

TEXAS OPTOMETRY BOARD

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OPINION COMMITTEE

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RE: Opinion Request

Dear General Paxton:

The Texas Optometry Act (Chapter 351 of the Occupations Code) contains several sections that regulate the relationship between an optometrist and an unlicensed retailer of ophthalmic goods.¹ The Office of the Attorney General has previously issued opinions regarding these sections of the Optometry Act.²

The Optometry Board has been presented with situations where a physician licensed by the Texas Medical Board leases space from an unlicensed retailer of ophthalmic goods.³ The physician then employs optometrists or therapeutic optometrists licensed by the Optometry Board to practice optometry in the leased space. These optometrists conduct examinations and treat eye disease, abnormal conditions and vision defects including issuing prescriptions signed by the optometrists for both medications and ophthalmic goods. These optometrists practice optometry as authorized by the Optometry Act.

¹ Tex. Occ. Code §§ 351.361, 351.364, 351.408 and 351.460.

² Tex. Att'y Gen. Op. No. DM-170 (1992), Tex. Att'y Gen. Op. No. MW-292(1981), and Tex. Att'y Gen. LO 98-113 (1998).

³ Although the term is not defined in the Texas Optometry Act, the Attorney General has defined "retailer of ophthalmic goods" as "a person or legal entity that sells to ultimate consumers spectacle lenses, frames, contact lenses, and other ophthalmic devices." Tex. Att'y Gen. Op. No DM-170 (1992) at 5.



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Under the lease arrangement between the retailer of ophthalmic goods and the physician, the unlicensed retailer of ophthalmic goods provides business services and shares employees with the office where optometry is practiced. The Optometry Act prohibits a retailer of ophthalmic goods from “. . . providing, hiring, or sharing employees, business services, or similar items to or with an optometrist or therapeutic optometrist . . .”⁴ The Optometry Act provides injunctive and other relief for violations of this section.⁵ The Texas Optometry Act authorizes licensed optometrists to be employed by a physician.⁶

The physician in these situations contends that Tex. Occ. Code § 351.005(a)(2) exempts licensed optometrists employed by the physician from the regulation of the Optometry Act, specifically Tex. Occ. Code § 351.408. Section 351.005(a)(2) provides:

(a) This chapter does not:

...

(2) prevent or interfere with the right of a physician licensed by the Texas Medical Board to:

(A) treat or prescribe for a patient; or

(B) direct or instruct a person under the physician's control, supervision, or direction to aid or attend to the needs of a patient according to the physician's specific direction, instruction, or prescription;

The Optometry Board has authorized the Executive Director to seek an Attorney General Opinion on the following questions:

Does Tex. Occ. Code § 351.005(a)(2) prevent the Optometry Board from seeking an injunction and a civil penalty against an unlicensed retailer of ophthalmic goods providing business services and sharing employees with an optometric office staffed by optometrists employed by a physician where the physician leases space from the unlicensed retailer?

Does Tex. Occ. Code § 351.005(a)(2) prevent the Optometry Board from taking disciplinary action under Tex. Occ. Code § 351.501 against licensed optometrists employed by a physician where the physician leases space from an unlicensed retailer of ophthalmic goods and the unlicensed retailer provides business services and shares employees with the office in which the optometrists practice?

The exemption for physicians in § 351.005(a)(2), though worded differently, has been part of the Optometry Act since 1925. An exemption for physicians is present.

⁴ Tex. Occ. Code § 351.408(b)(4).

⁵ Tex. Occ. Code §§ 351.501, 351.5512, 351.602 – 351.606.

⁶ Tex. Occ. Code § 351.457

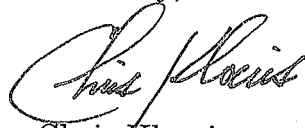
in other health licensing acts, for example: podiatrists,⁷ chiropractors,⁸ dentists,⁹ and psychologists.¹⁰

An optometrist holding himself or herself out as a licensed optometrist while performing examinations and signing prescriptions as a licensed optometrist is specifically exempt from statutes regulating the practice of medicine.¹¹ Such an independent licensee would not be included in the phrase "person under the physician's control, supervision, or direction" in § 351.005(a)(2)(B). Contrary to the physician's interpretation that licensed optometrists employed by a physician are included in the physician exemption, Tex. Occ. Code § 351.408(d), specifically speaks to situations where a physician owns an optometric practice and the practice is subject to the restrictions of § 351.408.

Please provide the Board with an opinion under the provisions of Tex. Gov. Code § 402.042. The Optometry Board has enclosed a Brief with a more thorough discussion than presented in the request.

Thank you. Should you have any questions, please call me at 512-305-8502.

Sincerely,



Chris Kloeris
Executive Director

Enclosure

⁷ Tex. Occ. Code § 202.003.

⁸ Tex. Occ. Code § 201.003.

⁹ Tex. Occ. Code § 251.004.

¹⁰ Tex. Occ. Code § 501.004.

¹¹ Tex. Occ. Code § 151.052.

Brief of Texas Optometry Board

Introduction

Optometrists¹ licensed by the Texas Optometry Board frequently locate their optometry practice next door to a business that dispenses eyeglasses and contact lenses. This business is a retailer of ophthalmic goods.² Many of these optometrists lease space for the optometry practice from the retailer of ophthalmic goods. The Optometry Act³ contains several provisions that regulate the relationship between the retailer of ophthalmic goods and optometrists.⁴ These provisions prevent retailers of ophthalmic goods from controlling the professional judgement and practice of optometrists.⁵

Physicians may also locate their eye health care practice next door to a retailer of ophthalmic goods with some of the practices leasing space from retailers of ophthalmic goods. These practices may hire or contract with licensed optometrists who provide eye examinations and treat patients for defects or diseases of the eye, including prescribing ophthalmic goods and medications. The optometrists perform these duties under the authority of the independent license issued by the Texas Optometry Board.

The Optometry Act in § 351.005(a)(2) contains a provision regarding the regulation of physicians such that the Act does not “. . . prevent or interfere with the right of a physician licensed by the Texas Medical Board to: . . . treat or prescribe for a patient”⁶ In addition, the Act does not “. . . prevent or interfere with the right of a physician licensed by the Texas Medical Board to . . . direct or instruct a person under the physician's control, supervision, or direction to aid or attend to the needs of a patient according to the physician's specific direction, instruction, or prescription; . . .”⁷

¹ The Optometry Board licenses optometrists and therapeutic optometrists. The term “optometrist” will be used to refer to both licensees.

² Tex. Att'y Gen. Op. No. DM-170 (1992).

³ Tex. Occ. Code § 351.001 *et. seq.*

⁴ Tex. Occ. Code §§ 351.408, 351.361, 351.364, 351.460.

⁵ Tex. Occ. Code § 351.408 (a).

⁶ Tex. Occ. Code § 351.005 (a)(2)(A).

⁷ Tex. Occ. Code § 351.005 (a)(2)(B).

This narrowly drafted exemption does not remove optometrists practicing in a physician's office from the restrictions imposed by the Optometry Act regarding the relationship between optometrists and retailers of ophthalmic goods. More specifically, the provisions of § 351.408 to prevent retailers of ophthalmic goods from "... controlling or attempting to control the professional judgment, manner of practice, or practice of an optometrist . . ." ⁸ apply to optometrists practicing under the authority of their optometry license when employed or contracted by a physician.

The legislature has directed § 351.408 to be liberally construed to prevent the control of an optometrist's professional judgement. ⁹ Optometrists practicing under an independent license are not included in an exemption for "persons under the physician's control" in § 351.005(a)(2)(B). ¹⁰ The § 351.005(a)(2) limitation prohibiting interference only applies to actions "aiding or attending to the needs of a patient." ¹¹ Regardless of the § 351.005(a)(2) exemption, the specific language of § 351.408 applies to physicians' offices.

Section 351.408 to be Liberally Construed

A manufacturer, wholesaler, or retailer of ophthalmic goods may not "... control or attempt to control the professional judgment, manner of practice, or practice of an optometrist or therapeutic optometrist . . ." ¹² The Optometry Act defines this phrase and includes in § 351.408 specific acts that are prohibited. ¹³ The Optometry Act also includes a legislative directive that § 351.408 "... shall be liberally construed to prevent manufacturers, wholesalers, and retailers of ophthalmic goods from controlling or attempting to control the professional judgment, manner of practice, or practice of an optometrist or therapeutic optometrist." ¹⁴ Thus the intent of the legislature was not to exclude § 351.408 from situations, but to apply it broadly to prevent control by retailers of ophthalmic goods. "The court may discern this intent or manifest objective by simply reading the operative part of the statute and finding it implicitly." ¹⁵

⁸ Tex. Occ. Code § 351.408 (a).

⁹ Tex. Occ. Code § 351.408 (a).

¹⁰ Tex. Occ. Code § 351.005 (a)(2)(B).

¹¹ Tex. Occ. Code § 351.005 (a)(2)(B).

¹² Tex. Occ. Code § 351.408 (c)(1).

¹³ Tex. Occ. Code § 351.408 (b).

¹⁴ Tex. Occ. Code § 351.408 (a).

¹⁵ Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 Baylor L. Rev. 342, 375 (2012) citing *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 347-48 (Tex. 1979).

Tex. Att'y Gen. Op. No. DM-170¹⁶ interpreted the predecessor to § 351.408¹⁷ to consider whether § 351.408 applied to an optometrist co-owner of an optometrist who is a retailer of ophthalmic goods. The Opinion examines the legislative history of § 351.408 to support the comprehensive application of the statute. The Opinion correctly notes that the legislative purpose behind the statute is to allow optometrists to exercise independent judgment without the influence of third parties whose business interests may not align with the best patient outcomes.¹⁸

Exemption in § 351.005(a)(2)

- - Person Under The Physician's Control, Supervision, Or Direction Does Not Include a Licensed Optometrist

The Optometry Act contains an exemption for physicians, which has been part of the Optometry Act since 1925¹⁹ (although worded differently). Health professional licensing acts commonly contain exemptions from the requirements of that act for licensed physicians. The licensing acts for podiatrists,²⁰ chiropractors,²¹ dentists,²² and psychologists, for example, have such an exemption.²³

Section 351.005(a)(2) has two clauses. The first clause, “[t]his chapter does not: . . . prevent or interfere with the right of a physician licensed by the Texas Medical Board to: . . . treat or prescribe for a patient;”²⁴ concerns a physician’s practice of medicine. Enforcing the statutory restrictions on the relationship between optometrists and retailers of ophthalmic goods to prevent the control or attempts to control the professional judgment, manner of practice, or practice of an optometrist does not prevent or interfere with the right of a physician to treat or prescribe for patients.

The second clause states that, “[t]his chapter does not: . . . prevent or interfere with the right of a physician licensed by the Texas Medical Board to: . . . direct or instruct a person under the physician's control, supervision, or direction to aid or attend to the needs of a patient according to the physician's specific direction, instruction, or prescription; . . .”²⁵ The statute does not apply the exemption to the right to

¹⁶ Tex. Att'y Gen. Op. No. DM-170 (1992).

¹⁷ Acts 1981, 67th Leg., R.S., ch. 758, § 2, sec. 5.11, 1981 Tex. Gen. Laws 2798, 2807; Senate Bill 109. Formerly Tex. Rev. Civ. Stat. Art. 4552-5.11.

¹⁸ Tex. Att'y Gen. Op. No. DM-170 (1992) at 5.

¹⁹ Acts 1925, 39th Leg., R.S., ch. 31; 1925 Tex. Gen. Laws 149; House Bill 295.

²⁰ Tex. Occ. Code § 202.003.

²¹ Tex. Occ. Code § 201.003.

²² Tex. Occ. Code § 251.004.

²³ Tex. Occ. Code § 501.004.

²⁴ Tex. Occ. Code § 351.005 (a)(2)(A).

²⁵ Tex. Occ. Code § 351.005 (a)(2)(B).

direct or instruct each and every employee of the physician. The statute is more restrictive, limiting the exemption to the right to direct or instruct only those persons under the physician's control, supervision, or direction.

An optometrist practicing under the authority of a license issued by the Texas Optometry Board is not under a physician's control, supervision, or direction even if employed in an optometric office owned by the physician. A therapeutic optometrist is authorized by the Optometry Act to independently examine patients; diagnose vision defects, abnormal conditions and disease; and prescribe corrective lenses, medications and physical treatment.²⁶ A licensed optometrist is exempt from regulation by the Medical Practice Act.²⁷

The language "a person under the physician's control, supervision, or direction" refers only to those persons who are not licensed to independently practice. Physicians are specifically authorized to direct or instruct such a person who is under the physician's supervision to perform a medical act.²⁸ Optometrists, because of their independent authority to practice optometry, are not included in Chapter 157 of the Occupations Code authorizing physician supervision.²⁹

This interpretation comports with the original language of the statute prior to the codification of the Optometry Act.³⁰

To adopt a different interpretation of the phrase such that it applies to all employees of the physician, even those independently licensed, could prohibit all regulation of optometrists by the Optometry Board, including examination procedures, standards of practice, continuing education, and licensing, simply because of employment by a physician. There is no indication in the Optometry Act or other Texas statutes

²⁶ Tex. Occ. Code § 351.002 (7).

²⁷ Tex. Occ. Code § 151.052.

²⁸ Tex. Occ. Code §§ 157.001 *et. seq.*

²⁹ *Id.*

³⁰ In Art. 4552-5.17 (Acts 1969, 61st Leg., R.S., ch. 401, 1969 Tex. Gen. Laws 1298), the phrase read "to direct or instruct others under the control, supervision, or direction of such a physician. . .," using "others" instead of "persons" used in the codified version. "Persons" is used elsewhere in the Optometry Act to in some instances refer to optometrists, but "others" in the Optometry Act would only refer to someone who is not an optometrist. The ordinary meaning of "others" is defined as "A different person or thing." *Websters II New College Dictionary* (2001). See Tex. Gov't Code § 311.011 regarding reading words and phrases according to their common usage.

that the legislature intended to remove the Board's regulatory authority over its licensees when those licensees are employed by physicians. Courts will not interpret the wording of a statute to lead to an absurd result.³¹

-- The Regulated Conduct In § 351.408 Is Not the Aiding or Attending To the Needs Of a Patient

Section 351.005(a)(2)(B), further limits the exemption to “. . . direct[ing] or instruct[ing] a person under the physician's control . . . to aid or attend to the needs of a patient”³² To aid or attend to the needs of a patient means the act of providing medical treatment, not the activities regulated in § 351.408.

Section 351.408 Specifically Applies the Section to Physician's Offices

The legislature, with knowledge that § 351.005(a)(2) imposes some restriction on the application of the Optometry Act,³³ enacted § 351.408 with a specific section that applies the control provisions to situations where a physician owns the practice. Specifically, the statute sets out the same exception for physicians as optometrists regarding when the physician is defined as a retailer.³⁴ Interpreting § 351.005(a)(2) such that optometrists employed by a physician are still subject to the requirements of § 351.408 prevents any conflict between § 351.005(a)(2) and § 351.408. “Therefore, the Texas Supreme Court has repeatedly held that a court should not assign a meaning to a provision that would be inconsistent with other provisions in the act.”³⁵

Conclusion

The limited exemption afforded physicians does not prevent the Texas Optometry Board from enforcing the provisions of § 351.408 regarding the activities of optometrists employed by physicians.

³¹ *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

³² Tex. Occ. Code § 351.005 (a)(2)(B).

³³ Art. 4552-5.17, the predecessor to § 351.005 (a)(2) was enacted in 1969 (Acts 1969, 61st Leg., R.S., ch. 401, 1969 Tex. Gen. Laws 1298). Tex. Rev. Civ. Stat. Art. 4552-5.11, the predecessor to § 351.408 was enacted in 1981 (Acts 1981, 67th Leg., R.S., ch. 758, § 2, sec. 5.11, 1981 Tex. Gen. Laws 2798, 2807).

³⁴ Tex. Occ. Code § 351.408 (d). “This section does not apply to a manufacturer, wholesaler, or retailer of ophthalmic goods who is an optometrist, therapeutic optometrist, or licensed physician or a legal entity wholly owned and controlled by at least one optometrist, therapeutic optometrist, or licensed physician, unless the optometrist, therapeutic optometrist, or legal entity has offices at more than three locations.”

³⁵ Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 Baylor L. Rev. 342, 400 (2012).