases that the credit terms for optical supplies and for the services of the optometrist is handled by the store and not by the optometrist, and that the advertising is likewise done by the store. We cannot conceive, however, that any arrangement of the optometrist with the store would exempt them from operating under the State Optometry Law and specifically from Section 10121(g). Exemptions from the operation of this law are set forth in Laws Missouri 1947, Volume I, page 414. This law states:

"The following persons, firms and corporations are exempt from the operation of the provisions of this Chapter except the provisions of Section 10124:

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

"(b) Persons, firms and corporations, not engaged in the practice of optometry, 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 other than that used by the customer or customers alone, vending machine or other mechanical means to assist the customer in selecting glasses."

Nothing in the above could be construed to exempt from the application of Section 10121(g) Doctors B and C.

If it be suggested that they are not liable to the application of Section 10121(g), because they do not themselves do or pay for the objectionable advertising (although on the bare facts before us, we do not know that they do not, directly or indirectly, pay for the advertising), it may be said in reply that it is a well known maxim of the law, that one cannot evade the consequences of the law by allowing another to do for him that which he cannot lawfully do himself. If this were not so then by a duplicitous technical arrangement an optometrist could become the employee of another and Section 10121(g) could be flaunted with impunity to the detriment of those optometrists who chose to practice within the law. Certainly it was not the intention of the law that this be done.

Clearly there is nothing in the advertisements of the X and Y or of Omnibus store to indicate that they are advertising optical supplies only. On the contrary, it is clear that they are advertising both optical supplies and optometric services.

Our attention has been directed to the case of State v. Gate City Optical Company, 339 Mo. 427, as perhaps bearing on the situation of Doctors B and C. In this case a department store and

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an optical supply company entered into an agreement whereby the optical supply company furnished optical supplies and employed an optometrist to be in charge of an optical department in the store. All receipts by the optical department were paid to the cashier of the store; all advertisements of the optical department were by the store; and the optometrist in charge of the department was paid a weekly salary plus a percentage of the receipts. The question before the court was whether the optical supply company and the store were practicing optometry, and the court held that they were not. It seems obvious to us that on the facts set forth above, this case is not applicable to the instant case, in which the issue is whether Doctors B and C were guilty of violating Section 10121(g) of the Optometry Law.

CONCLUSION

We are of the opinion that, on the basis of the material submitted to us, that the State Board of Optometry would be justified in citing the licensees involved to appear before the Board for a hearing to determine whether or not action should be taken by the Board to suspend or revoke the licenses of the persons involved.

Respectfully submitted,

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APPROVED:

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Attorney General