



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

JOHN BEN SHEPPERD
ATTORNEY GENERAL

March 28, 1956

Honorable W. F. Baber, O. D.
President, Texas State Board of
Examiners in Optometry
1928 Fannin Street
Vernon, Texas

Opinion No. MS-256

Re: Validity of proposed rules
relating to the authority of
the Board to cancel, revoke
or suspend the license of an
optometrist.

Dear Dr. Baber:

You have requested our opinion on the validity of proposed rules to be adopted by the Texas State Board of Examiners in Optometry. Each of the proposed rules concerns the exercise of the Board's power to cancel, revoke or suspend the operation of licenses granted by the Board. The proposed rules, which are attached to this opinion as an appendix, relate to (1) "Basic Competence," (2) "Price and Bait Advertising," and (3) "Corporate Practice."

The rule-making power of the Board is stated in Article 4556, Vernon's Civil Statutes, as follows:

" . . . The Board shall have the power to make such rules and regulations not inconsistent with this law as may be necessary for the performance of its duties, the regulation of the practice of optometry and the enforcement of this Act."

The Legislature has the power to define optometry, to prescribe the duties of optometrists, to provide for "basic competence," to prohibit "price and bait advertising," and to prohibit "corporate practice." Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Abelson v. State Board of Optometrists, 5 N.J. 412, 75 A.2d 867, 22 A.L.R.2d 929 (1950); Perlow v. Board of Dental Examiners, 127 N.E.2d 306 (Sup. Jud. Ct. of Mass. 1955); Baker v. State, 240 S.W.2d 924 (Tex. Crim. 1922). The Legislature cannot delegate its legislative powers. Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070 (1927); Abelson v. State Board of Optometrists, supra. The Legislature may, after declaring a policy and fixing a primary standard, confer upon an administrative agency the power to fill up the details by prescribing rules and regulations to carry out the legislation. Margolin v. State, 205 S.W.2d 775 (Tex.Crim. 1947); Williams v. State, 176 S.W.2d 177 (Tex.Crim. 1943). But rules or regulations cannot conflict with the statutes nor can they subvert or enlarge on the statutory authority or policy. Teacher Retirement System v. Duckworth, 260 S.W.2d 632 (Tex. Civ. App. 1953, adopted by the Supreme Court 264 S.W.2d 98); Abelson v. State Board of Optometrists, supra.

The grounds for the exercise of the Board's power to cancel, revoke or suspend a license are stated in Article 4563, V.C.S. The Board may adopt rules and regulations governing its conduct in the exercise of this power (so

long as they are not inconsistent with the procedure prescribed by Article 4563) and stating the extent to which this power will be used. But the Board cannot legislate. The Legislature has stated the only grounds which confer such power on the Board. Since an administrative agency cannot by the adoption of rules or regulations increase its authority granted it by the Legislature, no rule or regulation can list any additional grounds for cancellation, revocation or suspension of a license.

Proposed Rule No. 1 lists twelve requirements in the examination of patients and declares that the failure to comply with any of the requirements shall be considered a violation of subdivision (c) of Article 4563. Proposed Rule No. 2 lists various activities in regard to the nature of advertising which the Board considers to constitute fraud, deceit or misrepresentation in violation of subdivision (b) of Article 4563. Proposed Rule No. 3 lists eight activities which the Board considers to be a violation of subdivision (i) of Article 4563.

The Legislature has made the Board the fact-finding agency in connection with violations of Article 4563. State Board of Examiners in Optometry v. Marlow, 257 S.W.2d 761 (Tex.Civ.App. 1953). In a hearing pursuant to the provisions of Article 4563, it is the duty of the Board to determine existence of the essential ultimate facts constituting a violation of Article 4563 as distinguished from merely evidentiary facts. The difference between "evidentiary facts" and "ultimate facts" is that evidentiary facts are facts necessary to prove the essential ultimate fact, while the ultimate fact is the logical conclusion derived from evidentiary facts and is the final resulting effect reached by the processes of logical reasoning from evidentiary facts. The Evergreens v. Nunan, 141 F. 2d 927, 152 A.L.R. 1187 (C.C.A.2d 1944, cert. den. 323 U.S. 720); Texas Employers Ins. Ass'n. v. Reed, 150 S.W.2d 858 (Tex. Civ.App. 1941, error dismissed, judgment corrected.)

Applying the foregoing tests we will now consider each rule.

PROPOSED RULE NO. 1

The ground for revocation or suspension of a license stated in subdivision (c) of Article 4563 is "that said . . . licensee is unfit or incompetent by reason of negligence."

While the activities prohibited may be evidentiary of unfitness or incompetence by reason of negligence, it is our opinion that proof of such activity is not the ultimate fact to be determined by the Board and will not necessarily constitute as a matter of law a violation of subdivision (c). Therefore, you are advised that Proposed Rule No. 1 is invalid for the reason that it attempts to give the Board authority to cancel, revoke or suspend a license on grounds not prescribed by the Legislature.

PROPOSED RULE NO. 2

The ground for revocation or suspension stated in subdivision (b) of Article 4563 is "that said . . . licensee is guilty of any fraud, deceit or misrepresentation in the practice of optometry or in his seeking admission to such practice."

Subdivision (h) of Article 4563 states as a ground for revocation or suspension "that said licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage."

Subdivision (h) does not apply to advertisement in newspapers, radio, television, etc., but applies only to the employment of solicitors, canvassers and similar agents. Compare subdivision (h) of Article 4563 with subdivisions (f) through (r) of Article 752b of Vernon's Penal Code relating to the practice of dentistry.

Subdivision (b) condemns any fraud, deceit or misrepresentation in the practice of optometry. An essential element of fraud, deceit or misrepresentation is a false or misleading representation. We do not question that the types of advertising interdicted in Proposed Rule No. 2 would be fraudulent or deceitful if the representations were untrue. It may also be conceded, for the sake of argument, that this kind of advertising is frequently used by the unscrupulous practitioner to mislead and deceive the public. But the fact that some advertisements of this kind might be proved to be fraudulent does not justify a conclusion that all such advertisements are fraudulent. Under the proposed rule it would not be necessary, in order to make out a violation, to show that the representation made in the advertisement was false or misleading, and the person charged would not be allowed to show as a defense that the representation was in fact not false or misleading.

Therefore, it is our opinion that Proposed Rule 2 is invalid for the reason that it attempts to give the Board authority to cancel, revoke or suspend a license on grounds not prescribed by the Legislature.

PROPOSED RULE NO. 3

Subdivision (i) authorizes the Board to cancel, revoke or suspend the license of an optometrist for the following reason:

"(i) That said licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this State."

Neither a corporation nor an individual not licensed to practice optometry is permitted to practice through a licensed employee. The purpose of the Legislature in enacting subdivision (i) of Article 4563 was to curb the practice of optometry by unauthorized individuals or corporations by permitting the Board to cancel the license of any optometrist who aids such person in such unauthorized practice. See State Board of Examiners v. Marlow,

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257 S.W.2d 761 (Tex.Civ.App. 1953); Rockett v. Texas State Board of Medical Examiners, decided by the San Antonio Court of Civil Appeals on February 1, 1956 (not yet reported).

Subdivision 1 of Proposed Rule No. 3 is valid for the reason that optometry can be practiced only by licensed individuals and there is no distinction between the practice and the purely business side of the practice. Parker v. Board of Dental Examiners, 14 P. 2d 67 (Cal.Sup. 1932).

Subdivisions 2 through 8 list certain rules, nonobservance of which the Board will consider to be a violation of subdivision (1) of Article 4563. It is our opinion that the prohibited activities will not necessarily constitute a violation of subdivision (1), but are merely evidentiary of a violation. Proof of a violation of one or more of subdivisions 2 through 8 of Proposed Rule No. 3 will establish evidentiary facts tending to prove the essential ultimate fact that an optometrist placed his license at the disposal or in the service of a person not licensed to practice in this State, but will not constitute proof per se of the essential ultimate fact necessary to constitute a violation.

It is therefore our opinion that, except for subdivision 1, Proposed Rule No. 3 is invalid for the reason that it states grounds for cancellation, revocation or suspension of the license of an optometrist which are not prescribed by the Legislature.

It is the opinion of this office that each of the proposed rules attempts to enlarge the authority of the Board to cancel, revoke or suspend the license of an optometrist by making evidentiary matters a violation of Article 4563 and making violations of these rules grounds for cancellation, revocation or suspension of licenses. In view of the authorities cited in this opinion, you are advised that the Board does not have such authority.

During our study of this matter we have received a number of briefs in support of the validity of the proposed rules. To discuss separately all the contentions made in these briefs and the authorities cited in their support would make this opinion unduly long, but we do wish to acknowledge the briefs and to point out generally the inapplicability of the authorities relied on.

We are not concerned in this opinion with the question of whether the Legislature could validly enact the provisions embodied in the proposed rules or whether the Board could do so under a proper delegation of authority from the Legislature. The only question which it has been necessary for us to consider is whether, under the present law, the Legislature has delegated to the Board the power to make these particular rules. Cases which affirm the power of the Legislature to enact similar provisions have no bearing on this question. Therefore, the only cases which we shall note specifically in this opinion are those which involve a delegation of authority to an administrative body to promulgate similar rules and those which might be taken to hold that proof of acts prohibited in the proposed rules establishes per se a violation of the statutory provisions.

In Dubin v. Board of Regents of the State of New York, 141 N.Y.S.2d 54 (App. Div. 1955) and its predecessors (Finley Straus, Inc. v. University of New York, 62 N.Y.S.2d 892; Straus v. University of State of New York, 125 N.Y.S.2d 821), the Legislature had made "unprofessional conduct" a ground for revocation of licenses and had expressly delegated to the administrative agency the power to determine what constituted unprofessional conduct in advertising. In these cases the administrative rules prohibiting the kind of advertising described in Proposed Rule No. 2 were sustained because it was deemed to be unprofessional conduct regardless of whether it was fraudulent. The grounds for revocation or suspension which are stated in Article 4563, V.C.S., do not include unprofessional conduct. A rule which stated a ground for revocation not set out in Article 4563 would clearly be inconsistent with the statute.

The same distinction is also present in the case of State Board of Dental Examiners v. Bohl, 174 P.2d 998 (Kans. Sup. 1946), where the rule was based on a statutory prohibition against "dishonorable conduct."

Fisher v. Schumacher, 72 So.2d 804 (Fla. Sup. 1954), was rendered upon a four-to-three decision. We think the correct rule was stated in the dissenting opinion, which followed Abelson's, Inc. v. New Jersey State Board of Optometrists, 88 A.2d 632 (N.J. Super. 1952).

Ritholz v. Johnson, 17 N.W.2d 590 (Wis. Sup. 1945), contains language which might be taken to sustain the view that the kinds of advertising prohibited in Proposed Rule No. 2 are on their face in violation of subdivision (b) of Article 4563. The distinction, however, lies in the fact that the Wisconsin statute prohibited advertising which "will tend to mislead or deceive the public." The difference between conduct which has a tendency to deceive or to promote fraud and conduct which is actually deceitful or fraudulent (as required by the Texas statute to support a revocation or suspension) is illustrated in the following quotation from Semler v. Oregon State Board of Dental Examiners, 34 P.2d 311 (Ore. Sup. 1934):

"It may be that the appellant acted in good faith and that the representations made in his advertisements express the truth, but such is beside the question. The more pertinent inquiry is: Does the kind of advertising prohibited afford the unscrupulous practitioner a means of perpetrating fraud and deception upon his patients?"

We have stated that proof of the various activities which the proposed rules declare to be violations of the statute might be evidentiary of the ultimate facts which must be established under Article 4563. It is hardly necessary for us to point out that the power of the Board to revoke or suspend licenses for violations of subdivision (b), (c) or (1) of Article 4563 upon proof of these evidentiary facts along with the other evidentiary facts necessary to establish the ultimate fact is not dependent upon the prior promulgation of any rule or regulation. However, while the Board cannot make these acts violations per se, we think it would be within the power of the Board to promulgate rules making these activities prima facie evidence of a violation

of the statute and placing upon the person charged the burden of producing evidence to refute the prima facie presumption. Various other changes in wording and substance would also be necessary to put the rules into proper shape, but the following suggested changes will indicate the effect which the rules could be given:

In Rule No. 1, change paragraph 13 to read:

"The wilful or repeated failure or refusal of an optometrist to comply with any of the foregoing requirements shall be considered by the Board to constitute prima facie evidence that he is unfit or incompetent by reason of negligence within the meaning of Article 4563(c), Revised Civil Statutes of Texas, and shall be sufficient ground for the filing of charges to revoke or suspend his license. The charges shall state the specific instances in which it is alleged that the rule was not complied with. Upon a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that compliance with the rule in each instance in which proof is adduced that it was not complied with was not necessary to a proper examination of the patient in that particular case."

In Rule No. 2, change paragraph 3 to read:

"The wilful or repeated nonobservance by an optometrist of any of the foregoing provisions shall be considered by the Board to constitute prima facie evidence that he is guilty of fraud, deceit or misrepresentation in the practice of optometry within the meaning of Article 4563(b), Revised Civil Statutes of Texas, and shall be sufficient ground for the filing of charges to revoke or suspend his license. Upon a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that he has not been guilty of fraud, deceit or misrepresentation.

"If the advertisement represents that any part of his service is free, he shall have the burden of establishing the truth of the statement and of showing that his charge for other services or materials furnished to patients receiving the free service is not in excess of the amount customarily charged (or which would be charged) by other optometrists in the same locality or in similar localities for similar services or materials, not including the services or materials which are advertised as free.

"If the advertisement represents that his charges are cheaper or more reasonable, he shall have the burden of establishing the truth of the statement and of showing that his charge for the services and materials actually furnished to his patients is less than the amount customarily charged by other persons for similar services and materials in the same locality or in similar localities.

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"If the advertisement represents that the services or materials furnished by him are superior in any way, he shall have the burden of establishing the truth of the statement and of showing specifically wherein the services performed by him are superior to the services of optometrists generally or wherein the materials are superior to those used by optometrists or opticians generally."

In Rule No. 3, change paragraph 9 to read:

"The nonobservance by an optometrist of any of the foregoing rules shall be considered by the Board to constitute prima facie evidence of a violation of Article 4563(1), Revised Civil Statutes of Texas, and shall be sufficient ground for the filing of charges to revoke or suspend his license. Upon a hearing pursuant to the filing of charges based upon nonobservance of this rule, the person charged shall have the burden of establishing that his license has not been placed at the disposal or in the service of any person not licensed to practice optometry in this State."

Paragraph 12 of Rule No. 1 should either be omitted or changed. The optometrist should not be held responsible for the filling of a prescription by another person unless he selects the person to fill it and knows or should know that the person selected is incompetent, i.e., unless he is guilty of negligence in selecting the person, or unless he actually checks the glasses after the prescription is filled.

Paragraph 4 of Rule No. 2 should be omitted. Subdivision (h) of Article 4563 does not apply to this type of activity.

The provisions relating to sanitary condition of the surroundings should be omitted from Rule No. 3. There is no rational connection between the sanitary condition of the surroundings and the placing of a license at the disposal of an unlicensed person.

APPROVED:

Burnell Waldrep
Reviewer

John Ben Shepperd
Attorney General

MKW:lm

Yours very truly,

JOHN BEN SHEPPERD
Attorney General of Texas

By *Mary K. Wall*
Mary K. Wall
Assistant

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PROPOSED RULE NO. 1
BASIC COMPETENCE RULE

In the initial examination of a patient for whom the optometrist signs or causes to be signed a prescription for an ophthalmic lens the optometrist shall make and record, if possible, the following findings of the condition of the patient:

1. Case History (ocular, physical, occupational and other pertinent information).
2. Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any.
3. External examination (lids, cornea, sclera, etc.)
4. Internal ophthalmoscopic examination (media, fundus, etc.)
5. Static retinoscopy, O.D., O.S.
6. Subjective findings, far point and near point.
7. Phorias or ductions, far and near, lateral and vertical.
8. Amplitude or range of accommodation.
9. Amplitude or range of convergence.
10. Angle of vision, to right and to left.
11. The optometrist shall be responsible for the following information on every prescription: interpupillary distance, far and near; lens prescription, right and left; color or tint; segment type, size and position; the optometrist's signature.
12. The optometrist shall be responsible for the proper and accurate filling of his prescriptions.
13. An optometrist who knowingly, wilfully or repeatedly fails or refuses to comply with any of the foregoing requirements shall be considered by the Board unfit or incompetent by reason of negligence within the meaning of Article 4563(c), Revised Civil Statutes of Texas.
14. If any of the above provisions, or any part thereof, are construed by the Courts to be invalid for any reason, it is the intention of the Board that the remainder should continue in full force and effect; that is, it is the intention of the Board that each of the above rules and portions thereof are severable.

PROPOSED RULE NO. 2
PRICE AND BAIT ADVERTISING RULE

No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard or any advertising medium, or use as all or part of any trade or assumed name in which he practices optometry, any statement or advertisement which states or implies, directly or indirectly, any of the following:

1. A price for professional services or ophthalmic materials supplied in connection therewith, that such services or materials are free, cheaper, more reasonable, or that such services or materials will cost less or may be obtained at a specific price. Examples of advertisements prohibited hereby are: "at a saving," "lower costs," "more economical," "free examinations," "lowest prices," a price for glasses "including examination," "\$ _____ and up," "save \$ _____ on your eye care," "\$ _____ value for \$ _____," or any variations thereof or words of similar import or meaning.
2. That the optometrist, his employees or associates, are better or best trained, better qualified or superior to other optometrists, perform services in a superior manner, possess a peculiar or particular technique or style of service, including the advertisement of "superior," "finest," "complete," "better," or "best" examination or service or "satisfaction guaranteed," or "you must be satisfied," or other words of similar import or meaning; or, that ophthalmic materials furnished are "superior," "best," "finest," or any other words of similar import or meaning.
3. An optometrist who knowingly, wilfully or repeatedly violates any of the foregoing rules, shall be considered by the Board as guilty of fraud, deceit or misrepresentation in the practice of optometry within the meaning of Article 4563(b), Revised Civil Statutes of Texas.
4. An optometrist who wilfully or repeatedly obtains patients or patronage directly or indirectly by referrals from a person, firm or corporation who publishes or displays any statements or advertisements prohibited by sections 1 and 2 above shall be considered by the Board as guilty of directly or indirectly employing solicitors, canvassers or agents for the purpose of obtaining patronage within the meaning of Article 4563(h), Revised Civil Statutes of Texas.
5. If any of the above provisions, or any part or word thereof, are construed by the Courts to be invalid for any reason, it is the intention of the Board that the remainder should continue in full force and effect; that is, it is the intention of the Board that each of the above rules and portions of rules are severable.

6. All rules, regulations and administrative interpretations heretofore adopted by the Board are hereby repealed and rescinded in so far as such rules or interpretations, or any of them, or any provision thereof, is, or are inconsistent herewith.
7. These rules shall become effective on _____, 1956, and a copy hereof shall be immediately mailed to each optometrist licensed by the Board.

PROPOSED RULE NO. 3
CORPORATE PRACTICE RULE

In order to safeguard the visual welfare of the public and the optometrist-patient relationship, fix professional responsibility, establish standards of hygiene and professional surroundings, more nearly secure to the patient the optometrist's undivided loyalty and service, and carry out the legislature's prohibition of placing an optometric license in the service or at the disposal of unlicensed persons, optometrists who lease space from and practice optometry on the premises of a mercantile establishment shall comply with the following rules:

1. The practice must be owned by an optometrist licensed by the State of Texas.
2. Every phase of such practice and the leased premises shall be under the exclusive control of an optometrist licensed by the State of Texas.
3. Prescription files and all business records must be the sole property of the optometrist and free from involvement with the mercantile establishment or any unlicensed person.
4. The leased space must be definite and apart from space occupied by other occupants of the premises and free from any conditions or surroundings that might make same unsanitary or unhygienic.
5. The leased space shall have a patient's entrance opening on a public street, hall, lobby, corridor or other public thoroughfare.
6. No phase of the optometrist's practice shall be conducted as a department or concession of the mercantile establishment, and there shall be no legends or signs such as "Optical Department," "Optometrical Department," or others of similar import, displayed on any part of the premises or in any advertising.
7. The optometrist shall not permit his name or his practice to be directly or indirectly used in connection with the mercantile establishment in any advertising, displays, signs or in any other manner.

8. If a patient desires credit, the account shall be established with the optometrist and not the credit department of the mercantile establishment, provided, however, nothing herein shall prevent the optometrist thereafter selling, transferring or assigning such account.
9. An optometrist who knowingly, wilfully or repeatedly violates or continues in violation of any of the preceding rules, shall be considered by the Board in violation of Article 4563(1), Revised Civil Statutes of Texas.
10. If any of the above provisions, or any part thereof, are construed by the Courts to be invalid for any reason, it is the intention of the Board that the remainder should continue in full force and effect; that is, it is the intention of the Board that each of the above rules and portions thereof are severable.