

OPTOMETRY BOARD: Validity of rules.

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Dr. J. R. Bockhorst, Secretary  
Missouri State Board of Optometry  
136 N. Second Street  
St. Charles, Missouri



Dear Sir:

We have received your request for an opinion of this department concerning the validity of the proposed rules of the Missouri State Board of Optometry.

Section 10125, R.S. Mo. 1939, as amended Laws of 1947, page 416, contains the following provision:

"The State Board of Optometry may adopt reasonable rules and regulations within the scope and terms of this Act for the proper administration and enforcement thereof. \* \* \*"

The Board has no inherent power to regulate the practice of optometry, and all rules and regulations adopted by it must be exercised within the frame work of the provision bestowing regulatory powers on the Board and the policy of the statute which it administers. 42 Am. Jur. 359. The rules which the Board of Optometry proposes to adopt are based upon the following provisions found in Section 10121, R.S. Mo. 1939, as amended Laws of 1947, page 415:

"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:

\* \* \* \*

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

The United States Supreme Court, in the case of Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608-612, 55 S. Ct. 570, 79 L. Ed. 1086, made the following statement concerning regulation of advertising by persons engaged in rendering professional services connected with public health:

"We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement. \* \* \*"

We shall consider each of the proposed rules separately in the light of the above principles and statutory provisions:

"1. To advertise the prices of optometric services or any supplies in the rendering of these services shall be deemed advertising optometric services under Section 10121, Paragraph G."

Section 10121 (g), quoted above, provides that advertising, directly or indirectly, prices or terms for optometric services shall be grounds for suspension or revocation of certificate of registration. In the practice of optometry the cost of supplies used in rendering optometric services is regarded as a part of the price of such services. The proposed rule is, therefore, considered reasonable and valid.

"2. That under Section 10121, subdivision (e), (f), and (g), advertising be considered to cover newspapers, magazines, radio, outside building signs, corridor signs, stair signs, door signs, window signs, letterheads, envelopes, statement heads, or any other form generally accepted as a means of advertising."

This rule is a reasonable definition of advertising, and is considered valid.

"3. That specifically under (e), and (f), above, the interpretation of this Board is that no optometrist can advertise his services directly or indirectly as connected with any other person or persons, firms companies, or corporations except a person or persons registered as an optometrist, and that any such advertising, under or connected with a name other than one's own as stated in (f), is a violation of the optometry law."

This rule is considered likely to raise the question of the right of a corporation or individual not licensed as an optometrist to employ optometrists and advertise under the corporate name or the name of the individual employer. This problem has arisen on numerous occasions in states which have adopted optometry licensing laws. The decisions under such laws are not uniform, inasmuch as they necessarily depend upon the wording of the particular statute involved. Annotations,

102 A.L.R. 343, 128 A.L.R. 585. The question has arisen previously in Missouri in the case of State ex inf. McKittrick v. Gate City Optical Company, 339 Mo. 427, 97 S.W. (2d) 89. In that case, the Missouri Supreme Court held that, under the statute as then written, a corporation was not practicing optometry in violation of the optometry law when it employed registered optometrists whom it paid specified salaries, the fees obtained by them for their services being paid directly to the corporation. In that case, the advertising was conducted in the name of the corporate employer, but the names of the licensed optometrists employed by it were included in the advertising. There has been, however, what is regarded as a recent significant amendment in the law subsequent to the above mentioned case. In the Gate City case, the court refused to oust the corporation on the grounds that it was practicing optometry without a license because the exemption statute in the optometry law, now Section 10114, R.S. Mo. 1939, contained the following exemption:

"(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."

However, that provision was amended in Laws of 1947, page 414, to read as follows:

"(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." (Underscoring ours.)

The addition of the words "not engaged in the practice of optometry" is deemed significant. In the Gate City case the court was able to say that the corporation was not practicing optometry in violation of the law because of the specific exemption applicable to it. However, the exemption has now been limited to persons, firms or corporations not engaged in the practice of optometry. In the Gate City case, the court did not

hold that the corporation in question was not engaged in the practice of optometry, but that the particular method, by virtue of the exemption, of practicing optometry had not been prohibited by the Legislature. If any significance is to be attached to the recent amendment of the statute, it would seem necessarily to be to the effect that the Legislature had ruled out the method of practicing optometry approved in the Gate City case.

Therefore, we believe that the method of practicing optometry which was approved by the Supreme Court in that case has now been disapproved by this legislation, and that a corporation in this state can no longer practice optometry in such manner. As a consequence, the method of advertising, in effect, approved in that case would no longer be permissible, and the rule proposed would be valid. However, it is suggested that the rule be based on Section 10121 (g) alone, as there would appear to be no reason for including it under Section 10121(e).

"4. It shall be deemed deceptive to advertise the giving of gifts, premiums, discounts, or the like with any form of visual service."

This is a rule of long standing which is being readopted. It is considered reasonable and valid.

"5. It shall be deemed deceptive to advertise ophthalmic supplies at 'special sale' or as a 'special offer' or with any words of similar meaning."

This rule would seem to be more appropriate if placed under subsection (g) of Section 10121 rather than on the grounds of deceptive advertising, and considered under that section, the rule is deemed reasonable and valid.

"6. It shall be deemed deceptive to advertise a clinic or eye clinic in connection with the regular practice of optometry."

The reason behind this rule is that a clinic imports the idea of a place where the entire body may be studied. Any so-called eye clinic cannot be such because of the necessarily limited scope of optometric practice. In view of this, the rule is considered reasonable and valid.

"7. It shall be deemed deceptive to use in advertising, wording that is not clearly understandable or qualifying statements in smaller type which might be overlooked by a casual reader."

This rule is considered reasonable and valid.

"8. It must be presumed that any advertising in connection with the name of an optometrist must have had his sanction and approval."

This presumption cannot, of course, be an un rebuttable one. It may be overcome by direct evidence to the contrary, and the Board has no authority to provide otherwise. When so considered, the rule is deemed reasonable and valid.

The following general rules proposed to be adopted are considered reasonable and valid:

"Acting under the powers conferred upon the Board by Section 10125 of the optometry law, the Board has ruled the following to be the order of examination procedure under Section 10111.

"1. Applicants failing any subjects shall be permitted to retake those subjects at either of the two subsequent examinations. The same applicant failing any subject in the retake examination, may make a new application for complete examination in not less than one year from the date of the last examination.

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"The Missouri State Board of Optometry adopts the following procedural rules as a guide to licensed Missouri optometrists.

"1. Report violations of the optometry law and board rules and regulations to the Secretary of the board.

"2. An optometrist registered in the State of Missouri must notify the Secretary of the Board of any change of office address.

Dr. J. R. Bockhorst

-7-

"3. Any board ruling found to be invalid, shall not effect the validity of any other board ruling."

Respectfully submitted,

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APPROVED:

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Attorney General

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