



COMMONWEALTH of VIRGINIA

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The Honorable John S. Reid
Member, House of Delegates
P.O. Box 29566
Richmond, Virginia 23242

Dear Delegate Reid:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether an optometrist, whose practice is conducted from a kiosk type setting, a medical doctor's office, or other area that physically is located inside the same building as, and uses a common door with, a commercial or mercantile establishment violates the prohibitions in § 54.1-3205 pertaining to the practice of optometry. You also ask whether § 54.1-3205.1 limits or qualifies § 54.1-3205(D).

Response

It is my opinion that an optometry practice conducted in a kiosk type setting, a medical doctor's office, or other area that is physically located inside the same building and that uses a "common door" (requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way), violates § 54.1-3205. Furthermore, it is my opinion that where such a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates § 54.1-3205. Finally, it is my opinion that § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

Background

You advise that a 2000 opinion of the Attorney General ("2000 Opinion") notes that the statutory prohibition against practicing optometry in a commercial or mercantile establishment has existed since 1938.¹ You observe that the 2000 opinion notes that the policy of the General Assembly is to maintain an "extrication" of the practice of optometry from commercial or mercantile establishments "to prevent commercial enterprises from exercising control over an optometrist's professional practice," and constitutes a "continuing legislative policy of preventing improper lay control over professional decisions."²

¹ See 2000 Op. Va. Att'y Gen. 174.

² *Id.* at 176.

You relate that a recent opinion of the Attorney General issued on January 9, 2006 (“2006 Opinion”), responds to the narrow inquiry of 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.”³

You also observe that § 54.1-3205(D) appears to prohibit an optometrist from practicing in a physical location that has “direct access” to a commercial or mercantile establishment. Further, you state that § 54.1-3205.1 appears to prohibit an optometrist from practicing inside a commercial or mercantile establishment, regardless of the existence of an intervening employer or controlling entity, because such a physical setting results in the optometrist being supervised, either directly or indirectly, by an officer, agent, or employee of the commercial or mercantile establishment.

You assert that the General Assembly has determined, through committee and subcommittee hearings, that the mere presence of an optometrist inside a mercantile establishment is, in fact, placing an optometrist under the influence of the retail operator. This conclusion is based on the assertion that a retailer providing retail floor space would do so only if the presence of an optometrist will increase the sale of eyewear and related product under the control of the retailer. If such sales fail to materialize, you express the belief that it is not possible to determine the reason behind any subsequent firing of the optometrist or the termination of a lease for interior space.

You express the belief that the actions of the 2005 and 2006 Sessions of the General Assembly have made it clear that such a relationship would, in fact, place the optometrist under the supervision of the retailer. You, therefore, inquire whether an optometrist may be employed by an ophthalmology practice that physically is located inside of, or which has direct access to, a commercial or mercantile establishment.

Finally, you relate that the effective date of § 54.1-3205(D), December 30, 2005, would appear to supercede any previously existing statutory provision or regulatory guideline. Therefore, you also inquire regarding whether § 54.1-3205(D) is limited or qualified by § 54.1-3205.1, which prohibits an optometrist from being directly or indirectly supervised in the practice of optometry by any officer, employee, or agent of a commercial or mercantile establishment.

Applicable Law and Discussion

In § 54.1-3205(C), the General Assembly defines a “commercial or mercantile establishment” as “a business enterprise engaged in the selling of commodities.” The 2000 Opinion considers the definition and meaning of the terms “commercial or mercantile establishment” in § 54.1-3205(A) and (C) in the context of a business engaging in the sale of prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products, including the business of a licensed optician, and an optometrist selling prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products out of an optical dispensary located within his professional optometric office.⁴ The 2000 Opinion also declared the

³See 2006 Op. Va. Att’y Gen. No. 05-076, at *1 (Jan. 9, 2006), available at <http://www.vaag.com/OPINIONS/2006opns/05-076w.pdf>.

⁴See 2000 Op. Va. Att’y Gen., *supra* note 1, at 174.

legislative policy inherent in § 54.1-3205 to be “to maintain an extrication of the practice of optometry from commercial or mercantile establishments; and ... to prevent commercial enterprises from exercising control over an optometrist’s professional practice.”⁵

The 2006 Opinion concludes

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.^{6]}

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 penalty for a violation of § 54.1-3205(A) is found in § 54.1-3215:

The Board [of Optometry] may revoke or suspend a license or reprimand the licensee for any of the following causes:

....

15. Practicing optometry where any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § 54.1-3205, who is not licensed in Virginia to practice optometry or medicine directly or indirectly controls, dictates, or influences the professional judgment, including but not limited to the level or type of care of services rendered, of the licensed optometrist[.]

The statutory prohibition against practicing optometry in a commercial or mercantile establishment has existed since 1938.⁷ The statutory prohibition recently has been addressed by the General Assembly. The 2005 Session of the General Assembly amended § 54.1-3205⁸ by adding a new subsection D 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.*”⁹ The term “direct access” is defined to include

⁵ *Id.* at 176.

⁶ See 2006 Op. Va. Att’y Gen. No. 05-076, *supra* note 3, at *1.

⁷ 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).

⁸ See 2005 Va. Acts chs. 711, 720, at 1042, 1042-43, 1131, 1131, respectively (amending § 54.1-3205 by adding subsection D and redesignating former subsection D as subsection E).

⁹ *Id.* at 1042, 1131 (quoting § 54.1-3205(D)). The amendments to § 54.1-3205 became effective December 31, 2005. *See id.*, cls. 2, at 1043, 1131.

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.^{10]}

“[T]he primary rule of statutory construction is to ascertain and declare the intention of the legislature and to carry such intention into effect to fullest degree.”¹¹ Consequently, “[t]he rules of interpretation are resorted to for the purpose of resolving ambiguity, not for the purpose of creating it.”¹² The Supreme Court of Virginia has stated that “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.”¹³

The General Assembly clearly and unambiguously defines the term “direct access” in § 54.1-3205(D) to include *any* “entrance or exit ... that prohibits a person from exiting the building or structure occupied by [the optometry] practice or [commercial or mercantile] establishment” either “(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.”¹⁴ An optometrist practicing in a location that has direct access as defined in § 54.1-3205(D) is presumed to be practicing within a commercial or mercantile establishment.

Your specific inquiry involves an optometrist whose practice is conducted from a kiosk, a medical doctor’s office, or other area that physically is located inside the same building as, and uses a common door with, a commercial or mercantile establishment. Where a practice is conducted in a location that uses a common door requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way, such practice clearly violates the prohibitions in § 54.1-3205. Furthermore, where a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates the prohibitions in § 54.1-3205.

¹⁰VA. CODE ANN. § 54.1-3205(D) (2005). Section 54.1-3205(D) also contains two exceptions that are not applicable to your inquiry. “[N]either an optometric practice nor an ophthalmologic practice which sells eyeglasses or contact lenses ancillary to its practice shall be deemed a commercial or mercantile establishment. Further, any entity that is 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.” *Id.*

¹¹United States v. Jerge, 738 F. Supp. 181, 183 (E.D. Va. 1990).

¹²*In re Boggs-Rice Co.*, 66 F.2d 855, 858 (4th Cir. 1933).

¹³*Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)); *see also* 2001 Op. Va. Att’y Gen. 179, 180.

¹⁴The use of the word “or” evidences an intent that what follows the “or” is meant to be separate and independent from what preceded the “or.” Indeed, “phrases separated by a comma and the disjunctive ‘or’ are independent.” *Lampkins v. Commonwealth*, 44 Va. App. 709, 717, 607 S.E.2d 722, 726 (2005) (refusing to find that, where two phrases were separated by “or,” first phrase modified second phrase); *see also* *Smoot v. Commonwealth*, 37 Va. App. 495, 501, 559 S.E.2d 409, 412 (2002) (noting that word “or” connects parts of sentence, but disconnects their meaning; disjunctive results in alternatives, which must be treated separately).

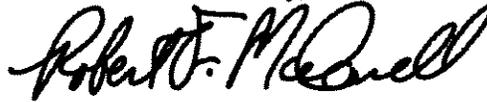
Section 54.1-3205.1 expressly prohibits commercial or mercantile interests from supervising or controlling optometrists.¹⁵ Section 54.1-3205(D) contains language describing a *prima facie*¹⁶ violation of an optometrist practicing in a commercial or mercantile establishment. Therefore, § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

Conclusion

Accordingly, it is my opinion that an optometry practice conducted in a kiosk type setting, a medical doctor's office, or other area that is physically located inside the same building and that uses a "common door" (requiring a person to use the same door to exit the building or structure occupied by the practice as that required to exit the commercial or mercantile establishment onto an exterior sidewalk or public way), violates § 54.1-3205. Furthermore, it is my opinion that where such a practice is conducted in a location that uses a common door requiring a person to use the same door to exit a commercial or mercantile establishment into the common areas of an enclosed shopping mall, the practice violates § 54.1-3205. Finally, it is my opinion that § 54.1-3205.1 does not limit or qualify § 54.1-3205(D).

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

2:213; 1:941/06-037

¹⁵"No optometrist shall be directly or indirectly supervised within the scope of the practice of optometry by any officer, employee, or agent of a commercial or mercantile establishment, as defined in subsection C of § 54.1-3205, who is not a Virginia-licensed optometrist or physician. No officer, employee, or agent of a commercial or mercantile establishment, who is not a Virginia-licensed optometrist or physician, shall directly or indirectly control, dictate, or influence the professional judgment, including but not limited to the level or type of care or services rendered, of the practice of optometry by a licensed optometrist." Section 54.1-3205.1 (2005).

¹⁶The term "*prima facie*" means "[a]t first sight; on first appearance but subject to further evidence or information." BLACK'S LAW DICTIONARY 1228 (8th ed. 2004)