



STATE OF ARIZONA  
OFFICE OF THE  
AUDITOR GENERAL

A PERFORMANCE AUDIT  
of  
**THE ARIZONA BOARD OF OPTOMETRY**

SEPTEMBER 1979

THE BOARD OF OPTOMETRY HAS NOT EFFEC-  
TIVELY PROTECTED THE PUBLIC FROM IN-  
COMPETENT OR UNSCRUPULOUS OPTOM-  
ETRISTS.

A REPORT TO THE  
ARIZONA STATE LEGISLATURE

REPORT 79-10

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September 14, 1979

The Honorable Bruce Babbitt, Governor  
Members of the Arizona Legislature  
Members of the Board of Optometry

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Arizona Board of Optometry. This report is in response to a September 19, 1978, resolution of the Joint Legislative Budget Committee and a January 18, 1979, resolution of the Joint Legislative Oversight Committee.

A summary of this report is found on the blue pages at the front of the report. A response to this report from members of the Board of Optometry is found on the yellow pages preceding the appendices of the report.

My staff and I will be happy to meet with the appropriate legislative committees, individual legislators or other state officials to discuss or clarify any items in this report or to facilitate the implementation of the recommendations.

Respectfully submitted,

A handwritten signature in cursive script that reads "Douglas R. Norton".

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	1
INTRODUCTION AND BACKGROUND	4
SUNSET FACTORS	8
FINDINGS	
FINDING I	15
The Board of Optometry has not effectively protected the public from incompetent or unscrupulous optometrists.	
CONCLUSION	36
RECOMMENDATION	36
FINDING II	38
The examination process of the Board of Optometry is not in compliance with state law and is of questionable validity.	
CONCLUSION	51
RECOMMENDATION	51
FINDING III	52
The Board of Optometry has not revised promulgated rules which are inconsistent with federal regulations and Arizona statutes.	
CONCLUSION	63
RECOMMENDATION	63
FINDING IV	65
Since fiscal year 1976-77, the Board of Optometry has substantially improved the documentation and recording of its proceedings; however, additional improvements are still needed to assure that Board records are maintained in a manner consistent with statutory requirements.	
CONCLUSION	77
RECOMMENDATION	78



	<u>Page</u>
FINDING V	79
<p>The Board of Optometry has been substandard in its encouragement and use of public input in its operations. Information regarding meeting notices, proposed rules and regulations, legislative proposals and Board actions has not been adequately provided to licensed optometrists or the consumers of optometric services.</p>	
CONCLUSION	87
RECOMMENDATION	87
FINDING VI	88
<p>Changes needed to improve the efficiency and effectiveness of the Board of Optometry.</p>	
CONCLUSION	92
RECOMMENDATION	92
OTHER PERTINENT INFORMATION	93
<p>The use of pharmaceutical agents by optometrists.</p>	
WRITTEN RESPONSE TO THE AUDITOR GENERAL'S REPORT	103
APPENDICES	
APPENDIX I	- Arizona Statutes Regarding the Optometry Profession
APPENDIX II	- Memorandum from the Arizona Legislative Council Regarding the Need to License Optometrists - May 2, 1979
APPENDIX III	- Memorandum from the Arizona Legislative Council Regarding any Weaknesses in the Optometry Law as Related to the Board's of Optometry Ability to Take Disciplinary Actions for Violations of the Optometry Law - August 8, 1978

- APPENDIX IV - Memorandum from the Arizona Legislative Council Regarding the Board's of Optometry Ability to Impose Intermediary Penalties for Violations of the Optometry Law - July 25, 1979
- APPENDIX V - Case Studies of Consumer and Board Initiated Complaints for Calendar Years 1976, 1977 and 1978.
- APPENDIX VI - Memorandum from the Arizona Legislative Council Regarding the Proper Methods of Conducting Complaint Investigation - July 20, 1978
- APPENDIX VII - Letter from Dr. Harold E. Cross comparing two prescriptions for the Same Patient Obtained by Different Optometrists
- APPENDIX VIII - Memorandum from the Arizona Legislative Council Regarding the Board's of Optometry Ability to Suspend or Revoke an Optometrist's License - April 24, 1979
- APPENDIX IX - Memorandum from the Arizona Legislative Council Regarding the Examination Grading Policies Adopted by the Board - August 21, 1979
- APPENDIX X - Suggested State Health Occupation Policy Coordinating Act
- APPENDIX XI - Letter from the Arizona Attorney General to the President of the Board of Optometry Rejecting Certification of Rules Proposed by the Board - April 16, 1979
- APPENDIX XII - Memorandum from the Arizona Legislative Council Regarding Board of Optometry Promulgated Rules in Conflict with Federal and State Antitrust Provisions - May 21, 1979
- APPENDIX XIII - Memorandum from the Arizona Legislative Council Regarding Adequate Documentation of Legal Actions Taken by the Board of Optometry - June 18, 1979
- APPENDIX XIV - Five Year Comparison of Examination Information Presented in the Annual Report to the Governor, Budget Requests, Board Minutes and Board Files



- APPENDIX XV - Memorandum from the Arizona Attorney General to all State Agencies Regarding Public Notice Requirements - August 19, 1975
  
- APPENDIX XVI - Quantitative Results of the Office of the Auditor General survey of the Arizona Optometry and Ophthalmology Professions

## SUMMARY

The Board of Optometry has primary responsibility for regulating the practice of optometry in Arizona. The duties of the Board include evaluating applications for examination and licensure, administering examinations, issuing licenses, and enacting rules and regulations concerning licensed optometrists.

Prior to 1979 legislative changes, the Board consisted of three optometrists appointed by the Governor to serve four-year terms. Legislative changes expanded Board membership to five individuals, four optometrists and one member representing the general public.

The Board and its activities are funded through fees charged for examinations and licenses issued. Ten percent of the fees received are deposited in the State General Fund while the remaining 90 percent are used for Board operations within the limits of an annual budget approved by the Legislature.

Our review of the Board of Optometry revealed that while regulation of optometrists by a state agency is needed, the Board of Optometry has not fulfilled this need. This assessment is based on the findings that:

1. The Board of Optometry has not effectively protected the public from incompetent or unscrupulous optometrists. (page 15)
2. The examination process of the Board of Optometry is not in compliance with state law and is of questionable validity. (page 38)

Our review also revealed that the Board of Optometry has not revised promulgated rules which are inconsistent with federal regulations and Arizona statutes. (page 53)



In addition, our review disclosed that since fiscal year 1976-77, the Arizona Board of Optometry has substantially improved the documentation and recording of its proceedings; however, additional improvements are still needed to assure Board records are maintained in a manner consistent with statutory requirements. (page 65)

Our review also disclosed that the Arizona Board of Optometry has been substandard in its encouragement and use of public input in its operations. Information regarding meeting notices, proposed rules and regulations, legislative proposals, and Board actions has not been adequately provided to licensed optometrists or the consumers of optometric services. (page 79)

Our review revealed that changes in the license renewal system can improve the efficiency and effectiveness of Board operations. (page 88)

Finally, an analysis of recent legislative actions in other states revealed that 23 states have authorized optometrists to use specified drugs or pharmaceutical agents in their practice. (page 93)

It is recommended that one of the two following alternatives be considered:

1. Arizona Revised Statutes, Title 32, Chapter 16, be amended to provide the Board of Optometry with the specific requirement to investigate all complaints and to expand enforcement responsibilities including the power to censure an optometrist who has provided faulty goods or services. In addition, the Board of Optometry should establish specific procedures for the investigation and resolution of all complaints. (page 36)
2. The Legislature and Governor approve a Health Occupations Council composed of representatives of health occupations subject to regulation and substantial public membership. The purpose of the Council would be to review and coordinate licensing regulations, establish discipline and enforcement procedures and resolve scope of practice questions. (page 37)



It is also recommended that:

1. Either ARS 32-1724 be amended to allow the acceptance of the National Board of Examiners in Optometry (NBEO) scores in Arizona or the Board of Optometry adopt rules allowing the acceptance of NBEO scores in lieu of the written portion of the Arizona examination. (page 51)
2. The Board of Optometry revise rules R4-21-03.A and R-21-04.B, regarding misleading advertising and recording 15 conditions of a patient, respectively, to become consistent with federal regulations and federal and state antitrust laws. The Board also continue its efforts to appropriately revise Rule R-21-03.B regarding advertising as an optometric specialist. Upon revising rules R4-21-03.A and R4-21-03.B, the Board should submit these rules to the Federal Trade Commission for approval. The Board of Optometry communicate to the Joint Committee of Reference for Health and Human Resources on the results of its efforts to revise these rules. (page 64)
3. The Board of Optometry establish a record management program to assure that its records are adequate as required by state law. (page 78)
4. The Board of Optometry adopt methods to encourage public input and participation in the promulgation of rules and regulations and development of legislative proposals. (page 87)
5. ARS 32-1725, which requires annual registration, be amended to allow the Board of Optometry to adopt a less frequent registration schedule. ARS 32-1726 be amended to permit the Board to charge an increased fee for less frequent renewal of licenses. (page 92)



## INTRODUCTION AND BACKGROUND

### History Of Optometry

Spectacle makers, or opticians, began grinding lenses and fitting and selling spectacles, often in small shops or jewelry stores, in America as early as the 1700's. In the late 1800's, "refracting opticians" began to conduct eye examinations in order to assist customers in the selection of appropriate spectacles. The first proposed legislation to define optometry in the United States was considered in New York. In 1901, Michigan enacted the first optometry law and by 1925 every state had passed laws defining and regulating the profession of optometry.

### Arizona Establishes Laws That Regulate The Practice Of Optometry

The 24th Legislative Assembly of the Territory of Arizona enacted Arizona's first optometry law in 1907. The law defined the practice of optometry as:

"The employment of subjective and objective means to determine the accommodative and refractive status of the eye and the scope of its functions in general."

The law also established the "Arizona Territorial Board of Examiners in Optometry" to examine, license and regulate optometrists.

This Act was incorporated into the State's first Civil Code in 1913. Since then, several legislative amendments have been adopted which substantially changed the optometry law. A notable example of legislative change is the current definition of the practice of optometry that reads:

"'Practice of optometry' means the examination and refraction of the human eye and its appendages, and the employment of any objective or subjective means or methods other than the use of drugs, medicine or surgery, for the purpose of determining any visual, muscular, neurological or anatomical anomalies of the eye, the use of any instrument or device to train the visual system or correct any abnormal condition of the eye or eyes and the prescribing, fitting or employment of any lens, prism, frame or mountings for the correction or relief of or aid to the visual function."

### The Optometry Profession Today

Today optometrists provide primary eye care for the majority of Americans, performing 70 percent of all visual examinations, writing 60 percent of all prescriptions and dispensing 60 percent of all eye glasses. Optometrists occupy the middle tier of the eye care health hierarchy as shown below:

Ophthalmologists - physicians who specialize in the medical and surgical diagnosis and treatment of defects and diseases of the eye.

Optometrists - persons who scientifically examines the eye to detect diseases or defects, and prescribes correctional lenses or exercises.

Opticians - individuals who fit, supply and adjust eye glasses and contact lenses prescribed by ophthalmologists and optometrists.

### The Board Of Optometry

Prior to a 1979 legislative amendment, the Board consisted of three licensed optometrists appointed by the Governor to serve four-year terms. Legislation in 1979 changed the Board membership to five individuals, four licensed optometrists and one member representing the general public.

The Board has the primary responsibility for regulating the practice of optometry in Arizona. The duties of the Board include evaluating applications for examination and licensure, administering examinations, issuing licenses, enacting rules and regulations and resolving complaints against licensed optometrists.

Table 1 summarizes the activities of the Board of Optometry for fiscal years 1975-76 through 1978-79.

TABLE 1

ACTUAL EXAMINATION, INITIAL AND RENEWAL LICENSING  
ACTIVITY OF BOARD OF OPTOMETRY\* FOR FISCAL YEARS  
1975-76 THROUGH 1977-78 AND PROJECTED FOR FISCAL  
YEARS 1978-79 AND 1979-80

Fiscal Year	Applications for Examinations		Initial Licenses Issued		Licenses Renewed	
	Number of Applications	Percentage Change From F/Y 1975-76	Number of Licenses	Percentage Change From F/Y 1975-76	Number of Licenses	Percentage Change From F/Y 1976-77
1975-76	70		57		N/A	N/A
1976-77	54	( 3)%	40	(30)%	415	
1977-78**	39	(44)	26	(54)	435	5%
1978-79	71	1	42	(26)	480	16
1979-80	50	(29)	35	(39)	480	16

\* These statistics may not be completely accurate, see page 65 for a discussion of inaccurate record keeping.

\*\* The actual number of optometrists practicing in Arizona is significantly less than the total number licensed. For instance, as of June 30, 1978, only 203 of the 461 optometrists issued initial and renewal licenses were practicing in Arizona.

The Board and its activities are funded through fees charged for examinations and licenses issued. Ten percent of the fees received are deposited in the state general fund while the remaining ninety percent are used for Board operations within the limits of an annual budget approved by the Legislature.

In April 1979, the Legislature and Governor approved an increase in the maximum fees that can be charged by the Board of Optometry. Effective June 9, 1979, the Board increased the annual license renewal fee from \$20 to \$50. Similar increases have been made to the fees charged for examination applications, reciprocity applications and original and duplicate licenses. These increased fees will increase the Board's net receipts and ending fund balances as shown in Table 2.



TABLE 2

ACTUAL AND PROJECTED FEE RECEIPTS AND  
EXPENDITURES BY THE BOARD OF OPTOMETRY  
DURING FISCAL YEARS 1975-76 THROUGH  
1979-80

<u>Fiscal Year</u>	<u>Actual</u>			<u>Estimated</u>	
	<u>1975-76</u>	<u>1976-77</u>	<u>1977-78</u>	<u>1978-79</u>	<u>1979-80</u>
Net Receipts (fees)*	\$11,975	\$9,436	\$ 8,186	\$23,715	\$27,450
Expenditures	<u>8,264</u>	<u>9,500</u>	<u>11,282</u>	<u>12,851</u>	<u>14,900</u>
Change in Fund Balance	<u>3,711</u>	<u>(64)</u>	<u>(3,096)</u>	<u>10,864</u>	<u>12,550</u>
Beginning Fund Balance	<u>5,479</u>	<u>9,190</u>	<u>9,126</u>	<u>6,030</u>	<u>16,894</u>
Ending Fund Balance	<u>\$ 9,190</u>	<u>\$9,126</u>	<u>\$ 6,030</u>	<u>\$16,894</u>	<u>\$29,444</u>

\* Amount is net after depositing ten percent of the amount received in the state general fund.

The Board of Optometry has no full-time support staff. All support functions are provided by the Department of Administration through the Arizona State Boards Administrative Office (ASBAO). The ASBAO, created in 1976, was designed to provide secretarial, clerical and other general support functions and office facilities to 11 small state boards and commissions, including the Board of Optometry. Prior to this, clerical work was performed by Board of Optometry members and part-time employees.

The Office of the Auditor General expresses its gratitude to the members of the Board of Optometry and the staff of the Arizona State Boards Administrative Office for their cooperation, assistance and consideration during the course of our audit.

## SUNSET FACTORS

In accordance with ARS sections 41-2351 through 41-2374, nine factors are to be considered to determine, in part, whether the Board of Optometry should be continued or terminated.

These factors are:

1. Objective and purpose in establishing the Board.
2. The degree to which the Board has been able to respond to the needs of the public and the efficiency with which it has operated.
3. The extent to which the Board has operated within the public interest.
4. The extent to which rules and regulations promulgated by the Board are consistent with the legislative mandate.
5. The extent to which the Board has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public.
6. The extent to which the Board has been able to investigate and resolve complaints that are within its jurisdiction.
7. The extent to which the attorney general or any other applicable agency of state government has the authority to prosecute actions under enabling legislation.
8. The extent to which the Board has addressed deficiencies in its enabling statutes which prevent it from fulfilling its statutory mandate.
9. The extent to which changes are necessary in the laws of the Board to adequately comply with the factors listed in this subsection.

SUNSET FACTOR: THE OBJECTIVE AND  
PURPOSE IN ESTABLISHING THE BOARD

In its 1979-80 budget request, the Board of Optometry stated the goals of the Board to be:

"To license qualified optometrists in Arizona in order to assure competency of optometric practice in Arizona for the protection of the health, welfare and safety of the public."

In order to assure that quality optometric care is provided in Arizona, the Board has been assigned the authority to:

- 1) promulgate rules and regulations governing the practice of optometry, (ARS 32-1705)
- 2) accredit schools and colleges of optometry, (ARS 32-1705)
- 3) examine and license applicants, (ARS 32-1723, 32-1724) and
- 4) investigate complaints and suspend or revoke licenses for violations of the optometry law. (ARS 32-1705, 32-1755)\*

SUNSET FACTOR: THE DEGREE TO WHICH  
THE BOARD HAS BEEN ABLE TO RESPOND TO  
THE NEEDS OF THE PUBLIC AND THE EFFICIENCY  
WITH WHICH IT HAS OPERATED

The Board of Optometry has been deficient in its investigation and resolution of complaints from consumers for services rendered by optometrists licensed with the Board. The Board did not discipline a single optometrist as a result of a consumer complaint filed during the four-year period ending December 31, 1978, in spite of the fact that consumers filed 50 complaints with the Board during that period. The Board has consistently 1) failed to conduct proper complaint investigations to determine if professional incompetence or malpractice was involved, 2) ruled that it has no jurisdiction over complaints, or 3) considered complaints closed if optometrists made reparations to the complainants.



The actions or inaction of incompetent and unscrupulous optometrists can result in serious physical harm to the patient, including blindness. Because the Board has not been sufficiently aggressive in its investigation and resolution of consumer complaints, it has not effectively protected the health, safety and welfare of the public.

The Board of Optometry appears to be operating efficiently. In the three years from fiscal years 1974-75 to 1977-78, expenditures per license holder have increased from \$22.49 to \$25.94, an increase of only 15.34 percent. The Board has contracted with the Department of Administration's, Arizona State Boards Administration Office (ASBAO), to provide clerical assistance. An analysis by the Office of the Auditor General revealed that efficiency could be improved if the ASBAO workload were redistributed by implementation of biennial registration of optometrists. (See page 88 for a discussion of this issue.)

SUNSET FACTOR: THE EXTENT TO WHICH  
THE AGENCY HAS OPERATED WITHIN THE  
PUBLIC INTEREST

According to the Arizona Legislative Council, in a memorandum dated May 2, 1979\*, the regulation of optometrists would be in the interest of maintaining the public's health and welfare. The opinion noted:

"Since the practice of optometry involves the study of the structure, functions, deficiencies and corrections of the human eye, it has a direct relationship to the health of the human body...Being thus related to public health, there can be little disagreement as to the authority of the legislature to regulate optometry...to safeguard the public health and welfare and to protect the public against ignorance, incapacity, deception or fraud because of incompetent or unscrupulous practitioners." (Emphasis added)

\* Appendix II contains a copy of this Legislative Council memorandum.

While regulation of optometrists by a state agency is needed, the Board of Optometry has not fulfilled this need. The Board has not responded to the consumer need for protection from incompetent or unscrupulous optometrists by its failure to adequately investigate and resolve consumer complaints. (page 15) The examination process of the Board of Optometry is not in compliance with state law and is of questionable validity. (page 38) In addition, several Board-enacted rules are in conflict with federal and state acts outlawing anticompetitive practices. (page 52) And, public notification of Board actions, and encouragement of public participation in Board affairs has been substandard. (page 79) Therefore, it is difficult to conclude that the Arizona Board of Optometry has operated within the interest of the consumer.

However, several recent Board actions have been notable. During 1979 the Board successfully proposed legislative amendments including requirements for continuing education for optometrists and lay membership on the Board. Additionally, the Board has initiated plans to establish educational seminars in Arizona.

SUNSET FACTOR: THE EXTENT TO WHICH  
RULES AND REGULATIONS PROMULGATED BY  
THE BOARD ARE CONSISTENT WITH LEGIS-  
LATIVE MANDATE

Three Board-enacted rules appear to be in conflict with Federal Trade Commission regulations and federal and state antitrust laws. (For a discussion of this issue, see page 52.)

Based upon a review of all other Board-enacted rules, it appears that all other rules are consistent with legislative mandate.

SUNSET FACTOR: THE EXTENT TO WHICH THE BOARD HAS ENCOURAGED INPUT FROM THE PUBLIC BEFORE PROMULGATING ITS RULES AND REGULATIONS AND THE EXTENT TO WHICH IT HAS INFORMED THE PUBLIC AS TO ITS ACTIONS AND THEIR EXPECTED IMPACT ON THE PUBLIC

The Board of Optometry has been substandard in its efforts to inform both registrants and the public consumer of optometric services regarding rules and regulations and other Board actions. (page 79)

Although complying with legal requirements regarding posting of meeting and public hearing notices regarding proposed rules and regulations, a survey of optometrists licensed by the Board of Optometry revealed that the vast majority of optometrists were not informed of meeting dates and proposed and actual Board actions. In addition, when compared to other Arizona regulatory bodies, the Board of Optometry is decidedly substandard in its efforts to obtain consumer participation in its decision making. (See page 79 for a discussion of this issue.)

SUNSET FACTOR: THE EXTENT TO WHICH THE AGENCY HAS BEEN ABLE TO INVESTIGATE AND RESOLVE COMPLAINTS THAT ARE WITHIN ITS JURISDICTION

The Board of Optometry has not demonstrated significant effectiveness in investigating and resolving consumer complaints. The Board has failed to consistently and adequately investigate consumer complaints to obtain the facts surrounding the complaints.



As a result of this inadequate investigative process, together with questionable statutory interpretations by the Board and a Board policy of dropping complaints when a remedy, such as returning money, is provided to the complainant, no optometrist as of July 31, 1979, has been disciplined for any consumer complaint filed since January 1, 1975. (See page 15 for an analysis of this issue.)

SUNSET FACTOR: THE EXTENT TO WHICH THE  
ATTORNEY GENERAL OR ANY OTHER APPLICABLE  
AGENCY OF STATE GOVERNMENT HAS THE AUTHORITY  
TO PROSECUTE ACTIONS UNDER ENABLING LEGISLATION

The Board of Optometry has, according to Legislative Council, authority to suspend or revoke an optometrist's license for violations of an optometry law that is comparable to other health-related regulatory boards in Arizona. Arizona Revised Statutes 32-1755 defines the grounds on which an optometrist's license can be suspended or revoked. ARS 32-1705 subsection E states that the Board may hire investigators to assist in investigations of violations of optometry laws. However, the Board is not statutorily required to investigate every complaint and the absence of such legislative mandate may have contributed to the Board's failure to conduct adequate investigations of consumer complaints. (See page 15 for a complete discussion of this issue.)

Arizona Revised Statutes 32-1759 makes the practice of optometry without a valid license a class 2 misdemeanor. The County and City Attorneys are responsible for prosecuting such criminal violations of optometry law.

SUNSET FACTOR: THE EXTENT TO WHICH THE  
BOARD HAS ADDRESSED DEFICIENCIES IN ITS  
ENABLING STATUTES WHICH PREVENT IT FROM  
FULFILLING ITS STATUTORY MANDATE

Since 1975 the Board of Optometry has each year proposed legislative changes in the optometry law to address deficiencies the Board perceived in its enabling statutes. The Board's attempts to amend the optometry law were ultimately successful during the 1979 legislative session. Changes in the law included:

1. Increased membership of the Board from three to five and the addition of one public member.
2. Continuing professional education requirements for renewal of licenses to practice optometry.
3. Changes in the subjects covered in the written examination for licensing.
4. Increased maximum amount of fees that can be charged for licenses, examinations and other Board services.

SUNSET FACTOR: THE EXTENT TO WHICH CHANGES  
ARE NECESSARY IN THE LAWS OF THE BOARD TO  
ADEQUATELY COMPLY WITH THE FACTORS LISTED  
IN THIS SUBSECTION

For a discussion of these issues, see pages 37, 51 and 92.

## FINDING I

### THE ARIZONA BOARD OF OPTOMETRY HAS NOT EFFECTIVELY PROTECTED THE PUBLIC FROM INCOMPETENT OR UNSCRUPULOUS OPTOMETRISTS.

The Board of Optometry has been deficient in its investigation and resolution of complaints from consumers for services rendered by optometrists licensed with the Board. The Board did not discipline a single optometrist as a result of a consumer complaint filed during the four-year period ending December 31, 1978, in spite of the fact that consumers filed 50 complaints with the Board during that period.

The Board has consistently: 1) failed to conduct proper complaint investigations to determine if professional incompetence or malpractice was involved, 2) ruled that it has no jurisdiction over complaints, or 3) considered complaints closed if optometrists made reparations to the complainants.

The actions or inaction of incompetent and unscrupulous optometrists can result in serious physical harm to the patient, including blindness. Because the Board has not been sufficiently aggressive in its investigation and resolution of consumer complaints, it has not effectively protected the health, safety and welfare of the public.

#### Legal Definition Of Optometry And Connection To Health And Welfare Of Public

Arizona Revised Statutes 32-1701, paragraph 3, defines the practice of optometry to include the examination of the eye for refractive error, recommendation of corrective lenses and recognition of eye diseases.

"...The examination and refraction of the human eye and its appendages, and the employment of any objective or subjective means or methods other than the use of drugs, medicine or surgery, for the purpose of determining any visual, muscular, neurological or anatomical anomalies of the eye, the use of any instrument or device to train the visual system or correct any abnormal condition of the eye or eyes and the prescribing, fitting or employment of any lens, prism, frame or mountings for the correction or relief of or aid to the visual function." (Emphasis added)



According to a Legislative Council opinion dated May 2, 1979\*, there is a definite connection based on legal precedent between the human eye and physical health:

"Since the practice of optometry involves the study of the structure, functions, deficiencies and corrections of the human eye, it has a direct relationship to the health of the human body. (citations omitted) Being thus related to public health, there can be little disagreement as to the authority of the legislature to regulate optometry and other allied health professions to safeguard the public health and welfare and to protect the public against ignorance, incapacity, deception or fraud because of incompetent or unscrupulous practitioners." (Emphasis added)

In other states, optometrists have been defendants in court cases that demonstrate the physical harm or damage to the health of the human eye that can occur in connection with the practice of optometry.

In Winograd v. Johnson, Colorado, No. 75-284, on December 16, 1976, the court concluded, in a case regarding failure of an optometrist to refer a patient who had glaucoma, that although optometrists could not legally "diagnose" glaucoma, they did have a:

"...right and duty to refer or direct a patient to a physician whenever...a patient exhibits signs or symptoms of a disease requiring treatment by an ophthalmologist or other physician."

In Fairchild v. Brian, 354 S. 2d 675, the Louisiana Court of Appeals on December 28, 1977, awarded the patient \$25,000 and her husband \$2,722.15 for medical expenses citing negligence by the optometrist:

"The optometrist was negligent for failing to refer the patient to an ophthalmologist and his negligence contributed to the delay in discovering a detached retina."

\* Appendix II contains a copy of this Legislative Council opinion.

Board Authority For Investigation

And Resolution Of Complaints

According to the information submitted by the State Board of Optometry during the 1979-80 state budgeting process, the Board is:

"...authorized to regulate the practice of optometry by: promulgating rules and regulations not inconsistent with this act, accrediting schools and colleges of Optometry, examining and licensing of applicants, denying, suspending or revoking a license for a just cause and investigating complaints regarding the optometric profession...." (Emphasis added)

In addition, Arizona Revised Statutes 32-1705 subsection E provides the Board with authority to obtain assistance for complaint investigation.

"The Board may hire investigators to assist in the investigation of violations of this chapter, and other employees required to enforce the provisions thereof." (Emphasis added)

Further, ARS 32-1755 defines the grounds upon which the Board of Optometry may, in its discretion, suspend or revoke an optometrist's license:

"After notice and hearing the board in its discretion may suspend or revoke the certificate of a registered optometrist for any of the following reasons:

- 1) Conviction of an offense involving moral turpitude
- 2) Obtaining a certificate by fraud or deceit
- 3) Conduct likely to deceive or defraud the public
- 4) Unprofessional conduct

- ...
- 12) Violation of any of the rules and regulations adopted by the board pursuant to its authority hereunder." (Emphasis added)

Unprofessional conduct has been defined in ARS 32-1701 paragraph 5, to include:

"...

- (g) Malpractice.
- (h) Any conduct or practice, including incompetency, which constitutes a danger to the health, welfare or safety of a patient or the public." (Emphasis added)

An analysis by Legislative Council revealed that the authority of the Board of Optometry to discipline optometrists is comparable to other health-related Arizona regulatory bodies. A memorandum from Legislative Council dated August 8, 1979\*, stated, in part:

"A selected review of statutory provisions\*\* prescribing grounds for denial, suspension or revocation of licenses in various medically-related fields indicates that the Optometry Board statutes fall within a common regulatory pattern and are not especially noteworthy for either their strong points or their weak points. In fact, the same 'boiler plate' language can be found throughout most of Title 32. If Arizona Revised Statutes section 32-1755 is regarded as 'weak' then the majority of Title 32 regulatory provisions must be viewed in the same manner."

Finally, according to Legislative Council, the Board of Optometry as a state agency is vested with the discretion to "informally" dispose of a case after a hearing to determine whether or not to suspend or revoke the certificate held by an optometrist. In a memorandum dated July 25, 1979,\*\*\* the Legislative Council stated:

- \* A full text of this memorandum is contained in Appendix III.
- \*\* See Arizona Revised Statutes sections 32-852 and 32-854.01 (podiatry); 32-924 (chiropractors); 32-1201 and 32-1263 (dentistry); 32-1401 and 32-1451 (medicine); 32-1554 (naturopathy); 32-1663 (nursing); 32-1927 (pharmacists); 32-2042 (physical therapy); 32-2081 (psychologists).
- \*\*\* A full text of this memorandum is contained in Appendix IV.



"Since the Board of Optometry is a state agency, it is clear that the provisions of the Administrative Procedure Act (Arizona Revised Statutes section 41-1001 et seq.) apply to all proceedings of the Board. (citations omitted) Thus, unless precluded by law, the provisions of Arizona Revised Statutes section 41-1009, subsection D, which allows for an informal disposition of a contested case, apply to actions by the Board of Optometry in deciding the legal rights, duties or privileges of a registered optometrist.

...the language of the statute does not require that the Board only suspend or revoke the certificate. In addition, there is no proscription against imposing a lesser penalty short of suspension or revocation. Because of this, the Board would not be prohibited from informally disposing of a case as allowed by Arizona Revised Statutes section 41-1009, subsection D.

...the term 'informal disposition' is not defined in Arizona Revised Statutes or by case law. It appears that an agreement to or default regarding the penalties listed in your letter (public letter of reprimand, probation, require specific educational courses, periodic review or supervision of an optometrist's practice by the Board)\* would qualify as an 'informal disposition'."

However, a review of the Board of Optometry's use of its statutory authority to conduct investigations and impose disciplinary actions against optometrists revealed that the Board's performance is more notable for its absence of appropriate action than for those limited actions that have been taken.

#### Complaints Considered By

##### The Board Of Optometry

The Board of Optometry reviews two types of complaints - consumer complaints and Board initiated complaints. Consumer complaints are those complaints filed by persons who believe they have received unsatisfactory or unacceptable optometric services or products from a licensed optometrist. Board initiated complaints are primarily concerned with possible violations of the Optometry Law regarding advertising, registration and use of the titles, "Optometrist" or "Optometry" by unlicensed persons.

Table 3 summarizes the number and basis of the complaints reviewed by the Board from January 1, 1975 through December 31, 1978.

\* Disciplinary penalties listed in the Auditor General letter to the Arizona Legislative Council.

TABLE 3

SUMMARY OF THE NUMBER AND BASIS OF  
COMPLAINTS RECEIVED BY THE BOARD OF  
OPTOMETRY FROM JANUARY 1, 1975 THROUGH  
DECEMBER 31, 1978

<u>Basis of Complaint</u>	<u>Number of Complaints Initiated By</u>		<u>Total Complaints</u>
	<u>Consumers</u>	<u>Board</u>	
Unacceptable Glasses	23		23
Misrepresentative Advertising	1	11	12
Basis of Complaint Cannot Be Determined			
Due To Inadequate Board Records*	7	2	9
Failure To Release Prescription	6		6
Unacceptable Contact Lenses	5		5
Not Practicing In State Within 60 Days After Being Granted License Through Reciprocity		5	5
Use of Another Optometrist's Name		4	4
Failure To Provide Goods Purchased	3		3
Unacceptable Services	3		3
Advertising As An Optometrist Without A License		3	3
Optometrist Charging Referral Fees	1	1	2
Failure To Keep Accurate Records	1		1
Failure To Register Address With County		1	1
Optometrist Convicted Of Felony	—	1	1
<b>Total Complaints</b>	<u>50</u>	<u>28</u>	<u>78</u>
<b>Percentages Of Complaints</b>	<u>64%</u>	<u>36%</u>	<u>100%</u>

\* For a discussion of inadequate Board records, see page 65.

As demonstrated in Table 3, consumer filed complaints constituted 64 percent of the complaints reviewed by the Board from January 1, 1975 through December 31, 1978.

However, for complaints filed in 1975 through 1978, the only discipline imposed by the Board against optometrists involved Board initiated complaints. The Board did not discipline a single optometrist as the result of a consumer initiated complaint during that period.

Table 4 summarizes the disposition of complaints reviewed by the Board from 1975 through 1978.

TABLE 4

SUMMARY OF BOARD OF OPTOMETRY DISPOSITIONS OF CONSUMER AND BOARD INITIATED COMPLAINTS FILED DURING CALENDAR YEARS 1975, 1976, 1977 AND 1978\*

	Board Disposition of Complaint										TOTALS	
	Discipline Imposed		No Disciplinary Action By Board		Reparations Made To Complainant		No Record of Disposition		In Process			Referred To Another Entity
	Revocation	Suspension	Cease and Desist Letter	Board Ruled It Had No Jurisdiction	Other	Board Ruled No Additional Action Taken	Record of Disposition	In Process	Referred To Another Entity			
<u>Consumer Complaints</u>												
Unacceptable Glasses or Contacts	-	-	-	5	13	6	2	2	-	28		
Unacceptable Service	-	-	-	-	2	-	1	-	-	3		
Other	-	-	-	1	1	6	1	-	-	12		
Basis of Complaint Cannot Be Determined Due To Inadequate Board Records	-	-	-	2	-	1	3	-	1	7		
Total	-0-	-0-	-0-	8	16	13	7	2	1	50		
% of Total	-0-%	-0-%	-0-%	16%	32%	26%	14%	4%	2%	100%		
<u>Board Initiated Complaints</u>												
Misrepresentative Advertising	-	1**	5	1	-	-	1	1	8	18		
Failure to Register Address with the County	-	1	-	-	-	-	-	-	-	1		
Not Practicing in State Within 60 Days of Receiving License by Reciprocity	5	-	-	-	-	-	-	-	-	5		
Other	-	-	-	-	-	-	1	1	-	2		
Basis of Complaint Cannot be Determined Due to Inadequate Board Records	-	-	-	-	-	-	2	-	-	2		
Total	5	2***	5	1	-0-	-0-	4	2	8	28		
% of Total	18%	7%	18%	3%	-0-%	-0-%	14%	7%	30%	100%		

\* Appendix V contains a complete listing of each complaint, its source and disposition.  
 \*\* Being appealed.  
 \*\*\* Suspensions were for a period of three days each.



As shown in Table 4, the five license revocations, two suspensions and five cease and desist letters that have been imposed by the Board during 1975 through 1978 all related to Board initiated complaints concerning advertising and administrative matters.

In resolving consumer complaints, the Board has consistently: 1) failed to conduct proper complaint investigations to determine if professional incompetence or malpractice was involved, 2) ruled that it has no jurisdiction over complaints, or 3) closed complaints because optometrists made reparations to the complainants.

#### Failure To Conduct Proper

#### Complaint Investigations

The Board of Optometry has used a process for investigating consumer complaints that is not consistently applied and inadequate to determine if professional incompetency or malpractice was involved.

The Legislative Council, in a memorandum dated July 20, 1979\*, noted that while Arizona Optometry Statutes do not specifically require the Board to investigate every complaint, the failure to do so would provide little protection to the public:

"...Arizona Revised Statutes, Title 32, Chapter 16 does not specifically mandate that every complaint to the Optometry Board must be investigated. A general rule of law is that the powers and duties of an administrative agency must be measured by the statutes creating them. Pressley v. Industrial Commission, 73 Ariz. 22, 236P.2d 1011 (1951). Under this rule a strict interpretation of chapter 16 would result in the conclusion that the Optometry Board is not required to investigate every complaint submitted to it."

\* Appendix VI contains a full text of this memorandum.

"However, it can also be argued that the duty to investigate complaints is an implied duty which is necessary to protect the public and to effectively regulate optometrists. A more reasonable interpretation of chapter 16 results in the conclusion that the statutory scheme makes little sense if the Board has no duty to investigate complaints. The legislature has defined 'unprofessional conduct' (Arizona Revised Statutes section 32-1701, paragraph 5), has provided the Board with authority to hire investigators to assist in investigations of unprofessional conduct (Arizona Revised Statutes section 32-1705, subsection D) and has prescribed hearing procedures for disciplinary action for unprofessional conduct (Arizona Revised Statutes section 32-1755). A failure to investigate complaints of unprofessional conduct would render these statutory provisions meaningless and would result in little protection for the public against unprofessional conduct. Arguably this would defeat the legislative intent of these sections.

We are unable to predict how an Arizona court would resolve these arguments." (Emphasis added)

The Legislative Council also discussed what constitutes a proper "investigation" as follows:

"...a proper investigation would seem to include, as a minimum, the following procedures:

- a. Interviewing the complainant, the optometrist who is the subject of the complaint and any third person who might have knowledge of the facts of the complaint.
- b. Verifying any previous complaint against the optometrist and the disposition of the complaint.
- c. Checking for any previous complaints by the complainant.
- d. Identifying the generally accepted practice in the profession for the act which is the subject of the complaint.

...

Finally, Arizona Revised Statutes section 41-1010, relating to evidence at hearings in a contested case, offers some insight into the kind of evidence which should be gathered in an investigation: it must be 'substantial, reliable and probative'." (Emphasis added)

Our review of the 50 consumer complaints the Board has received from January 1, 1975 through December 31, 1978 revealed that only two complaints were sufficiently investigated to satisfy the criteria shown above. The remaining 48 consumer complaints were resolved by a mere review of written correspondence from the complainant and the optometrist involved. There is no documentation of Board: 1) interviews of all parties involved, 2) verification of previous complaints against the optometrist and their disposition, 3) review of complaints by the same complainant, or 4) identification of the generally accepted practice in the profession. The process of depending upon written correspondence provided by the complainant and the optometrist does not appear to satisfy the requirement that evidence be "substantial, reliable and probative."

The following cases illustrate the consistent failure of the Board to adequately investigate the circumstances surrounding a consumer complaint in spite of allegations of professional incompetence.

#### CASE I

Board records include a letter dated June 6, 1978, from a patient to an optometrist requesting redress for a pair of unsatisfactory glasses:

"My last visit to you, Friday, May 12, 1978, prompts this letter. I could not believe what you said i.e., that even though you prescribed the glasses, that you know and stated that you over corrected, that the computer agrees, that the glasses are unsatisfactory, there is nothing that can be done to correct the situation.

This has gone on since December 1977. As I cannot wear the glasses you prescribed, I am wearing my old ones. My old ones are several years old and need to be replaced. Time is of essence.

All I can say is; you examined me, you determined what I needed, you prescribed the glasses. I paid you for your services. I want and need a pair of glasses that I can see with properly and made to the high standards of your profession.

You have the opportunity to rectify a serious error gracefully." (Emphasis added)



The optometrist refused to provide the patient with either a new pair of glasses or a refund of money. The patient subsequently filed a complaint with the Board; however, the Board refused to investigate the matter as it was not within their jurisdiction.

Situation - On September 5, 1978, the Board received the following complaint:

"Attached please find:

1. Letter to (the Optometrist) (sent Return Receipt Requested)\*
2. Prescription by (the Optometrist)
3. Prescription by another Optometrist

Because (the Optometrist) has chosen to ignore my letter, the fact that the glasses that he prescribed are unsatisfactory and I was unable to wait any longer, I finally had another Optometrist make me a pair of glasses. These glasses are satisfactory and they are made to the fine standards of your profession.

I am in no position to judge his competence, that is for you to decide. However, I feel that he did not prescribe or deliver a proper pair of glasses, although he accepted full payment for them.  
(Emphasis added)

Board Action - The Board sent the following letter dated September 20, 1978 to the complainant.

"The Arizona State Board of Optometry has reviewed the correspondence you recently submitted for consideration.

In accordance with state law, the Board has no control over the fees a doctor charges his patients.

If you feel the matter has not been resolved, you may wish to seek advice of counsel for civil action."

No additional Board action was taken.

\* The consumer is referring to the June 6, 1978 letter quoted on page 24.

Comment

Although the complainant raised the question of professional incompetence, the Board determined this matter did not constitute a violation of optometry law and was, therefore, not within its jurisdiction. Board records do not, however, indicate any investigation of the case to determine possible incompetence of the optometrist involved. (See page 65 for a discussion of inadequate recordkeeping and see page 15 for a discussion of inadequate investigation procedures.)

The Office of the Auditor General requested the Ophthalmology Department of the University of Arizona Medical School to inspect the prescriptions prepared by: 1) the Optometrist against whom the complaint was filed, and 2) the Optometrist who subsequently prescribed a pair of glasses satisfactory to the complainant. The Ophthalmologists from the Medical School\* stated:

"...I think the difference in the two prescriptions are highly significant and cast out on the competency of the individual who obtained the first prescription that the patient was unhappy with.

I believe that the consumer was justified in registering his complaint. I further believe that additional investigation is in order to determine if additional complaints of perhaps a similar nature have been launched against the practitioner responsible for the error. Should the results of such an investigation be negative, I believe it would be premature to pass any judgement on this episode regarding professional competency."

It should be noted that the Optometrist named in the above complaint was also named in three other consumer complaints filed with the Board as of June 30, 1979. The Board has not initiated any investigations into the professional competency of this Optometrist.

Further, our review of Board records revealed that as of December 31, 1978, eight optometrists had 26 consumer complaints filed against them. This represents 52 percent of all the consumer complaints filed with the Board from January 1, 1975 through December 31, 1978 and yet the Board has not reviewed any of these six optometrists for professional incompetency.

\* Appendix VII contains a copy of the letter containing this statement.



No Jurisdiction Over The  
Complaint

From January 1, 1975 to December 31, 1978 the Board of Optometry received eight consumer complaints which were judged by the Board to be not a violation of the Optometry Law, in that they constituted a dispute over fees.

The following case is an illustration.

Case 2

In January 1979, the Board of Optometry received a complaint alleging that an optometrist had incorrectly and improperly prescribed contact lenses. The Board did not take any action on the complaint because, in the Board's view, the complaint involved a fee dispute.

Situation - On January 18, 1979 the Board received the following letter:

"Regarding my problem with a local optometrist I am pleading for a hopeful solution.

In Oct. 30 - 78 I took my 19 yr. old son to (the optometrist), optometrist for an eye examination and upon a complete exam of his vision, I was advised to have him fitted with hard contact lens. Being a disabled veteran and unemployed I of course asked to see if arrangements could be made to pay the costs of \$200.00 on installments, I was rejected and told it would be on a cash bases(sic) only. There-fore I have to beg and borrow \$200.00 from friends. After a few day's my son encountered a lot of problems with his new lens. Then while in Gila County (Globe AZ) I took my son to another optometrist...and upon a complete and thorough eye exam, he said my son could definately not wear any kind of lens, soft or hard and prescribed and issued him some eye glasses which immediately improved his vision 100 percent. At my earliest convenience due to my disability and weather conditions, I confronted (the optometrist) today and explained the situation to him, and asked for an adjustment or compromise of some sort, and he was very rude to my son and I and hollered numerous false accusations and blah - blah - blah Also flatly refusing to make any kind of adjustment of partial refund of any nature...I personally feel that the reason he got so up tight, (sort of speak) was when he saw my son wearing eye glasses and also realized that he was contradicted by another optometrist on wearing lens. I strongly feel I was conned by (the optometrist) not to mention fraud in other words I was left holding the bag...." (Emphasis added)



Board Action - The Board requested an explanation from the second optometrist and received this reply on April 9, 1979:

"The above was examined by us on 12-14-78. The father wanted (the boy's) eyes examined and reported contacts (hard) had not given clear or comfortable vision. How recent was not mentioned, but the son had not worn any correction for some time.

He inquired about soft contact lens and I remember to the best of my knowledge saying to recheck with his former doctor but that I would not recommend the soft lens due to the degree of astigmatism.

He said he did not wish to go back again and ordered conventional glasses." (Emphasis added)

Based on a review of this correspondence and without obtaining any further information, the Board closed the case and sent a letter dated May 9, 1979 explaining its lack of jurisdiction over fee disputes:

"Upon review, the Board determined that this matter is not within their jurisdiction. (The optometrist) has not violated Optometry Law, the only area upon which this Board can rule. Because of this, we must consider the matter closed.

If you wish to pursue the matter, you may have other recourse through civil action by private counsel."

Comment

Arizona Revised Statutes section 32-1701, paragraph 5 as amended by Laws 1979, Chapter 50, effective April 17, 1979 defines "unprofessional conduct" as meaning:

"...

(g) Malpractice.

(h) Any conduct or practice, including incompetency, which constitutes a danger to the health, welfare or safety of a patient or the public."

In addition, the Board has prescribed by regulation in A.C.R.R. R4-21-04, subsection G, that:

"(f) For materials dispensed by an optometrist or any of his agents, the failure, neglect or refusal to be sure prescriptions are filled accurately and with quality workmanship in ophthalmic materials shall be deemed to constitute 'unprofessional conduct'."

According to the Legislative Council in an memorandum dated April 24, 1979:\*

"Thus, the board clearly has jurisdiction to receive a complaint that an optometrist is guilty of unprofessional conduct as defined by statute and regulation or that a violation of a statutory provision or regulation has occurred. However, the response of the board is limited to holding a hearing on whether the certificate of the optometrist should be suspended or revoked. No authority exists for the board to remedy unsatisfactory services or to require replacement of defective ophthalmic materials. A dissatisfied patient must resort to other legal procedures to remedy these perceived wrongs."

Complaints Closed Because  
Optometrists Made Reparations  
To The Complainants

From January 1, 1975 to December 31, 1978 the Board of Optometry has closed 13 consumer complaints because optometrists made reparations to the complainants. The Board did not pursue any of these complaints to determine if unprofessional conduct had occurred.

The following case is an illustration.

\* A full text of the memorandum is contained in Appendix VIII.

Case 3

In March of 1974, the Board of Optometry received a complaint against an optometrist alleging professional incompetence on the part of an optometrist. The Board of Optometry subsequently closed the case stating the matter had been "settled amicably" because the optometrist had partially reimbursed the patient the cost of a pair of contact lenses. The only action taken by the Board to ascertain the facts in this case was to contact the optometrist by telephone and request that the optometrist submit a written explanation to the Board.

Situation - On March 21, 1974 the Board of Optometry received the following complaint alleging professional incompetence on the part of an optometrist.

"After making an inquiry by telephone at your office, I was told that, legally, an optometrist is not allowed to prescribe drugs. It is because my optometrist did prescribe a drug to me that I am filing this letter of complaint.

I wish to register a complaint against (the optometrist), on the following grounds:

- 1) I received from (the optometrist) sub-standard instructions regarding the cleaning and ascepticizing of the Soflens contacts he prescribed for me. Later, I contacted a virus infection in my eyes which caused me pain, loss of work time, additional expense, as well as possible permanent damage.
- 2) (The optometrist) prescribed the drug NEOSPORIN to me.

Attached to this letter is an account of all the events that have transpired from the time I first saw (the optometrist) to the present time."



"Saturday, March 9

I woke up desparate! My eyes bothered terribly and the drops seemed to make it worse. I called (the doctor), because my M.D. was not in on Saturday. (The doctor) fit me in around noon. He looked at my eyes and said that the irritation was caused by a virus. He then wrote the name NEOSPORIN on a piece of paper. He said that an M.D. could write a prescribe this in drop form and that it would cost me \$6-\$8. He said that I could go to any drug store and buy the very same thing in ointment form for less than half the money. He told me that I was to put some of this in each eye before I went to bed, and to then hold the eyelid shut until the ointment melted. He also said that on the box that it would say 'Do not use in your eyes', but that it was the exact same thing as the drops and that I was to use it anyway."

Comment

It should be noted that these are two types of NEOSPORIN. One is a prescription drug that is used to treat eye inflammations. The other is an over-the-counter drug that contains a specific warning against its use in the eyes. The over-the-counter NEOSPORIN was the drug the Optometrist recommended his patient use in her eyes.

Board Action - The Board of Optometry, upon receipt of the complaint, requested the optometrist by telephone to respond to the allegations in the complaint. The Optometrist responded as follows regarding the use of drugs:\*

"On February 15, 1974 another visit - tests run. She complained of eyes itching, hurting and redness and blurred V.A. Rr, Eye. Said she had a cold. Changed the Rt lens to 7.00N I believe I gave her some prefrin samples at this time to use along with the red eyes to help clear the inflamation. Returned on March 5, 1974 said she couldn't wear the CL. & that A M.D. was treating her eye lids. I told her I seen several cases of conjuvetivitis lately & It probably was due to a virus. I have sent some cases to (the doctor) and (the doctor) for the same, and they were having trouble getting it cleared up. She said the medicine her doctor was using didn't seem to be helping too much. (When I first came to Scottsdale I took over the eye records from (the doctor) and he had told me that Neosporine that you could by over the counter without a prescription worked very effectively for eye inflamations.)

\* Errors in spelling and grammar are as contained in the optometrist's response.

So I suggested that she might try Neosporine (I did not prescribe) I also told her the lable said not to use in the eye but if she tried it and it made it worse not to use it, but she should return to her M.D. - I did spell the work Neosporin on a plane piece of paper, not a perscription blank and I did not sign it." (Emphasis added)

Regarding the instruction for soflens care the optometrist responded:

"...I carefully explained that the F.D.A. approved method of serilization was with the aseptieror and that I must give her one, and that the SRCL was listed as a drug as a whole package. The soflens, the case, the salt tablets, the saline bottle, and the aseptisizon I also explained that I wore the soflens and had for almost a year and had not boiled my lenses one time. We had found the better way of caring for the lens to stop the build up of protien has to clean the lens in soaclens upon removal and then clean with hot tap water, & then in the saline solution and then to soak them in the case filled  $\frac{1}{2}$  with saline solution and  $\frac{1}{2}$  with soaclens, and that I had not had any problem with my lenses building up a residue or a film nor did I get any infections, and I suggested that she might do the same, again telling her that the F.D.A.'s approved method was I had stated above.

I hope this explains my position - I certainly meant no harm to any one only trying to help my patient's needs, & I hope no legal action will have to be taken."

Board Action - At its May 11, 1974 meeting, the Board closed the complaint by stating:

"...the Board considers this matter closed as the complaint was settled amicably."\*

\* Available Board records indicate that the patient was reimbursed \$65 of \$155 paid to the optometrist. It should be noted that the patient had filed her complaint with the Board after she had been reimbursed the \$65 by the optometrist.



Comment

On November 13, 1978, another patient of the optometrist (discussed in the above complaint) filed a civil suit against the optometrist in Maricopa County. In November 1978, the Maricopa County Liability Review Board concluded that the optometrist had provided his patient with substandard care and stated in its advisory opinion:

"We find in favor of the plaintiffs (patient).

For the guidance of consul, it is the conclusion of the panel that on August 11, 1977, (the doctor) failed to comply with standard of care which would be practiced by a reasonable and prudent optometrist in this community...The standard of care required that he either perform additional tests for symptoms of glaucoma or refer to an ophthalmologist." (Emphasis added)

On June 5, 1979, after two days of trial, the above civil suit was settled out of court and the patient was to receive \$100,000 for damages.

According to Board minutes, a discussion of the Board's responsibility to pursue complaints was discussed on March 14, 1977:

"There was a general discussion regarding complaints. (A Board member) asked (an Assistant Attorney General) what form of action the Board can take against an optometrist. (An Assistant Attorney General) stated that in most cases where an agreement cannot be reached, investigators are hired to obtain all the facts surrounding the case. Because the Board does not have the funds to do this, it can be requested of the A.G.'s office and they may be able to assist, time permitting. (A Board member) asked what form of disciplinary action may be taken and was told that it is entirely up to the discretion of the Board; suspension, probation, revocation, etc. It is also up to the Board to decide whether or not to further investigate a complaint even if it has been dropped by the complainant." (Emphasis added)



In our opinion, the Board of Optometry has failed to demonstrate significant effectiveness in the investigation and resolution of consumer complaints regarding the optometric profession. Its policy of dismissing complaints if a remedy is provided to the complainant avoids the question of whether an unscrupulous or incompetent optometrist is practicing in Arizona. In addition, the Board determinations that consumer complaints are "fee disputes" or that violations of the Optometric Law have not occurred without so much as a minimal investigation of the facts and evidence in the complaint constitutes an inadequate basis for such determinations. Therefore, the Board of Optometry has not provided the consumer of optometric services with a significant avenue for thorough investigation and judicious resolution of complaints.

Board Reasons For Inactivity

According to Board members, the Board has been constrained in its investigatory activities because of a lack of sufficient funds. Our review of the Board, however, revealed that the Board has had sufficient funds to conduct investigations.

From fiscal years 1975-76 through 1978-79, the Board has had a surplus of available funds ranging from a low of \$5,479 to a high of \$9,190. These funds would have been sufficient to provide for a minimum of 31 investigations in any one year as shown below.

	<u>Fiscal Year</u>			
	<u>1975-76</u>	<u>1976-77</u>	<u>1977-78</u>	<u>1978-79 (Estimated)</u>
Beginning Fund Balance	\$ 5,479	\$ 9,190	\$ 9,126	\$ 6,030
Board Receipts	11,975	9,436	8,186	23,715
Board Expenses	(8,264)	(9,500)	(11,282)	(12,851)
Ending Fund Balance	<u>\$ 9,190</u>	<u>\$ 9,126</u>	<u>\$ 6,030</u>	<u>\$ 16,894</u>
Number of Investigations That Could Have Been Conducted With Available Funds:				
Contracted Investigator	<u>31</u>	<u>51</u>	<u>51</u>	<u>34</u>
State Employee	<u>40</u>	<u>67</u>	<u>67</u>	<u>44</u>

The above calculations are based upon the history of Board investigative information. For example: In May of 1978 the Board of Optometry paid \$60.00 in per diem for a licensed optometrist to conduct a two-day investigation. In October of 1978, a private investigator charged \$12.00 per hour for seven hours work plus \$37.20 in expenses to conduct an investigation. According to Mr. Jack Keaton, Chief, Special Investigations Bureau, Department of Economic Security, the average Investigator II classification would receive \$7.27 per hour.

It should be noted that the greatest number of consumer complaints received by the Board during fiscal years 1975-76 through 1978-79 was 17 in 1978-79. Therefore, the Board has had more than sufficient funds to conduct investigations into consumer complaints.

Health Occupations Council As  
Alternative To Individual  
Regulatory Bodies

A Council of State Governments\* publication entitled, State Regulatory Policies - Dentistry and the Health Professions,\*\* contains a description of a model law creating a State Health Occupations Council. Composed of one representative from each health area subject to regulation through the law and at least one-third membership representing the general public, the Council is authorized to review and coordinate licensing boards regulations, establish discipline and enforcement procedures, and resolve scope of practice questions. Such a Council would also coordinate certain functions currently performed by individual licensing boards by centralizing budgeting, staffing, investigations and professional discipline.

According to the Council of State Governments, the major purpose of such a Council is to maintain the perspective of public interest in the regulation of professions and occupations:

\* The Council of State Governments is a joint agency of all the state governments - created, supported and directed by them. It conducts research on state programs and problems; maintains an information service available to state agencies, officials, and legislators; issues a variety of publications; assists in state-federal liaison; promotes regional and state-local cooperation; and provides staff for affiliated organizations.

\*\* The model law creating a State Health Occupations Council is contained in Appendix X.

"Historically, once licensed, the groups tended to be regulated by autonomous boards composed primarily of representatives from the profession. Many have felt that such a system dominated by practitioners will primarily protect the interests of the individual professional groups rather than those of the consumer. State policymakers often have been frustrated in their attempts to ensure that the licensure and regulatory process takes into consideration broad public policy issues such as costs, availability of services, and fragmentation of health care delivery." (Emphasis added)

#### CONCLUSION

The Board of Optometry has been deficient in its investigation and resolution of complaints from consumers for services rendered by optometrists licensed with the Board. The Board has consistently: 1) failed to conduct proper complaint investigations to determine if professional incompetence or malpractice was involved, 2) ruled that it has no jurisdiction over the complaints, or 3) considered complaints closed if optometrists made reparations to the complainants.

Because the Board of Optometry has not been sufficiently aggressive in its investigation and resolution of consumer complaints, it has not effectively protected the health, safety and welfare of the public.

#### RECOMMENDATION

The present performance of the Board of Optometry regarding its investigation and disposition of consumer complaints does not warrant the continuation of this activity on the Board's part without significant improvements.

It is recommended that consideration be given to one of the two following alternatives to improve protection of the consumer:



Alternative I

- (a) Arizona Revised Statutes, Title 32, Chapter 16, be amended to provide the Board of Optometry with the specific requirement to investigate all complaints and enforcement responsibilities including the power to censure an optometrist who has provided faulty goods or services.
- (b) The Board of Optometry establish specific procedures for the investigation and resolution of all complaints. These procedures should meet the standards of a minimum investigation cited by the Arizona Legislative Council.

Alternative II

The Legislature and Governor approve a Health Occupations Council as outlined by the State Council of Governments. This alternative would apply to all health regulatory entities and is also included in the recommendations of the Board of Dental Examiners performance audit.

## FINDING II

### THE EXAMINATION PROCESS OF THE ARIZONA BOARD OF OPTOMETRY IS NOT IN COMPLIANCE WITH STATE LAW AND IS OF QUESTIONABLE VALIDITY.

Persons wishing to be licensed as an optometrist in Arizona, who have not been licensed in other states, must pass an examination prepared and administered by the State Board of Optometry. Our review of the Board's examination process revealed that the Board has failed to maintain sufficient records to adequately document the preparation, administration and grading of its examinations. This lack of documentation precludes a thorough, independent, and qualitative evaluation of the Board's examination process. However, our review of the limited documentation that is available 1) indicates that the Board is not in compliance with state law, and 2) raises serious questions regarding the validity of the Board's entire examination process.

#### Noncompliance With State Law

Arizona statutes specify that an examination shall be given to persons desiring to practice optometry who have not been licensed in another state or who do not meet requirements for being granted a license by reciprocity. ARS 32-1723 provides that in order to take the examination, an applicant must meet the following requirements:

1. Be of good moral character.
2. Must have graduated from a high school accredited by the University of Arizona or an equivalent education.
3. Must have graduated from a university or school teaching the profession of optometry accredited by a nationally accepted accrediting body of optometric education.
4. In lieu of accredited education, an applicant may furnish a license granted by another state or foreign country showing the applicant has held the license for not less than five years and is an active practitioner, and furnish additional evidence of knowledge and ability to practice optometry as the Board requires.

ARS 32-1724 provides that applicants who meet these requirements must be administered an examination in the subject matter currently being taught in the accredited universities or schools of optometry.

ARS 32-1724 further states:

"B. A grade of not less than seventy-five per cent in each subject is required to pass the examination successfully."

According to the President of the Board of Optometry when the Board's written examinations are graded, the examinations are "curved." Webster's New Collegiate Dictionary, defines a "curved" examination as one that measures individuals against one another rather than against a standard:

"...a distribution indicat(ing) the relative performance of individuals measured against each other that is used especially in assigning good, medium or poor grades to usually predetermined proportions of students rather than in assigning grades based on predetermined standards of achievement." (Emphasis added)

Thus, when an examination is "curved" usually a predetermined proportion will be assigned passing and failing grades.

According to a statement made by the Board president on August 9, 1979, the 1979 written examination will be statistically curved, passing all candidates receiving scores not less than one standard deviation below the mean score. This statistical method of assigning a pass/fail grade will consistently produce a pass rate of approximately 84.13 percent regardless of the raw examination results.

A review of the pass rates of the Board's 1977 and 1978 examinations has revealed that such a predetermined proportion may have existed. In 1977, the percentage of applicants passing the Board's written examination was 85.19 percent while the percentage passing in 1978 was 84.44 percent.



According to the Legislative Council, the Board's practice of curving the written examination is not in compliance with ARS 32-1724. In an August 21, 1979 memorandum\*, the Legislative Council stated:

"There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses'. The language of Arizona Revised Statutes section 32-1724 plainly expresses that in order for an applicant to successfully pass the optometry examination, the applicant must receive a grade of at least 75% in each tested subject.

The term 'per cent' means '...as many parts in the hundred or so many hundredths.' Black's Law Dictionary, 1293 (4th Ed. 1951). If the optometry examination consists of only a written examination and that examination is graded on a curve, the board of optometry is not complying with the statutory mandate since the passing rate on an examination graded on a curve would not necessarily be 75%.

In Laws 1979, Chapter 50, section 6, Arizona Revised Statutes section 32-1724 was amended in part to remove the requirement of a written examination. It appears then that the optometry examination could consist of an oral or practical examination as well as a written examination. However, the requirement still remains that, in order to pass the examination, an applicant must receive a grade of not less than 75% in each subject."

Questions Regarding The Validity  
Of The Board's Entire Examination  
Process

Until 1977, applicants for licensure as an optometrist in Arizona had the option of taking either a written examination administered by the National Board of Examiners in Optometry (NBEO) or a written examination administered by the Arizona State Board of Optometry. Since 1977, applicants no longer have the option of taking the NBEO examination and must take an examination administered by the Arizona State Board of Optometry. Our review of the Board's examination process raises serious questions regarding the validity of the entire process in that: 1) the Board has failed to maintain sufficient records to adequately document the preparation, administration and grading of its examinations, and 2) the preparation and grading of specific examination sections are the responsibility of individual Board members who may not be qualified or competent to perform those functions.

\* Appendix IX contains the full text of this memorandum.

Lack Of Adequate Documen-  
tation Regarding Examinations  
Administered By The Board

The Board of Optometry does not maintain adequate files of the annual written examinations which must be passed by an applicant in order to be licensed. The Board's policy with regard to written examinations that have been administered to applicants and graded is as follows:

- The Board does not retain the examinations taken by applicants that passed.
- The Board destroys those examinations taken by applicants that failed 60 days after the examination is administered.

As a result, the examinations that have been administered to applicants and graded by the Board are not available for review.

Further, the Board has not retained file copies of written examinations in an orderly manner. For example, when the Office of the Auditor General requested copies of all Board-developed and administered examinations, the Board was able to provide only 18 of an estimated 44 examination sections that have been developed and administered by the Board since 1975. In addition, only one examination section was identified as to its year of administration. Complete sets of past annual examinations could not be reviewed, thus precluding a thorough, independent, and qualitative evaluation of those examinations administered by the Board.

Questionable Board Procedures  
For Developing And Grading The  
Optometry Examination

Until 1977 applicants for licensure as optometrists in Arizona were allowed to submit scores from the National Board of Examiners in Optometry (NBEO) in lieu of taking the examination prepared by the Arizona State Board of Optometry. However, in 1976, the Board decided not to accept the NBEO scores, and instead required applicants to take an examination developed by members of the Board.

The optometry examination for applicants not licensed by other states or eligible for reciprocity consists of practical or clinical examination and a written examination.



The practical or clinical examination consists of 1) members of the Board observing each applicant conducting an eye examination, and 2) a test of each applicant's ability to identify various eye diseases as shown on pathology slides.

The written examination is developed and administered by individual Board members. The process used by the Board to develop, administer and grade these examinations is as follows:

- Each Board member is responsible for drafting three or four examination sections.
- There is no requirement that members of the Board review the examination sections prepared by other members.
- The Board member who drafted an examination section is also responsible for grading the examination section.
- Multiple choice and true/false questions are machine graded.
- If every applicant misses the same true/false or multiple choice question, the question is deleted from the examination.
- When grading essay questions, Board members look for specific facts and award points when these facts are mentioned by the applicant.
- When grading essay questions, Board members may award extra points if the applicant mentions facts not considered when the questions are prepared.
- There is no requirement that Board members review essay question points awarded by other Board members.

The above process relies heavily on the ability and competency of the individual Board members to 1) prepare examination sections that are a valid test of an applicant's knowledge, and 2) correctly and equitably award points to applicants. Individual Board members may not possess such ability or be competent to perform those functions, especially if they have not received specific training or education.



A Study of Professional and Occupational Licensing in California, published in 1977, cited a national authority on occupational licensing that explained the problems of locally developed examinations:

"According to Benjamin Shimberg of the Educational Testing Service and author of several studies on occupational licensing, a source of many problems afflicting the examination process of licensing boards is the fact that: (Emphasis added)

'Board members have taken it upon themselves to develop and administer examinations without any training for the task and without outside help'."

The study also identified another problem regarding Board-prepared examinations. Namely, the quality and appropriateness of the questions asked:

"Even more vexing problems exist with regards to the actual content of the examination. The material content of the exam ought to be limited to those types of questions that may be shown to have pertinency to the professed goals of licensure.

There have been cases cited by critics to indicate that some boards ask questions which bear no relation to public welfare except by the most generous expansion of logic. Illustrative of this category are board examinations which test an applicant's knowledge of the custom, history or theory of the occupation and which require essays on esthetics or any understanding of helpful business methods."

According to Benjamin Shimberg of the Educational Testing Service, the problems of Board-prepared examinations could be avoided if boards turned the job of designing tests over to outside testing experts or used the national testing programs developed by many of the trade and professional associations.

It should be noted that the U.S. Equal Employment Opportunity Council requires that, when a professional examination has been shown to be discriminatory, it must be validated to demonstrate a positive correlation between the examination and job performance. According to the Deputy Director of the NBEO, the NBEO examination has been validated to demonstrate such a correlation. Further, the NBEO is contemplating the possibility of contracting with either the Educational Testing service or the Psychological Corporation to develop a new examination. The examinations prepared by the Board of Optometry have not been validated for compliance with U.S. Equal Employment Opportunity Council requirements.

According to the NBEO as of April 1979, 35 states accepted passage of their examination as either partially or completely, fulfilling the written examination requirement for licensure. Table 5 lists the states accepting the NBEO examination as of April 1, 1979.

TABLE 5

STATES ACCEPTING THE WRITTEN EXAMINATION  
OF THE NATIONAL BOARD OF EXAMINERS IN  
OPTOMETRY AS OF APRIL 1, 1979

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Alabama	Maine	Oregon
Alaska	Massachusetts	Pennsylvania
California	Michigan	Rhode Island
Colorado	Minnesota	South Dakota
Connecticut	Missouri	Tennessee
Delaware	Montana	Utah
Florida	Nebraska	Vermont
Idaho	New Hampshire	Virginia
Illinois	New Jersey	Wisconsin
Indiana	New York	Wyoming
Iowa	North Carolina	Washington
Kentucky	North Dakota	

In addition, a survey of Arizona professional regulatory agencies by the Office of the Auditor General revealed that 13 of the 19 agencies surveyed utilize national or regional examinations. Table 6 displays the results of this survey.



TABLE 6

SUMMARY OF THE UTILIZATION OF NATIONAL  
OR REGIONAL EXAMINATIONS BY  
AGENCIES AS OF AUGUST 15, 1979

<u>Professional* Regulatory Agency</u>	Utilize National or Regional Examinations?	
	<u>Yes</u>	<u>No</u>
BOARD OF OPTOMETRY		X
State Board of Accountancy	X	
State Bar of Arizona**	X	
State Board of Barber Examiners		X
State Board of Chiropractic Examiners**	X	
State Board of Cosmetology		X
Board of Dental Examiners**	X	
State Board of Education		X
State Board of Funeral Directors and Embalmers	X	
Board of Medical Examiners	X	
State Naturopathic Board of Examiners		X
State Board of Nursing	X	
Arizona Board of Osteopathic Examiners in Medicine and Surgery	X	
Arizona State Board of Pharmacy	X	
Board of Physical Therapy Examiners	X	
State Board of Podiatry Examiners		X
State Board of Psychologist Examiners	X	
State Board of Technical Registration***	X	
Arizona State Veterinary Medical Examiners Board	X	
Total	<u>13</u>	<u>6</u>

\* Webster's Seventh New Collegiate Dictionary defines a profession as:  
"A calling requiring specialized knowledge and often long and intensive  
academic preparation." Accordingly, the professional regulatory agencies  
were determined by a post-high school educational requirement to enter the  
profession.

\*\* Agency may require a state examination in addition or in lieu of national  
or regional examination.

\*\*\* The State Board of Technical Registration administers examinations for  
six professions and utilizes five national and one state examination.

As illustrated in Table 6, the majority of Arizona's professional regulatory agencies utilize national or regional examinations.

According to available records, the Board decided to discontinue accepting NBEO scores in 1976 because of 1) the infrequency of NBEO examinations, 2) concerns regarding optometry school curricula, 3) inconsistency between NBEO subject matter and Arizona state law, and 4) the possible illegality of using NBEO scores for Arizona.

However, a review of the above reasons revealed that 1) the Board administers its examination no more frequently than does the NBEO, 2) recent legislation rendered problems with optometry school curricula and inconsistencies with Arizona state law moot, and 3) the Board could have used its rule-making authority to remedy any legal problems associated with using NBEO scores.

The Board made its decision to discontinue accepting the NBEO scores at its October 18, 1976 meeting. The following are excerpts from the minutes of that meeting which document the Board's reasoning.

Frequency of the NBEO  
Examination

Excerpt From October 18, 1976 Meeting

"The Board is required by law to give qualifying written examinations to candidates at least once a year. It is no more difficult to give written examination to five or fifty candidates."

One reason purported by the Board for discontinuing the practice of accepting NBEO scores was that the NBEO examination is given only once a year. However, it should be noted that since 1976, the Board has administered its examination only once a year -- a frequency that is less than that of any other professional regulatory body in Arizona as shown in Table 7.

TABLE 7

COMPARISON OF EXAMINATION FREQUENCY FOR ENTRANCE  
INTO THE PROFESSION BETWEEN THE BOARD OF OPTOMETRY  
AND OTHER ARIZONA PROFESSIONAL REGULATORY BODIES  
AS OF AUGUST 15, 1979

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<u>Professional Regulatory Body</u>	<u>Number of Examinations Offered Per Year</u>
BOARD OF OPTOMETRY	one
State Board of Accountancy	two
State Bar of Arizona	two
State Board of Barber Examiners	four
State Board of Chiropractic Examiners	two
State Board of Cosmetology	eleven
State Dental Board*	four
State Board of Education	twelve
State Board of Funeral Directors and Embalmers	two
Board of Medical Examiners	two
State Naturopathic Board of Examiners	two
State Board of Nursing	two
Arizona Board of Osteopathic Examiners in Medicine and Surgery	two
Arizona State Board of Pharmacy	two
Board of Physical Therapy Examiners	two
State Board of Podiatry Examiners	two
State Board of Psychologist Examiners	two
State Board of Technical Registration**	two
Arizona State Veterinary Medical Examiners Board	two

\* Three regional examinations and one state examination.

\*\* Five of the examinations administered by the State Board of Technical Registration are offered twice a year, one is offered only once a year.



Optometry School Curricula And  
Inconsistencies Between NBEO  
Subject Matter And Arizona  
State Law

Excerpt from the October 18, 1976 meeting

"The Board feels some schools are educating the student to pass the N.B.E.O. exams. This could hurt the future development of optometry.

Also there is the inconsistency of subject matter between the N.B.E.O. exams and to ones to be given by the state through its optometric licensing agency." (Emphasis added)

The Board was concerned that schools of optometry were teaching students to pass the NBEO examination to the detriment of optometry. The Board was also concerned that the NBEO examination did not test applicants on the 11 subjects specified in ARS 32-1724 which were: geometric optics, ocular anatomy, ocular pathology, theoretical and practical optics, theoretical and practical optometry, hygiene, psychology, optical laboratory and clinical work, visual training or orthoptics, contact lenses and general anatomy, physiology, mathematics as related to optometry physics and optics.

However, in 1979 the Legislature amended ARS 32-1724 regarding test content to delete the 11 specific test subjects to read as follows:

"...subject matter currently being taught in the accredited universities or schools of optometry."

As a result of the 1979 amendment to ARS 32-1724, which was supported by the Board, the Board's enumerated concerns regarding optometry school curricula and inconsistencies with Arizona state law have been eliminated.

Possible Illegality Of Using

NBEO Scores For Arizona

Excerpt from the October 18, 1976 meeting

"(The Assistant Attorney General) was brought up to date on the Board's policy on acceptance of N.B.E.O. grades. (The Assistant Attorney General's) opinion was that the previous Board erred in accepting the grades of the N.B.E.O. They should have either changed the law or followed through on their rule making procedure before acceptance would be legal. (The Assistant Attorney General) was told that this Board was changing that 'policy' and it was not going to accept the N.B.E.O. examination grades at least until we are delegated to do so by the Legislature." (Emphasis added)

On November 16, 1976, the Board sent the following letter to the NBEO.

"This Board has reviewed its past policy regarding acceptance of N.B.E.O. grades and upon conferring with the Attorney General find this policy was not in conformance with the state optometry law.

Consequently, until the Legislature makes such changes, the Arizona State Board of Examiners in Optometry cannot accept the grades of the N.B.O. examinations in lieu of our written examination." (Emphasis added)

It should be noted that the Board's Assistant Attorney General advised them that they could either 1) propose legislation to eliminate any statutory problems with using NBEO scores, or 2) use their rule-making authority to administratively remedy those problems. The Board chose neither option and instead elected to discontinue accepting NBEO scores.

### CONCLUSION

The Arizona State Board of Optometry has failed to maintain sufficient records to adequately document the preparation, administration and grading of its examinations. This lack of documentation precludes a thorough, independent, and qualitative evaluation of the Board's examination process. However, a review of the limited documentation that is available 1) indicates that the Board is not in compliance with state law, and 2) raises serious questions regarding the validity of the Board's entire examination process.

### RECOMMENDATION

It is recommended that consideration be given to the following options:

1. ARS 32-1724 be amended to allow acceptance of the NBEO scores in Arizona.
2. The Board of Optometry adopt rules allowing the acceptance of N.B.E.O. scores in lieu of the written portion of the Arizona examination.



### FINDING III

#### THE ARIZONA BOARD OF OPTOMETRY HAS NOT REVISED PROMULGATED RULES WHICH ARE INCONSISTENT WITH FEDERAL REGULATIONS AND ARIZONA STATUTES.

The Board of Optometry has the authority to promulgate, and amend when appropriate, rules and regulations governing the practice of optometry which are consistent with federal regulations and Arizona law. Three rules, promulgated by the Board, regarding advertising by an optometrist and defining a minimum eye examination are not in agreement with Federal Trade Commission (FTC) regulations and federal and state antitrust laws. In June 1978, Board members received a copy and explanation of FTC regulations which supercede any state restrictions, including rules enacted by the Board of Optometry, on the advertisement of ophthalmic goods and services. The Board was also notified of an inconsistency between a Board rule and federal and state antitrust laws by the Arizona Attorney General in a letter dated April 16, 1979. Although informed of these inconsistencies, the Board of Optometry has not, as of June 30, 1979, amended the Board rules to be consistent with legislative mandate.

#### Responsibility Of The Board To Enact And Revise Rules Which Are Consistent With Legislative Mandate

The Board of Optometry has been granted the authority and responsibility to adopt and revise rules and regulations that are consistent with Arizona Revised Statutes. By authority of ARS 32-1705.A:

"The board shall make, and may from time to time amend, such rules and regulations not inconsistent with the provisions of this chapter, governing the practice of optometry, for the performance of its duties under this chapter and for the examination of applicants for certificates or licenses...." (Emphasis added)

When enacting and amending rules, the Board is responsible for assuring that the rules are consistent with all Arizona Statutes and appropriate federal regulations. Arizona Revised Statutes 32-1705 subsection A prohibits adoption of any rule:

"...that will regulate fees or charges of a registered optometrist to the patient or will regulate the place in which a registered optometrist shall practice, or the manner or method of his accounting, billing or collection of fees, and that no rule shall be promulgated by the board which shall prohibit advertising by a registered optometrist, unless such advertising is inconsistent with section 44-1481." (Emphasis added)

In a related opinion, the Attorney General of Arizona has ruled:

"No state or political subdivision, board, or commission may enact rules, regulations or policies which are in conflict with any section of the Arizona Revised Statutes." (OP. Atty. Gen. No. 57-121.)

Thus, the Board cannot enact and enforce rules regulating prices, location, billing or certain advertising by an optometrist or any rule which conflicts with state law. Further, to be enforceable all Board adopted rules must be consistent with all applicable federal statutes or regulations.

Since March 1972, each proposed rule of the Board of Optometry, as with every state agency, must be certified as approved by the Attorney General. Under Administrative Procedures Law the Attorney General reviews each proposal to determine: 1) that the rule is in proper form, 2) that adoption of the rule is within the power of the agency, and 3) that the rule is within enacted legislative standards. This process assures that all newly promulgated rules are reviewed and approved by the Attorney General for consistency with legislative mandate before the rules become effective. However, the Board of Optometry has the sole responsibility for revising rules that conflict with legislative mandate because of legislative amendments.

Rule R4-21-04 Promulgated By The  
Board Of Optometry Has Not Been  
Revised To Remain Consistent With  
Federal And State Antitrust Laws

Rule R4-21-04.B, promulgated on September 13, 1961, requires an optometrist in Arizona to "make a complete minimum examination" and "keep a record" of fifteen conditions of every patient examined. Based upon an advisory opinion of the Arizona Attorney General, the rule may be invalid and an unreasonable restraint of trade. In January 1979, the Board proposed an amendment to R4-21-04.B which would have changed the fifteen requirements of a minimum eye examination to thirteen requirements.

The existing and proposed rules are contrasted below.

R4-21-04.B Any optometrist in the State of Arizona shall make a complete minimum examination and shall keep a record of the following conditions of every patient examined:

<u>Existing Requirements</u>	<u>Proposed Requirements</u>
1. Complete case history	1. Case history
2. Naked visual acuity	2. Aided and unaided visual acuity
3. Detailed report of external findings	3. External examination
4. Ophthalmoscopic examination (Media, Fundus, Bloodvessels, Disc)	4. Ophthalmoscopic examination
5. Corneal curvature measurements (dioptral)	5. Corneal curvature measurements
6. Static retinoscopy	6. Retinoscopy
7. Amplitude of convergence and accommodation	7. (Unchanged)
8. Phoria and duction findings; Hori- zontal and vertical, distance & near	8. Phoria and duction findings
9. Subjective findings	9. (Unchanged)
10. Fusion	10. (Unchanged)
11. Stereopsis	11. Color vision (initial examination)
12. Color vision	12. Visual fields
13. Visual fields (confrontation)	13. Prescription given and visual acuity attained
14. Visual fields, central (after age 40)	
15. Prescription given and visual acuity attained	



In an April 16, 1979, letter formally rejecting the certification of several January 1979 amendments including the proposed rule on eye examinations, the Attorney General explained that the rule appeared to require the public to pay for unnecessary services:

"...in order to obtain any optometric service from a licensed optometrist in the State of Arizona, a patient must undergo and pay for the complete minimum examination required under Rule R4-21-04.B. On its face, the Rule therefore appears to interfere with the patient's ability to purchase needed services at the lowest possible price, and to further inflate the spiraling cost of health care by requiring the public to pay for optometric services that may be unnecessary. For example, a patient who wants only a prescription for eye glasses consisting of the four findings detailed in Rule R4-21-04.C\* is required under subsection B to pay for additional findings regarding ophthalmoscopic factors, color vision and numerous other procedures. In addition, the Rule appears to present an unnecessary cost barrier to a patient who wishes to change optometrists or to purchase selected services from an ophthalmologist, since it requires the patient to pay the optometrist for a 'complete minimum examination' even if the required findings have recently been made by another fully qualified eye care provider." (Emphasis added)

The Attorney General also enumerated the anticompetitive effect of R4-21-04.B by explaining:

"Because the 'complete minimum examination' bundles together a number of procedures which might otherwise be purchased separately, the Rule requiring their purchase on the patient's initial visit to an optometrist may constitute a 'tying arrangement.' The courts have long held that it is unlawful for a seller of goods or services to condition the sale of one product or service (the 'tying' product or service on the sale of another product or service the 'tied' product or service)...In this case, Rule R4-21-04.B controls all optometrists in the State of Arizona and, by forcing consumers to purchase a 'complete minimum examination' in order to obtain any optometric service, it has a substantial anticompetitive effect....

...because it forces the patient to purchase the thirteen required findings from the optometrist." (Emphasis added)

\* R4-21-04.C - Any spectacle prescription by any optometrist in the State of Arizona shall contain these minimum findings:

1. Refractive power of lenses desired.
2. Reading addition and type of bifocal prescribed.
3. Inner-pupillary distance (far and near).
4. Signature of refractionist and date of refraction.

In explaining to the Board that federal and state antitrust laws take precedence over the Board promulgated Rules the Attorney General stated:

"To fall within the 'state action' exemption from the federal antitrust laws, Rule R4-21-04.B would have to be mandated by the Legislature...and the statute which grants rule-making authority to the Board gives no indication that the Legislature expected the Board to require every optometrist to perform a complete minimum examination' on every patient.

...

Moreover, Arizona's Uniform State Antitrust Act was enacted in 1974 without any exception for Rule R4-21-04.B or any other regulation of the State Board of Optometry. Ariz. Rev. Stat. Ann. sections 41-1401 et seq. Consequently, the Rule is subject to both federal and state antitrust laws." (Emphasis added)

In the advisory opinion, the Attorney General also stated the actions the Board needed to undertake before obtaining certification of the proposed rule:

"In order for this office to certify Rule R4-21-04, we would request that the Board provide us with information substantiating the need for all 13 findings contained in the Rule and an explanation of why an optometrist cannot rely on part or all of such findings made recently by another individual qualified to make such ." (Emphasis added)

Members of the Board have discussed the proposed and existing rule on minimal eye examination on several occasions. In a June 7, 1979 discussion, Dr. Martin Laderman, president of the Board, explained:

"Records of those 13 conditions listed in the proposed Rule are necessary for an optometrist to make accurate conclusions on a patient's vision status."

In their May 21, 1979 meeting, the Board of Optometry decided to retain the existing rule (R4-21-04) which requires 15 conditions rather than continuing to try to obtain certification of the proposed rule requiring 13 conditions.



It should be noted that according to Legislative Council, in a memorandum dated May 21, 1979, the intent of both the existing and proposed amendment to the rule requiring a minimum number of elements for an eye examination are similar and that both would represent a conflict with antitrust laws. The Legislative Council stated in part:

"We concur in the reasoning of the Attorney General... For the reasons discussed in that...opinion...we believe that the Board Rule (R4-21-04.B) conflicts with antitrust law."\*

Therefore, the Board of Optometry has knowingly retained a rule that appears to contain anticompetitive restrictions that are in conflict with state and federal antitrust laws.

Two Board Rules Are Not Consistent  
With Federal Trade Commission Regula-  
tion of Advertisement of Ophthalmic  
Goods and Services

The Federal Trade Commission has recently adopted regulations prohibiting the enforcement of state laws or regulations governing advertisement of ophthalmic goods and services. The Board of Optometry promulgated, on September 13, 1961, Rule R4-21-03, parts of which contain such prohibitions regarding advertising, and has not revised the rule to be consistent with federal regulation.

Federal Trade Commission Regulation  
Of Advertising Of Ophthalmic Goods  
And Services

As of July 13, 1978, state regulation of advertisement of ophthalmic goods and services has been preempted by Federal Trade Commission Regulations. Federal regulation CFR Part 456.3 reads:

\* Appendices XI and XII contain a complete text of the Attorney General's letter and the Legislative Council memorandum.



"It is an unfair act or practice...for any state or local government entity or any subdivision thereof, state instrumentality, or state or local governmental official to enforce any:

- (a) prohibition, limitation or burden on the dissemination of information concerning ophthalmic goods and services by any seller or group of sellers, or
- (b) prohibition, limitation or burden on the dissemination of information concerning eye examinations by any refractionist. PROVIDED: Nothing in subpart (b) shall be construed to prohibit the enforcement of a state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those examinations, but requires that specified affirmative disclosure also be included."  
(Emphasis added)

This federal regulation allows state law or regulation to require "specific affirmative disclosures"\* or factual statements disclosing information important to the consumer, but does not allow any other form of limitation on information about ophthalmic goods and services.

\* The FTC regulations also contain definitions of the type of state "specific affirmative disclosures" that can be required for ophthalmic goods. These are limited to:

- "1) Whether an advertised price includes single vision and/or multifocal lenses;
- 2) Whether an advertised price for contact lenses refers to soft and/or hard contact lenses;
- 3) Whether an advertised price for eyeglasses or contact lenses includes an examination;
- 4) Whether an advertised price for eyeglasses or contact lenses includes all dispensing fees; and
- 5) Whether an advertised price for eyeglasses includes both frame and lenses."

However, the FTC has not promulgated any regulations defining the type of "Specific affirmative disclosures" a state can require for ophthalmic services.

If a state reasonably regulates all retail advertising through state law, rule or regulation, the FTC regulations permit similar regulation of ophthalmic goods and services. FTC regulation CRF Part 456.B states:

"(b) Where a state or local law, rule or regulation applies to all retail advertisements of consumer goods and services (including a law, rule, or regulation which requires the affirmative disclosure of information or imposes reasonable time, place and manner restrictions), such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information."

Also, upon application by a state agency, the FTC will review any state requirement that the agency has deemed to be necessary in preventing deception or unfairness. If the state requirement is reasonable and does not unduly restrict advertising, then that requirement will be permissible to the extent specified by the FTC.

Therefore, the state can regulate advertisement of ophthalmic goods and services upon receiving permission from the FTC or through a state law that applies to all retail advertising.

Board Enacted Rule May  
Conflict With the FTC  
Regulations

Board of Optometry rule ACRR R4-21-03.A prohibiting certain advertising practices by an optometrist or concerning ophthalmic materials is similar to a state law regarding false or misleading advertisement but may not be enforceable due to differences in language and terms used in the rule.

The Board promulgated Rule R4-21-03.A states:

- "A. No optometrist in the State of Arizona shall use advertising of any kind or nature which is misleading, false, deceptive or inaccurate in any material particular, nor shall an optometrist misrepresent any ophthalmic material, optometric services, credit terms, or values or the nature or form of the practice conducted by that optometrist or group of optometrists. No ophthalmic material shall be advertised unless it is described fully and truthfully in all of its component parts."

While the state law ARS 44-1481 regarding false or misleading advertising states:

- "A. A person is guilty of a class 3 misdemeanor who:
1. Knowingly and with the intent to sell to the public real or personal property or services, or to induce the public to acquire an interest therein, makes and publishes an advertisement, either printed or by public outcry or proclamation, or otherwise, containing any false, fraudulent, deceptive or misleading representations in respect to such property or services, or the manner of its sale or distribution." (Emphasis added)

The state law is an acceptable method of state regulation of all retail advertising; however, according to Legislative Council, it could be argued that the Board of Optometry rule is not enforceable.

In a memorandum dated May 21, 1979, the Legislative Council noted that the Board of Optometry needs to revise Rule R4-21-03.A to bring it into consonance with ARS 44-1481. The Legislative Council stated, in part:

"Strictly construing the language of the trade regulation rule, it is arguable that the Board of Optometry may not promulgate and enforce its own rule prohibiting fraudulent advertising of ophthalmic materials and optometric services. However, this seems unduly restrictive.



"It is more appropriate that the Board of Optometry should revise its current rule to follow the language of Arizona Revised Statutes section 44-1481 as it relates to the advertising of ophthalmic goods and services and should use the definitions of the latter terms prescribed in the trade regulation rule. This result would eliminate any question that the Board was attempting to be generally more restrictive in permitting advertising than the state."\* (Emphasis added)

As indicated in the Legislative Council memorandum, if the language of the rule followed state law, the Board would not be placing any more restrictions on ophthalmic goods and services advertising than now applies to all retail advertising.

#### Another Board Enacted Rule

##### Conflicts With The FTC Regulations

Another Board adopted rule regulating advertising by an optometrist conflicts with the recently enacted Federal Trade Commission regulations. ACRR R4-21-03.B provides:

"B. No optometrist shall in any manner advertise or hold out to the public that his services or abilities are superior to those of any other licensed optometrist."

This rule directly conflicts with the FTC regulation prohibiting any restriction on the dissemination of information in that it does not permit an optometrist to hold himself out to the public in advertised messages as a specialist, even if in fact one is a specialist. In the May 21, 1979 opinion, Legislative Council wrote:

"A.C.R.R. R4-21-03, subsection B prohibits an optometrist from advertising that he is a specialist. The Board's rule does limit the dissemination of information concerning an optometrist's service in such a manner that it would conflict with the previously cited trade regulation rule." (Emphasis added)

The Board of Optometry could be fined up to \$10,000 by federal authorities for enforcement of a rule that conflicts with federal regulation. However, the Board can eliminate the conflict with federal regulations by revising Rule R4-21-03 to require that a "specific affirmative disclosure" be included in any advertisement that identifies the optometrist as a specialist. According to Legislative Council:

"The Board is not precluded from promulgating a rule which requires that 'specified affirmative disclosure' also be included in advertising. The Board of Optometry could revise its rule to require certain additional information if an optometrist chooses to advertise that he is a specialist... . Revising the rule would promote increased consumer information, would help prevent possible deception in advertising and would seem to implement the purposes of this state in regulating the optometry profession, as well as public advertising, to benefit the public and the purposes of the FTC to promote consumer information and prevent anticompetitive practices." (Emphasis added)

The Board Is Aware Of The FTC  
Regulations And Has Taken Limited  
Action

Individual Board members received a copy of the applicable FTC regulations in June 1978; and were, therefore, notified that the federal regulations regarding advertising preempted Board promulgated rules. In response to the new FTC regulations, the Board proposed an amendment to Rule R4-21-03.B regarding limitation of advertisement as an optometric specialist. This amendment has not yet been certified by the Attorney General. However, the Board has not taken action to have Rule R4-21-03.A amended to be consistent with state law and approved by the FTC.

An initial amendment of R4-21-03.B, concerning advertisement as a specialist, was adopted by the Board and sent to the Attorney General for certification on February 2, 1979. In an April 16, 1979 letter to the Board, the Attorney General rejected certification because the amendment was not clear. Using the Attorney General's suggestions the Board adopted, on May 21, 1979, the following revised version of the rule:

"No optometrist shall in any manner advertise or hold out to the public that his services or abilities are superior to those of any other licensed optometrist except that an optometrist may advertise as a specialist if he has been certified by the American Academy of Optometry as a diplomat in that specialty or as a fellow in the College of Optometrists in Vision Development."

The Attorney General had not, as of July 1, 1979, certified the amended rule. Since the revision would allow an optometrist to advertise as a specialist, provided the optometrist was certified by an appropriate organization, the rule appears to be enforceable under the FTC regulations.

#### CONCLUSION

Board of Optometry enacted three rules that need to be revised in order to avoid conflict with federal and state laws and regulations serving to prohibit anticompetitive practices. The Board of Optometry has taken action to revise one of the three rules to allow optometrists to advertise as specialists, but has not taken appropriate action to revise the others.

#### RECOMMENDATION

It is recommended that consideration be given to the following:

- The Board of Optometry revise Rule R4-21-04.B, regarding the recording of 15 conditions of a patient to become consistent with federal and state antitrust laws.
- The Board of Optometry revise Rule R4-21-03.A regarding misleading advertising to become consistent with state law.



- The Board of Optometry continue their efforts to appropriately revise Rule R4-21-03.B, regarding advertising as an optometric specialist.
- Upon amending Rules R4-21-03.A and R4-21-03.B, the Board of Optometry submit the revised rules to the Federal Trade Commission for approval.
- The Board of Optometry communicate to the Joint Committee of Reference, Health and Human Resources on the results of their efforts to revise these rules.

#### FINDING IV

SINCE FISCAL YEAR 1976-77, THE ARIZONA BOARD OF OPTOMETRY HAS SUBSTANTIALLY IMPROVED THE DOCUMENTATION AND RECORDING OF ITS PROCEEDINGS; HOWEVER, ADDITIONAL IMPROVEMENTS ARE STILL NEEDED TO ASSURE THAT BOARD RECORDS ARE MAINTAINED IN A MANNER CONSISTENT WITH STATUTORY REQUIREMENTS.

Arizona statutes require the Board of Optometry to keep accurate and complete records of their actions. Without such records; 1) Board actions could be declared null and void and 2) Board records may have to be subsequently recreated. Prior to fiscal year 1976-77, Board records and files were grossly inadequate with regard to the documentation of legal actions taken by the Board. Since fiscal year 1976-77 the Board's recordkeeping and maintenance of files has substantially improved. However, additional improvements are still needed to assure that Board records and files are maintained in a manner consistent with statutory requirements.

#### Arizona Statutes Require The Board Of Optometry To Maintain Records

Arizona Revised Statutes relating to public records, open meetings and optometry require the Board to keep accurate records. As required by these laws, the Board must document and maintain such information as financial and personnel records, general administrative policies and Board licensing and enforcement activities.

ARS 41-1345 through 41-1351 define requirements for government entities to maintain public records. A specific definition of agency responsibility is contained in ARS 41-1346 which reads in part:

- "A. The head of each state and local agency shall:
1. Establish and maintain an active, continuing program for the economical and efficient management of the public records of the agency.
  2. Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the rights of the state and of persons directly affected by the agency's activities." (Emphasis added)

Further, ARS 38-431 requires each governing body in the state to hold open meetings and to document legal actions taken in those meetings. ARS 38-431.01 states:

- "A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.
- B. All public bodies...shall provide for the taking of written minutes or a recording of all their meetings. Such minutes or recording shall include, but not be limited to....
- ...An accurate description of all legal actions proposed, discussed or taken...." (Emphasis added)

The term "legal action" includes discussions and deliberations by members of the public body in addition to the results of formal votes by the Board. An August 1975 opinion by the Arizona Attorney General defined legal actions as follows:

"...it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body constitute 'Legal action' and must be conducted in an open meeting...." (Emphasis added)



Finally, the Optometry Law, ARS 32-1705, requires the Board to "keep a record of its acts, receipts and disbursements, and of examinations held,... the names of all persons to whom certificates have been issued, the date of issuance and all renewals."

A review of the Board of Optometry records reveals that adequate records have not been maintained.

Documentation Of Legal Actions In  
Board Minutes Has Been Inadequate

As required by ARS 38-431.01, all legal actions of the Board must be conducted at public meetings, and documented in the minutes. Since fiscal year 1976-77 the Board's recordkeeping and maintenance of files has substantially improved. However, the Board of Optometry's minutes do not document all of the legal actions taken by the Board. Further, for those legal actions that are documented in the minutes, required items such as discussions, deliberations, considerations or consultations regarding Board decisions are omitted.

Specifically, three types of legal actions taken by the Board have not been adequately recorded. These actions are:

1. the approval or denial of applications for examination,
2. the approval or denial of the optometry license based upon the results of the examination, and
3. the investigation and disposition of complaints.

Records of the above threetypes of legal actions are inconsistent, incomplete or absent from minutes of the Board of Optometry.

Table 8 demonstrates the extent to which the approval or disapproval of examination applications, examination results and approval or denial of optometry licenses has substantially improved since fiscal year 1976-77.

TABLE 8

THE EXTENT TO WHICH THE BOARD'S  
LICENSING DECISIONS HAVE BEEN  
RECORDED\* IN THE MINUTES OF BOARD MEETINGS  
FOR FISCAL YEARS 1974-75 THROUGH 1978-79

	FISCAL YEAR 1974-75		FISCAL YEAR 1975-76		FISCAL YEAR 1976-77		FISCAL YEAR 1977-78		FISCAL YEAR 1978-79	
	Number of Decisions Appearing Correctly	Total Number of Decisions	Number of Decisions Appearing Correctly	Total Number of Decisions	Number of Decisions Appearing Correctly	Total Number of Decisions	Number of Decisions Appearing Correctly	Total Number of Decisions	Number of Decisions Appearing Correctly	Total Number of Decisions
<b>Applications</b>										
Approved for examination	-0-	N/A	-0-	N/A	-0-	53	37	37	68	68
Rejected for examination	-0-	N/A	-0-	N/A	-0-	N/A	-0-	2	3	3
Total	-0-	N/A	-0-	N/A	-0-	N/A	37	39	71	71
Percent of total decisions reported correctly	0%		0%		0%		95%		100%	
<b>Examination Results</b>										
Pass/issued license	-0-	37	-0-	57	-0-	39	26	26	42	42
Failed	5	5	-0-	9	-0-	-0-	4	4	8	8
Total approved applicants who took the examination	5	42	-0-	66	-0-	39	30	30	50	50
Withdrawals/Absentees	-0-	N/A	-0-	N/A	-0-	14	-0-	7	18	18
Total approved applicants	5	N/A	-0-	N/A	-0-	53	30	37	68	68
Percent of examination results reported correctly	N/A		0%		0%		81%		100%	

\* In order to be considered correctly reported in the minutes, a record had to include the name of the applicant, the Board's decisions and, if appropriate, the reasons for rejecting the application.  
N/A Not available for our review. The Board of Optometry reported only the total number of applications received; with no indication of the number approved, rejected and the number of approved but absent, for fiscal years 1974-75, 1975-76 and 1976-77.

As shown in Table 8, the decisions to approve or deny examination applications were not recorded in the Board minutes by the name of the applicant until fiscal year 1978-79. Examination results were not consistently recorded until 1977-78; the number and names of those applicants absent or withdrawn were not recorded until 1978-79. The decision to approve or deny the optometry license has only been recorded for the past two fiscal years. It should be noted, however, that recordkeeping of these actions has substantially improved since fiscal year 1976-77 with all items recorded correctly in fiscal year 1978-79.

Regarding the recordkeeping of complaint investigations and resolutions, the Board of Optometry consistently has recorded an acknowledgement of complaints received in the Board minutes. However, basic information essential to identifying and understanding the complaint has been omitted. For instance, in 1976 two of seven complaints were documented in the minutes without an indication of the optometrist involved, the charges filed or the Board's resolution of the complaint. The following is the entry for these two complaints in the Board's minutes for its February 2, 1976 meeting:

"The Board received two new complaints, (complainant name)  
and (complainant name)."

No subsequent entries regarding these two complaints appear in later Board minutes; nor can an investigative file for these complaints be located.

The Board of Optometry obtained contracted clerical assistance on July 1, 1976, through the Arizona State Boards' Administrative Office (ASBAO). Prior to this, the minutes were written, typed and filed by either Board members or through part-time clerical assistance. According to the Administrative Manager of ASBAO, the Office became fully responsible for Board of Optometry minutes and maintenance of files in late April of 1977. Even with this improved clerical support omissions in the recording of legal actions in Board minutes regarding complaints continues.



For example, for the 30 complaints received and reviewed by the Board in calendar years 1976 through 1978, 29 elements of information basic to the identification of the complaint and its disposition were omitted.

Table 9 displays the complaint documentation recorded for calendar years 1976 through 1978 and the information omitted.

TABLE 9

SUMMARY OF COMPLAINT DOCUMENTATION  
IN BOARD OF OPTOMETRY MINUTES  
CALENDAR YEARS 1976 THROUGH 1978

Information Basic to Identifying the Complaint and Its Disposition	1976			1977			1978		
	Number of Instances Recorded	Number of Instances Not Recorded	Percent Not Recorded	Number of Instances Recorded	Number of Instances Not Recorded	Percent Not Recorded	Number of Instances Recorded	Number of Instances Not Recorded	Percent Not Recorded
Name of Individual Filing Complaint	7	-0-	0%	8	1	11%	20	1	5%
Name of Optometrist Involved	4	3	43	5	4	44	20	1	5
Charges Filed Against the Optometrist	3	4	57	9	-0-	-0-	16	5	24
Discussions, Deliberations, Considerations or Consultations About Complaint*	1	6	86	9	-0-	-0-	20	1	5
Resolution Issued by Board	5	2	29	9	-0-	-0-	20	1	5
Total	20	15	43%	40	5	11%	96	9	9%
Number of Complaints	7	9		9	21				

\* Evidence of discussion, deliberation, consideration or consultation concerning the complaint and its disposition included letters, testimony, discussions, and deliberations apparently used by the Board to reach a complaint disposition.

As shown in Table 9, the percentage of basic information regarding complaint investigation and resolution not recorded declined from 43 percent in calendar year 1976 to 9 percent in calendar year 1978.

Although recordkeeping regarding examination applications, examination results, licenses granted or denied, complaints and their resolution has substantially improved since obtaining clerical assistance through ASBAO, it should be noted that the performance audit of the Board of Optometry was impaired to the extent that these legal actions and other information was not consistently available. In addition, the absence of such information as shown in Tables 8 and 9 could result in the legal actions of the Board being declared null and void.

Legal Actions Not Taken At  
Board Meetings And Not Documented  
In Board Minutes Could Be Declared  
Null And Void

The Board is responsible for documenting legal actions, such as licensing decisions and complaint dispositions in the minutes of open meetings. In a June 18, 1979 memorandum, Legislative Council\* warned that in the absence of adequate documentation, such Board actions could be nullified:

"...if the effect of the Board's action was to ban from the public view the decision-making process in approving or denying a person's application to practice optometry in this state, it would appear that the decision would be null and void."

\* Appendix XIII contains a copy of the June 18, 1979 Legislative Council memorandum.



Legislative Council opinion continued:

"In order to avoid this situation, it would be advisable that when the Board takes any legal action, it: '...be preceded both by disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting and by an indication of what information will be available in the minutes pursuant to A.R.S. section 38-431.01(B) so that the public may, if it desires, discover and investigate further the background or specific facts of the decision.'" (Emphasis added)

While recording of licensing and examination legal actions has improved to an adequate level, the documentation of the Board of Optometry's complaint process is still not sufficient.

Unavailable Documentation Which  
May Have To Be Subsequently  
Recreated

In addition to documenting legal actions in the Board minutes, the Board of Optometry is required to maintain files documenting regulatory activities. However, files of documents relating to licensing decisions and complaints have not been adequately maintained.

Since the passage of 1979 legislation, the legal proceedings of the Board of Optometry can now be accepted by the courts for appeals of Board decisions. If the Board cannot supply adequate documentation of appealed cases from its files, the court will incur an unnecessary expense of recreating this information.

As demonstrated in Table 9 on page 71, a number of Board legal actions were not adequately documented in Board minutes. Our review revealed that this absence of documentation also extended to the files maintained by the Board. For example, it was not always possible to determine why applicants for licensure were denied licenses by the Board. More importantly, in a number of cases, documents regarding complaints filed against licensees of the Board are not available. Table 10 summarizes the availability of complaint documentation in Board files for complaints filed during 1976, 1977 and 1978.

SUMMARY OF THE AVAILABILITY OF  
COMPLAINT DOCUMENTATION IN  
BOARD FILES FOR COMPLAINTS FILED  
DURING 1976, 1977 AND 1978

	CALENDAR YEAR					
	1976		1977		1978	
	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>	<u>Number</u>	<u>Percent</u>
Documentation of <u>Complaints</u>						
Not Located	3	43%	0	0%	4	19%
Located	<u>4</u>	<u>57</u>	<u>9</u>	<u>100</u>	<u>17</u>	<u>81</u>
Total Complaints	<u>7</u>	<u>100%</u>	<u>9</u>	<u>100%</u>	<u>21</u>	<u>100%</u>

As demonstrated in Table 10, documentation could not be located for 43 percent of the 1976 complaints and 19 percent of the 1978 complaints in that the original complaint, correspondence, testimony and other pertinent records could not be located.\*

Reports Prepared By The  
Board Of Optometry For The  
Public Reflect Inaccurate  
Recordkeeping\*\*

The Board of Optometry prepares an annual report to the Governor regarding its operations and submits a budget request to the Executive Budget Office for review and recommendation. Reflecting the inadequacy of past recordkeeping, the activity levels reported in these documents were not consistent to each other, to Board minutes and files. For example, in fiscal year 1978-79, according to the report submitted to the Governor, 67 persons applied for the examination to be an optometrist; whereas, the Board minutes and Board files indicated that 71 persons had applied for the examination. Similar instances of these reporting differences have also occurred in previous years. Appendix XIV contains a five year comparison of information appearing in the annual report to the Governor, the budget request to the Executive Office, Board minutes and Board files.

\* It should be noted that Board minutes did contain some of this information. However, as was discussed on page 69, the Board's minutes are not consistent in their complaint documentation.

\*\* Appendix XIV contains a five year comparison of inconsistent reports of Board actions.

The Board Of Optometry  
Does Not Maintain Adequate  
Files Of Examinations

The Board of Optometry does not maintain adequate files of the annual written examinations which must be passed by an applicant in order to be licensed. (For a further discussion of the Board's lack of adequate files of examinations and examination procedures, see page 41.)

Records Management Center Has  
Established Standards For  
Recordkeeping

In April 1977 the Records Management Center of the Department of Library, Archives and Public Records issued a guideline for establishing an "economical and efficient Records Management Program" that was endorsed by the Attorney General and Auditor General. This guideline explains records management principles and techniques and encourages agencies to adopt them as the framework for a file plan.

Two types of records, support and mission, are identified in the guideline. Support records are the administrative files maintained by all agencies. Examples of support records are agency minutes, financial and personnel records and general administrative information. Mission records are unique to an agency's own particular identity, such as the licensing and enforcement function of the Board of Optometry.

In establishing a records management program, the guideline includes 1) an inventory of records holding, 2) organization of records on functional lines, and 3) establishment of a records retention schedule to determine which records should be retained for specific periods of time.



A suggested functional arrangement for a regulatory body, such as the Board of Optometry is as follows:

Licensing Function

Applications  
Background Checks  
Evaluation Report  
Testing

Enforcement

Compliance Violations  
Complaint Followup  
Investigations  
Hearings  
Legal Cases

Monitoring Function

Status Change to License Cards  
Renewal Applications  
Spot Compliance Checks in the Field

Revenue Function

Receipt Books or Cash Register  
Tapes  
Accounts Receivable Register  
(Renewal Billings)

In addition, several questions were included for an agency to consider when establishing a records retention schedule:

- "1. How serious would it be if we were unable to put our hands on a particular record five or ten years from now?
2. What are the chances of its being needed?
3. Are the consequences serious enough to justify our keeping many cubic feet of records for a long period of time at considerable cost?
4. Is this information available anywhere else?
5. What would it cost to reconstruct the record if this becomes necessary?"

Statutory provisions, including the statute of limitations, must also be considered when establishing a record retention policy.

Arizona Revised Statute 41-1346 outlines responsibilities of state agencies regarding public records management and specifies that each agency will establish records retention and disposal schedules and lists of essential public records. The statute reads, in part:

"A. The head of each state and local agency shall:

...

3. Submit to the director of the department of library, archives and public records, in accordance with established standards, schedules, proposing the length of time each record series warrants retention for administrative, legal or fiscal purposes after it has been received by the agency. Also, submit a list of public records in the agency's custody that are not needed in the transaction of current business and that are not considered to have sufficient administrative, legal or fiscal value to warrant their inclusion in established disposal schedules.
4. Submit to the director of the department of library, archives and public records lists of all essential public records in the custody of the agency."  
(Emphasis added)

According to Arizona State Boards' Administrative Office staff, the Board of Optometry has not complied with this law.

#### CONCLUSION

Several state laws require the Board of Optometry to document their proceedings. Board actions could be declared null and void and other records may have to be recreated in the absence of accurate and complete records. Prior to fiscal year 1976-77, Board of Optometry records were significantly inadequate, but have since substantially improved. Several areas of recordkeeping, especially complaint and written examination files, are still in need of improvement. The Records Management Center of the Department of Library, Archives and Public Records has published guidelines which would assist the Board of Optometry in establishing adequate records management and in complying with state laws regarding public records.

RECOMMENDATION

Consideration should be given to the following recommendations:

- The Board of Optometry should establish a record management program to assure that their records are adequate as required by state law. To implement this the Board should:
  1. Request legal assistance in establishing procedures to document legal actions in Board minutes and to maintain those records which are necessary to support the Board's proceedings.
  2. Implement the recommendations establishing a records management program proposed by the Records Management Center and appropriate to the Board of Optometry.
  3. Submit records retention and disposal schedules to the Director of Library, Archives and Public Records along with lists of all essential public records as required by ARS 41-1346.



FINDING V

THE ARIZONA BOARD OF OPTOMETRY HAS BEEN SUBSTANDARD IN ITS ENCOURAGEMENT AND USE OF PUBLIC INPUT IN ITS OPERATIONS. INFORMATION REGARDING MEETING NOTICES, PROPOSED RULES AND REGULATIONS, LEGISLATIVE PROPOSALS AND BOARD ACTIONS HAS NOT BEEN ADEQUATELY PROVIDED TO LICENSED OPTOMETRISTS OR THE CONSUMERS OF OPTOMETRIC SERVICES.

The Board of Optometry has been substandard in its encouragement of public input from the consumer of optometric services and in notifying license holders of Board meetings, proposed rules and regulations, legislative proposals and Board actions. The Board of Optometry needs to expand its efforts to encourage participation by potential and actual optometric consumers and to notify all licensed optometrists of Board meetings, activities and actions.

Board Actions Regarding

Public Notice Of Meetings

Arizona Revised Statute 38-431.02(A) defines the responsibility of the Board of Optometry to provide public notice of all meetings:

"Public notice of all meetings of public bodies shall be given as follows:

1. The public bodies of the state shall file a statement with the secretary of state stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to meetings." (Emphasis added)

The Board of Optometry has filed a statement with the Secretary of State identifying that meeting notices will be posted in the Occupational Licensing Building at the State Capitol and in the business office of the Board President. Notices have been consistently posted in these locations.

However, the Attorney General in a memorandum to all state agencies dated August 19, 1975, noted that an:

"'open meeting' is open only in theory if the public has no knowledge of the time and place at which it is to be held."

The Attorney General stated that the law on open meetings was not specific, and outlined guidelines to be followed in complying with the public meeting law. He also cautioned agencies against the serious consequences for failure to comply with the law:

"Decisions made at a meeting for which defective notice was given may likely be declared null and void..."\*

In providing guidelines to agencies regarding what would constitute sufficient "additional" public notice of meetings beyond posting printed notices, the Attorney General stated:

"F. Additional Notice

In deciding what types of notice shall be given in addition to posting, governing bodies should consider the following:

1. Newspaper Publication

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. Mailing List

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

\* Appendix XV contains the full text of the Attorney General's memorandum.

"3. Articles or Notices in Professional or Business Publications

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field or regulation.

It is not necessary that all of these types of notices be given. Indeed, merely providing notice through the use of a mailing list and by posting should be sufficient in most cases. Neither should the above listings be considered exclusive and, to the extent other forms of notice are reasonably available, they should be used." (Emphasis added)

The Board of Optometry has not adopted any of the "additional notice" methods outlined by the Attorney General. The only public notice regularly used by the Board other than posting consists of telephone calls by the Board President to two professional associations announcing the forthcoming meeting.

It should be noted that in a survey by the Office of the Auditor General of optometrists\* licensed in Arizona, 80 percent (177) of the 222 optometrists responding stated they were not aware of scheduled Board meetings.

Thus, by the current public notice methods used by the Board of Optometry, only 20 percent of the license holders and only those consumers who are notified through the postings in Occupational Licensing Building or the Board President's Office would be aware of meetings.

Board Actions Regarding  
Public Notice Of Proposed  
Rules And Regulations And  
Other Board Actions

When proposing changes in rules and regulations, each agency is required by ARS 41-1002 (Administrative Procedures Law) to file a notice of such changes with the Secretary of State at least 20 days prior to the proposed adoption date. The Secretary of State publishes the proposed changes monthly in the Administrative Procedures Digest.

\* Appendix XVI contains the results of the survey.



The Board of Optometry has complied with this statute; however, a review of the distribution list for the Digest as of May 1, 1979, revealed that 87.4 percent (195) of the 223 individuals or organizations reviewing the Digest were law firms or government agencies. Thus, the publication of proposed rules in the Digest does not appear to be an effective method of notifying the consuming public or Board registrants of proposed rule changes.

When developing proposed legislative changes, the only solicitation of public input by the Board of Optometry consists of notifying two professional associations.

A survey of 34 Arizona regulatory agencies by the Office of the Auditor General regarding methods used to encourage public input and participation in the promulgation of rules and regulations and in developing legislative proposals revealed that 82 percent (28) notified registrants of rule changes prior to the required public hearing and 35 percent (12) notified registrants of legislative proposals. Table 11 summarizes the various public input methods used by these 34 other regulatory agencies.

SUMMARY OF METHODS USED BY ARIZONA  
REGULATORY BODIES TO ENCOURAGE PUBLIC  
INPUT AND PARTICIPATION IN THE PROMULGATION  
OF RULES AND REGULATIONS AND DEVELOPING  
LEGISLATIVE PROPOSALS

AGENCY	METHOD OF ENCOURAGING PUBLIC INPUT AND PARTICIPATION									
	PROMULGATING RULES				DEVELOPING LEGISLATIVE PROPOSALS					
	Informs Affected Registrants Prior To Hearing	Advertises in News Media	Informs Consumer Groups	Holds Pre-adoption meetings other than hearings	Informs Affected Registrants Prior to Adoption	Contacts Professional Associations	Advertises in News Media	Holds Pre-adoption Meetings	Solicits Consumer Group Participation	
STATE BOARD OF OPTOMETRY						X				
Professional Regulatory Agencies										
State Bar of Arizona	X	X			X		X			
State Board of Accountancy	X <sup>A</sup>					X				
State Board of Barber Examiners	X				X			X		
State Board of Chiropractic Examiners	X	X				X				
State Board of Cosmetology	X	X	X	X	X			X	X	
State Dental Board	X									
State Board of Funeral Directors and Embalmers	X	X								
Board of Medical Examiners	X				X		X			
State Naturopathic Board of Examiners	X					X				
State Board of Nursing	X	X			X	X	X			
Arizona Board of Osteopathic Examiners in Medicine and Surgery										
Arizona State Board of Pharmacy	X						X			
Board of Physical Therapy Examiners	X						X			
State Board of Podiatry Examiners	X				X	X				
State Board of Psychologist Examiners	X		X		X	X		X		
State Board of Technical Registration						X				
Arizona State Veterinary Medical Examiners Board	X									
State Board of Education			X <sup>C</sup>	X <sup>C</sup>	X	X		B	X	
SUBTOTAL	15	5	3	2	8	12	3	4	1	
Other Regulatory Agencies										
Arizona Commission of Agriculture and Horticulture	X	X	X							
Arizona State Athletic Commission	X					X				
Arizona Atomic Energy Commission		X								
State Banking Department, Collection Agencies	X									
Registrar of Contractors							X		X	
Division of Mobile and Manufactured Housing Standards	X				X	X				
State Dairy Commissioner	X									
State Board of Dispensing Opticians	X									
State Egg Inspection Board	X					X				
Department of Insurance	X				X					
Department of Liquor Licenses and Control	X	X					X			
Board of Nursing Care Institution Administrators	X				X	X				
Arizona Racing Commission	X									
State Real Estate Department	X	X								
Structural Pest Control Board	X				X					
SUBTOTAL	13	4	1	0	4	6	0	1	0	
TOTAL	28	9	4	2	12	18	3	5	1	

A Statutes require notification to registrants

B Agency does not draft legislative proposals

C Agency creates task forces of professional and lay persons to develop proposals

Source: Agency responses to a May 1979 Auditor General survey.

As shown in Table 11, a total of nine methods are used by Arizona's regulatory agencies to solicit public input and participation when promulgating rules and developing legislative proposals. Since the Board of Optometry utilizes only one of these nine methods, the Board is significantly substandard in its efforts to encourage public participation in its decision-making.

Reflecting this substandard effort, a majority of Board license holders, while aware of existing rules and regulations, are not aware of actions or proposed actions by the Board of Optometry. In a survey of licensed optometrists by the Office of the Auditor General, approximately 71 percent of those responding stated they were not aware of Board actions and 79 percent responded they were unaware of proposed Board actions. Therefore, the licensees of the Board appear to be inadequately informed regarding the Board's actions or proposed actions.

Methods For Improving  
Public Participation

Mr. Ernest Gellhorn, former Dean of Arizona State University College of Law and a recognized authority on administrative procedure law, has formulated recommendations for improving the Federal Administrative Procedures Act.\* Many of these recommended actions are equally applicable to state regulatory bodies. According to Mr. Gellhorn:

- "1. Agency obligations. Minimum constitutional requirements are insufficient reasons for agencies to fail to explore appropriate procedures for providing effective notice to the affected public. (Emphasis added)
2. Meeting public notice needs. Agencies should be required to provide identified, accessible sources of information about proceedings in which public participation is likely to be effective. At a minimum, each agency should:
  - a. Strive to provide notice as far in advance of the proceeding as possible; and
  - b. Prepare a separate bulletin issued periodically, identifying the proceeding and providing relevant information.

\* Ernest Gellhorn, "Public Participation in Administrative Proceedings," Yale Law Journal, Volume 81, No. 3 (January 1972) pp. 398-401.



"3. Attracting and focusing public attention. The public can be made aware of important agency proceedings in many ways, such as press releases to news media; requirements that applicants directly inform users; special notice to governmental bodies, citizen groups or trade associations and separate agency listing of significant matters.

Coverage in the news media is perhaps the most effective way of reaching the average citizen, and public interest groups and agencies should make special efforts to encourage reporting of their activities. Factual press releases written in lay language should explain the significance of the proceedings and the opportunities for public participation. Releases describing important proceedings with a local geographical impact should be sent to area news media. In major matters, agencies might consider public service advertisements and announcements over local broadcasting facilities. Direct mailings are yet another alternative."  
(Emphasis added)

Under ARS 41-2354 (The Sunset Law), one factor that shall be considered in determining the need for continuation or termination of each agency is:

"The extent to which the agency has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public."

In our opinion, the Board of Optometry has not adequately encouraged the input of license holders, consumers of optometric services or the general public in the promulgation of rules or other actions and has not adequately informed the public of its actions and their expected impact.

Cost Of Program To  
Encourage Public Input  
Would Be Minimal

The Administrative Manager of ASBAO stated on March 15, 1979, that the cost of notifying the public of Board meetings and actions would be prohibitive for small boards such as the Board of Optometry due to a lack of funds.

However, a review of the costs of selected public input methods revealed that the combined cost for a mailing to Board of Optometry license holders and professional associations, a press release to news media, and legal advertisement in five Arizona newspapers would be approximately \$184.

Table 12 details the estimated costs for obtaining public input.

TABLE 12

ESTIMATED COSTS\* FOR IMPLEMENTING  
 THREE METHODS OF ENCOURAGING PUBLIC  
 PARTICIPATION BY THE BOARD OF OPTOMETRY

<u>Public Participation Method</u>	<u>Estimated Cost</u>
Copying and postage costs to mail announcements to 450 license holders and 20 professional associations and interested individuals	\$105
Copying and postage costs for press release to 25 newspapers, radio and TV stations	5
Legal advertisements in five Arizona newspapers @ \$14.75 average** cost per newspaper	<u>74</u>
Total	<u>\$184</u>

\* Staff time to type and mail copies not included in cost estimate.  
 \*\* Based on actual costs for legal advertising in 20 Arizona newspapers.

The estimated cost for these three methods for encouraging public participation, if utilized three times per year, would be approximately \$552. This represents 1.6 percent of the 1977-78 fiscal year expenditures for the Board of Optometry and 1.4 percent of the 1978-79 fiscal year estimated expenditures. It appears that this represents a minimal level of expenditure affordable by the Board.

#### CONCLUSION

The Board of Optometry has been substandard as compared to other Arizona regulatory agencies in its encouragement and use of public input in its operations. As a result, license holders are not adequately informed of Board meetings, actions and proposed actions and consumers have significantly limited opportunities to be informed concerning Board activity.

#### RECOMMENDATION

It is recommended that consideration be given to the following:

- The Board of Optometry adopt methods to encourage public input and participation in the promulgation of rules and regulations and development of legislative proposals. Consideration should be given to the methods being used by other Arizona regulatory bodies and the recommendations presented by the Arizona General and Mr. Gellhorn.



## FINDING VI

### CHANGES NEEDED TO IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF THE ARIZONA BOARD OF OPTOMETRY.

The Board of Optometry can improve the efficiency and effectiveness of its operations through statutory and procedural changes. These changes are:

1. The Board should adopt a two-year license renewal system; and
2. The renewal date for licenses should be advanced from June to an earlier month in the fiscal year or staggered throughout the year.

#### The Board Should Adopt

##### A Two-Year Renewal System.

Arizona Revised Statutes 32-1725 states that the Board shall renew the licenses of optometrists on an annual basis. Because of the limited support services available to the Board of Optometry, annual renewals hinder the efficiency and effectiveness of the Board by significantly increasing the workload of the Board's support staff. Revising ARS 32-1725 to authorize biennial renewals of licenses would reduce the workload on the Board, result in a cost savings to the Board, and increase the efficiency and effectiveness of the Board of Optometry.

The Board of Optometry has no full-time support staff. All support services are provided through contract with the Department of Administration, by the Arizona State Boards Administrative Office (ASBAO). ASBAO serves as the support staff for the Board of Optometry and ten State Boards or Commissions. These boards or commissions are:

1. Arizona State Athletic Commission
2. State Board of Dispensing Opticians
3. Ethics Board
4. State Board of Funeral Directors and Embalmers
5. State Naturopathic Board of Examiners
6. Board of Nursing Care Institution Administrators
7. Board of Optometry
8. Board of Physical Therapy Examiners
9. State Board of Podiatry Examiners
10. State Board of Psychologist Examiners
11. Arizona State Veterinary Medical Examiners Board

Nine of the above Boards renew certificates or licenses on a yearly basis creating a heavy annual<sup>^</sup> for on the ASBAO. Our review indicates that this workload could be reduced if ARS 32-1725 were amended to allow the Board of Optometry to renew the licenses of optometrists on a biennial basis. Further, our review has shown that such a change would result in cost savings to the Board of approximately \$1,568.40 in four years. The costs of printing renewal notices, licenses and mailing costs would all be significantly reduced.

It should be noted that amending ARS 32-1725 to allow for biennial renewal of licenses may also necessitate a change in ARS 32-1726 concerning renewal fees which the Board may impose. Presently, ARS 32-1726 states that:

"The following fees shall be paid to the board:

- ...
3. Renewal of certificate to practice optometry, up to one hundred dollars."

If ARS 32-1725 were amended to allow for biennial renewals, then ARS 32-1726 should also be amended to allow a higher renewal fee to finance Board operations for two years. A biennial fee not to exceed two hundred dollars appears to be appropriate.

The current trend appears to illustrate that more states are utilizing a biennial renewal system. In May 1977 only two states had a biennial renewal system and as of August 20, 1979, 14 states have adopted such a system. Table 13 illustrates the states that are utilizing a biennial renewal system as of August 20, 1979.

TABLE 13

STATES UTILIZING AND NOT  
UTILIZING BIENNIAL LICENSE  
RENEWAL OF OPTOMETRISTS  
AS OF AUGUST 20, 1979

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STATES UTILIZING BIENNIAL REGISTRATION

Alaska	Hawaii	New York
Colorado	Illinois	Pennsylvania
Delaware	Indiana	Vermont
Florida	Massachusetts	Wisconsin
Georgia	New Jersey	

STATES NOT UTILIZING BIENNIAL REGISTRATION

Alabama	Louisiana	Nevada	South Carolina
Arkansas	Maine	New Hampshire	South Dakota
ARIZONA	Maryland	New Mexico	Tennessee
California	Michigan	North Carolina	Texas
Connecticut	Minnesota	North Dakota	Utah
Idaho	Mississippi	Ohio	Virginia
Iowa	Missouri	Oklahoma	Washington
Kansas	Montana	Oregon	West Virginia
Kentucky	Nebraska	Rhode Island	Wyoming

The Renewal Date For Optometrists'

Licenses Should Be Moved Forward

Arizona Revised Statute 32-1725 states that renewals shall be made annually before the first day of July. As a result, ASBAO issues optometrists' licenses during the month of June.

Of the 11 State Boards or Commissions to which the ASBAO provides support services, nine renew certificates or licenses. These nine Boards, along with the estimated number of annual renewals during 1978 and the month of renewal, are shown below:



<u>Board or Commission</u>	<u>Number of Annual Renewals</u>	<u>Renewal Month</u>
Board of Physical Therapy Examiners	450	August
State Naturopathic Board of Examiners	155	December
Arizona State Veterinary Medical Examiners Board	600	December
State Board of Dispensing Opticians	300	December
State Board of Psychologist Examiners	770	June
State Board of Funeral Directors and Embalmers	890	June
Board of Optometry	480	June
Board of Nursing Care Institution Administrators	190	June
State Board of Podiatry Examiners	125	June

Currently, the ASBAO processes 62 percent of its total annual renewals during the month of June, the last month of the fiscal year. Because of this heavy renewal workload at the end of the fiscal year, the ASBAO has experienced difficulties in recording revenue in the proper fiscal year. This problem could be eliminated and the efficiency of the renewal process improved if the renewal date for the optometrists' licenses were changed to another month or staggered throughout the year.

Arizona Revised Statute 32-1725 states that the renewals shall be made on or before June 30. Presently, the Board cannot require optometrists to renew their licenses earlier than June 30 unless ARS 32-1725 is amended.\* The Administrative Manager of the ASBAO has stated that a change in the renewal month would greatly reduce the workload placed on the ASBAO in the month of June.

\* The Legislative Council in an April 20, 1979, opinion stated that the Board of Dental Examiners could not impose a mandatory staggered registration system because Arizona law specified that fees must be paid on or before June 30 each year. Based upon that Legislative Council opinion, it appears that the Board of Optometry would also be restricted by ARS 32-1725 from imposing staggered registration schedule without statutory change.

## CONCLUSIONS

Our review of the Board of Optometry has shown that statutory and procedural changes are needed. The Board's efficiency and effectiveness in the process of renewing optometrists' licenses is significantly impaired by the constraints of the present statutes.

## RECOMMENDATION

It is recommended that consideration be given to the following:

1. Amendment of ARS 32-1725, which requires annual registration, to allow the Board of Optometry to adopt a less frequent registration schedule in an appropriate month or months when workload is reduced.
2. Amendment of ARS 32-1726 to permit the Board to charge an appropriate fee for less frequent renewal of licenses. Presently, the statutes limit the renewal fee to one hundred dollars.

## OTHER PERTINENT INFORMATION

### THE USE OF PHARMACEUTICAL AGENTS BY OPTOMETRISTS

In 1976 and every year thereafter, the Arizona Optometric Association has advocated legislation which would allow optometrists to use specified drugs or pharmaceutical agents in their practice. Each year the bill has been defeated. Although the use of pharmaceutical agents aids the optometrist in examining eyes and detecting disease of the eye, under certain conditions the use of these drugs can also cause adverse reactions that could endanger the health of the patient. Consideration of legislation permitting optometrists to use pharmaceutical agents has not been limited to Arizona. As of June 1, 1979, 23 states have passed laws allowing drug usage by optometrists for diagnostic and/or therapeutic purposes.

A summary of the following pertinent areas concerning pharmaceutical agent usage is included:

1. Incidence of Arizona optometrists referring patients to ophthalmologists for treatment of disease,
2. An analysis of past proposed Arizona legislation concerning usage of pharmaceuticals,
3. The advantages and disadvantages of allowing optometrists to use pharmaceuticals, and
4. Results of legislative proposals of other states and the major elements of legislation that was enacted.

#### Responsibility For And Incidence Of Optometrists Referring Patients To Appropriate Health Care Professionals

As was discussed on page 16, several national court cases have established the optometrist's duty to refer to the appropriate physician those persons exhibiting symptoms of a disease or condition requiring medical treatment.



According to a survey of ophthalmologists\* by the Office of the Auditor General, Arizona optometrists do refer patients to them for care. Table 15 summarizes the number of yearly referrals received by ophthalmologists from optometrists.

TABLE 14

NUMBER OF PATIENTS REFERRED TO  
OPHTHALMOLOGISTS BY OPTOMETRISTS EACH  
YEAR IN ARIZONA

<u>Survey Questions Asked of Arizona Ophthalmologists</u>	<u>Summary of Survey Responses</u>	
<u>Number of Patients Referred to You Each Year By Optometrists</u>	<u>Number of Ophthalmologists Responding to Question</u>	<u>Percentage of Ophthalmologists Responding to Question</u>
1 - 20	29	52%
21 - 40	12	21
41 - 60	7	13
61 - 80	3	5
Over - 80	5	9
	<u>56</u>	<u>100%</u>

\* Results of the Office of the Auditor General survey are contained in Appendix XVI.

The results of the Auditor General survey of Arizona ophthalmologists were that optometrists refer an average of 39 patients to ophthalmologists per year. It should be noted that although optometrists do not make differential diagnoses of health condition, they are expected to be able to discover abnormalities and refer the patient to the appropriate health care professional.

Proponents of legislation to allow optometrists usage of pharmaceutical agents argue that the use of drugs will increase the ability of optometrists to detect disease and increase needed referrals to physicians for treatment.

#### Proposed Legislation Supported

##### By The Arizona Optometric Association

Since 1976 the Arizona Optometric Association has initiated the proposal of legislation introduced each year in the Arizona State Legislature to allow the use of diagnostic drugs by optometrists.

Although the legislation has not been adopted, in 1977 the proposed legislation passed both houses before an amended version failed a vote in the Senate. The proposed legislation would have allowed optometrists to use seven specified drugs in their practice of optometry. Although the use of the drugs proposed may assist the optometrist in detecting eye diseases, under some conditions, the use of these pharmaceutical agents can cause adverse effects that may endanger the health of the patient. The adverse reactions of these drugs can range from stinging of the eye and headaches to convulsions, respiratory depression and circulatory collapse. Table 15 depicts each pharmaceutical agent, its generic and trade name, the solution, the effect of the drug, the possible adverse reactions caused by the drug and a description of persons to whom administration of the drug may be dangerous.

TABLE 15

EFFECT OF PHARMACEUTICAL AGENTS  
PERSONS TO WHOM ADMINISTRATION  
MAY BE DANGEROUS, AND POSSIBLE  
ADVERSE REACTIONS

	PHARMACEUTICAL AGENT (TRADE NAME)											
	Proparacaine Hydrochloride* (Ophthalmine)	1% 1%	Tetracaine Hydrochloride (Pontocaine)*	1% 1%	Phenylephrine Hydrochloride (Neo-Synephrine)	10% 2 1/2%	Hydroxyamphetamine Hydrobromide (Paredrine)*	1% 1%	Cyclopentolate Hydrochloride (Cyclogyl)*	1% 1%	Tropicamide* (Mydracil)	1% 1%
<u>Solution</u>												
<u>Effect Of Pharmaceutical Agent</u>												
Myriatic (Dilation Of The Pupil)					X	X						X
Cycloplegic (Paralysis Of Eyelid Muscle)												X
Local Anesthetic (Suppression Of Pain)	X		X									X
<u>Persons To Whom Administration May Be Dangerous</u>												
Persons With Narrow Angle Glaucoma					X	X						X
Infants And Children					X	X						X
Elderly					X	X						X
Persons With High Intraocular Pressure					X	X						X
Persons With Diabetes, Hypertension					X	X						X
Persons With Hyperthyroidism					X	X						X
Persons With Allergy, Cardiac Disease					X	X						X
Persons With Low Weight					X	X						X
Persons With Hypersensitivity to the Drug					X	X						X
<u>Possible Adverse Reaction</u>												
Retards Wound Healing	X											
Rebound Contraction Of The Pupil					X	X						
Increased Intraocular Pressure												X
Behavioral Disturbances												X
Increased Blood Pressure					X	X						X
Stinging/Burning	X											X
Subsequent Corneal Infection					X	X						X
Blurring Of Vision	X											X
Fast Heart Beat												X
Visual Hallucinations												X
Incoherent Speech												X
Allergic Reaction	X											X
Convulsions												X
Decreased Vision												X
Respiratory Depression												X
Circulatory Collapse					X	X						X
Sensitivity To Light												X
Headache												X
Inability To Coordinate Voluntary Bodily Movements												X

\* Name which is used in the 1979 legislation supported by the Arizona Optometrists' Association. Proparacaine Hydrochloride appears as proparacaine in the proposal.



It should be noted that the information on Table 15 was derived from the Physicians Desk Reference for Ophthalmology and was verified by pharmacists from the University of Arizona Medical School and the Arizona State Board of Pharmacy.

The questions considered by legislators when discussing the proposed law include whether the beneficial effects outweigh the dangers of adverse reactions that can occur.

#### Advantages And Disadvantages

##### Of Allowing Optometrists

##### To Use Pharmaceutical Agents

Advantages and disadvantages of allowing optometrists to use pharmaceutical agents include the following:

##### Advantages

As stated by optometrists and other proponents, three advantages are:

- The ability of an optometrist to detect abnormal conditions of the eye during an examination would be improved by the use of drugs to dilate the pupil or relax the eyelash muscle.
- With this improved ability, diseases and other abnormalities can be detected at an earlier stage and optometrists would be able to refer the patients who need medical attention to ophthalmologists in a more timely manner.
- Since only six counties in Arizona have the professional services of a full-time ophthalmologist, much of the ophthalmic care in the eight other rural counties falls directly upon the optometrists. An extension of the optometrists' ability to conduct a thorough eye examination would improve the quality of eye care in these rural counties.

### Disadvantages

Detractors of this legislation, including ophthalmologists and other physicians, stated the disadvantages as:

- Under certain conditions the pharmaceutical agent can cause serious reactions such as high blood pressure, convulsions, visual hallucinations, central respiratory failure and circulatory collapse. Optometrists do not have the adequate training nor the adequate emergency facilities to treat these adverse reactions.
- Since optometrists are unable adequately to diagnose eye diseases, the public will not be served by allowing optometrists to use eyedrops which will allow optometrists to look for diseases they are not trained to diagnose.
- Diagnostic tests will have to be repeated upon referral to the ophthalmologists, thus creating higher health care costs.

### Twenty-Three States

#### Have Authorized Optometrists

#### To Use Pharmaceutical Agents

Since 1971, 23 states have approved legislation to allow optometrists to use pharmaceutical agents. As shown in Table 16, two states have also determined that therapeutic drugs can also be used in the practice of optometry.

TABLE 16

STATES WHICH STATUTORILY  
ALLOW OPTOMETRISTS TO USE  
PHARMACEUTICAL AGENTS

<u>Name of State</u>	<u>Year of Enactment</u>	<u>Diagnostic</u>	<u>Therapeutic</u>
Rhode Island	1971	X	
Pennsylvania	1974	X	
Tennessee	1975	X	
Oregon	1975	X	
Maine	1975	X	
Louisiana	1975	X	
Delaware	1975	X	
West Virginia	1976	X	X
California	1976	X	
Wyoming	1977	X	
New Mexico	1977	X	
Montana	1977	X	
Kansas	1977	X	
North Carolina	1977	X	X
Kentucky	1978	X	
Wisconsin	1978	X	
Nebraska	1979	X	
South Dakota	1979	X	
Utah	1979	X	
North Dakota	1979	X	
Arkansas	1979	X	
Iowa	1979	X	
Nevada	1979	X	

The optometry laws in eight additional states do not prohibit the use of pharmaceutical agents. In five of these states, the Attorney General has expressed an opinion on drug usage by optometrists; in one state the Board of Optometry has adopted rules and regulations allowing qualified optometrists to use drugs; and in two states, the issue has not been legally resolved. Table 17 lists these eight states.



TABLE 17

STATES WHICH DO NOT  
 STATUTORILY PROHIBIT  
 OPTOMETRISTS FROM USING DRUGS

State	Year of Attorney General Opinion (If Appropriate)	Use of Drugs Is Allowed		Use of Drugs Is Not Allowed By Attorney General Opinion	Use of Drugs Has Not Been Legally Resolved
		By Attorney General Opinion	By Board of Optometry Rules		
Alabama	1976			X	
Florida	1975	X			
Idaho			X		
Indiana	1946	X			
Michigan					X
Minnesota					X
New Jersey	1968	X			
Virginia	1972			X	
		<u>3</u>	<u>1</u>	<u>2</u>	<u>2</u>

As demonstrated by Tables 16 and 17 the current trend among the various states is to allow optometrists the use of pharmaceutical agents. In total, optometrists in 27 states are allowed to use specified drugs, 23 states by law, three through favorable Attorney General's Opinions and one by Board of Optometry rules and regulations.

Assuring That Optometrists  
Are Qualified To Administer  
Pharmaceutical Agents

Recent graduates of optometry schools are required to take a course in ocular pharmacology. However, optometrists licensed in previous years may not have such education. State legislatures have considered the problem of educational requirements in pharmacology for optometrists; and in some states, have passed laws requiring completion of an educational and testing requisite in pharmacology as a condition for issuance of a special permit to use diagnostic drugs. The proposed legislation in Arizona had a similar requirement which stated that an optometrist must have:

"Satisfactory completion of a course in clinical pharmacology, as it applies to optometry, with particular emphasis on the clinical application of diagnostic pharmaceutical agents for the purpose of examination of the human eye and the analysis of ocular functions, approved by a committee composed of the President of the Board, the Chairman of the Pharmacology Department of the University of Arizona College of Medicine and the Chairman of the Department of Ophthalmology of the University of Arizona College of Medicine."

Certain "safety" clauses have been included in the optometric pharmacology legislation enacted by other states to further protect the patient from the likelihood of sustaining physical harm from drug usage. Nine states require optometrists to refer patients to physicians if problems are encountered during the eye examination. Oregon allows the use of miotics, a drug which causes prolonged contraction of the pupil, only in emergencies and only upon consultation with a physician. Utah requires optometrists to attend an annual refresher course in emergency medical care and pharmacology in order to retain the permit to use drugs.

## SUMMARY

Whether or not to allow optometrists to use diagnostic or therapeutic pharmaceutical agents is a current issue in Arizona and other states. It has been argued that an optometrist's ability to detect diseases or other abnormalities of the human eye would be improved by using drugs. The drugs proposed for use by optometrists can cause damage to the patient in certain circumstances. Twenty-three states have enacted legislation which allow optometrists to use pharmaceutical agents in their practice. Legislation in some states and the proposed legislation in Arizona contain clauses for requiring optometrists to be trained in Pharmacology.





# Arizona State Board of Optometry

1645 W. Jefferson Room 418  
Phoenix, AZ 85007

RESPONSE BY THE ARIZONA STATE BOARD  
TO THE  
PERFORMANCE AUDIT BY THE OFFICE OF THE AUDITOR GENERAL

MARTIN LADERMAN, O.D., President  
MORT KAY, O.D., Member  
KARL O. HOEFERT, O.D., Secretary

Sept. 7<sup>th</sup> 1979

A REPORT TO THE ARIZONA STATE LEGISLATURE

## FINDINGS

### FINDING I

The Board of Optometry has not effectively protected the public from incompetent or unscrupulous optometrists.

#### RESPONSE:

Throughout this report there appears this statement, "The Board did not discipline a single optometrist as a result of a consumer complaint."

In 1976 the license of Tom Head, O.D. #365 was revoked as a result of a review of a consumer complaint filed on November 17, 1974.

G. W. Patterson, licensed O.D., was suspended as a result of consumer complaint. This was prior to 1970. The Board has suspended a license for advertising in a manner as to hold himself out to the public that his services were superior to those of other optometrists. The judicial system again reversed the decision of the Board without giving a reason.

We have investigated every complaint and have taken the appropriate action after consulting with the Assistant Attorney General. We have made numerous investigations in as far as our limited financial situation allows. We have frequently asked for help from the consumers fraud division of the Attorney General's Office to resolve or even help investigate complaints. They complain of terrible backlog and cannot help us.

We have asked the Attorney General's Office for help through individual training or setting up training classes in procedures for conducting an investigation, holding an administrative hearing and discharging other responsibilities as a public official to no avail. We would have appreciated such investigative guidelines as are contained in the Legislative Council memorandum.

We have also attended a meeting of other Arizona regulatory board members where the possibility of hiring off-duty law enforcement officers as investigators was discussed. However, no further actions have been taken to date by the state agency organizing the meeting.

Page 24 to 26. You conclude that the Board has been deficient in its investigation and resolution of complaints from consumers. Most dealt with services and refund of fees and you state we have no legal jurisdiction in these matters.

Legislative Council Opinion: "The State Board of Optometry has no jurisdiction to arbitrate service or product disputes between optometrists and their patients. However, the board does have jurisdiction, for purposes of certificate suspension or revocation, to determine if an optometrist has committed unprofessional conduct by a failure, neglect or refusal to ensure that prescriptions are filled accurately and with quality workmanship in materials or has misrepresented ophthalmic materials or optometric services.

You may wish to recommend that the statutes be amended to provide the board with the power to censure an optometrist who has provided faulty service or products."



Of the three cases cited all occurred prior to present legislation which gives the Board some added powers regarding competency.

p. 29. Memo dated April 24, 1979: "...Thus, the Board clearly has jurisdiction to receive a complaint that an optometrist is guilty of unprofessional conduct as defined by statute and regulation or that a violation of a statutory provision or regulation has occurred. However, the response of the board is limited to holding a hearing on whether the certificate of the optometrist should be suspended or revoked. No authority exists for the board to remedy unsatisfactory services or to require replacement of defective ophthalmic materials. A dissatisfied patient must resort to other legal procedures to remedy these perceived wrongs..."

There is no reason to dispute table 3 & 4. However, the Board acted on all complaints even though they felt they had no jurisdiction according to statute. Because of our actions amicable settlements between practitioners and consumers were made.

## FINDING II

The examination process of the Board of Optometry is not in compliance with state law and is of questionable validity.

### RESPONSE:

Exam process - curved.

Audit people told that all grades were raised by the same number of points. This is common practice and the National Board has curved its examination results since its inception. The method we use is: Curves are utilized to compensate for the difficulty of the question.

What was meant was that if a question or questions were answered incorrectly by 100% of the candidates that question was presumed to be invalid and eliminated from grading.

Page 46, table 5 is very misleading as a large number of these states require successful passage of the N.B.E.O. as a prerequisite to taking the complete (written and practical) exam.

## FINDING III

The Board of Optometry has not revised promulgated rules which are inconsistent with federal regulations and Arizona statutes.

### RESPONSE:

All Rules and Regulations of the Board have gone through the legally prescribed procedures and further adopted and certified by the Attorney General's office and filed with the Secretary of State.

Upon passage of the new legislation this year the Board intends to consider the promulgation of Rules and Regulations to bring into conformity our Rules to State and Federal regulation.



#### FINDING IV

Since fiscal year 1976-77, the Board of Optometry has substantially improved the documentation and recording of its proceedings; however, additional improvements are still needed to assure that Board records are maintained in a manner consistent with statutory requirements.

#### RESPONSE:

The Auditor General states that records prior to 1976 are inadequate.

Mr. Bill George, fiscal officer of the Finance Department came to Casa Grande and personally picked up all records and delivered them to the newly formed Department of Administration (ASBAO). These records were complete and we are sure are still in the Department's possession.

#### FINDING V

The Board of Optometry has been substandard in its encouragement and use of public input in its operations. Information regarding meeting notices, proposed rules and regulations, legislative proposals and Board actions has not been adequately provided to licensed optometrists or the consumers of optometric services.

#### RESPONSE:

The past three years we have requested a public member be placed on the Board. However the Legislature defeated this proposal until the past session.

In addition both professional optometric organizations in Arizona have been notified of proposed rules and regulations in fact most changes come about through their efforts and encouragement, i.e. continued Education, minimum examinations and clarifying of Rx release.

All dates regarding examinations are widely publicized in various professional journals and all schools of optometry.

Still you must realize under our past financial capabilities we are limited as far as paid notices are concerned.



COMMENTS ON THE TWO SURVEYS.

APPENDIX XVI

OPTOMETRIC

Seems to give the Board a good rating.

OPHTHALMOLOGICAL

How can ophthalmologists have the competency to answer this question when they have little or no knowledge of the workings of the Board of Optometry.

Traditionally, optometrists have included in their services the dispensing of ophthalmic materials, only recently has ophthalmology begun to dispense ophthalmic materials obviously because of economic gain.

DIAGNOSTIC PHARMACEUTICAL AGENTS (D.P.A.'s)

We feel the question of D.P.A.'s is not appropriate for the Sunset Review. However, it should be noted in addition to more than half of the states utilization by optometrists of D.P.A.'s the United States Armed Forces and Public Health Services, not to mention Great Britain, Canada, Australia, New Zealand, etc. also use D.P.A.'s.

In addition, Dr. Joseph C. Toland, who is both an optometrist and an ophthalmologist and is the Director of Ophthalmological Services of the Pennsylvania College of Optometry, has testified before a Colorado Senate committee that optometrists are more than adequately educated to use D.P.A.'s. He also stated that in eleven years of practice as an ophthalmologist, he had never seen, nor was aware of a condition of anaphylactic shock, cardiac arrest, severe allergic reaction, or other alleged serious side effects, in the judicious use of D.P.A.'s.

OTHER COMMENTS

We strongly question PP2, page 83. The AZOA which composes approximately 75% of the practicing optometrists in this state passed a resolution urging the adoption of a continuing education requirement. The questionnaire obviously was mailed to all licensed optometrists and only approximately 50% of those do reside and practice in the State of Arizona.

Throughout this report there appears legal opinions by the Legislative Council that are different from the advice offered by the Assistant Attorney General. We feel it is incumbent upon us to accept the advice provided by the Attorney General representative.

A.R.S. 32-1759.

Advised by Assistant Attorney General this is not so. The City Attorney is responsible for misdemeanors. See page 13 of your report.

On page 14 should be added:

5. Increased the time regarding reciprocity licensees have to come into this state to begin practice to 180 days.

6. Trial de novo deleted.

Refer to page 11. The first two lines and the last two lines are not clearly stated.

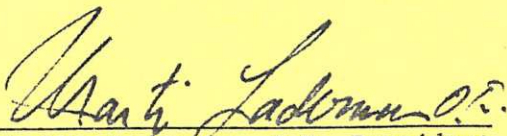
We question table two's validity (Page 7) in that we have been deficit spending for the last 3-4 years. This was the prime reason to go before the Legislature 3 years in a row to rectify this poor financial position.

We have adequately answered the first and second pages of your summary and agree wholeheartedly with the first alternative and the other recommendations on page 3, with the exception of No. 1. We have responded to the Section on N.B.E.O. and questioned its validity.

Your recommendation, No. 1, p. 3, seems unacceptable without further studies.

We need improved communications between the Board, Attorney General and Administrative offices.

We appreciate the number of hours that must have gone into this draft. We will utilize the valid suggestions to their fullest extent. However, we felt that it should have been completed 4 weeks prior to our receiving it, as scheduled by the Legislature. Your actions only left the Board with a minimal time to respond.

  
Martin Laderman, O.D. President

APPENDICES



ARIZONA STATUTES REGARDING  
THE OPTOMETRY PROFESSION

ARTICLE 1. BOARD OF OPTOMETRY

32-1701. Definitions

In this chapter, unless the context otherwise requires:

1. "Board" means the state board of optometry.
2. "Certificate" means certificate or license of registration.
3. "Practice of optometry" means the examination and refraction of the human eye and its appendages, and the employment of any objective or subjective means or methods other than the use of drugs, medicine or surgery, for the purpose of determining any visual, muscular, neurological or anatomical anomalies of the eye, the use of any instrument or device to train the visual system or correct any abnormal condition of the eye or eyes and the prescribing, fitting or employment of any lens, prism, frame or mountings for the correction or relief of or aid to the visual function.
4. "Registered optometrist" means any person holding a certificate or license of registration to practice optometry in Arizona.
5. "Unprofessional conduct" shall consist of:
  - (a) Wilful disclosure of a professional confidence or knowledge gained in a professional capacity.
  - (b) Final judgment of a conviction for an offense involving moral turpitude, in which case the record of such conviction shall be conclusive evidence.
  - (c) Giving or receiving rebates.
  - (d) Habitual intemperance in the use of alcohol or narcotic drugs, or practicing or attempting to practice optometry while under the influence of alcohol or narcotic drugs.
  - (e) Impersonation of another licensed practitioner. ~~of a like or different name.~~
  - (f) Knowingly having professional connection with or lending one's name to an illegal practitioner.
  - (g) Gross Malpractice.
  - (h) Any conduct or practice, INCLUDING INCOMPETENCY, which constitutes a danger to the health, welfare or safety of a patient or the public.

Sec. 2. Section 32-1702, Arizona Revised Statutes, is amended to read:

32-1702. Board of optometry

A. There shall be a board of optometry which shall consist of ~~three~~ FIVE members appointed by the governor for terms of four years EXPIRING ON JULY 1. ~~Each member~~ FOUR MEMBERS shall have been engaged in the actual practice of optometry in this state for at least three years immediately prior to appointment. ONE MEMBER SHALL BE A LAY PERSON.

~~B. The term of one member of the board shall expire July 1, 1956 and every fourth year thereafter, the term of one member shall expire July 1, 1958 and every fourth year thereafter, and the term of one member shall expire July 1, 1959 and every fourth year thereafter.~~

~~6.~~ B. The governor may remove any PROFESSIONAL member for neglect of duty, incompetency, improper or unprofessional conduct, or when his certificate or license has been revoked or suspended. THE GOVERNOR MAY REMOVE ANY MEMBER FOR NEGLIGENCE OF DUTY OR IMPROPER CONDUCT. Appointment to fill a vacancy caused other than by expiration of term shall be for the unexpired portion of the term.

§ 32-1703. Compensation

Members of the board shall receive compensation as determined pursuant to § 38-611 for each day actually spent in the performance of their duties. As amended Laws 1959, Ch. 86, § 3; Laws 1970, Ch. 204, § 111.

§ 32-1704. Organization; secretary-treasurer; duties

A. The board shall annually elect from among its membership a president and a secretary-treasurer, and in its discretion may appoint a person not holding a certificate or license to assist in the performance of the duties of the secretary-treasurer.

B. The secretary-treasurer shall account for all fees and monies received on behalf of the board and keep the accounts and records of the board and of all the proceedings of the board. As amended Laws 1959, Ch. 86, § 4; Laws 1971, Ch. 125, § 44.

32-1705. Powers and duties of board

A. The board shall make, and may from time to time amend, such rules and regulations not inconsistent with the provisions of this chapter governing the practice of optometry, for the performance of its duties under this chapter and for the examination of applicants for certificates or licenses, and shall adopt and use a seal, administer oaths and take testimony concerning any matter within its jurisdiction, provided that no rules shall be adopted that will regulate fees or charges of a registered optometrist to the patient or will regulate the place in which a registered optometrist shall practice, or the manner or method of his accounting, billing or collection of fees, and that no rule shall be promulgated by the board which shall prohibit advertising by a registered optometrist, unless such advertising is inconsistent with section 44-1481.

B. The board shall meet at least once each year at the capitol and at such other times and places as its president or the governor may designate by call. The board shall keep a record of its acts, receipts and disbursements, and of examinations held, with the names and addresses of the applicants and the results thereof, the names of all persons to whom certificates have been issued, the date of issuance, and all renewals. All such records shall be public.

C. THE BOARD SHALL ADOPT AND PROMULGATE ADMINISTRATIVE RULES PROVIDING CRITERIA FOR APPROVING PROGRAMS OF CONTINUING EDUCATION FOR REGISTERED OPTOMETRISTS. PROGRAMS MUST BE DESIGNED TO ASSIST REGISTERED OPTOMETRISTS TO MAINTAIN COMPETENCY, TO BECOME AWARE OF NEW DEVELOPMENTS IN THE PRACTICE OF OPTOMETRY AND TO INCREASE MANAGEMENT SKILLS AND ADMINISTRATIVE EFFICIENCY. THE BOARD SHALL APPROVE PROGRAMS MEETING ITS ADOPTED CRITERIA.

D. The board shall accredit schools of optometry giving standard courses in optometry with eighty per cent of actual attendance by students. An accredited school shall teach all of the subjects on which applicants for a certificate or license are required to be examined by this chapter.

E. The board may hire investigators to assist in the investigation of violations of this chapter, and other employees required to enforce the provisions thereof.

F. Not later than December 31 each year the board shall transmit to the governor a written report of its actions and proceedings. The report shall be verified by the secretary-treasurer and shall include a detailed statement of the receipts and disbursements for the preceding year.



§ 32-1706. Board of optometry fund

All money received by the board shall be paid to the state treasurer monthly. The state treasurer shall deposit ten per cent thereof in the general fund and ninety per cent in the board of optometry fund for the payment of salaries and other expenses of the board when appropriated for such purposes.

Historical Note

Source:

§ 10, Ch. 143, L. '54, in part; 67-1418, C. '39, Supp. '54.

ARTICLE 2. CERTIFICATION

§ 32-1721. Persons and acts not affected by chapter

This chapter shall not apply to physicians and surgeons duly licensed to practice medicine in this state, nor prohibit the sale of spectacles and eye-glasses as merchandise from a permanently established place of business. As amended Laws 1959, Ch. 86, § 6.

Sec. 4. Section 32-1722, Arizona Revised Statutes, is amended to read:

32-1722. Reciprocity

A. Any person who presents to the board a certified copy of or a certificate or license of registration in good standing which was issued to him after examination by a board of registration in optometry in any other state, where the requirements for registration are in the opinion of the board equivalent to those of this state, may, at the discretion of the board, be registered and given a certificate of qualification in this state without a written examination, but shall be given a practical and oral examination, subject to the following provisions:

1. That such state accords like privileges to holders of certificates of registration issued in this state.

2. The certificate of registration of the applicant shall not have been suspended or revoked by such other state for any cause which is a basis of suspension or revocation of certificate under this chapter.

3. The applicant has not previously failed to pass the examination in this state subsequent to his admission to practice in such other state.

4. The applicant has been engaged in the practice of optometry continuously IN SUCH STATE for not less than four of the five years immediately preceding his application.

5. The applicant intends to reside and practice optometry in this state.

B. The provisions of subsection A shall apply only to those optometrists coming into this state to open a permanent office within ~~sixty~~ ONE HUNDRED EIGHTY days from the date a license is issued.

C. When the holder of a "reciprocity license" removes from this state for a period of five years or more, his license shall become automatically subject to review by the board.



32-1723. Qualifications of applicant; application

A. A person of good moral character, desiring to engage in the practice of optometry, shall file with the board, not less than thirty days prior to the date on which an examination is to be held, a verified application, accompanied by the required application fee, which shall show:

1. Applicant's name, age and address.
2. Graduation from a high school giving a four-year course accredited by the university of Arizona or an equivalent preliminary education.

3. Graduation from an accredited A university or school teaching the profession of optometry ACCREDITED BY A NATIONALLY ACCEPTED ACCREDITING BODY ON OPTOMETRIC EDUCATION. ~~Graduation may be from an accredited university or school teaching the full five-year course in the profession of optometry or from an accredited university or school teaching a three-year course in the profession of optometry upon submission of proof by the student that he has previously had at least sixty semester hours of collegiate work.~~

B. In lieu of the evidence of ACCREDITED education, the applicant may furnish a certificate issued by an agency of another state or foreign country authorized to grant licenses to practice optometry, showing that the applicant has held such license therein for not less than five years and is an active practitioner, and furnish additional evidence as the board requires concerning his knowledge of and ability to practice optometry.

Sec. 6. Section 32-1724, Arizona Revised Statutes, is amended to read:

32-1724. Examination; issuance of certificate

A. Applicants for a certificate shall be given a written AN examination only on the subjects of ~~geometric optics, ocular anatomy, ocular pathology, theoretical and practical optics, theoretical and practical optometry, hygiene, psychology, optical laboratory and clinical work, visual training or orthoptics, contact lenses, and general anatomy, physiology, mathematics as related to optometry, physics and optics~~ SUBJECT MATTER CURRENTLY BEING TAUGHT IN THE ACCREDITED UNIVERSITIES OR SCHOOLS OF OPTOMETRY.

B. A grade of not less than seventy-five per cent in each subject is required to pass the examination successfully.

C. Examinations shall be held at least once each year at the capitol, and at such other times and places as the board designates. Notice of examination shall be given not less than sixty days prior to the date ~~thereof~~ OF THE EXAMINATION. If an applicant is unable to take the examination and notifies the board prior to the date fixed ~~therefor~~ FOR THE EXAMINATION, the board shall MAY refund to the applicant the application fee AND MAY ALLOW THE APPLICANT TO TAKE THE EXAMINATION WITHIN ONE YEAR.

D. Each applicant who satisfactorily passes the examination shall UPON PAYMENT OF THE ISSUANCE FEE ~~thereafter~~ be registered in the board's register of optometry, and a certificate of registration shall be issued to him under the seal and signature of the members of the board. ~~upon the payment of the issuance fee.~~ The certificate shall continue in force until July 1 of the next succeeding year. FAILURE TO PAY THE ISSUANCE FEE WITHIN ONE YEAR SHALL NECESSITATE THE RETAKING OF THE EXAMINATION.

Sec. 7. Section 32-1725, Arizona Revised Statutes, is amended to read:

32-1725. Annual renewal of certificate; continuing education; failure to renew

A. A certificate shall remain in effect until July 1 of the year next succeeding the date the certificate is issued, unless sooner suspended or revoked. Upon payment of the renewal fee AND COMPLETION OF THE CONTINUING EDUCATION REQUIREMENTS, the certificate shall be renewed by the board each year thereafter for an additional one year period. FAILURE TO PAY THE RENEWAL FEE ON OR BEFORE JUNE 30 OF ANY YEAR SHALL VOID THE CERTIFICATE.

B. EACH OPTOMETRIST FIRST REGISTERED IN THIS STATE AT LEAST ONE YEAR BEFORE THE EXPIRATION OF A CERTIFICATE IS REQUIRED AS A CONDITION OF RENEWAL OF THE CERTIFICATE TO ATTEND DURING THE YEAR BEFORE THE EXPIRATION OF THE CERTIFICATE A CONTINUING EDUCATION PROGRAM APPROVED BY THE BOARD FOR AT LEAST TWELVE BUT NO MORE THAN TWENTY CLOCK HOURS AS DETERMINED BY RULE OF THE BOARD.

C. IF IT APPEARS THAT A CERTIFICATE WILL NOT BE RENEWED BY JULY 1 FOR FAILURE TO ATTEND THE REQUIRED CONTINUING EDUCATION, THE BOARD SHALL RENEW THE CERTIFICATE IF THE REGISTERED OPTOMETRIST SUCCESSFULLY PASSES A WRITTEN EXAMINATION GIVEN BY THE BOARD TO DEMONSTRATE COMPLIANCE WITH THE PURPOSE OF CONTINUING EDUCATION, BUT THE EXAMINATION MAY ONLY BE GIVEN TO A REGISTERED OPTOMETRIST IF THE BOARD IS SATISFIED THAT THE REGISTERED OPTOMETRIST SEEKING RENEWAL MADE A REASONABLE EFFORT TO ATTEND THE CONTINUING EDUCATION AND THAT FAILURE TO ATTEND WAS DUE TO CIRCUMSTANCES BEYOND THE OPTOMETRIST'S CONTROL OR IF THE BOARD IS SATISFIED THAT THE PECULIAR CIRCUMSTANCES OF THE REGISTERED OPTOMETRIST MADE THE REQUIRED ATTENDANCE IMPRACTICAL AS A HARDSHIP. IF A CERTIFICATE HAS NOT BEEN RENEWED BY JULY 1 FOR FAILURE TO ATTEND THE REQUIRED CONTINUING EDUCATION, THE BOARD SHALL REINSTATE THE CERTIFICATE IF THE APPLICANT ATTENDS THE REQUIRED CONTINUING EDUCATION DURING THE YEAR BEFORE THE REINSTATEMENT OR SUCCESSFULLY PASSES A SIMILAR WRITTEN EXAMINATION GIVEN BY THE BOARD.

D. AN OPTOMETRIST WHOSE CERTIFICATE HAS BEEN VOIDED UNDER THIS SECTION SHALL NOT BE REINSTATED EXCEPT UPON WRITTEN APPLICATION AND PAYMENT OF ALL DELINQUENT ANNUAL FEES, PLUS PENALTIES FIXED BY THE BOARD NOT TO EXCEED TWENTY-FIVE DOLLARS PER ANNUM. IF THE APPLICATION FOR REINSTATEMENT OF THE CERTIFICATE IS MADE, AND ALL DELINQUENT AND RENEWAL FEES AND PENALTIES ARE PAID WITHIN FIVE YEARS AFTER THE CERTIFICATE HAS BEEN VOIDED, AN INITIAL CERTIFICATION EXAMINATION SHALL NOT BE REQUIRED.

E. A PERSON HOLDING A CERTIFICATE TO PRACTICE OPTOMETRY IN THIS STATE WHO HAS NOT ENGAGED IN THE PRACTICE OF OPTOMETRY IN THIS STATE WITHIN A FIVE-YEAR PERIOD MAY BE REQUIRED BY THE BOARD TO PASS AN INITIAL CERTIFICATION EXAMINATION BEFORE HIS CERTIFICATE IS RENEWED.

Sec. 8. Section 32-1726, Arizona Revised Statutes, is amended to read:

32-1726. Fees

The following fees shall be paid to the board:

1. For filing an application for examination, ~~twenty-five~~ UP TO ONE HUNDRED dollars.
2. Registration fee OR ISSUANCE FEE, ~~twenty~~ UP TO ONE HUNDRED dollars.
3. Renewal of certificate to practice optometry, ~~twenty~~ UP TO ONE HUNDRED dollars.
4. Application for reciprocity license, ~~fifty~~ UP TO TWO HUNDRED dollars.
5. DUPLICATE LICENSE FEE, UP TO TWENTY-FIVE DOLLARS.

### ARTICLE 3. REGULATION

#### § 32-1751. Practicing optometry without license prohibited

No person shall engage or continue to engage in the practice of optometry in this state unless he has a certificate in good standing as provided in this chapter.



§ 3, Ch. 143, L. '54, in part; 67-1411, C. '39, Supp. '54.

§ 32-1752. Recording of certificate

A holder of a certificate shall, before beginning practice in any location, file his certificate or a certified copy thereof for record with the county recorder of each county in which he intends to practice. It shall be unlawful to engage in the practice of optometry in any county, including temporary visitant practice away from the registrant's regular office, until the certificate has been recorded.

Historical Note

Source:

§ 5, Ch. 143, L. '54, in part; 67-1413, C. '39, Supp. '54.

§ 32-1753. Registering place of practice with board

A holder of a certificate shall notify the board in writing of the place where he is practicing or intends to begin practice, and of any subsequent change of his office location, including temporary visit and practice. Any notice required to be given by the board to any registered optometrist may be given by mail to this address.

Historical Note

Source:

§ 5, Ch. 143, L. '54, in part; 67-1413, C. '39, Supp. '54.

§ 32-1754. Practice away from registered place of business

A registered optometrist who temporarily practices optometry outside or away from his regular registered place of practice shall deliver to each patient there fitted or supplied with glasses, a signed receipt showing:

1. His permanent registered place of practice.
2. The number of his certificate.



§ 32-1755. Grounds for suspension or revocation of certificate

After notice and hearing the board in its discretion may suspend or revoke the certificate of a registered optometrist for any of the following reasons:

1. Conviction of an offense involving moral turpitude.
2. Obtaining a certificate by fraud or deceit.
3. Conduct likely to deceive or defraud the public.
4. Unprofessional conduct.
5. Employment of a solicitor to solicit business, or soliciting from house to house, or person to person.
6. Obtaining a fee or compensation by fraud or misrepresentation.
7. Employment of a person to engage in the practice of optometry who does not hold a certificate to practice optometry.
8. Having a contagious or infectious disease.
9. Using any device to evade or defeat the provisions of this chapter, such as a profit-sharing plan or partnership with an optometrist not registered in this state.
10. Violation of any provision of this chapter.
11. The practice of optometry under a false or assumed name.
12. Violation of any of the rules and regulations adopted by the board pursuant to its authority hereunder. As amended Laws 1959, Ch. 86, § 10.

32-1756. Hearing; judicial appeal

A. The board shall hold a public hearing for the purpose of determining if it should in its discretion suspend or revoke a certificate. Ten days prior notice of such hearing shall be given by the board to the certificate holder.

B. The board may compel the attendance of witnesses at the hearing, and the accused may appear in person or by another and present evidence in his own behalf. The board shall keep a record of the testimony presented, and serve a copy of its findings and orders entered on the accused.

C. Except upon conviction of an offense involving moral turpitude or when a certificate was obtained by fraud or deceit, the revocation or suspension may be set aside by the board within six months from the date thereof, upon proof, to the satisfaction of the board, that the cause therefor no longer exists, or that the applicant has been sufficiently punished.

D. The decision of the board shall be final in any matter relating to the issuance, renewal, suspension or revocation of a license unless the person aggrieved, within thirty days after the date of the decision, files an appeal with the superior court, and serves a copy of such appeal on the secretary of the board. In such appeal, the court shall hear and determine the matter ~~de novo~~, not more than twenty days after the date of filing the appeal.

§ 32-1757. Allegations sufficient to charge violation

In charging any person in a complaint for injunction or in an affidavit, information or indictment with a violation of this chapter by practicing optometry without a license, it shall be sufficient to charge that he did upon a certain day and in a certain county engage in the practice of optometry, not having a valid license to do so, without averring any further or more particular facts concerning the act.

Historical Note

Source:

§ 12, Ch. 143, L. '54, in part; 67-1420, C. '39, Supp. '54.

§ 32-1758. Injunctive relief

The attorney general, a county attorney, the state board of optometry or any citizen of a county where a person engages in the practice of optometry without having first obtained a license therefor, or whose license has been regularly issued and for cause has been suspended or revoked, may, in accordance with the laws governing injunctions, maintain in the name of the state an action in the county in which the offense is committed to enjoin such person from so engaging until a license therefor is secured or restored. A person so enjoined who violates the injunction shall be punished as for contempt of court. The injunction shall not relieve a person practicing optometry without a license from criminal prosecution, but shall be in addition to any remedy provided for the criminal prosecution of the offender.

Historical Note

Source:

§ 12, Ch. 143, L. '54, in part; 67-1420, C. '39, Supp. '54.

§ 32-1759. Violations; classification

A person who practices optometry without at the time having a valid recorded certificate of registration therefor, or who files or attempts to file for record a certificate of registration issued to another, claiming to be the person entitled thereto, is guilty of a class 2 misdemeanor. As amended Laws 1978, Ch. 201, § 556, eff. Oct. 1, 1978.



## ARIZONA LEGISLATIVE COUNCIL

## MEMO

May 2, 1979

TO: Douglas R. Norton, Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-79-26)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated April 13, 1979.

QUESTIONS PRESENTED

I. What legal precedent is there to substantiate or refute [the proposition] that [the licensing and regulation of] optometrists protect[s] the health and safety of the public?

II. Is there, based on legal precedent, a need to license optometrists?

ANSWERS

I. Your first question concerning the existence of any legal precedent to support the proposition that the licensing of optometrists protects the health and safety of the public can be approached in two ways: (1) the right of the legislature to regulate the professions in general and specifically the profession of optometry; and (2) directly on point, whether such regulation protects the public health and safety.

(1) It is well established at both state and federal levels that one has an inalienable right to carry on one's business or profession free from all unlawful interference. (See Wallace v. Ford, D.C. Texas, 21 F. Supp. 624 (1937); Louisiana Board of Examiners in Watchmaking v. Morrow, 188 So. 2d 160, application for rehearing denied, 249 La. 729, 190 So. 2d 238 (1966); and Miller's, Inc. v. Journeymen Tailors Union Local No. 195, 15 A. 2d 822; affirmed 128 N.J. Eq. 162, 15 A. 2d 824, reversed on other grounds, 312 U.S. 658 (1940)). However, statutes and regulations within the scope of the police power of the state for the regulation of the professions, trades or business have been held not to constitute an infringement of such vested rights. (See Collins v. Texas, 223 U.S. 288 (1915); and Northern Inyo Hospital v. Fair Employment Practices Commission, 112 Cal. Rptr. 872, 38 C.A. 3rd 14 (1974)). For purposes of reference, the police power has been defined by Black's Law Dictionary (4th edition, page 1317), among other authorities, as:

... The power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they judge to be for the good and welfare of the commonwealth, and of the subjects of the same.\*

\*See also Commonwealth v. Alger, 7 Cush. (Mass.) 53, 85 (1853).



Thus, there is considerable caselaw precedent to support the proposition that there is no vested right to engage in any of the professions, including the practice of optometry, free from statutory regulation. (See Bennett v. Indiana State Board of Registration and Examination in Optometry, 211 Ind. 678, 7 N.E. 2d 977 (1937)).

(2) The "practice of optometry" is defined by Arizona Revised Statutes section 32-1701, paragraph 1 as:

. . . The examination and refraction of the human eye and its appendages, and the employment of any objective or subjective means or methods other than the use of drugs, medicine or surgery, for the purpose of determining any visual, muscular, neurological or anatomical anomalies of the eye, the use of any instrument or device to train the visual system or correct any abnormal condition of the eye or eyes and the prescribing, fitting or employment of any lens, prism, frame or mountings for the correction or relief of or aid to the visual function.

Optometry thus involves, at the most basic level, the examination of the human eye for refractive error, the recommendation of corrective lenses and the recognition of diseases of the eye. (See Kachian v. Optometry Examining Board, 44 Wash. 2d 1, 170 N.W. 2d 743, 745 (1969); and Delaware Optometric Association v. Sherwood, 35 Del. Ch. 507, 122 A. 2d 424, 425 (1956)). Since the practice of optometry involves the study of the structure, functions, deficiencies and corrections of the human eye, it has a direct relationship to the health of the human body. (See Abelson's, Inc. v. New Jersey State Board of Optometrists, 3 N.J. 332, 65 A. 2d 644, mod. on other grounds, 5 N.J. 412, 75 A. 2d 867 (1949)). Being thus related to public health, there can be little disagreement as to the authority of the legislature to regulate optometry and other allied health professions to safeguard the public health and welfare and to protect the public against ignorance, incapacity, deception or fraud because of incompetent or unscrupulous practitioners. (See State v. Borah, 51 Ariz. 318, 76 P. 2d 757 (1938); Barskey v. Board of Regents of State of N.Y., 347 U.S. 442 (1954); People v. Reuter, 320 Ill. App. 600 51 N.E. 2d 812 (1943); and Bigelow v. Virginia, 421 U.S. 809 (1974)).

The profession of optometry may, as cited in the dissenting portion of the U.S. Supreme Court opinion referenced in your letter, essentially be a "mechanical art" requiring skill or knowledge in the use of certain measuring instruments, rather than an art or science dealing with the cause, cure and alleviation of disease. (See Friedman v. Rogers, 47 U.S.L.W. 4151 (February 21, 1979)). This conclusion does not obviate the empirical relationship between effective vision and good overall physical and mental health. However, given the limited training of optometrists in comparison with ophthalmologists, it is questionable from a public policy standpoint whether the former should be relied on in any exclusive sense for the detection of eye diseases.

II. In response to the second question in your inquiry, whether there is a need, based on legal precedent, to license optometrists, an affirmative answer can in general be derived from the body of caselaw cited in the first half of this opinion. To summarize, given the relationship between the determination and correction of refractive error in the human eye and good physical and mental health, there is a rational state interest, under the police power, to ensure that those who undertake this profession meet a minimum standard of competency through licensing.

CONCLUSIONS:

I. There is considerable legal precedent to support the proposition that the licensing of optometrists protects the health and safety of the public.

II. Legal precedent as well as considerations of public policy can be cited as justification for the licensing of optometrists in order to ensure that all who engage in this profession meet minimum standards of competency.

cc: Gerald A. Silva

MEMO

August 8, 1979

TO: Douglas R. Norton, Auditor General  
FROM: Arizona Legislative Council  
RE: Request for Research and Statutory Interpretation (O-79-53)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated August 1, 1979.

FACT SITUATION:

According to an Assistant Attorney General at the Board of Optometry meeting on May 22, 1978, the statutes concerning grounds for revocation or suspension of an optometrist's license are weak. Board minutes stated:

"... ARS 32-1755 is very weak and should be amended to provide the Board with more authority to regulate matters of this sort (an optometrist ignored the Board's request to respond to a consumer's complaint) that so often come to their attention and under present statutes the Board cannot act."

This section (ARS 32-1755) was indirectly modified in the 1979 legislative session through changes in the definitions of malpractice and unprofessional conduct that are grounds for revocation or suspension.

QUESTIONS PRESENTED:

1. Is ARS 32-1755 in any sense "weak" especially when contrasted to other professional and occupational regulation laws so that the Board of Optometry is prevented from revoking or suspending optometrists' licenses when justified?
2. Did the 1979 legislative changes mentioned above materially improve the Board's authority to revoke or suspend licenses?
3. Could the Board have defined unprofessional conduct to include incompetency by promulgation of rules rather than statutory change contained in the 1979 amendment?
4. Could the Board further refine the definition of unprofessional conduct through rule promulgation?

DISCUSSION:

1. Arizona Revised Statutes section 32-1755 provides that:

After notice and hearing the board in its discretion may suspend or revoke the certificate of a registered optometrist for any of the following reasons:

1. Conviction of an offense involving moral turpitude.
2. Obtaining a certificate by fraud or deceit.



3. Conduct likely to deceive or defraud the public.
4. Unprofessional conduct.
5. Employment of a solicitor to solicit business, or soliciting from house to house or person to person.
6. Obtaining a fee or compensation by fraud or misrepresentation.
7. Employment of a person to engage in the practice of optometry who does not hold a certificate to practice optometry.
8. Having a contagious or infectious disease.
9. Using any device to evade or defeat the provisions of this chapter, such as a profit-sharing plan or partnership with an optometrist not registered in this state.
10. Violation of any provision of this chapter.
11. The practice of optometry under a false or assumed name.
12. Violation of any of the rules and regulations adopted by the board pursuant to its authority hereunder.

This section was adopted from California law and has not been amended in twenty years. This section must be read in conjunction with Arizona Revised Statutes section 32-1701, paragraph 5 which defines unprofessional conduct.

A selected review of statutory provisions\* prescribing grounds for denial, suspension or revocation of licenses in various medically-related fields indicates that the Optometry Board statutes fall within a common regulatory pattern and are not especially noteworthy for either their strong points or their weak points. In fact, the same "boiler plate" language can be found throughout most of Title 32. If Arizona Revised Statutes section 32-1755 is regarded as "weak" then the majority of Title 32 regulatory provisions must be viewed in the same manner.

We cannot conclude that Arizona Revised Statutes sections 32-1701 and 32-1755 are especially weak when compared with other Arizona occupational licensing laws.

2. Arizona Revised Statutes section 32-1701, paragraph 5 was amended by Laws 1979, chapter 50 in subdivision (g) to change the term "gross malpractice" to "malpractice" and in subdivision (h) by adding the phrase "including incompetency". As amended, section 32-1701, paragraph 5 now reads:

"Unprofessional conduct" shall consist of:

- (a) Wilful disclosure of a professional confidence or knowledge gained in a professional capacity.
- (b) Final judgment of a conviction for an offense involving moral turpitude, in which case the record of such conviction shall be conclusive evidence.
- (c) Giving or receiving rebates.
- (d) Habitual intemperance in the use of alcohol or narcotic drugs, or practicing or attempting to practice optometry while under the influence of alcohol or narcotic drugs.

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\*See Arizona Revised Statutes sections 32-852 and 32-854.01 (podiatry); 32-924 (chiropractors); 32-1201 and 32-1263 (dentistry); 32-1401 and 32-1451 (medicine); 32-1554 (naturopathy); 32-1663 (nursing); 32-1927 (pharmacists); 32-2042 (physical therapy); 32-2081 (psychologists).

- (e) Impersonation of another licensed practitioner.
- (f) Knowingly having professional connection with or lending one's name to an illegal practitioner.
- (g) Malpractice.
- (h) Any conduct or practice, including incompetency, which constitutes a danger to the health, welfare or safety of a patient or the public.

The addition of the phrase "including incompetency" did, in our opinion, broaden the board's authority to revoke or suspend a license under Arizona Revised Statutes section 32-1755. It is less clear what effect the deletion of the word "gross" has. We are unable to discern any significant difference between the phrases "gross malpractice" and "malpractice". It is extremely difficult to delineate the boundaries between "gross" malpractice and "ordinary" malpractice. Such phrases as "great or excessive malpractice", the "absence of slight care" and "extremely reckless" have been used to describe gross malpractice. 18A Words and Phrases, "Gross Malpractice" and "Gross Negligence" (1979). A leading commentator has noted that there is:

. . . no generally accepted meaning [of the phrase gross negligence]; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention but less than conscious indifference to consequences; and that it is, in other words, merely an extreme departure from the ordinary standard of care. W. Prosser, Torts 184 (4th Ed. 1971).

To the extent that the deletion of the term "gross" can be perceived as lessening the standard by which malpractice actions become "unprofessional conduct", the board's authority to suspend or revoke licenses has been materially altered.

3. We believe that the Optometry Board could have defined unprofessional conduct to include incompetency by promulgation of rules rather than by statute. As we noted in an earlier memo (O-79-3, dated March 14, 1979) issued by this office:

. . . the constitutional power of the legislature to legislate cannot be relinquished or delegated so as to permit an administrative agency to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate. (citation omitted)

This does not mean that when authorized to do so by their enabling legislation administrative agencies:

. . . may not make rules and regulations supplementing legislation for its complete operation and enforcement if such rules and regulations are within the standards set forth by the legislature. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P.2d 915 (1950).

The Optometry Board is clearly authorized to make rules and regulations governing the practice of optometry. Arizona Revised Statutes section 32-1705, subsection A. While in Arizona Revised Statutes section 32-1701, paragraph 5, the legislature has expressly defined "unprofessional conduct", subdivision (h) of that paragraph provides that unprofessional conduct shall consist of:



. . . (a)ny conduct or practice, including incompetency, which constitutes a danger to the health, welfare or safety of a patient or the public.

Arguably, this statutory language provides standards under which the Optometry Board could expand the meaning of the term "unprofessional conduct" through its rule-making authority. Indeed, in two instances the board has already refined the meaning of the phrase "unprofessional conduct". In A.C.R.R. R4-21-02, subsection A, paragraph 2, the board has prescribed that if an optometrist accepts employment or places himself under the control, directly or indirectly, of a corporation, trading partnership or layman and performs optometric services for the public, "such acceptance shall be deemed to constitute unprofessional conduct." Additionally, the board has provided that:

. . . (t)he failure, neglect or refusal of any optometrist in the State of Arizona to keep a complete record of all patients examined by him, and/or for whom he has adapted optical accessories, for a period of not less than six (6) years shall be deemed to constitute "Unprofessional Conduct".  
A.C.R.R. R4-21-04, subsection F.

Thus it would seem that the board by regulation could have declared incompetency to be "unprofessional conduct". Incompetency certainly falls within the legislative standard of "conduct or practice which constitutes a danger to the health, welfare or safety of a patient or the public."

4. The Optometry Board could further refine the definition of unprofessional conduct through rule promulgation so long as it falls within and does not conflict with the guidelines expressed in Arizona Revised Statutes section 32-1701, paragraph 5. See discussion in point three of this memo.

## CONCLUSIONS

1. Arizona Revised Statutes section 32-1755 is quite similar to other Title 32 statutory provisions which prescribe grounds for denial, suspension or revocation of licenses.

2. The Laws 1979, chapter 50 addition of "incompetency" to the definition of unprofessional conduct materially improved the Optometry Board's authority to revoke or suspend licenses. It is less clear what effect the change in terminology of "gross malpractice" to "malpractice" has on the board's authority.

3. The Optometry Board could have defined unprofessional conduct to include incompetency by promulgation of rules rather than by statutory change.

4. The Optometry Board could further refine the definition of unprofessional conduct through rule promulgation so long as it falls within and does not conflict with existing statutory guidelines.

cc: Gerald A. Silva  
Performance Audit Manager



ARIZONA LEGISLATIVE COUNCIL

MEMO

July 25, 1979

TO: Douglas R. Norton, Auditor General  
FROM: Arizona Legislative Council  
RE: Request for Research and Statutory Interpretation (O-79-52)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated July 20, 1979.

BACKGROUND:

Arizona Revised Statutes section 32-1755 states:

"After notice and hearing the board in its discretion may suspend or revoke the certificate of a registered optometrist for any of the following reasons: . . ."

However, Arizona Revised Statutes section 41-1009, subsection D states:

"Unless precluded by law, and except as to claims for compensation and benefits under chapter 6 of Title 23, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default."

QUESTION PRESENTED:

Can the Arizona State Board of Optometry impose intermediary penalties such as:

1. Public letter of reprimand.
2. Probation.
3. Require specific educational courses.
4. Periodic review or supervision of an optometrist's practice by the Board.

DISCUSSION:

Since the Board of Optometry is a state agency, it is clear that the provisions of the Administrative Procedure Act (Arizona Revised Statutes section 41-1001 et seq.) apply to all proceedings of the Board. Arizona Revised Statutes section 41-1001, paragraph 1; Didlo v. Talley 21 Ariz. App. 446, 520 P.2d 540 (1974). Thus, unless precluded by law, the provisions of

Arizona Revised Statutes section 41-1009, subsection D, which allows for an informal disposition of a contested case, apply to actions by the Board of Optometry in deciding the legal rights, duties or privileges of a registered optometrist.

In conferring the power on the Board to suspend or revoke the certificate of a licensed optometrist, the term "may" in Arizona Revised Statutes section 32-1755 is used in the permissive, rather than a restrictive, sense. The power conferred upon the Board could not be construed as a duty since the statute explicitly states that the Board act "in its discretion". See Dickerson, Legislative Drafting section 7.4. Therefore, the language of the statute does not require that the Board only suspend or revoke the certificate. In addition, there is no proscription against imposing a lesser penalty short of suspension or revocation. Because of this, the Board would not be prohibited from informally disposing of a case as allowed by Arizona Revised Statutes section 41-1009, subsection D.

It should be noted that the informal disposition can only be imposed in a contested case. A contested case is defined in Arizona Revised Statutes section 41-1001, paragraph 2 as a proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. Therefore, the informal disposition could take place only after the Board of Optometry held a hearing to decide whether or not the certificate of a registered optometrist should be suspended or revoked.

The term "informal disposition" is not defined in Arizona Revised Statutes or by case law. It appears that an agreement to or default regarding the penalties listed in your letter would qualify as an "informal disposition".

CONCLUSION:

Since the provisions of the Administrative Procedure Act apply to the Board of Optometry, the Board may informally dispose of a contested case by stipulation, agreed settlement, consent order or default.

cc: Gerald A. Silva  
Performance Audit Manager

CASE STUDIES OF CONSUMER COMPLAINTS  
RECEIVED BY THE BOARD OF OPTOMETRY  
FOR CALENDAR YEAR 1978

APPENDIX V

Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition			
			Suspension or Revocation	No Record of Disposition	No Jurisdiction and/or no Violation Of Optom, Law	Settled By Both Parties and Dropped By The Board
1	Contacts prescribed caused great pain	126			X	
2	Patient could not see with glasses provided; had to obtain proper glasses from another doctor	42			X	
3	Patient could not see with glasses provided; had to obtain proper glasses from another doctor	42			X	
4	Patient did not want the type of glasses that were prescribed	30			X	
5	Patient wanted a copy of the prescription but the doctor would not release it	30				X
6	No record of the charges of this complaint	28			X	
7	Patient wanted a refund for unacceptable contacts	63			X	
8	No record of the charges of this complaint	Unknown		X		
9	No record of the charges of this complaint	35			X	
10	Patient received unacceptable glasses and wanted a refund. Board dropped complaint because patient did not appear at Board meeting to discuss the complaint	35			X	
11	Doctor refused to release prescription, subsequently released	51				X



CASE STUDIES OF CONSUMER COMPLAINTS  
RECEIVED BY THE BOARD OF OPTOMETRY  
FOR CALENDAR YEAR 1978

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Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition			
			Suspension or Revocation	No Record of Disposition	No Jurisdiction and/or no Violation Of Optom. Law	Settled By Both Parties and Dropped By The Board
12	Patient billed for contacts which never arrived	91			X	
13	Patient claimed glasses did not correct his vision	126			X	
14	Patient claimed glasses were unusable and wanted a refund	1			X	
15	Patient claimed doctor did not fill pre-scription properly	42			X	
16	Patient claimed pre-scription was wrong; doctor said fit of glasses was incorrect	42			X*	
17	Patient said glasses were too heavy and prescription is not correct	In process				
18	Patient claimed he never received the glasses after paying for them	Unknown				X
19	Doctor refused to release prescription, subsequently released	1				X
20	Records could not be located when doctor relocated his office	91				X
21	Glasses cause patient headaches and illness	In Process				
Totals			<u>-0-</u>	<u>1</u>	<u>13</u>	<u>5</u>

\* Complaint's disposition was "no violation of optometry law" and "settled by both parties and dropped by the Board."

CASE STUDIES OF CONSUMER COMPLAINTS  
RECEIVED BY THE BOARD OF OPTOMETRY  
FOR CALENDAR YEAR 1977

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CONSUMER	Description of Complaint	Elapsed Process Time (Days)	Disposition			
			Suspension or Revocation	No Record of Disposition	No Jurisdiction and/or no Violation Of Optom. Law	Settled By Both Parties and Dropped By The Board
1	Unacceptable prescription which was filled successfully by an ophthalmologist	49			X	
2	Patient claimed frames were loaned to her by the doctor; but the doctor charged her for them	49			X	
3	Patient received an unacceptable pair of glasses; doctor subsequently gave her a pair of acceptable glasses	202				X
4	Patient wanted a copy of the prescription, but the doctor would not release it.*	1				
5	Doctor did not fit lenses in the frames properly, thereby ruining patient's frames. Doctor subsequently provided new frames	336				X
6	Doctor illegally used eye drops on the patient	175			X	

\* The Rules and Regulations of the Board and the Optometry Act conflicted. Subsequently, the rules were changed to conform to the Optometry Act.

CASE STUDIES OF CONSUMER COMPLAINTS  
RECEIVED BY THE BOARD OF OPTOMETRY  
FOR CALENDAR YEAR 1977

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<u>Complaint Number</u>	<u>Description of Complaint</u>	<u>Elapsed Process Time (Days)</u>	<u>Disposition</u>			
			<u>Suspension or Revocation</u>	<u>No Record of Disposition</u>	<u>No Jurisdiction and/or no Violation Of Optom. Law</u>	<u>Settled By Both Parties and Dropped By The Board</u>
7	Patient wanted a copy of his prescription but the doctor would not release it. Board stated "since you received the refund you have relieved the doctor of his duty to provide the prescription."	1			X**	
8	Board received this complaint from Arizona State University Newspaper but would not take action until it received complaint directly from the complainant.	1			X	
9	Two years later, complainant complained that glasses were not acceptable. Wanted to make Board aware of poor services received	1			X	
Totals			<u>-0-</u>	<u>-0-</u>	<u>6</u>	<u>2</u>

\*\* Complaints disposition was "No violation of Optometry Law" and "Settled by both parties and dropped by the Board."



CASE STUDIES OF CONSUMER COMPLAINTS  
RECEIVED BY THE BOARD OF OPTOMETRY  
FOR CALENDAR YEAR 1976

Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition			
			Suspension or Revocation	No Record of Disposition	No Jurisdiction and/or no Violation Of Optom. Law	Settled By Both Parties and Dropped By The Board
1	No record of the charges or disposition of this complaint	Unknown		X		
2	Same as complaint #1	Unknown		X		
3	No record of the charges on this complaint. Complaint was referred to another entity	Unknown				
4	No record of the charges of this complaint	155				X
5	Same as complaint #4	1				X
6	Patient had trouble wearing contact lenses he was given by his optometrist	63				X
7	Patient received unacceptable glasses and wanted a refund	3			X	
Totals			<u>-0-</u>	<u>2</u>	<u>1</u>	<u>3</u>

CASE STUDIES OF COMPLAINTS INITIATED  
BY THE BOARD OF OPTOMETRY FOR CALENDAR  
YEAR 1978

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Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition					
			Suspension or Revocation	Cease and Desist Order Issued	Violator is to Review Ads	Referred to Another Entity	No Violation of Optometry Law	No Record of Dispositio
1	Doctor using previous owner's name beyond time allowed	70		X				
2	Doctor using previous owner's name beyond time allowed	42		X				
3	Computer administered eye exam is not a complete exam; misrepresentative advertising	30			X			
4	Misrepresentative advertising	1				X		
5	Misrepresentative advertising in the yellow pages of the phone book	11		X				
6	Dispensing optician; advertisement claiming he was an optometrist	1		X				
7	Advertising as a licensed optometrist when not licensed	91		X				
8	Corporation advertising as an optometrist	49				X		
9	Doctor advertising as a specialist	157	X*					
10	Misrepresentative advertising	42				X		

CASE STUDIES OF COMPLAINTS INITIATED  
BY THE BOARD OF OPTOMETRY FOR CALENDAR  
YEAR 1978

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Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition						
			Suspension or Revocation	Cease and Desist Order Issued	Violator is to Review Ads	Referred to Another Entity	No Violation of Optometry Law	No Record of Disposition	
11	Failure to record license with the county doctor is practicing in	98	X*						
12	Doctor advertising as a specialist; repeat violation by same optometrist in complaint #9	98	X*						
13	Advertising as a specialist; outcome awaiting appeal of complaints 9 and 12	In Process							
14	Doctor using previous owner's name beyond time allowed	98				X			
15	Related to case #14; using retired optometrist's name for advertising	98				X			
16	Doctor using previous owner's name beyond time allowed	60				X			
17	Doctor is charged with child molesting, a felony	In Process							
Totals			<u>3</u>	<u>5</u>	<u>1</u>	<u>6</u>	<u>-0-</u>	<u>-0-</u>	

\* Being appealed



CASE STUDIES OF COMPLAINTS INITIATED  
BY THE BOARD OF OPTOMETRY FOR CALENDAR  
YEAR 1977

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Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Disposition					
			Suspension or Revocation	Cease and Desist Order Issued	Violator is to Review Ads	Referred to Another Entity	No Violation of Optometry Law	No Record of Dispositio
1	Misrepresenta- tive advertis- ing	98				X		
2	Advertising as an optometrist without a license	56				X		
3	Doctor advertised stating "Satisfac- tion Guaranteed"; Board wanted to know the definition of this claim	1					X	
Totals			<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>2</u>	<u>1</u>	<u>-0-</u>

CASE STUDIES OF COMPLAINTS INITIATED  
BY THE BOARD OF OPTOMETRY FOR CALENDAR  
YEAR 1976

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Complaint Number	Description of Complaint	Elapsed Process Time (Days)	Suspension or Revocation	Disposition				
				Cease and Desist Order Issued	Violator is to Review Ads	Referred to Another Entity	No Violation of Optometry Law	No Record of Disposition
1	Doctor got license by reciprocity but did not practice in Arizona in 60 days of licensure	108	X					
2	Same as complaint #1	25	X					
3	Same as complaint #1	108	X					
4	Same as complaint #1	115	X					
5	No record of the charges or disposition of this complaint	Unknown						X
6	No record of the charges or disposition of this complaint	Unknown						X
7	Same as complaint #1	56	X					
	Totals		<u>5</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>-0-</u>	<u>2</u>

## ARIZONA LEGISLATIVE COUNCIL

## MEMO

July 20, 1979

TO: Douglas R. Norton, Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-79-51)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated July 18, 1979.

FACT SITUATION:

The Arizona State Board of Optometry regulates the optometry profession. In regulating the profession of optometry, the Arizona State Board of Optometry receives and resolves complaints.

In the case of State Board of Technical Registration v. McDaniel, 84 Ariz. 223, 326 P.2d 348 (1958) the Arizona Supreme Court commented that:

Indeed the Board would be remiss in its duty if it did not investigate complaints made to it to see if such acts constituted professional misconduct sufficient upon which to predicate formal charges.

QUESTIONS PRESENTED:

1. Would the McDaniel case apply to the Arizona State Board of Optometry? Would the Arizona State Board of Optometry be remiss in its duty if it did not investigate complaints made to it to see if such acts constituted professional misconduct sufficient upon which to predicate formal charges?

2. If the Board of Optometry does conduct investigations of complaints to see if such acts constituted professional misconduct sufficient upon which to predicate formal charges, what would a proper investigation consist of?

ANSWERS:

1. A review of the McDaniel case indicates that the Supreme Court's statement would not be controlling in a case concerning the Optometry Board because the statement was merely dictum. Any expression of opinion by a court on a question not up for decision is purely dictum and is not precedential authority for later cases. Hernandez v. Yuma County, 91 Ariz. 35, 369 P.2d 271 (1962). The court in the McDaniel case was not faced with the question of the failure of the Technical Registration Board to investigate complaints.

More important is that the Technical Registration statutes differ from the optometry statutes in that the Technical Registration Board is specifically required by statute to "hear and pass upon complaints or charges" (Arizona Revised Statutes section 32-106, subsection A, paragraph 4).

There are two arguments on the issue of whether the Optometry Board violates its duties if it fails to investigate complaints presented to it; each reaching an opposite



conclusion. First, Arizona Revised Statutes, Title 32, chapter 16 does not specifically mandate that every complaint to the Optometry Board must be investigated. A general rule of law is that the powers and duties of an administrative agency must be measured by the statutes creating them. Pressley v. Industrial Commission, 73 Ariz. 22, 236 P.2d 1011 (1951). Under this rule a strict interpretation of chapter 16 would result in the conclusion that the Optometry Board is not required to investigate every complaint submitted to it.

However, it can also be argued that the duty to investigate complaints is an implied duty which is necessary to protect the public and to effectively regulate optometrists. A more reasonable interpretation of chapter 16 results in the conclusion that the statutory scheme makes little sense if the Board has no duty to investigate complaints. The legislature has defined "unprofessional conduct" (Arizona Revised Statutes section 32-1701, paragraph 5), has provided the Board with authority to hire investigators to assist in investigations of unprofessional conduct (Arizona Revised Statutes section 32-1705, subsection D) and has prescribed hearing procedures for disciplinary action for unprofessional conduct (Arizona Revised Statutes section 32-1755). A failure to investigate complaints of unprofessional conduct would render these statutory provisions meaningless and would result in little protection for the public against unprofessional conduct. Arguably this would defeat the legislative intent of these sections.

We are unable to predict how an Arizona court would resolve these arguments. You may wish to recommend that the statutes be amended to specifically require the Optometry Board to investigate complaints presented to it.

2. There is no statute or regulation in Arizona which requires specific investigatory procedures for the Board of Optometry. Additionally, it does not appear that there are any such provisions which govern other professional and occupational licensing boards. It is apparent that the legislature has left investigatory procedures to the discretion of the particular board.

However, a proper investigation would seem to include, as a minimum, the following procedures:

- a. Interviewing the complainant, the optometrist who is the subject of the complaint and any third person who might have knowledge of the facts of the complaint.
- b. Verifying any previous complaint against the optometrist and the disposition of the complaint.
- c. Checking for any previous complaints by the complainant.
- d. Identifying the generally accepted practice in the profession for the act which is the subject of the complaint.

Finally, Arizona Revised Statutes section 41-1010, relating to evidence at hearings in a contested case, offers some insight into the kind of evidence which should be gathered in an investigation: it must be "substantial, reliable and probative."

#### CONCLUSIONS:

1. The McDaniel case does not apply to the State Board of Optometry. A strict interpretation of Title 32, chapter 16, Arizona Revised Statutes, results in the conclusion

that the Optometry Board has no mandatory duty to investigate complaints. A more reasonable interpretation of this chapter results in the conclusion that mandatory investigation of complaints is necessarily implied from the statutory scheme. You may wish to recommend that the statutes be amended to prescribe mandatory investigation of complaints.

2. A proper investigation of a complaint against a licensed optometrist should consist of obtaining relevant information so that the Board of Optometry could determine whether to proceed with a formal hearing.

cc: Gerald A. Silva  
Performance Audit Manager



## THE UNIVERSITY OF ARIZONA

HEALTH SCIENCES CENTER  
TUCSON, ARIZONA 85724

COLLEGE OF MEDICINE  
DEPARTMENT OF SURGERY

August 17, 1979

Blake Peterson  
Performance Audit Division  
Suite 600  
112 North Central Avenue  
Phoenix, Arizona 85004

Dear Mr. Peterson:

Your letter of August 10, 1979 to Dr. James Ganley regarding his opinion on a consumer complaint has been turned over to me as Dr. Ganley will not return to town until August 22, 1979.

I have reviewed the materials submitted to Dr. Ganley together with your letter. Basically, I would agree with the apparent opinion that Dr. Ganley gave you on the phone. However, I think the difference in the two prescriptions are highly significant and cast out on the competency of the individual who obtained the first prescription that the patient was unhappy with. Nevertheless, I would emphasize that it is difficult to judge competency based on a single episode but would feel more comfortable with a pattern of such errors before making a definitive judgement.

I believe that the consumer was justified in registering his complaint. I further believe that additional investigation is in order to determine if additional complaints of perhaps a similar nature have been launched against the practitioner responsible for the error. Should the results of such an investigation be negative, I believe it would be premature to pass any judgement on this episode regarding professional competency.

I trust this is sufficient to answer your questions, but should you wish additional discussion of this matter, please feel free to contact me directly.

Sincerely,

Harold E. Cross, M.D., Ph.D.  
Professor  
Section of Ophthalmology

HEC:kds

Dictated but not read.



## ARIZONA LEGISLATIVE COUNCIL

## MEMO

April 24, 1979

TO: Douglas R. Norton, Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (0-79-25)

This is in response to a request submitted on your behalf by Gerald A. Silva in a memo dated April 13, 1979.

## QUESTION PRESENTED:

Does the State Board of Optometry have any jurisdiction over matters where a customer of an optometrist is not satisfied with a service or product? If so, what powers does the board have through Arizona Revised Statutes sections 32-1705 and 32-1755 to investigate and, if proved to be valid, correct such complaints?

A review of Title 32, chapter 16, Arizona Revised Statutes, reveals that no authority exists enabling the State Board of Optometry to arbitrate service or product disputes between optometrists and their clients. While the board's characterization of a product or service complaint as a fee dispute may be questionable, the board clearly has no authority to require an optometrist to remedy defective services or materials.

The authority of the board is limited to a licensing function and a disciplinary function. The board can hire investigators to assist in investigations of violations of the chapter (Arizona Revised Statutes section 32-1705, subsection D). The disciplinary function of the board consists solely of the ability to suspend or revoke a certificate after a notice and hearing upon a finding of any of the following grounds as provided in Arizona Revised Statutes section 32-1755:

...

1. Conviction of an offense involving moral turpitude.
2. Obtaining a certificate by fraud or deceit.
3. Conduct likely to deceive or defraud the public.
4. Unprofessional conduct.
5. Employment of a solicitor to solicit business, or soliciting from house to house or person to person.

6. Obtaining a fee or compensation by fraud or misrepresentation.

7. Employment of a person to engage in the practice of optometry who does not hold a certificate to practice optometry.

8. Having a contagious or infectious disease.

9. Using any device to evade or defeat the provisions of this chapter, such as a profit-sharing plan or partnership with an optometrist not registered in this state.

10. Violation of any provision of this chapter.

11. The practice of optometry under a false or assumed name.

12. Violation of any of the rules and regulations adopted by the board pursuant to its authority hereunder.

Arizona Revised Statutes section 32-1701, paragraph 5 as amended by Laws 1979, chapter 50, effective April 17, 1979 defines "unprofessional conduct" as meaning:

...

(a) Wilful disclosure of a professional confidence or knowledge gained in a professional capacity.

(b) Final judgment of a conviction for an offense involving moral turpitude, in which case the record of such conviction shall be conclusive evidence.

(c) Giving or receiving rebates.

(d) Habitual intemperance in the use of alcohol or narcotic drugs, or practicing or attempting to practice optometry while under the influence of alcohol or narcotic drugs.

(e) Impersonation of another licensed practitioner.

(f) Knowingly having professional connection with or lending one's name to an illegal practitioner.

(g) Malpractice.

(h) Any conduct or practice, including incompetency, which constitutes a danger to the health, welfare or safety of a patient or the public.

The board has prescribed by regulation in A.C.R.R. R4-21-04, subsection G, that:

/f/or materials dispensed by an optometrist or any of his agents, the failure, neglect or refusal to be sure prescriptions are filled accurately and with quality workmanship in ophthalmic materials shall be deemed to constitute unprofessional conduct.

Additionally an optometrist cannot misrepresent any ophthalmic material or optometric services (A.C.R.R. R4-21-03).

Thus, the board clearly has jurisdiction to receive a complaint that an optometrist is guilty of unprofessional conduct as defined by statute and regulation or that a violation of a statutory provision or regulation has occurred. However, the response of the board is limited to holding a hearing on whether the certificate of the optometrist should be suspended or revoked. No authority exists for the board to remedy unsatisfactory services or to require replacement of defective ophthalmic materials. A dissatisfied patient must resort to other legal procedures to remedy these perceived wrongs.

#### CONCLUSION

The State Board of Optometry has no jurisdiction to arbitrate service or product disputes between optometrists and their patients. However, the board does have jurisdiction, for purposes of certificate suspension or revocation, to determine if an optometrist has committed unprofessional conduct by a failure, neglect or refusal to ensure that prescriptions are filled accurately and with quality workmanship in materials or has misrepresented ophthalmic materials or optometric services.

You may wish to recommend that the statutes be amended to provide the board with the power to censure an optometrist who has provided faulty service or products.

Please contact this office if you have further questions.

cc: Gerald A. Silva,  
Performance Audit Manager



# ARIZONA LEGISLATIVE COUNCIL

## MEMO

August 21, 1979

TO: Douglas R. Norton, Auditor General  
FROM: Arizona Legislative Council  
RE: Request for Research and Statutory Interpretation (0-79-54)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated August 17, 1979.

### FACT SITUATION:

Arizona Revised Statutes section 32-1724, subsection A provides that applicants for a certificate to practice optometry shall be given an examination, as follows:

"A. Applicants for a certificate shall be given an examination on the subject matter currently being taught in the accredited universities or schools of optometry."

The grading of the examination is defined in Arizona Revised Statutes section 32-1724, subsection B as follows:

"B. A grade of not less than seventy-five per cent in each subject is required to pass the examination successfully."

According to the board of optometry president, the board this year intends to grade the written portion of the examination "on a curve" and intends to accept as passing all scores that are within one standard deviation below the mean score for each subject. The written examination is typically administered to approximately 50 persons at each sitting.

### QUESTION PRESENTED:

Is the practice of "curving" the examination within the legal purview of the board?

### DISCUSSION:

"There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses." DeWitt v. Magma Copper Company, 16 Ariz. App. 305, 492 P.2d 1243 (1972). Sutherland, Statutory Construction, 4th Ed., section 46.04. The language of Arizona Revised Statutes section 32-1724 plainly expresses that in order for an applicant to successfully pass the optometry examination, the applicant must receive a grade of at least 75% in each tested subject.

The term "per cent" means "...as many parts in the hundred or so many hundredths." Black's Law Dictionary, 1293 (4th Ed. 1951). If the optometry examination consists of only a written examination and that examination is graded on a curve, the board of optometry is not complying with the statutory mandate since the passing rate on an examination graded on a curve would not necessarily be 75%.

In Laws 1979, Chapter 50, section 6, Arizona Revised Statutes section 32-1724 was amended in part to remove the requirement of a written examination. It appears then that the optometry examination could consist of an oral or practical examination as well as a written examination. However, the requirement still remains that, in order to pass the examination, an applicant must receive a grade of not less than 75% in each subject.

**CONCLUSION:**

Grading the optometry examination on a curve does not comply with the statutory requirement that, to successfully pass the optometry examination, an applicant must receive a grade of not less than 75% in each subject.

cc: Gerald A. Silva  
Performance Audit Manager

## 4. Suggested State Health Occupations Policy Coordinating Act

An increasing number of health professional groups continue to seek regulation through state legislation. Historically, once licensed, the groups tended to be regulated by autonomous boards composed primarily of representatives from the profession. Many have felt that such a system dominated by practitioners will primarily protect the interests of the individual professional groups rather than those of the consumer. State policymakers often have been frustrated in their attempts to ensure that the licensure and regulatory process takes into consideration broad public policy issues such as costs, availability of services, and fragmentation of health care delivery.

This suggested act creates a Health Occupations Council composed of health professionals and consumers. The council would coordinate certain functions currently performed by individual licensing boards by centralizing budgeting, office location, staffing, investigations, and professional discipline. The council's membership would ensure the availability of professional expertise while maintaining a broad public health policy perspective.

The act gives the council broad powers to define roles and responsibilities in the provision of health services. The council is authorized to review and coordinate licensing board regulations, establish discipline and enforcement procedures, and resolve scope of practice questions. In addition, the council may grant limited waivers to existing practice acts to allow pilot projects to determine whether or not certain skills can safely be delegated to auxiliaries and new manpower groups. The information that results can be utilized by the council and the legislature to alter existing scopes of practice.

### The Council of State Governments

The Council is a joint agency of all the state governments created, supported, and directed by them. It conducts research on state programs and problems; maintains an information service available to state agencies, officials, and legislators; issues a variety of publications; assists in state-federal liaison; promotes regional and state-local cooperation; and provides staff for affiliated organizations.



Article I  
[General Provisions]

Section 101. [Short Title.] This act may be cited as the [state] Health Occupations Policy Coordinating Act.

Section 102. [Definitions.] As used in this act:

(1) "Health professions" or "health occupations" means the licensed professions of [medicine, dentistry, nursing, pharmacy, osteopathy, physical therapy, optometry, podiatry, psychology, chiropractic, and veterinary medicine], the specialties and subspecialties of each of the foregoing professions, and the licensed and unlicensed auxiliaries of each of the foregoing professions.

(2) "Health professional" or "practitioner" means a person licensed or otherwise authorized to practice a health occupation enumerated in this act or any recognized auxiliary occupation.

(3) "Health Occupations Council" means the administrative and policymaking body established by Article II.

(4) "Auxiliary" means a person who assists a health professional in the delivery of health care services to patients. Persons providing clerical or housekeeping services are not auxiliaries within the meaning of this definition.

(5) "Licensed" means that the practitioner holds a license or certificate issued by the appropriate health professional licensing board over which the Health Occupations Council has jurisdiction, and which entitles the holder to practice the health profession or occupation regulated by the board.

(6) "Public member," for purposes of Health Occupations Council membership, means a person who is not a health professional as defined in subsection (2) [and who is not a parent, spouse, child, or sibling of a health professional or health professional student]. For purposes of board membership, any person with a significant financial interest in a health service or occupation is not a public member.

(7) "Scope of practice" means the duties and responsibilities of a particular health professional and the services which that particular health professional group is permitted to provide to the public as defined by the applicable rules, regulations, and statutory language.

(8) "Emerging occupation" means a group of health care providers whose actual or proposed duties, responsibilities, and services include functions which are not presently regulated or which are presently in the scope of practice of an existing licensed health occupation.

Sec. 102(1). The task force recognizes the clear and legitimate distinction between a profession and an occupation. Although, for any given practitioner group, there may be intense debate about whether the group should be classified as an occupation or a profession. The task force chose the term occupation and it is intended to include all health care practitioners. The professions listed in this section and the licensing boards listed in Section 201(a) should be the same.



(9) "Approved project" means an educational, training, or manpower utilization program approved by the Health Occupations Council which, on a pilot program basis, administers projects as described in Section 203.

(10) "Trainee" means a person being taught health care skills under the authority of Section 203 of this act.

(11) "Supervisor" means a person designated by the approved project sponsor who already possesses the skills to be taught the trainees and is certified or licensed in this state to perform the health care tasks involving such skills.

(12) "Licensing board" means an entity established by this state which tests for competency and licenses applicants to a health occupation, and which has administered or enforced legislation regulating that health occupation in the past.

(13) "Training cycle" means the period of time determined by the Health Occupations Council required to instruct trainees who participate in approved projects.

(14) "Power of enforcement" means the powers and duties with respect to the receipt and processing of consumer complaints; the investigation of possible violations of a practice act, rule, or regulation; the adjudication of contested complaints; and the imposition of license revocation, suspension, or other sanction against a practitioner.

## Article II

### [Administrative Provisions]

#### Section 201. [Establishment of Health Occupations Council.]

(a) There is established a Health Occupations Council as a [bureau] [division] of the [state department of public health] [other appropriate agency]. The Health Occupations Council shall administer this act and exercise its power under this act over the following licensing boards: [medical, dentistry, pharmacy, nursing, physical therapy, osteopathy, optometry, psychology, podiatry, chiropractic and veterinary medicine].

(b) The Health Occupations Council shall consist of [21] members. Each licensing board subject to this act shall elect one representative to the Health Occupations Council. Membership shall also include no fewer than [one-third] public members as defined in Section 102(6) of this act. Public members and others not appointed by the licensing boards shall be appointed by the governor. The governor shall appoint [ ] members to provide for representation of auxiliaries.

(c) The governor shall designate the length of the terms of the members of the Health Occupations Council. The governor shall designate [one-third] of the members to a term of two years, [one-third] of the members to a term of three years, and [one-third] of the members to a term of four years. After expiration of the terms of members first appointed

Sec. 201(a). The task force recommended the establishment of a Health Occupations Council primarily for two reasons. The first was to bring some order to the numerous health practitioner groups competing over roles in the health care delivery system. The nature of the issues or conflicts is similar in the over 200 identified health occupational groups. Continuous changes in the needs of the patient population, changes in education and training systems, and other factors such as the cost of care, distribution of manpower, etc., exacerbate these conflicts. The questions generally center on the scope and boundaries of the responsibilities of one group of practitioners versus another group of professionals or versus a group of paraprofessionals.

The second reason involves the need to address deficiencies in the organizational structure of boards and state government that tend to create inefficiency, policy fragmentation, and little public accountability.

The task force determined that there were three essential ingredients to a licensing and regulation system that would address the problems outlined above. These include: (1) a broad public policy perspective linked with a state government policymaking and administrative agency, (2) access to specific technical information regarding each occupation or group involved in any controversy, and (3) a range of responsibility and powers that includes all regulated health manpower groups within the health care delivery system.

The specific state agency under which the Health Occupations Council should be administered is an individual state decision. While the task force considered the state department of public health to be most logical, they also recognized that states might also consider an education agency (in New York, health regulatory boards are administered under the State Board of Regents, Department of Education) or centralized regulatory agency (several states currently have such an agency; they include Illinois, Michigan, and Virginia). The functions of the Health Occupations Council should be coordinated with health systems agencies and other planning and coordinating groups.

Opponents of the Health Occupations Council approach are primarily concerned that the interdisciplinary composition of the council would mean that each individual profession would no longer have control over the decisions affecting the profession. In addition, opponents claim such a council would be a costly addition to the bureaucracy and that autonomous boards operate more efficiently.

Sec. 201(b). The selection of occupational groups that would be regulated by the Health Occupations Council is also an individual state decision. Beyond a group of five to seven health professions, there is considerable debate about which groups are independent major professions and which are secondary or auxiliary. It is suggested that enough boards be included so that the spectrum of health care services is regulated by the Health Occupations Council. The membership selection process is flexible and accounts for only a limited number of seats in the Health Occupations Council. Auxiliary groups continue to play a greater role in health care delivery and should be represented. While it may not be practical to include representation from all auxiliary groups, they could be included on a rotating basis. Other options would be greater public or professional membership.

The task force placed considerable emphasis on the need for coordination of licensing board and Health Occupations Council activities. Thus, the provision calls for a representative to the Health Occupations Council appointed by each board. Additionally, public members and other appointees with expertise on consumer concerns, health planning, administration, legal matters, and education are essential in creating the broad public policy orientation intended for the Health Occupations Council.



under this act, each of their successors shall hold office for a term of four years. In the event a member is unable to serve his full term, his successor shall be appointed to serve the unexpired portion of his predecessor's term. Health Occupations Council members shall be eligible for [ ] terms.

(d) The executive director of the Health Occupations Council shall serve at the pleasure of the [governor/department head]. The executive director shall execute the decisions of the Health Occupations Council and be its chief administrative officer. The executive director shall maintain a staff adequate for the efficient operation of the Health Occupations Council and licensing boards which are placed under the jurisdiction of the Health Occupations Council.

(e) The [governor/department head] may remove members of the Health Occupations Council for cause. Health professional members of the Health Occupations Council shall be removed if found guilty in a professional disciplinary proceeding. Any professional member subject to a professional disciplinary proceeding shall disqualify himself from Health Occupations Council business until the charge is finally adjudicated.

(f) The governor shall appoint a chairman from the Health Occupations Council membership to a term of two years.

(g) Members of the Health Occupations Council shall receive \$[ ] per day in compensation for each day or portion of day spent in carrying out their duties as council members. In no event shall the salary of a council member exceed \$[ ] per year. Members shall also receive reimbursement for actual and reasonable expenses incurred in carrying out their duties as council members.

(h) The Health Occupations Council shall meet at the call of the chairman. A majority of board members shall constitute a quorum. A simple majority may direct the executive director to call a meeting, absent the call of the chairman. A majority vote of those present when a quorum is found shall be a decision of the Health Occupations Council.

#### Section 202. [Powers and Duties of the Health Occupations Council.]

(a) The duties, responsibilities, and powers of enforcement granted by other laws to the licensing boards enumerated in Section 201(a) are transferred to the Health Occupations Council. Each licensing board shall exercise only the rights, duties, and powers enumerated in Section 401.

(b) The Health Occupations Council shall continually evaluate statutes and rules governing health care services provided by health professionals. The Health Occupations Council shall forward recommendations for statute revisions to the appropriate ttee of the legislature.

(c) The Health Occupations Council shall promulgate educational and training standards upon which to authorize the assumption or delegation of services to health occupations groups where the legislature has expressly vested the Health Occupations Council with the authority to do so.

Sec. 201(d). This subsection is designed to address the fragmentation resulting from independent staff reporting to separate boards. The creation of an executive director position provides for continuity and coordination of Health Occupations Council activities and is a vehicle for coordination and control of staff activities throughout the state regulatory system. All licensing board and Health Occupations Council staff should be subject to the Civil Service employment practices of state government and are intended to report to the executive director. The task force anticipates that the Health Occupations Council would draw upon staff expertise available through existing state health agency activities.

Sec. 202. By adoption of this section and Section 401 of this act, all included regulatory boards can be brought within the administrative system contemplated by the task force.

Sec. 202(b). The task force intends that the Health Occupations Council become the body responsible for a unified and systematic state health manpower policy. To do so, the Health Occupations Council is charged to evaluate existing or proposed legislation and regulations.

Sec. 202(e). Autonomous licensing boards have at times tended to establish higher and higher education and training standards which can operate to limit unnecessarily the supply of available practitioners. A decision to raise educational or training standards to a level higher than those in other states is a significant state policy decision. The task force believes that the Health Occupations Council, with input from a wide variety of professions, is in the best position to objectively evaluate and comment on the training required for a particular practitioner to competently carry out a given procedure.



(d) The Health Occupations Council shall promulgate rules and regulations, upon consultation with the public and appropriate boards and professions, regarding:

- (1) Scopes of practice.
- (2) The delivery and regulation of health care services.
- (3) Educational or systems research which would utilize manpower groups in a manner at variance with the existing applicable practice acts.
- (4) Board operations and other matters which are necessary and appropriate to the development of a cohesive and unified health regulatory policy.

(5) Execution of its duties and powers under this act.

(e) The Health Occupations Council shall sit as the final administrative authority in cases of professional discipline. The Health Occupations Council may subpoena witnesses found in any part of this state to compel their presence in professional disciplinary proceedings.

(f) The Health Occupations Council shall receive and evaluate requests for regulations by emerging or unregulated health professions. The evaluation and the recommendation as to the need for regulating the group shall be forwarded to the legislature.

(g) The Health Occupations Council may authorize pilot projects in health manpower use under the procedures enumerated in Section 203.

(h) The Health Occupations Council shall establish the daily and annual compensation limits which licensing board members shall receive for each day or portion of day spent on licensing board business, which in no event shall be higher than \$[ ] daily and \$[ ] annually.

(i) The Health Occupations Council shall establish the fees charged by licensing boards in connection with the boards' testing, licensure, and renewal activities. The fee charged by any board in connection with testing and initial licensure shall not exceed \$[ ]. The fee charged in connection with licensure renewal shall not exceed \$[ ]. The Health Occupations Council may vary the fees charged by individual boards based upon the actual cost of the respective testing, licensure, and renewal processes.

#### Section 203. [Health Manpower Experimentation.]

(a) The Health Occupations Council shall review applications for, and may grant by rule [or temporary rule] where appropriate, waivers to selected scope of practice limitations, whether limitation is by statute or regulation, of any health occupational group subject to this act so as to permit safe and controlled experimentation in new kinds and combinations of health care delivery and health manpower utilization.

(b) The Health Occupations Council may designate experimental health manpower projects as approved projects where such projects are sponsored by [nonprofit educational institutions or nonprofit community hospitals or clinics]. Nothing in this section shall preclude approved proj-

Sec. 202(d). In giving the Health Occupations Council the authority to promulgate rules, the task force considered the serious need for consultation and advice from the various professional groups affected by a given regulation. However, the task force considered the broad perspective of the Health Occupations Council (representing many professional interests and consumers) to be essential in making judgments on the matters outlined in this section.

With the increasing scrutiny given to board actions in both initial licensing and discipline, the task force determined that the Health Occupations Council should have rulemaking authority governing board operations. Most decisions relating to board operations are administrative and policy matters that can be decided at a single level rather than by dozens of independent boards.

Sec. 202(e). Final authority for professional discipline matters vested in the Health Occupations Council ensures that practitioners desiring further hearing of a board decision or recommendation need not proceed immediately to court actions, and that procedures and penalties are brought in line with established state policies and thus fare better against increasing court intervention in this area.

Sec. 202(f). With the increasing specialization of the health care delivery system, legislatures continue to be petitioned by practitioner groups requesting licensure or other forms of state regulation. This subsection does not remove authority for such decisions from the legislature, but provides the legislature with an objective evaluation of the licensure request. Minnesota and Virginia currently use such a process. See the Council of State Governments, *Occupational Licensing: Questions a Legislator Should Ask* (Lexington, Ky.: 1978), pp. 22-25.

Sec. 202(g). This provision recognizes the need for experimentation and the resulting data in making decisions regarding the functions carried out by various health care practitioners. This is the enabling section for exercise and powers enumerated in Section 203.

Sec. 202(h) and (i). These sections provide for the coordination of compensation and fee schedules. It does not mandate that such amounts be uniform but intends to ensure that decisions regarding such amounts be made under a perspective covering all boards and all fees.

Sec. 203(a). Practice acts permit certain functions to be performed by practitioners meeting prescribed requirements and do not permit experimentation. The task force considers controlled experimentation to be desirable in the search for improving the health care delivery system. Experimental projects as authorized under this provision provide for a degree of flexibility in regulatory decisions and provide the legislature and Health Occupations Council with much-needed and previously unavailable information regarding the training and background necessary for provision of particular services. This provision is based on a California statute enacted in 1972. [California Health and Safety Code, Article 18, Sections 429.70-429.80. See the Council of State Governments, *Health Manpower Licensing: California Demonstration Projects* (Lexington, Ky.: 1978).]

Sec. 203(b). A number of conditions may be imposed to ensure that project sponsors will be responsible in the conduct of the research. These include limiting the prospective applicants to nonprofit educational institutions and hospitals. There is the danger that a sponsoring agency could use the program for other than honest experimentation.



ects from utilizing the offices of physicians, dentists, pharmacists, and other health professionals, and other clinical settings as training sites.

(e) Subject to the approval of the Health Occupations Council, an approved project may:

- (1) Teach new skills to existing categories of health care personnel.
- (2) Develop new categories of health care personnel.
- (3) Accelerate the training of existing categories of health care personnel.
- (4) Teach new health care roles to previously untrained persons.
- (5) Utilize health manpower in a manner which is at variance with the terms of the applicable practice act.

(d) Notwithstanding any other provision of law, a trainee in an approved project may perform health care services under the supervision of an appropriate licensed health professional where the general scope of such services has been approved in advance by the Health Occupations Council.

(e) A trainee shall be held to the standard of care of an individual otherwise legally qualified to perform the health care service or services performed by such trainee.

(f) Any patient being seen or treated by a trainee shall be informed of that fact before treatment is undertaken and shall be given the opportunity to refuse treatment. Consent to such treatment shall not constitute assumption of the risk or waiver of any right by a patient.

(g) Organizations requesting to undertake approved projects shall provide the Health Occupations Council with a description of the project indicating the category of person to be trained, the tasks to be taught, the numbers of trainees, numbers and qualifications of supervisors, the length of the project, a description of the health care agency to be used for training students, and a description of the types of patients likely to be seen or treated.

[(h) Projects which address maldistribution of health services shall be given priority.]

(i) The Health Occupations Council shall hold hearings to seek the advice of the public, the appropriate professions, and appropriate health licensing boards prior to designating approved projects.

(j) The Health Occupations Council shall carry out periodic on-site visitations of each approved project and shall evaluate each project to determine the following:

- (1) Whether there is a significant need in the health care delivery system for the service and manpower use combination which is the subject of the approved program.
- (2) The new health skills taught or extent to which existing services would be reallocated among health professionals.
- (3) Implications of the project for existing licensure laws, with suggestions for changes in the law where appropriate.

Sec. 203(d). The Health Occupations Council would determine the appropriate and specific duties for which the students would be trained. Trainees in approved projects would not be allowed to be trained in any and all procedures.

Sec. 203(e). Patients of trainees should be protected to the same degree as for services performed by a legally qualified practitioner. The rules may prescribe additional standards to ensure public health and safety. It is important to understand that only one standard of care is intended, whether services are provided by a trainee or an already qualified practitioner.

Sec. 203(f). This section ensures that patients will be informed that a trainee is providing services. Consent to treatment does not create a defense in the event of malpractice.

Sec. 203(h). This optional subsection is used to emphasize the alleviation of shortages in certain service areas. States may attempt to accomplish a variety of other purposes through the use of a similar provision.

Sec. 203(i). This subsection is included to ensure that existing boards and professions have adequate notice of Health Occupations Council actions and to ensure that their expertise is made available to the Health Occupations Council prior to authorization of any project.

Sec. 203(j). The criteria on which approved projects are to be evaluated are spelled out to ensure that projects have specific and identified implications for possible changes in existing regulatory statutes.

(4) Implications of the project for health services curricula and for the health care delivery system.

(5) Teaching methods used in the project.

(6) The extent to which persons with the new skills could find employment in the health care system, assuming laws were changed to incorporate their skill.

(7) The quality of care and patient acceptance of the project.

(8) The cost of care provided in the project, and the cost of such care by current providers thereof, and the likely future cost of such care if a new occupation is recognized and granted an exclusive or semiexclusive right to provide such care.

(k) The Health Occupations Council shall annually report to the legislature and appropriate licensing boards concerning the results of each evaluation.

(l) The Health Occupations Council shall not approve a project for a period lasting more than two training cycles plus a preceptorship of more than [24] months, unless it determines that the project is likely to contribute substantially to the availability of high-quality health services in the state or a region thereof.

(m) Upon conclusion of each experimental health manpower project, the Health Occupations Council shall forward the results, its conclusions concerning the success of the project, and a recommendation as to what action, if any, the legislature should consider regarding new or existing legislation.

### Article III

#### [Complaints against Practitioners; Professional Discipline]

##### Section 301. [*Grounds for Professional Discipline.*]

(a) Practitioners subject to this act shall conduct their practice in accordance with the standards established by the board and Health Occupations Council and shall be subject to the exercise of the disciplinary sanctions enumerated in Section 303(a) if, after a hearing, the Health Occupations Council finds that:

(1) A practitioner has employed or knowingly cooperated in fraud or material deception in order to obtain a license to practice the profession, or has engaged in fraud or material deception in the course of professional services or activities, or has advertised services in a false or misleading manner.

(2) A practitioner has been convicted of a felony or other crime which affects the practitioner's ability to continue to practice competently and safely on the public.

(3) A practitioner has engaged in or permitted the performance of unacceptable patient care by himself or by auxiliaries working under his supervision due to his deliberate or negligent act or acts or failure to act

Sec. 203(d). This subsection is included on the assumption that projects should be approved for the purpose of experimentation and gathering information and not as a mechanism for avoiding existing regulatory requirements.

Sec. 203(m). This provision requires an interpretation from the Health Occupations Council of the legislative implications of the project results.

Article III. In the event that this act is adopted in conjunction with the Dental Practice Act, Sections 301, 302, and 303 must be coordinated with Sections 501, 502, and 503 of the Dental Practice Act.

Sec. 301. The grounds enumerated in this section are substantially similar to those in Section 501 of the Dental Practice Act. The difference is that in this bill the grounds apply to multiple professions ranging from podiatry to medicine to optometry. This reflects the task force conclusion that health regulatory issues are similar regardless of the profession involved. The state interest, regardless of the individual profession, is to protect the public from unacceptable practice. These concerns need not be expressed in terms which only apply to a single profession. It was this unity of issues in the health regulatory field which led the task force to the Health Occupations Council concept.



regardless of whether actual injury to the patient is established.

(4) A practitioner has [knowingly] violated any provision of this act, the applicable practice act, or licensing board regulations promulgated under the provisions of this act.

(5) A practitioner has continued to practice although he has become unfit to practice his profession due to:

- (i) Professional incompetence.
  - (ii) Failure to keep abreast of current professional theory and practice.
  - (iii) Physical or mental disability.
  - (iv) Addiction or severe dependency upon alcohol or other drugs which endangers the public by impairing a practitioner's ability to practice safely.
- (6) A practitioner has engaged in a course of lewd or immoral conduct in connection with the delivery of health care services to patients.
- (b) A licensing board or Health Occupations Council may order a practitioner to submit to a reasonable physical or mental examination if his physical or mental capacity to practice safely is at issue in a disciplinary proceeding.
- (c) Failure to comply with a board or Health Occupations Council order to submit to a physical or mental examination shall render a practitioner liable to the summary revocation procedures described in Section 303(c).

#### Section 302. [Receiving and Processing Complaints.]

(a) The Health Services Complaints Unit of the Health Occupations Council shall receive complaints concerning a practitioner's business or professional practices. Complaints received by any licensing board shall be promptly forwarded to the Complaints Unit. Each complaint received shall be logged, recording the practitioner's name, name of the complaining party, date of the complaint, and a brief statement of the complaint and its ultimate disposition.

(b) After investigation for the purpose of determining probable cause, the Health Services Complaints Unit may dismiss any complaint when it appears that probable cause cannot be established. The complaining party shall be notified promptly of the dismissal and may appeal the dismissal to the [executive director] [Health Occupations Council]. Each dismissal shall be reported to the Health Occupations Council.

(c) Complaints which are not dismissed may be referred to the appropriate board to seek an adjustment between the complaining party and the practitioner. The adjustment may include any penalty enumerated in Section 303 or any other adjustment which is accepted by the board, complaining party, and the practitioner. Each adjustment shall be reported to the Health Occupations Council.

(d) Complaints which are not dismissed or adjusted pursuant to Sec-

Sec. 302(a). This provision establishes a single unit for receiving consumer complaints. In many states, board offices are located in areas other than the state capital. This arrangement, co-location with professional societies, part-time staff, and related factors have in some cases discouraged consumer complaints and undermined confidence in complaint disposition. The task force concluded that a single, statewide complaints receiving unit would establish uniform state policies regarding complaints which would boost public confidence in the disciplinary process.

A centralized investigatory unit is also recommended by the task force. Many consumer complaints against health care practitioners are similar—dealing with drugs or alcohol abuse, billing practices, and advertising. The task force determined that there was a need for specialists in investigations, etc., but that it was unwise for each investigator of health care practitioners to be employed by and therefore identified with a particular board. Taking investigative duties away from licensing boards and vesting such responsibilities with a state agency perceived to be impartial and working in the interest of the consumer should further boost consumer confidence in the regulatory process.

In addition, the task force determined that there was a need for coordination and a broader accountability of investigation activities. Under the autonomous board structure, some boards may employ several investigators while others employ one, perhaps part-time. All boards are likely to argue that they need more investigators to do a better job. The task force determined that the best way to achieve this coordination and accountability was by having the investigations staff report to a single state official responsible for the provision of such services. This official or office would be responsible for decisions regarding the types of practitioners or cases to be investigated and should be able to allocate resources accordingly. One would expect investigators to specialize in various types of investigation and the task force would urge that this occur. In addition, technical expertise would be available, as it currently is, through professional societies.

tion 302(b) and (c) shall be referred to a hearing officer. A representative of the Health Services Complaints Unit shall present evidence of violations to the hearing officer. The hearing officer shall make findings of fact, conclusions of law, and recommendations after a hearing. The hearing officer's findings of fact, conclusions of law, and recommendations shall be forwarded to the Health Occupations Council.

(e) The Health Occupations Council shall review the hearing officer's findings of fact. The Health Occupations Council, after a due review, and hearing if deemed advisable, shall accept or reject the hearing officer's findings of fact as provided in [the Administrative Procedures Act of this state]. The Health Occupations Council shall issue an order of its findings and its decision as to penalty, if any, and the order shall be implemented by the appropriate board.

(f) Decisions of the Health Occupations Council may be appealed within 30 days to any [circuit] court of competent jurisdiction, as determined by the rules of civil procedure. A license shall remain in effect during the pendency of an appeal unless revoked under Section 303(c).

(g) The Health Occupations Council shall have the power to subpoena witnesses and evidence in any part of this state to compel testimony in disciplinary proceedings.

[(h) All disciplinary proceedings held under the authority of this act are subject to the procedural guarantees of the Administrative Procedures Act of this state.]

### Section 303. [Disciplinary Sanctions.]

(a) The Health Occupations Council may impose any of the following sanctions, singly or in combination, when it finds that a practitioner is guilty of any offense described in Section 301(a):

- (1) Permanently revoke a practitioner's license to practice.
- (2) Suspend a practitioner's license.
- (3) Censure a practitioner.
- (4) Issue a letter of reprimand.
- (5) Place a practitioner on probationary status and require the practitioner to:

(i) Report regularly to the board upon the matters which are the basis of probation.

(ii) Limit practice to those areas prescribed by the Health Occupations Council.

(iii) Continue or renew professional education until a satisfactory degree of skill has been attained in those areas which are the basis of the probation.

(b) The Health Occupations Council may withdraw the probation if it finds that the deficiencies which require disciplinary action have been remedied.

(c) The Health Occupations Council may summarily suspend a prac-

Sec. 302(h). The task force recommends that states examine *Disciplinary Action Manual for Occupational Licensing Boards*, published by the National Association of Attorneys General, Committee on the Office of Attorney General.

Sec. 303(a). The task force determined that it is the individual practitioner's responsibility to maintain a minimum level of competence. The professional association's role is to encourage practitioners to maintain or improve competence through study clubs, opportunities for continuing education, self-assessment procedures, and associations with minimum requirements for continuing State government is responsible for assuring an adequate minimum level of applied competence. This is carried out through initial testing and licensure procedures and through complaint investigation and discipline. Vigorous enforcement is probably the most appropriate governmental role to ensure competent practice.

In many states, disciplinary boards have complained that their alternatives for disciplinary sanctions have been too limited. License revocation is often the only available sanction and it is a step that boards have been hesitant to take for all but the most serious cases. This subsection attempts to expand the alternatives available to the disciplinary body to include lesser penalties geared more specifically to the nature of the infraction. For example, requirements to limit practice to certain functions or to take special remedial education recognize that the practitioner can continue to practice competently if certain conditions are met. The range of penalties provided puts the burden on the enforcement authority to act if a basis exists. The task force does not recommend mandatory continuing education except as a specific disciplinary activity.



itioner's license in advance of a final adjudication or during the appeals process if the Health Occupations Council finds that a practitioner represents a clear and immediate danger to the public health and safety if he is allowed to continue to practice. A practitioner whose license is suspended under this section shall be entitled to a hearing before the Health Occupations Council no later than [20] days after the effective date of the suspension. The practitioner may subsequently appeal the suspension to any [circuit] court of competent jurisdiction as determined by the rules of civil procedure.

(d) The Health Occupations Council may reinstate a license which has been suspended under this act if, after a hearing, the Health Occupations Council is satisfied that the applicant is able to practice the profession with reasonable skill and safety to patients. As a condition of reinstatement, the Health Occupations Council may impose disciplinary or corrective measures authorized under this act.

(e) The Health Occupations Council shall seek to achieve consistency in the application of the foregoing sanctions and significant departure from prior decisions involving similar conduct shall be explained in the Health Occupations Council's findings or orders.

#### Article IV

#### [Powers and Duties of Boards]

Section 40]. [*Powers and Duties of Boards.*] Each licensing board, with respect to the health occupations or professions for which it was established, shall exercise the following powers:

(1) The boards shall establish the educational training and competency standards required for initial licensure of health professionals which the boards are empowered to regulate.

(2) The boards shall examine for competency eligible applicants for the license which the board is empowered to issue.

(3) The boards shall issue licenses to those applicants who successfully complete the required licensure examinations and renew the licenses of those practitioners who continue to meet the licensure standards of their respective practice acts.

(4) The boards shall consult with and make recommendations to the Health Occupations Council with respect to all regulations promulgated by the Health Occupations Council which affect the board's jurisdiction or which require professional expertise.

(5) The boards shall advise and make recommendations to the Health Occupations Council on matters concerning:

(i) Experimental health manpower projects which may be authorized under Section 203.

(ii) Proposed educational or manpower research which is a variance with the scope of practice restrictions of a profession's respective

Sec. 303(e). Professional discipline is a sometimes lengthy process. Due process of law requires that a licensee be given a fair opportunity to be heard if he is to be deprived of a valuable property right such as a professional license. This means that a practitioner may continue to practice while disciplinary proceedings are pending.

From time to time, whether due to mental or physical illness or other cause, a practitioner becomes suddenly unfit to practice safely. This section provides the board with emergency suspension powers in those events. To exercise the power, a clear and immediate threat must exist to the public's safety. In order to provide due process safeguards, the practitioner is entitled to a speedy hearing on the matter.

Sec. 303(e). The task force is concerned that public agencies be accountable to elected officials. Efforts have been made throughout this legislation to make licensing boards accountable. In order to ensure that the Health Occupations Council's disciplinary powers are exercised wisely, this provision included. This enables a reviewing court to determine whether a licensee has received equal justice. An unusually high or low penalty must have a demonstrated justification.

Sec. 401. By adoption of this section and Section 202 of this act, all included regulatory boards can be brought within the administrative system contemplated by the task force. The board powers listed in this section are set out to indicate the task force conclusions concerning the relative powers of the boards compared to the powers of the Health Occupations Council. The provisions listed here apply to boards generally. Special provisions may be needed to include all the powers and duties currently carried out by particular boards in a given state.

Section 202(a) of this act repeals all existing board powers. This section cedes back to the boards certain uniform powers. A second approach would be to selectively repeal in the repealer clause (Section 503) portions of existing practice acts to create the same relationships. This legislation adopts the former approach because of its simplicity.

Some of the powers ceded back to the boards included the construction and administration of examinations. In some states, boards employ outside examiners in addition to the use of board members to conduct exams. The task force would support the use of consultants for examination functions.

The task force seeks to emphasize the boards' role in matters requiring technical and professional advice. The optimum functioning of the Health Occupations Council requires that such expertise be available. The task force intends for boards to be technical consultants to the Health Occupations Council on the issues listed in the section and others as identified by the boards or the Health Occupations Council.

In an effort to create a policymaking perspective, the boards are given an advisory role in the rulemaking process. The choice of an advisory role for boards is tied closely to the concept of a Health Occupations Council. Disputes such as those between dentists and auxiliaries, opticians and ophthalmologists, or physical therapists and athletic trainers adequately illustrate the difficulty boards have in maintaining a broad perspective. The Health Occupations Council is intended to make rules on the basis of all health care delivery needs rather than the interests of one profession.

An advisory role should also encourage boards to develop a policy-oriented perspective on their duties. A board with rulemaking authority can promulgate rules without squarely addressing the issue of what interest or purpose the rule serves, but an advisory group must develop persuasive arguments in support of its position. To vindicate its position, a board must justify its position in terms of policy or purpose. Intra-board debate should be encouraged by this system as boards seek to develop their position on any issue. In many cases, interprofessional debate will develop within the forum of the Health Occupations Council as the various board positions on an issue are considered. This debate will benefit the development of a reasoned health regulatory policy.

The requirement for boards to maintain certain data on licensees follows current practices in many states. Data on location of licensees, type of practice, etc., is of use to state officials in education and health planning activities. Further, the lack of availability of data regarding malpractice actions has been a concern of enforcement officials.



practice act.

- (iii) Scopes of practices.
- (iv) Other professional and technical advice which the Health Occupations Council may solicit.
- (6) The boards shall give professional advice and opinion in proceedings involving the revocation or suspension of licenses or other disciplinary actions where questions of professional competency, standards or practices are involved.
- (7) The boards shall maintain records concerning the licensee's age, practice location(s), practice status (full-time, active, semiactive, inactive), practice characteristics, malpractice history, and other data as determined by the board concerning their respective licensees which is reasonably related to the administration of a regulatory system in the interest of public health and safety. The records shall be updated annually, except that a change in home or office address shall be reported when it occurs. The boards shall require their licensees to immediately report the existence of any malpractice action against them whether filed or not and its ultimate disposition.
- (8) The boards shall report annually to the Health Occupations Council. The report shall include information concerning board licensing activity, board receipts and expenditures, and other information which the Health Occupations Council may deem appropriate.
- (9) The boards may adopt reasonable rules and regulations, subject to the comment of the Health Occupations Council, to carry out their duties under this act.
- (10) A licensing board may delegate its duties under Section 401(a) (1, 2, 5, and 6) to designated members which it may from time to time convene.
- (11) All fees collected by licensing boards shall be deposited to the credit of the General Fund.

Article V  
[Implementation]

Section 501. [Appropriations.] There shall be appropriated from the General Fund to the executive director of the Health Occupations Council such sums as may be necessary for the administrative expenses incurred in fulfilling the provisions of this act. The executive director shall allocate to the licensing boards funds adequate to carry out their duties.

Section 502. [Severability.] [Insert severability clause.]

Section 503. [Repeal.] [Insert repealer clause.]

Section 504. [Effective Date.] [Insert effective date.]

Sec. 501. The task force concluded that the present autonomy of many boards contributes to their lack of accountability. With all license fees deposited to the General Fund and all monies for the Health Occupations Council and board activities appropriated by the legislature, some accountability is introduced into the system. Further, the task force believes that if regulatory activities are in fact serving a public protection function, then they should not be financed by what is essentially a tax on licensees, but rather appropriated from general revenues as are other consumer protection activities.



APR 17 1979  
Attorney General  
STATE CAPITOL  
Phoenix, Arizona 85007

Robert R. Corbin

April 16, 1979

Martin Laderman, President  
State Board of Optometry  
Room 418  
1645 West Jefferson  
Phoenix, Arizona 85007

Re: Request for Certification of  
Rules R4-21-03 and R4-21-04

Dear Dr. Laderman:

We have reviewed the above-referenced rules approved by the Arizona Board of Optometry on January 22, 1979, and have determined that the rules must be rejected for the following reasons.

Subsection D of Rule R4-21-04 reads as follows: "No optometrist shall violate the rules and regulations of the Federal Trade Commission." This provision constitutes an improper delegation of authority by the Board of Optometry to the Federal Trade Commission.

Rule R4-21-03 is not in proper form for the following reasons. The use of the term "you must first be certified" implies that, in addition to being certified by the American Academy of Optometrists and/or the College of Optometrists, there are additional requirements not specified in the rules. The use of the phrase "or other means or methods recognized by the Board" is not sufficiently specific to be valid.

Finally, subsection B.1 conflicts with subsection B as written. The following change in form is suggested:

B. No optometrist shall in any manner advertise or hold out to the public that his services or abilities are superior to those of any other licensed optometrist except that an optometrist may advertise as a specialist if he has been certified by the American Academy of Optometry as a diplomat in that specialty or as a fellow in the College of Optometrists in vision development.



APR 17 1979

In reviewing the rules submitted, it has come to our attention that there may be additional problems with Rule R4-21-04.B. due to the requirement of Rule R4-21.04.B that every optometrist perform a complete minimum examination which includes 13 different findings on every patient. The requirement may be in violation of state and federal antitrust laws. Moreover, as your legal adviser, we feel it is our duty to advise you that, under recent court decision, the Rule may be invalid as an unreasonable restraint of trade.

Under Arizona law, the practice of optometry involves a broad range of services, including

[t]he examination and refraction of the human eye and its appendages, and the employment of any objective or subjective means or methods other than the use of drugs, medicine or surgery, for the purpose of determining any visual, muscular, neurological or anatomical anomalies of the eye, the use of any instrument or device to train the visual system or correct any abnormal condition of the eye or eyes and the prescribing, fitting or employment of any lens, prism, frame or mountings for the correction or relief of or aid to the visual function.

Ariz. Rev. Stat. Ann. § 32-1701.3.

An individual patient might require one or more of those services at any given time. But in order to obtain any optometric service from a licensed optometrist in the State of Arizona, a patient must undergo and pay for the complete minimum examination required under Rule R4-21-04.B. On its face, the Rule therefore appears to interfere with the patient's ability to purchase needed services at the lowest possible price, and to further inflate the spiraling cost of health care by requiring the public to pay for optometric services that may be unnecessary. For example, a patient who wants only a prescription for eyeglasses consisting of the four findings detailed in Rule R4-21-04.C<sup>1</sup> is required under

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1. Rule R4-21-04.C, as amended, provides:

Any prescription by any optometrist in the state of Arizona shall contain these minimum findings:

1. Refractive power of lenses desired.
2. Reading addition and type of bifocal prescribed.
3. Inner-pupillary distance (far and near).
4. Signature of refractionist and date of refraction.



APR 17 1979

Martin Laderman  
April 16, 1979  
Page 3

subsection B to pay for additional findings regarding ophthalmoscopic factors, color vision and numerous other procedures.<sup>2</sup> In addition, the Rule appears to present an unnecessary cost barrier to a patient who wishes to change optometrists or to purchase selected services from an ophthalmologist, since it requires the patient to pay the optometrist for a "complete minimum examination" even if the required findings have recently been made by another fully qualified eye care provider.

Because the "complete minimum examination" bundles together a number of procedures which might otherwise be purchased separately, the Rule requiring their purchase on the patient's initial visit to an optometrist may constitute a "tying arrangement." The courts have long held that it is unlawful for a seller of goods or services to condition the sale of one product or service (the "tying" product or service on the sale of another product or service (the "tied" product or service). E.g., Northern Pacific R. Co. v. United States, 456 U.S. 1 (1958). When the seller has control over the tying product, a tying arrangement is a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and the Uniform State Antitrust Act. Ariz. Rev. Stat. Ann. § 44-1402. E.g., International Salt Co. v. United States, 332 U.S. 392 (1947). In this case, Rule R4-21-04.B controls all optometrists in the State of Arizona

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2. Rule R4-41-04.B, as amended, would provide:

Any optometrist in the State of Arizona shall make a complete minimum examination and shall keep a record of the following conditions of every patient examined:

1. Case history.
2. Aided and unaided visual acuity.
3. External examination.
4. Ophthalmoscopic examination.
5. Corneal curvature measurements.
6. Retinoscopy.
7. Amplitude of convergence and accommodation.
8. Phoria and duction findings.
9. Subjective findings.
10. Fusion.
11. Color vision (initial examination).
12. Visual fields.
13. Prescription given and visual acuity attained.

The current rule lists 15 required findings.

and, by forcing consumers to purchase a "complete minimum examination" in order to obtain any optometric service, it has a substantial anticompetitive effect.

The sale of distinct products or services as a single unit is a recognized form of tying arrangement. See, e.g., United States v. Loew's, Inc., 371 U.S. 38 (1962). For example, the practice of furnishing copying machines and paper only as a package for a package price was held to be an unlawful tying arrangement in Advance Business Systems and Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. den. 397 U.S. 920 (1970). Recently, the United States Supreme Court held that a public utility's program of giving free light bulbs to its residential electric users was an unlawful tying arrangement which in effect forced electric users to get their bulbs from the utility. Cantor v. Detroit Edison Co., 428 U.S. 479 (1976).<sup>3</sup> The requirement that every patient has a "complete minimum examination" on his or her initial visit to an optometrist has an equally coercive and anti-competitive effect because it forces the patient to purchase the thirteen required findings from the optometrist.

According to recent decisions of the Supreme Court, e.g., City of Lafayette v. Louisiana Power & Light Co., 98 S.Ct. 1123 (1978), the fact that Rule R4-21-04.B was adopted by the Board rather than by private individuals does not make it immune from antitrust scrutiny. While the Arizona Legislature has delegated authority to the Board to make and amend rules and regulations governing the practice of optometry, Ariz. Rev. Stat. Ann. § 32-1705.A, that delegation of authority does not exempt the Board from the antitrust laws. To fall within the "state action" exemption from the federal antitrust laws, Rule R4-21-04.B would have to be mandated by the Legislature, Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975), and the statute which grants rule-making authority to the Board gives no indication that the Legislature expected the Board to require every optometrist to perform a "complete minimum examination" on every patient. Ariz. Rev. Stat. Ann. § 32-1705.A. To the contrary, the express limitations which that

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3. A similar practice called "bundling" once prevailed in the computer industry. Under that practice, a manufacturer of computer hardware provided computer software programs and other services to its hardware customers at no additional charge, thereby limiting the competitive market for the software programs and other services. See, generally, Control Data Corp. v. International Business Machines Corp., 1970 CCH Trade Cas., Para. 73,297 (E.D. Minn. 1970).



APR 16 1979

Martin Laderman  
April 16, 1979  
Page 5

statute places on the Board's rule-making authority clearly reflect the Legislature's intention to preserve competition in the field of optometry, for the statute specifically forbids the Board to adopt any rule that would regulate optometrists' prices, location, billing or advertising (other than the false or deceptive advertising proscribed by A.R.S. § 44-1481). Id.

Moreover, Arizona's Uniform State Antitrust Act was enacted in 1974 without any exception for Rule R4-21-04.B or any other regulation of the State Board of Optometry. Ariz. Rev. Stat. Ann. §§ 44-1401 et seq. Consequently, the Rule is subject to both federal and state antitrust laws. (See Arizona Attorney General Rule No. 132 dated September 8, 1978, and Opinion of the Arizona Attorney General to Arizona State Board of Accountancy dated September 19, 1975, 1975-2 CCH Trade Cas., Para. 60,529.)

In order for this office to certify Rule R4-21-04, we would request that the Board provide us with information substantiating the need for all 13 findings contained in the Rule and an explanation of why an optometrist cannot rely on part or all of such findings made recently by another individual qualified to make such findings.

Sincerely,



BOB CORBIN  
Attorney General

BC/mm



## ARIZONA LEGISLATIVE COUNCIL

## MEMO

May 21, 1979

TO: Douglas Norton, Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-79-34)

This is in response to a request submitted on your behalf in a memo by Gerald A. Silva dated April 26, 1979.

QUESTIONS PRESENTED:

Are any of the following rules promulgated by the Board of Optometry in conflict with state or federal antitrust provisions?

1. R4-21-02.A.1 - prohibiting an optometrist from paying or rewarding a person for services in securing, soliciting or steering patients or patronage to himself.
2. R4-21-03 - prohibiting an optometrist from using certain advertising.
3. R4-21-04.B - requiring an optometrist to perform a complete minimum examination of every patient.

DISCUSSION:

1. Question 1 presents a difficult issue to analyze. The Board of Optometry has promulgated A.C.R.R. R4-21-02, which reads in part:

A. It shall be grounds for suspension or revocation of license for an optometrist in the State of Arizona to:

1. Employ or agree to employ, to pay or promise to pay, or reward or promise to reward in any manner to any person, firm, association, partnership, or corporation for services in securing, soliciting or steering patients or patronage to himself or any other optometrist.

The rule prohibits a practice known as "fee referrals". According to the current president of the Board of Optometry, the rule was promulgated to combat what the Board apparently viewed as an unethical practice among optometrists.

Stephanie W. Kanwit, director of the Chicago regional office of the Federal Trade Commission (FTC), noted in her address before the American Bar Association's Antitrust Law Section that "It is a difficult task to try to judge when professional regulations (such as codes of ethics) . . . do prevent harm to the public, and when . . . they merely restrain competition between practitioners and ultimately increase the cost of services." (See Kanwit, FTC Enforcement Efforts Involving Trade and Professional Associations, 46 Antitrust Law Journal, 640, 641 (1978)).

Without more factual evidence this rule would seem to have as its basis an ethical consideration as well as an optometrist's pecuniary interest. The circumstances and manner of client solicitation are of important concern as will be noted in later discussion of this point.

For purposes of our analysis, an analogy may be drawn to a somewhat similar practice known as "fee splitting" which exists within the legal profession. Banned by the American Bar Association since 1928, the practice involves the payment of money by one lawyer who has handled a legal matter for a client to another lawyer who initially referred the client. Usually the amount paid to the lawyer who has done nothing more than refer a client to the second lawyer is a portion of the fee the second lawyer received from the client for handling the legal matter. According to a recent story in The National Law Journal, February 26, 1979, at 1, col. 1, many lawyers favor the ban against fee splitting because they consider the practice to be nothing more than a kickback which inflates the price of legal services to consumers and results in payment to a lawyer who has done no work. It is reported that fee splitting between lawyers is very common and despite the ban few disciplinary actions are ever brought.

It is for several reasons that some states are modifying the rule banning fee splitting between attorneys under certain circumstances. In Florida, Massachusetts and Texas one of the circumstances is client consent. According to The National Law Journal, April 2, 1979, at 3, col. 1, California has also proposed a change in its Rules of Professional Conduct for Lawyers which would permit fee splitting if the client consents in writing and the total fee charged the client is reasonable.

A related point involves client solicitation. According to The National Law Journal, March 19, 1979, at 3, col. 1, Illinois is considering the adoption of a code of ethics for its lawyers which would not only permit fee splitting (though the referring lawyer would remain responsible for the quality of services delivered) but which would permit client solicitation. However, solicitation would not be permitted when "coercion, duress, compulsion, intimidation, threats, over-persuasion, overreaching or vexatious or harrassing (sic) conduct" is involved.

In California, the State Bar has proposed revised rules for lawyer advertising which include retaining the present ban on client solicitation in "a specific or particular case or matter" /July 31, 1978/ 344 Trade Reg. Rep. (CCH) 5.

The U.S. Department of Justice, in presenting its comments on the rules to the Board of Bar Governors of the State Bar of California on July 26, 1978, objected to the ban on solicitation. As reported in the previously cited Trade Regulation Reports:

The Department said this type of solicitation helps assure that individuals will not have access to the courts because of ignorance of the law. Such solicitation often helps people receive information necessary to select a lawyer at the right time, the Department said. The Department urged the fashioning of a narrowly drawn rule that would prohibit solicitation only in those circumstances likely to lead to undue influence or something similar.

The Board's rule could be construed to be as broad as California's proposed rule banning solicitation and thus objectionable.



It is apparent that the same ethical concerns are present for the profession of optometry as for the legal profession.

Despite the fact that enforcement of the Board's rule prohibiting fee referrals may restrict the right of an optometrist to conduct his business and solicit clients as he wishes, it is clear that the consumer derives a benefit from enforcement of the rule. Even Illinois acknowledged that fee splitting between lawyers may drive up legal fees because the referral fee is included as part of the cost of doing business. Therefore, by prohibiting a scheme of referral fees the costs of professional services are more likely to remain uninflated and the consumer is less likely to be harassed by solicitation efforts.

As noted by a staff member of the Federal Trade Commission, it is possible that under various fact situations a number of antitrust theories could be successfully argued to defeat the rule in question. These could be drawn from the limitations and prohibitions included in this state's antitrust law, Title 44, chapter 10, article 1, Arizona Revised Statutes, federal antitrust laws including the Sherman Act, 15 U.S.C.A. sections 1-7 or the Federal Trade Commission Act, 15 U.S.C.A. sections 41-58. In addition, a First Amendment challenge could possibly be upheld as in the recent case of Bates v. State Bar of Arizona, 433 U.S. 350 (1977). (The Bates case is often cited for the proposition that the First Amendment's commercial speech doctrine protects the consuming public's "right to know". See Meyer and Smith, Attorney Advertising: Bates and A Beginning, 20 Arizona Law Review 427 (1978) for a discussion of this issue. However, the rule in question does not appear to involve the public's right to know except when a less restrictive alternative to the rule is involved, which is discussed later in this memo.)

We believe that it is unnecessary to reach the issue of whether enforcement of the Board's rule prohibiting referral fees violates state or federal antitrust law. Without additional facts and much economic data to determine the impact the rule has, it is not possible for us to determine whether enforcement of the rule restrains trade or is an anticompetitive practice. However, it is our opinion that even if the rule was found to restrain trade or to be anticompetitive, the rule would fall within the "public service aspect" specified in Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975).

The Goldfarb case first applied federal antitrust laws to the legal profession. The U.S. Supreme Court held that minimum fee schedules mandated by the Virginia State Bar were anticompetitive. However, the court left open the question of whether professionals could ever be treated differently from other trades for purposes of applying antitrust laws.

The court noted:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the profession, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. *Id.* at 788-89 n.17.



In addition, in Boddicker v. Arizona State Dental Association, 549 F.2d 626 (9th Cir. 1977), cert. denied, 434 U.S. 825 (1977), this same factor was described as one which "contributes directly to improving service to the public."

The Boddicker case involved appellate review of an antitrust complaint which had been dismissed on grounds that the antitrust laws did not apply to a "learned profession". In this case the profession was dentistry.

Here the circuit court could not find that the arrangements complained of (requiring membership in the American Dental Association prior to membership in the Arizona State Dental Association) were so obviously designed to promote public service that antitrust laws would not apply because of the "learned profession" exemption. In its analysis, the circuit court declared:

As we interpret the Court [U.S. Supreme], to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, viz. to serve the public. Id. at 632.

The circuit court in Boddicker cited an exhaustive study of the legislative intent of the Sherman Act conducted by Robert H. Bork, U.S. Solicitor General at that time, as "no . . . other than the maximization of consumer welfare." Id. at 632 n.10.

Even if a case could be made that the Board's rule prohibiting referral fees does restrain competitive activity or restricts an optometrist's right to freely engage in conducting his business and soliciting clients, enforcement of the rule is consistent with the purpose of antitrust legislation which is to protect the consumer from harm by practices which increase costs and restrict consumer choices.

When viewed from this perspective the Board's rule prohibiting the referral fee schemes appears to benefit the consumer by helping to maintain prices at a level commensurate with the cost of services actually performed. In addition, the potentially abusive circumstances of solicitation are minimized.

There is a less restrictive alternative to the rule's blanket prohibition. That is exemplified by the fee splitting rules promulgated for attorneys which require client consent to the fee splitting arrangement. This protects the consumer's "right to know". In addition, the rule could require that the client's fee remain reasonable. This protects the public from high costs and permits consumers to make the choice for their own professional services.

Additionally, we urge the Board of Optometry to review its rule prohibiting referral fees in light of the comments the U.S. Department of Justice made with regard to California's proposed rules for lawyer advertising. It is possible that the Board's fee referral rule could be more narrowly drawn. In that case, appropriate action should be taken.

2. Question 2 asks whether A.C.R.R. R4-21-03 promulgated by the Board of Optometry violates antitrust laws.

That rule provides that:

A. No optometrist in the State of Arizona shall use advertising of any kind or nature which is misleading, false, deceptive or inaccurate in any material particular, nor shall an optometrist misrepresent any ophthalmic material, optometric services, credit terms, or values or the nature or form of the practice conducted by that optometrist or group of optometrists. No ophthalmic material shall be advertised unless it is described fully and truthfully in all of its component parts.

B. No optometrist shall in any manner advertise or hold out to the public that his services or abilities are superior to those of any other licensed optometrist.

C. Every optometrist whose name and address appears in any advertisement or directory shall be personally responsible to have knowledge of the contents of that advertisement or directory.

This rule must be analyzed in light of the following information. Section 202 of the Magnuson-Moss Act, P.L. 93-637, 88 Stat. 2183 (1975) authorizes the Federal Trade Commission to prescribe trade regulation rules which specifically define acts or practices which are unfair or deceptive in or affecting commerce. The FTC trade regulation rules can preempt state law (See Kanwit, FTC Enforcement Efforts Involving Trade and Professional Associations, 46 Antitrust Law Journal 640, 646 n.23 (1978)).

The FTC trade regulation rule relating to advertising of ophthalmic goods and services (43 Fed. Reg. 23992 (1978) (to be codified in 16 C.F.R. Part 456)) has been in effect since July 13, 1978. The trade regulation rule specifically applies to optometrists.

A.C.R.R. R4-21-03, subsection A prohibits the false advertising of materials or services offered by an optometrist. Since this rule clearly restricts advertising it must be interpreted in light of the FTC trade regulation rule relating to advertising of ophthalmic goods and services.

The trade regulation rule, in section 456.3, specifies certain public restraints and provides in pertinent part:

It is an unfair act or practice . . . for any state or local government entity or any subdivision thereof, state instrumentality, or state or local governmental official to enforce any:

(a) prohibition, limitation or burden on the dissemination of information concerning ophthalmic goods and services by any seller or group of sellers, or

(b) prohibition, limitation or burden on the dissemination of information concerning eye examinations by any refractionist. PROVIDED: Nothing in subpart (b) shall be construed to prohibit the enforcement of a state or local law which permits the dissemination of information concerning eye examinations, including information on the cost and availability of those



examinations, but requires that specified affirmative disclosure also be included.

In addition, section 456.5(b) of the trade regulation rule prescribes certain permissible state limitations on advertising.

Where a state or local law, rule or regulation applies to all retail advertisements of consumer goods and services (including a law, rule, or regulation which requires the affirmative disclosure of information or imposes reasonable time, place and manner restrictions), such a law, rule, or regulation shall not be considered to prohibit, limit, or burden the dissemination of information.

This state has enacted Arizona Revised Statutes section 44-1481 which prohibits fraudulent advertising practices in general. Strictly construing the language of the trade regulation rule, it is arguable that the Board of Optometry may not promulgate and enforce its own rule prohibiting fraudulent advertising of ophthalmic materials and optometric services. However, this seems unduly restrictive.

It is more appropriate that the Board of Optometry should revise its current rule to follow the language of Arizona Revised Statutes section 44-1481 as it relates to the advertising of ophthalmic goods and services and should use the definitions of the latter terms prescribed in the trade regulation rule. This result would eliminate any question that the Board was attempting to be generally more restrictive in permitting advertising than the state.

A.C.R.R. R4-21-03, subsection B prohibits an optometrist from advertising that he is a specialist. The Board's rule does limit the dissemination of information concerning an optometrist's services in such a manner that it would conflict with the previously cited trade regulation rule.

However, this does not mean that the rule could not be revised so it would comply with the trade regulation rule. The Board is not precluded from promulgating a rule which requires that "specified affirmative disclosure" also be included in advertising. The Board of Optometry could revise its rule to require certain additional information if an optometrist chooses to advertise that he is a specialist. For example, the optometrist could be required to include in his advertising that he is a specialist certified by the American Academy of Optometry or other organization which certifies specialists in optometry. Revising the rule would promote increased consumer information, would help prevent possible deception in advertising and would seem to implement the purposes of this state in regulating the optometry profession, as well as public advertising, to benefit the public and the purposes of the FTC to promote consumer information and prevent anticompetitive practices.

A.C.R.R. R4-21-03, subsection C would not seem to conflict with the letter or the spirit of the trade regulation rule.

3. Question 3 asks whether A.C.R.R. R4-21-04, subsection B, which requires that an optometrist perform a complete minimum examination of every patient, conflicts with antitrust laws.



We concur in the reasoning of the Attorney General in a letter dated April 16, 1979 to Dr. Martin Laderman, current president of the Board of Optometry. For the reasons discussed in that advisory opinion (of which you have a copy), we believe that the Board rule conflicts with antitrust laws.

Finally, it should be noted that the rules of the Board of Optometry which you question predate the trade regulation rule. The Board should be encouraged to review its rules in light of the trade regulation rule. In addition, the federal trade regulation rule has been appealed to the U.S. Court of Appeals in Washington, D.C. It is important to remember that this is a rapidly developing area of the law. We suggest that the Board of Optometry continue to consult with the Attorney General on matters relating to antitrust.

cc: Gerald A. Silva  
Performance Audit Manager

## ARIZONA LEGISLATIVE COUNCIL

## MEMO

June 18, 1979

TO: Douglas R. Norton, Auditor General

FROM: Arizona Legislative Council

RE: Request for Research and Statutory Interpretation (O-79-42)

This is in response to a request made on your behalf by Gerald A. Silva in a memo dated May 12, 1979 and by Jim Sexton in a conversation on June 7, 1979.

BACKGROUND:

According to Arizona Revised Statutes section 32-1705, subsection B, the Arizona State Board of Optometry:

...shall meet at least once each year at the capitol and at such other times and places as its president or the governor may designate by call. The board shall keep a record of its acts, receipts and disbursements, and of examinations held, with the names and addresses of the applicants and the results thereof, the names of all persons to whom certificates have been issued, the date of issuance and all renewals. All such records shall be public.

QUESTIONS PRESENTED:

1. Does the pass/fail decision of the Board constitute a legal action which must be conducted at a formal Board meeting and included in the Board minutes?
2. Does the disposition of a complaint by the public against a registered optometrist constitute a legal action by the Board?
3. If contested, could a pass/fail decision be declared null or void if it was not conducted at a formal Board meeting and included in the minutes? What other legal ramifications could result from the improper handling of such decisions?

DISCUSSION:

1. The basic rule of the Arizona open meeting law prescribes that "All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." Arizona Revised Statutes section 38-431.01, subsection A. A "meeting" according to Arizona Revised Statutes section 38-431, paragraph 3 is "...the gathering of a quorum of members of a public body to propose or take legal action, including any deliberations with respect to such action." In this context, "legal action" is "a collective decision...made by a majority of the members of a public body pursuant to the...specified scope of appointment or authority, and the laws of this state." Arizona Revised Statutes section 38-431, paragraph 2.



Clearly, the Arizona open meeting law (Arizona Revised Statutes section 38-431 et seq.), which is designed to expose to public view all meetings of any public body, applies to the Board of Optometry. Op. Atty. Gen. No. 75-7 p. 44, 1975-1976. This conclusion is given greater weight by the fact that the legislature recently amended the open meeting law to make it clear that meetings of all boards and commissions which are supported in whole or in part by tax revenues or which expend tax revenues are subject to the law. Arizona Revised Statutes section 38-431, Laws 1978, chapter 86, section 1.

Moreover, although the open meeting law contains certain exceptions and limitations, (Arizona Revised Statutes section 38-431.08), none of these exceptions and limitations apply to the fact situation presented to us.

Whether the law applies if the Board meets to consider whether an applicant should be issued or denied a certificate to practice optometry in this state, or when the Board disposes of a complaint against a registered optometrist, turns on the question of whether the Board is meeting to take legal action. As used in the open meeting law, the term legal action should be construed broadly and is not only the mere formal act of voting but includes discussions and deliberations by members of the public body prior to the final decision. Op. Atty. Gen. No. 75-8 p. 55, 1975-1976. The Board is empowered to issue certificates of registration to practice optometry in this state to qualified applicants. One prerequisite to the granting of a certificate is the successful passage by the applicant of an examination conducted by the Board. Arizona Revised Statutes sections 32-1705 and 32-1724. Therefore, any meeting by a majority of the Board to make a collective decision pursuant to such statutes would be legal action by the Board. The meeting must therefore be open to the public and the Board must maintain written minutes which include an accurate description of all legal action taken. Arizona Revised Statutes section 38-431.01, subsection B.

In addition, Arizona Revised Statutes section 32-1705, subsection B specifically requires the Board to keep a record of its acts. It would appear that a pass/fail decision of the Board is an "act" which requires the maintenance of adequate records.

2. Arizona Revised Statutes section 32-1755 authorizes the Board of Optometry, after notice and a hearing, to suspend or revoke the certificate of a registered optometrist for certain reasons. Arizona Revised Statutes section 32-1756, subsection A requires the Board to hold a public hearing for the purpose of determining if it should suspend or revoke the certificate of a registered optometrist. Read together, these statutes require the Board to hold a public hearing after receiving a complaint against a registered optometrist to decide if the optometrist's certificate should be suspended or revoked. Therefore, any decision made by a majority of the Board pursuant to these statutes would fall within the definition of legal action by the Board.

3. Arizona Revised Statutes section 38-431.05 requires that "All business transacted by any public body during a meeting held in violation of the provisions of this article shall be null and void." A strict reading of this statute suggests that any decision by the Board of Optometry at an informal meeting to determine whether an applicant should be issued a certificate to practice optometry without including the decision in the minutes would be null and void. The Arizona Court of Appeals recently held that if a meeting complies with the intent of the legislature in passing the open meeting law, "a



technical violation having no demonstrated prejudicial effect on a complaining party would not nullify all the business in a public meeting if to conclude otherwise would be inequitable". Karol et al. v. Board of Education Trustees, Florence Unified School District No. 1 of Pinal County C.A.No. 2 CA-Civ 2838 \_\_\_ Ariz. \_\_\_ (App. March 19, 1979). The court stated that in order to arrive at the intent of the legislature, the provisions of the open meeting law must be read as a whole. The court went on to state that the intent of the legislature, in passing the open meeting law, was to open the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret.

Thus, under the given fact situation, if the effect of the Board's action was to ban from the public view the decision-making process in approving or denying a person's application to practice optometry in this state, it would appear that the decision would be null and void. In order to avoid this situation, it would be advisable that when the Board takes any legal action, it:

...be preceded both by disclosure of that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting, and by an indication of what information will be available in the minutes pursuant to A.R.S. section 38-431.01 (B) so that the public may, if it desires, discover and investigate further the background or specific facts of the decision. Karol et al. at \_\_\_ (footnote omitted)

Finally, a meeting held by the Board of Optometry in violation of the open meeting law would cause a member of the Board to be guilty of a class 3 misdemeanor. Arizona Revised Statutes section 38-431.06.

#### CONCLUSION:

1. A pass/fail decision of the Board of Optometry is a legal action which requires a formal Board meeting and must be included in the Board minutes.
2. The disposition of a complaint against a registered optometrist by a member of the public is a legal action by the Board.
3. A pass/fail decision could be declared null and void if the effect of the decision is to hide the Board's actions from public examination. In addition, a violation of the open meeting law could subject the Board members to a criminal penalty.

FIVE YEAR COMPARISON OF  
 INFORMATION PRESENTED  
 IN THE ANNUAL REPORTS TO  
 THE GOVERNOR, BUDGET REQUESTS,  
 BOARD MINUTES AND BOARD FILES\*

Examination/Licensing Statistic	F I S C A L Y E A R																
	1974-75**			1975-76**			1976-77			1977-78			1978-79**				
	Governor's Report	Board Minutes	Board Files	Governor's Report	Board Minutes	Board Files	Governor's Report	Budget Request	Board Minutes	Board Files	Governor's Report	Budget Request	Board Minutes	Board Files	Governor's Report	Board Minutes	Board Files
Applicants passing examination	37	37	37	62	57	57	39	40	39	40	***	26	26	26	42	42	42
Applicants failing examination		5	UKN		UKN	0	0	0	0	0			4	4	8	8	8
Total Examinees	50	42	UKN	66	66	57	39		39	40		30	30	30	50	50	50
Applicants withdrawing or absent from examination		UKN	UKN		UKN	7			14	UKN			7	7		18	18
Rejected applicants		UKN	UKN		UKN	UKN			UKN	UKN			0	0		3	3
Total Applications	60	UKN	UKN	70	UKN	64	54	68	UKN	UKN		39	39	37	67	71	71

Applicants passing examination

Applicants failing examination

Total Examinees

Applicants withdrawing or  
absent from examination

Rejected applicants

Total Applications

\* For comparative purposes the statistics for original license applications and reciprocity license applications were combined.

\*\* Appropriate budget request did not contain a report on the examination/licensing statistics.

\*\*\* Includes one individual who was granted a license based upon successful completion of the examination in 1974.

UKN Unknown statistic. The Board minutes and/or Board files do not contain this information.





OFFICE OF THE  
**Attorney General**  
 STATE CAPITOL  
 Phoenix, Arizona 85007

BRUCE E. BABBITT  
 ATTORNEY GENERAL

August 19, 1975

75-08-19LB

TO: All State Agencies

FROM: Bruce E. Babbitt, Attorney General

RE: The Public Notice and Minute Taking Requirements Under Arizona's Open Meeting Act, as amended Laws 1975

Several questions have arisen as to the specific requirements imposed by Arizona's Open Meeting Act with respect to the giving of notice of public meetings. In addition, the Legislature, in its last regular session, amended the Open Meeting Act by including specific requirements with respect to the taking of minutes of public meetings. This memorandum is designed to clarify the public notice requirements imposed under the Act and to inform all state agencies of the recently enacted minute taking requirements.

If you have any questions regarding this memorandum, please call Roderick G. McDougall, Chief Counsel of the Civil Division at 271-3562.

PUBLIC NOTICE REQUIREMENTS

It has been stated that an "open meeting" is open only in theory if the public has no knowledge of the time and place at which it is to be held. 75 Harv.L. Rev. 1199 (1962). The right to attend and participate in an open meeting is contingent upon sufficient notice being given. Like other acts, Arizona's Open Meeting Act affords few statutory requirements for the mechanics of giving notice of meetings of governing bodies.

A.R.S. § 38-431.02, added Laws 1974, which sets forth the public notice requirements, provides as follows:

A. Public notice of all regular meetings of governing bodies shall be given as follows:

1. The state and its agencies, boards and commissions shall file a statement with the secretary of state stating where all



Memorandum  
All State Agencies  
August 19, 1975  
Page Two

notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

2. The counties and their agencies, boards and commissions, school districts, and other special districts shall file a statement with the clerk of the board of supervisors stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

3. The cities and towns and their agencies, boards and commissions shall file a statement with the city clerk or mayor's office stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

B. If an executive session only will be held, the notice shall be given to the members of the governing body, and to the general public, stating the specific provision of law authorizing the executive session.

C. Meetings other than regularly scheduled meetings shall not be held without at least twenty-four hours' notice to the members of the governing body and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances.

D. A meeting can be recessed and held with shorter notice if public notice is given as required in paragraph A of this section.

Memorandum  
All State Agencies  
August 19, 1975  
Page Three

The Open Meeting Act when originally enacted in 1962 made no specific provision for the giving of notice. While the requirements set forth in the 1974 amendments provide some guidelines, the particular mechanics of giving notice have not been set forth. Moreover, the language used in the 1974 amendments relating to notice is ambiguous, confusing and often contradictory. Without engaging in a long discussion of the many problems involved, we offer the following guidelines to be followed in complying with the notice requirements of A.R.S. § 38-431.02. Although an agency in following these guidelines will in some cases do more than required by the Act, it should never fall short of the Act's requirements. Being over-cautious is certainly justified, however, in view of the serious consequences for violating the Act. For example, a decision made in a meeting for which defective notice was given may likely be declared null and void by reason of A.R.S. § 38-431.05.

A. Statement to Secretary of State

Each state agency which is a governing body as defined in A.R.S. § 38-431 must file a statement with the Secretary of State stating where notices of all its meetings and the meetings of its committees or subcommittees will be posted. See Appendix A for a sample statement. The purpose of the statement is to provide information to the public regarding the place where it can find notices of the governing body's meetings. Generally, a governing body will post notices of its meetings directly outside the door to its offices or on a bulletin board in the lobby of the building in which the governing body's offices are located. Governing bodies which hold regular meetings on the same day of each month may post notices of such meetings by providing the information under the body's name in the building directory. For example, the directory listing in the lobby of the building might look as follows:

Arizona Accountancy Board      Room 202  
(Regular meetings every 2nd Monday of each month)

B. Regular Meetings

Regular meetings are generally those required to be conducted on a regular basis by statute and the dates of which are set by statute, rule, ordinance, resolution or



custom. For each regular meeting, the governing body must post a Notice of Regular Meeting at the place described in the statement filed with the Secretary of State as described above. See Appendix B for a sample Notice of Regular Meeting. The posting of this notice must be done as far in advance of the regular meeting as is reasonable and in no event less than 24 hours prior to the meeting. In addition, the governing body must give additional notice as is reasonable under the circumstances. Several types of additional notices which might be given are described in Paragraph F below.

C. Special Meetings Other Than Emergency Meetings

Special meetings are all meetings other than regular meetings. For each special meeting, the governing body must post a Notice of Special Meeting at the place described in the statement filed with the Secretary of State. See Appendix C for a sample Notice of Special Meeting. The governing body should also give such additional notice as is reasonable under the circumstances. See Paragraph F below. This additional notice must include notice both to the general public and each member of the governing body. The several notices given, including the Notice of Special Meeting posted as described above, must be accomplished at least 24 hours prior to the time of the special meeting, except in the case of an emergency meeting covered under Paragraph D below.

D. Emergency Meetings

Emergency meetings are those special meetings in which the governing body is unable to give the required 24 hours notice. In the case of an actual emergency, the special meeting may be held "upon such notice as is appropriate to the circumstances". The nature of the notice required in emergency cases is obviously subject to a case by case analysis and cannot be specified by general rules. However, any relaxation or deviation in the normal manner of providing notice of meetings, either to the general public or to members of the governing body, must be carefully scrutinized and can be justified only for compelling practical limitations on the ability of the governing body to follow its normal notice procedures.



E. Executive Sessions

An executive session is nothing more than a meeting (regular or special) wherein the governing body is allowed under the Open Meeting Act to discuss and deliberate on matters in secret. See A.R.S. § 38-431.03. Separate notice need not be given of an executive session if it is held in conjunction with a properly noticed regular or special meeting. However, where only an executive session will be held, all notices of the meeting must state the specific provision of law authorizing the executive session, including a reference to the appropriate paragraph of Subsection A of A.R.S. § 38-431.03. See Appendix D for a sample Notice of Executive Session.

F. Additional Notice

In deciding what types of notice shall be given in addition to posting, governing bodies should consider the following:

1. Newspaper Publications

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. Mailing List

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

3. Articles or Notices in Professional or Business Publications

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field of regulation.

It is not necessary that all of these types of notice be given. Indeed, merely providing notice through the use of a mailing list and by posting should be sufficient in most cases. Neither should the above listings be considered exclusive and, to the extent other forms of notice are reasonably available, they should be used.

#### REQUIREMENTS FOR TAKING WRITTEN MINUTES

The first requirement for taking written minutes of meetings of governing bodies was included in the Open Meeting Act by the Legislature in 1974. The 1974 amendment, however, provided very little detail as to what the minutes must include. The original minute taking requirement read as follows:

\* \* \*B. Governing bodies, except for subcommittees, shall provide for the taking of written minutes of all their meetings. Such minutes shall be properly and accurately recorded as to all legal action taken and open to public inspection except as otherwise specifically provided by statute.

A.R.S. § 38-431.01.

In its last regular session, the Legislature amended this section to read in part as follows:

\* \* \*B. All governing bodies, except for subcommittees, shall provide for the taking of written minutes of all their official meetings. Such minutes shall include, but not be limited to: (1) the day, time and place of the meeting, (2) the numbers of the governing body recorded as either present or absent, (3) an accurate description of all matters proposed, discussed or decided, and the names of members who proposed and seconded each motion.

C. The minutes or recording shall be open to public inspection three working days after the meeting except as otherwise specifically provided by this article. \* \* \*

A.R.S. § 38-431.01, as amended Laws 1975 (eff. 9/12/75).

Memorandum  
All State Agencies  
August 19, 1975  
Page Seven

You should note that this section requires that the minutes or recording be open to public inspection, except as otherwise specifically provided by this article. The specific exception referred to is the provision in A.R.S. § 38-431.03 which provides that minutes of executive sessions shall be kept confidential.

BEB:PMW:lc



QUANTITATIVE RESULTS OF THE OFFICE  
OF THE AUDITOR GENERAL SURVEYS  
OF THE ARIZONA OPTOMETRY AND  
OPHTHALMOLOGY PROFESSIONS

These surveys were conducted to obtain general information regarding the optometric profession and the Board of Optometry. Surveys were sent to all optometrists licensed by the Board of Optometry as of April 10, 1979, and to all ophthalmologists maintaining a membership in the Arizona Ophthalmological Society. The number of surveys sent and returned are scheduled below.

	<u>Number Sent</u>	<u>Number Returned</u>	<u>Percentage Returned</u>
Optometrists	463	231	50%
Ophthalmologists	<u>120</u>	<u>68</u>	<u>57</u>
Total	<u>583</u>	<u>299</u>	<u>51%</u>

STATE OF ARIZONA  
OFFICE OF THE AUDITOR GENERAL  
GENERAL SURVEY OF OPTOMETRISTS

1. Do you believe that the absence of the licensure and regulation of optometrists would significantly harm, affect, or endanger the public health and welfare?

<u>223</u>	yes
<u>6</u>	no
<u>2</u>	no opinion

2. Do you believe that there is a less restrictive method of regulation which would adequately protect the public?

<u>23</u>	yes
<u>202</u>	no

3. Have you ever been involved in the board's complaint review process?

<u>19</u>	yes
<u>213</u>	no

If yes,

- A) Was the matter resolved in a timely fashion?

Yes	No
<u>18</u>	<u>2</u>

- B) Was the resolution equitable?

<u>16</u>	<u>3</u>
-----------	----------

- C) Was a formal hearing involved?

<u>5</u>	<u>14</u>
----------	-----------

- D) Did you appeal the board's decision?

<u>2</u>	<u>13</u>
----------	-----------

If yes, did you win the appeal?

<u>2</u>	<u>0</u>
----------	----------

4. If you were the subject of a complaint, how would you rate the manner in which your case was handled?

<u>9</u>	excellent
<u>7</u>	satisfactory
<u>2</u>	poor
<u>0</u>	unacceptable

5. Have you had any contact with the board's administrative office?

<u>76</u>	yes
<u>149</u>	no

If yes,

- A) Was your request dealt with in a timely manner?

<u>70</u>	yes
<u>7</u>	no

- B) The quality of the response was:

<u>45</u>	excellent
<u>27</u>	adequate
<u>4</u>	substandard

State of Arizona  
 Office of the Auditor General  
 General Survey of Optometrists  
 Page Two

6. Have you had any contact with similar boards in other states?

<u>104</u>	yes
<u>122</u>	no

If yes, how would you rate Arizona's Board?

<u>27</u>	superior
<u>69</u>	equal
<u>10</u>	inferior

7. Do you believe that continuing education is necessary for optometrists?

<u>202</u>	yes
<u>24</u>	no

8. Do you believe that continuing education provides assurance of continued proficiency?

<u>123</u>	yes
<u>96</u>	no

9. Could you suggest any other alternatives that would promote continued proficiency besides continued education?

<u>52</u>	yes
<u>146</u>	no

10. Are you aware of:

	<u>Yes</u>	<u>No.</u>
A) Scheduled board meetings?	<u>45</u>	<u>177</u>
B) Rules and regulations of the board?	<u>148</u>	<u>63</u>
C) Actions taken by the board?	<u>61</u>	<u>147</u>
D) Other proposed actions of the board?	<u>42</u>	<u>160</u>

11. In your opinion, has the board through its licensing function properly protected the profession from incompetent practitioners?

<u>144</u>	yes
<u>53</u>	no



12. By which of the following methods were you licensed in Arizona?

<u>219</u>	examination
<u>0</u>	grandfather clause
<u>11</u>	reciprocity

If licensed by reciprocity,

A. Rate the timeliness of licensure by the Board.

<u>14</u>	Good
<u>2</u>	Average
<u>0</u>	Poor

B. The requirements of licensure are:

<u>0</u>	Too strict
<u>33</u>	Adequate
<u>2</u>	Too lenient

13. If you took the board examination for licensure, please evaluate the examination.

<u>119</u>	Good
<u>70</u>	Average
<u>18</u>	Poor

14. What percent of the year do you practice optometry in the State of Arizona?

<u>94</u>	100%
<u>3</u>	75%
<u>2</u>	50%
<u>2</u>	25%
<u>129</u>	0%

Please return this questionnaire to:

Blake Peterson  
 Auditor General's Office  
 112 N. Central - Suite 600  
 Phoenix, Arizona 85004

STATE OF ARIZONA  
OFFICE OF THE AUDITOR GENERAL  
GENERAL SURVEY OF OPHTHALMOLOGISTS

1. Do you believe that the absence of the licensure and regulation of optometrists would significantly harm, affect or endanger the public health and welfare?

60    yes  
8        no

2. Do you believe that there is a less restrictive method of regulation which would adequately protect the public?

7        yes  
58       no

3. In your opinion, has the optometry board, through its licensing function properly protected the profession from incompetent practitioners?

15       yes  
43       no

4. Do you believe that there is a duplication of duties between ophthalmologists, optometrists and dispensing opticians?

46       yes  
21       no

5. Presently, ophthalmologists, optometrists and dispensing opticians are licensed through separate agencies: which do you think could be consolidated into one agency?

<u>56</u>	All three should remain separated
<u>3</u>	Ophthalmologists consolidated with dispensing opticians
<u>0</u>	Ophthalmologists consolidated with optometrists
<u>4</u>	Optometrists consolidated with dispensing opticians
<u>5</u>	Other

6. Optometrists claim that they can discover eye disease while conducting an eye examination. Have you received any patients with eye disease by referral from an optometrist?

60       yes  
7        no

If yes, how many referrals do you receive in a year?

See Page 94

How many of these referrals were correctly diagnosed?

Unusable

Please return this questionnaire to:

Blake Peterson  
Auditor General's Office  
112 N. Central - Suite 600  
Phoenix, Arizona 85004