

**OP. NO. 05-076**

**PROFESSIONS AND OCCUPATIONS: OPTOMETRY – GENERAL PROVISIONS.**

**Licensed optometrist, whose practice is not controlled or influenced by agent or employee of commercial or mercantile establishment, may be employed by independent ophthalmology practice, which has direct access to commercial or mercantile establishment and sells eye glasses or contact lenses ancillary to its practice, provided that majority of beneficial ownership of practice is owned by ophthalmologic practice and/or one or more ophthalmologists.**

The Honorable John M. O'Bannon, III, M.D.  
Member, House of Delegates  
January 9, 2006

**Issue Presented**

You ask whether an optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an ophthalmologic practice that has direct access to a commercial or mercantile establishment and that sells eyeglasses or contact lenses ancillary to the practice.

**Response**

It is my opinion that a licensed optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an independent ophthalmology practice that has direct access to a commercial or mercantile establishment and that sells eye glasses or contact lenses ancillary to its practice, provided that the majority of the beneficial ownership of the practice is owned by an ophthalmologic practice and/or one or more ophthalmologists.

**Background**

You state that a large discount retailer, doing business in the Commonwealth of Virginia, engaged in the sale of commodities provides leased space to independent ophthalmology practices that operate within many of its retail stores. Licensed ophthalmologists own and operate these ophthalmology practices. Further, you relate that the licensed ophthalmologists employ and supervise licensed optometrists for the purposes of providing patient examinations and professional eye care at these practices. The ophthalmology practices also sell corrective eyewear ancillary to the practice. Typically, you note that the only public access is through the retail store. Finally, neither the ophthalmology practices nor their employee optometrists are controlled by the retailer or by any other unlicensed agents of commercial or mercantile establishments.

**Applicable Law and Discussion**

The statutory prohibition against practicing optometry in a commercial or mercantile establishment has existed since 1938.<sup>1</sup> Section 54.1-3205(C) defines a "commercial or mercantile establishment" as "a business enterprise engaged in the selling of commodities."<sup>2</sup> There appears to be no disagreement that the large discount retailer about which you inquire is such a business enterprise.<sup>3</sup>

Section 54.1-3205(A) provides:

It shall be unlawful for any optometrist to practice his profession as a lessee of or in a commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a licensed practitioner and is practicing or will practice optometry as a lessee of or in the commercial or mercantile establishment.

The 2005 Session of the General Assembly amended § 54.1-3205<sup>4</sup> to provide that after December 31, 2005, an optometrist is "*deemed to be practicing in a commercial or mercantile establishment if he practices ... in any location that provides direct access to or from a commercial or mercantile establishment.*"<sup>5</sup>

Direct access includes any entrance or exit, except an entrance or exit closed to the public and used solely for emergency egress pursuant to applicable state and local building and fire safety codes, that prohibits a person from exiting the building or structure occupied by such practice or establishment (i) onto an exterior sidewalk or public way or (ii) into a common area that is not under the control of either the optometry practice or the commercial or mercantile establishment, such as into the common areas of an enclosed shopping mall.<sup>6</sup>

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."<sup>7</sup> Thus, unless one of the two exceptions in § 54.1-3205 apply, an optometrist practicing in a location that is within a "large discount retailer" when the practice has direct access to the retailer is presumed to be practicing within a commercial or mercantile establishment.

First, § 54.1-3205(D) provides that optometry and ophthalmology practices that sell eyeglasses and contact lenses ancillary to the practice of optometry or ophthalmology are not deemed to be a commercial or mercantile establishment. This exception is consistent with a 2000 Opinion of the Attorney General which concluded that the sale of eyeglasses and contact lenses is incidental to the practice of optometry and ophthalmology.<sup>8</sup> The 2000 Opinion did not address practices physically located within commercial or mercantile establishments; it merely opined that the sale of eyeglasses and contact lenses did not cause every practice selling those items to become a commercial or mercantile establishment.<sup>9</sup> Likewise, the exception language of § 54.1-3205(D) does not negate the long-standing prohibition against practice in a commercial or mercantile establishment in § 54.1-3205(A) nor does it render meaningless the definition of what constitutes practice in a commercial or mercantile establishment.<sup>10</sup> Statutes should not be construed to frustrate their purpose.<sup>11</sup>

Secondly, § 54.1-3205(D) provides that "any entity ... engaged in the sale of eyeglasses or contact lenses, the majority of the beneficial ownership of which is

owned by an ophthalmologic practice and/or one or more ophthalmologists, shall not be deemed a commercial or mercantile establishment." Section 54-278.1, which prohibited physicians from practicing in a commercial or mercantile establishment, was repealed in 1988.<sup>12</sup> Ophthalmologists are physicians<sup>13</sup> and may, therefore, practice in a commercial or mercantile establishment. Additionally, an optometrist may also practice in an entity that meets the ownership criteria of § 54.1-3205(D). The language in § 54.1-3205(D) is somewhat unclear regarding the extent of its application, but when added to the repeal of § 54-278.1,<sup>14</sup> and based on the specific and narrow facts you present, it is my opinion that a licensed optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an independent ophthalmology practice that has direct access to a commercial or mercantile establishment and that sells eye glasses or contact lenses ancillary to its practice, provided that the majority of the beneficial ownership of the practice is owned by an ophthalmologic practice and/or one or more ophthalmologists.<sup>15</sup>

### Conclusion

Accordingly, it is my opinion that a licensed optometrist, whose practice is not controlled or influenced by any agent or employee of a commercial or mercantile establishment, may be employed by an independent ophthalmology practice that has direct access to a commercial or mercantile establishment and that sells eye glasses or contact lenses ancillary to its practice, provided that the majority of the beneficial ownership of the practice is owned by an ophthalmologic practice and/or one or more ophthalmologists.

<sup>1</sup>See 1938 Va. Acts ch. 442, at 995, 997-98 (amending § 1635, predecessor to § 54.1-3205, of which subsection k prohibited practice of optometry by direct or indirect employee of any commercial or mercantile establishment); see also 1985-1986 Op. Va. Att'y Gen. 235 (interpreting practice of medicine or optometry in commercial or mercantile establishment under former § 54-278.1).

<sup>2</sup>A prior opinion of this Office previously has interpreted the definition of a "commercial or mercantile establishment" in § 54.1-3205(C). See 2000 Op. Va. Att'y Gen. 174. I note that the definition of a "commercial or mercantile establishment" in § 54.1-3205(C) remains unchanged. See Va. Code Ann. § 54.1-3205(C) (2005) (effective until December 31, 2005); § 54.1-3205(C) (2005) (effective December 31, 2005).

<sup>3</sup>See *Cowardin v. Burrage*, 195 Va. 54, 77 S.E.2d 428 (1953) (noting that business engaged in retail jewelry business and watch and clock repair in addition to optometry practice was commercial or mercantile establishment within meaning of § 54-388, predecessor to § 54.1-3205).

<sup>4</sup>See 2005 Va. Acts chs. 711, 720, at 1042, 1042-43, 1131, 1131, respectively (amending § 54.1-3205 by adding subsection D and redesignating subsection D as subsection E).

<sup>5</sup>*Id.* at 1042, 1131 (quoting § 54.1-3205(D)). The amendments to § 54.1-3205 are not effective until December 31, 2005. See *id.*, cls. 2, at 1043, 1131.

<sup>6</sup>Section 54.1-3205(D) (effective December 31, 2005).

<sup>7</sup>Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>8</sup>See 2000 Op. Va. Att'y. Gen., *supra* note 2, at 175.

<sup>9</sup>See *id.* at 174.

<sup>10</sup>See *supra* text accompanying note 5.

<sup>11</sup>See Op. Va. Att'y Gen. 2004 at 120, 121; 2003 at 137, 138; 1999 at 59, 60; 1982-1983 at 309, 311.

<sup>12</sup>See 1988 Va. Acts ch. 765, cl. 6, at 1016, 1197 (repealing Title 54[, including § 54-278.1]).

<sup>13</sup>An ophthalmologist is "[a] physician who specializes in the diagnosis and treatment of eye disorders." 3 J.E. Schmidt, M.D., Attorney's Dictionary of Medicine and Word Finder 0-62 (1996).

<sup>14</sup>See *supra* note 12 and accompanying text.

<sup>15</sup>The General Assembly may utilize this opinion to take action to further clarify their intent. See *City of Winchester v. Am. Woodmark Corp.*, 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995).

[Back to January 2006 Opinion Index](#)