Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2010 Sunset Review: Colorado State Board of Optometric Examiners

October 15, 2010

Consumer Protection

Department of Regulatory Agencies

Executive Director's Office
Barbara J. Kelley
Executive Director

Bill Ritter, Jr.
Governor

October 15, 2010

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the Colorado State Board of Optometric Examiners. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2011 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

> The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...
>
> The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination….

The report discusses the question of whether there is a need for the regulation provided under Article 40 of Title 12, C.R.S. The report also discusses the effectiveness of the Colorado State Board of Optometric Examiners and staff in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this regulatory program is continued by the General Assembly.

Sincerely,

Barbara J. Kelley
Executive Director

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2010 Sunset Review:
Colorado State Board of Optometric Examiners

Summary

What Is Regulated?
Optometrists diagnose and treat vision problems. During eye examinations, optometrists test for glaucoma and other eye diseases, and diagnose conditions caused by systemic diseases, such as diabetes and high blood pressure, referring patients to other healthcare practitioners as appropriate.

Why Is It Regulated?
The Optometric Practice Act (Act) protects consumers by ensuring that only qualified optometrists are practicing in Colorado. One complication that may arise from an unqualified person practicing optometry is permanent vision loss.

Who Is Regulated?
Colorado has 1,144 licensed optometrists.

How Is It Regulated?
The Colorado State Board of Optometric Examiners (Board), which licenses optometrists, is housed in the Division of Registrations of the Department of Regulatory Agencies. Applicants must be at least 21 years of age, graduate from a college of optometry, and pass a national licensing examination.

What Does It Cost?
The fiscal year 08-09 expenditure to oversee this program was $112,711, and there were 0.6 full-time equivalent employees associated with the program.

What Disciplinary Activity Is There?
For the period fiscal year 04-05 through 08-09, the Board issued 16 disciplinary actions, including probation or practice limitation, letters of admonition, denial of a license, injunctions, and cease and desist orders.

Where Do I Get the Full Report?
The full sunset review can be found on the internet at: www.dora.state.co.us/opr/oprpublications.htm.

Key Recommendations

Continue the Board for 11 years, until 2022.
Optometrists examine eyes and prescribe eye glasses and contact lenses. Certified therapeutic optometrists are authorized to prescribe specified drugs to treat conditions of the eye and remove superficial foreign bodies from the eye. Treatment performed by an unqualified optometrist could result in serious harm, including loss of vision. Considering the potential for harm, regulation is necessary.

Restate the definition of unprofessional conduct such that failing to properly address the practitioner's own physical or mental condition is unprofessional conduct, and authorize the Board to enter into confidential agreements with practitioners to address their respective conditions.
In Colorado, an optometrist could be disciplined for merely having a disability or illness. Worse, perhaps, is the fact that not only does the Act require discipline in such situations, but it also defines the underlying conduct as unprofessional. The General Assembly should clarify that it is unprofessional conduct to suffer from an illness, or a physical or mental condition, and fail to act within the limitations created by the illness or condition. The General Assembly should also authorize the Board to enter into confidential agreements with such practitioners whereby the practitioner agrees to limit his or her practice.

Increase the minimum financial responsibility requirement to $1 million per incident and $3 million aggregate per year.
Failure to diagnose a condition of the eye, such as glaucoma or macular degeneration, may result in blindness. Additionally, poor or inadequate treatment could result in the loss of an eye. In order to be made whole, a person who suffers serious permanent injury such as blindness may require compensation in excess of the current statutory minimum.

Major Contacts Made During This Review

American Optometric Association
Colorado State Board of Optometric Examiners
Colorado Pharmacists Society
Colorado Attorney General's Office
Colorado Optometric Association
Colorado Society of Eye Physicians and Surgeons

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are Prepared by:
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Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria[1] and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

[1] Criteria may be found at § 24-34-104, C.R.S.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.dora.state.co.us/pls/real/OPR_Review_Comments.Main.

The regulatory functions of the Colorado State Board of Optometric Examiners (Board) relating to Article 40 of Title 12, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2011, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the Board pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation of optometrists should be continued for the protection of the public and to evaluate the performance of the Board and staff of the Division of Registrations (Division). During this review, the Board and the Division must demonstrate that the regulation serves to protect the public health, safety or welfare, and that the regulation is the least restrictive regulation consistent with protecting the public. DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly.

Methodology

As part of this review, DORA staff attended Board meetings, interviewed Board staff, reviewed Board records and minutes including complaint and disciplinary actions, interviewed officials with state and national professional associations, interviewed optometrists and ophthalmologists, reviewed Colorado statutes and Board rules, and reviewed the laws of other states.

Profile of the Profession

Optometrists—also known as eye doctors or doctors of optometry—diagnose and treat vision problems. They examine eyes and prescribe eye glasses and contact lenses. During eye examinations, optometrists test for glaucoma and other eye diseases, and diagnose conditions caused by systemic diseases, such as diabetes and high blood pressure, referring patients to other healthcare practitioners as appropriate. They may also provide other vision treatment such as vision therapy or low-vision rehabilitation.[2]

Ophthalmologists also examine eyes and prescribe eye glasses and contact lenses. However, as doctors of medicine they may also perform eye surgery. Opticians, who work with ophthalmologists or optometrists, fit and adjust eye glasses.[3]

Optometrists earn a post-graduate doctor of optometry (OD) degree from a four-year college accredited by the Accreditation Council on Optometric Education (ACOE). The ACOE accredits 19 colleges of optometry in the U.S. and 1 in Puerto Rico.[4] There are no colleges of optometry in Colorado.

Optometry curriculum focuses on the eye, vision, and associated systemic diseases, such as diabetes and high blood pressure, as they relate to the eye.[5]

All states, the District of Columbia and Puerto Rico require passage of Part I and Part II of a national examination administered by the National Board of Examiners in Optometry. Fifty U.S. jurisdictions, including Colorado, the District of Columbia and Puerto Rico require passage of Part III, and in order to use drugs to treat conditions of the eye, 46 U.S. jurisdictions, including Colorado and the District of Columbia require passage of the Treatment and Management of Ocular Disease examination.[6]

Optometrists may additionally spend one year in a residency program training for a specialty, such as: family practice, pediatrics, geriatrics, vision therapy and rehabilitation, low vision rehabilitation, cornea and contact lenses, refractive and ocular surgery, or ocular disease.[7] Colorado does not have any accredited residency programs.

All states and the District of Columbia regulate the practice of optometry.[8]

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[2] Bureau of Labor Statistics. *Occupational Outlook Handbook, 2010-2011 Edition.* Retrieved February 5, 2010, from http://www.bls.gov/oco/ocos073.htm

[3] Bureau of Labor Statistics. *Occupational Outlook Handbook, 2010-2011 Edition.* Retrieved February 5, 2010, from http://www.bls.gov/oco/ocos073.htm

[4] Bureau of Labor Statistics. *Occupational Outlook Handbook, 2010-2011 Edition.* Retrieved February 5, 2010, from http://www.bls.gov/oco/ocos073.htm

[5] American Optometric Association. *Doctors of Optometry and their Education.* Retrieved June 21, 2010, from http://www.aoa.org/x5879.xml

[6] National Board of Examiners in Optometry. State Board Requirements. Retrieved August 9, 2010, from http://www.optometry.org/state_requirements.cfm

[7] Bureau of Labor Statistics. *Occupational Outlook Handbook, 2010-2011 Edition.* Retrieved February 5, 2010, from http://www.bls.gov/oco/ocos073.htm

[8] Bureau of Labor Statistics. *Occupational Outlook Handbook, 2010-2011 Edition.* Retrieved February 5, 2010, from http://www.bls.gov/oco/ocos073.htm

Legal Framework

History of Regulation

The Colorado State Board of Optometric Examiners (Board) was created in 1913. The early Board met twice a year to examine applicants. In the 1960's, the Board's disciplinary powers were strengthened and Board activity focused on eliminating optometrists practicing in department stores. Such practitioners were known as "commercialists."

A very dramatic movement in optometric regulation has been the expansion of the scope of practice to include use of diagnostic and therapeutic medications and the treatment of uveitis[9] and glaucoma.[10]

In the 1983 legislative session, the General Assembly authorized the use of specific pharmaceutical agents for examination purposes only, not for the treatment of eye disease. The legislation required that the standard of care provided be the same as the standard provided by an ophthalmologist.

In 1988, the General Assembly amended the scope of practice again to include certain classes of pharmaceutical agents and procedures for treatment of the anterior segment of the eye by optometrists who meet Board requirements. Again, in 1996, they authorized optometrists to treat glaucoma. Each of these advancements was accompanied by increased standards for certification of licensed optometrists.

Following the 2002 sunset review, the General Assembly further expanded the scope of practice to permit optometrists to prescribe oral antiviral medications and eliminated the requirement that optometrists consult with a physician in order to treat anterior uveitis and glaucoma.

In 2009, a bill was passed to allow optometrists to prescribe and dispense medicated contact lenses—a technology that is currently being developed by pharmaceutical companies—as long as the medication is within the current scope of optometric practice. For example, rather than using eye drops to treat allergies, optometrists could potentially prescribe contact lenses containing medication that would be time released into the eye.

[9] Uveitis: Inflammation of the middle layer of the eye (uvea), which may cause permanent vision loss.
[10] Glaucoma: A group of conditions in which the optic nerve is damaged, usually caused by abnormally high pressure in the eye. Glaucoma is the second most common cause of blindness in the United States.

Summary of Colorado Law

In Colorado, the laws that govern the regulation of optometry are contained in Article 40, of Title 12, Colorado Revised Statutes (C.R.S.) (Act). The Board regulates the practice of optometry.

The Board consists of seven members: five optometrists and two public members. The Governor appoints the members of the Board to four-year terms and may remove members for misconduct, incompetency, or neglect of duty. Members may not serve more than two consecutive terms. Professional members must have been licensed in Colorado for a minimum of five years previous to appointment.[11] The members annually elect a president, vice-president and secretary of the Board.[12]

The Board is granted the following powers and duties, among other things:[13]

- Examine applicants;
- License qualified applicants;
- Promulgate rules;
- Conduct disciplinary hearings;
- Discipline licensees;[14] and
- Establish educational programs.

The Board also has investigative subpoena authority.[15] The Board may issue an order to cease and desist and may seek an injunction against persons violating the Act.[16] The Board does not have the authority to arbitrate or adjudicate fee disputes.[17]

Practice of Optometry

The practice of optometry is limited to persons licensed by the Board. The titles "optometrist," "OD," and "doctor of optometry" are also protected.[18]

The Act does not apply to any licensed surgeon or physician, or any optometrist, surgeon or physician in the service of the U.S. armed forces, public health service, or veterans' administration. Opticians and anyone who repairs, supplies or sells eyeglasses or contact lenses with a valid prescription are also exempt from the Act. Additionally, any resident or intern who is serving in a program that is part of the curriculum of an accredited college of optometry and who is under the supervision of a licensed optometrist is exempt from the Act.[19]

[11] § 12-40-106(1), C.R.S.
[12] § 12-40-106(2), C.R.S.
[13] §§ 12-40-107(1)(a), (d), (g), and (n), C.R.S.
[14] § 12-40-119(1)(a), C.R.S.
[15] § 12-40-107(1)(m)(II), C.R.S.
[16] § 12-40-123(1), C.R.S.
[17] § 12-40-107.5, C.R.S.
[18] § 12-40-104, C.R.S.
[19] § 12-40-105(1)(d), C.R.S.

The practice of optometry is defined as:[20]

> The employment of any means other than medicine, surgery, invasive laser surgery, postoperative care management following surgery without referral from an ophthalmologist, unless ninety days have expired from and after the surgery or the physician justifies medically indicated reasons for extending the postoperative period or the patient has been released by the physician, X ray, or drugs, [with some exceptions], to diagnose and treat the presence of abnormal conditions of the human eye or its appendages and the accommodative and refractive conditions of the human eye or the scope of its functions in general; except for treatment of posterior uveitis; and the measurement of the powers or range of human vision and the adaptation of lenses and frames to improve the powers or range of human vision.

Optometrists may use the following topically-applied pharmaceuticals for examination purposes:[21]

- Mydriatics;
- Miotics;
- Cycloplegics; and
- Anesthetics.

Otherwise, an optometrist is prohibited from using pharmaceuticals to treat eye disease or disorders unless he or she is certified as a therapeutic optometrist.[22] Certified therapeutic optometrists may treat glaucoma and anterior uveitis.[23] They are authorized to use topical and oral antiglaucoma agents to treat glaucoma.[24]

Certified therapeutic optometrists are also authorized to use the following classes of pharmaceuticals and procedures to treat the eye:

- Topical and oral antimicrobials (except oral antifungal agents);
- Topical and oral antihistamines;
- Topical anti-inflammatory agents;
- Topical and oral nonscheduled analgesics, and any controlled substance for ocular pain and inflammation;[25] and
- The removal of superficial foreign bodies from the human eye or its appendages.

[20] § 12-40-102(1), C.R.S.
[21] §§ 12-40-102(4) and 12-40-108.5, C.R.S.
[22] § 12-40-102(3), C.R.S.
[23] § 12-40-102(7)(a), C.R.S.
[24] § 12-40-102(6), C.R.S.
[25] Except those specified in schedules I and II as provided in part 2 of article 18 of title 18, C.R.S.

Licensure

In Colorado, an optometrist may obtain a license by one of two routes, either by examination or by endorsement.

To be licensed by examination, an applicant must have the following qualifications:[26]

- Be at least 21 years of age;
- Graduate from a college of optometry accredited by a regional or professional accreditation organization which is recognized or approved by the Council on Postsecondary Accreditation or the U.S. Commissioner of Education, or approved by the Board; and
- Pass a written examination developed by the National Board of Examiners in Optometry, or any other examination approved by the Board.[27]

Applicants must attest that they are not addicted to or dependent on, nor habitually or excessively using or abusing, intoxicating liquors, habit-forming drugs, or controlled substances.[28]

In addition to licensure, an optometrist may be certified as a therapeutic optometrist. Certification may be met through an optometric graduate degree or through additional education at an institution accredited by a regional or professional accreditation organization recognized or approved by the Council on Postsecondary Education or the U.S. Department of Education.[29]

In order to use certain pharmaceuticals for the treatment of eye disease or for any therapeutic purpose, an optometrist must be certified as a therapeutic optometrist.[30]

As of 1996, all applicants for licensure are required to meet the educational training standards of a therapeutic optometrist and pass a standardized national examination in the treatment and management of ocular disease.[31] According to Board rule, applicants with optometric degrees granted after 1992 are considered to have satisfied the requirements for certification as a therapeutic optometrist through their degree programs.[32]

Applicants seeking certification are also required to have successfully completed a course in cardiopulmonary resuscitation within the immediate 24 months preceding application for licensure.[33]

[26] §§ 12-40-108(1)(a) and (b), C.R.S.
[27] §§ 12-40-108(1)(e) and 12-40-109.5(1), CRS
[28] §§ 12-40-108(1)(d) and 12-40-108(2), C.R.S.
[29] §§ 12-40-108.5 and 12-40-109.5, C.R.S.
[30] § 12-40-108.5, C.R.S.
[31] § 12-40-108(1)(f), C.R.S.
[32] 4 CCR 728-1 Rule 10.00.
[33] § 12-40-109.5(2), C.R.S.

To be licensed by endorsement, an applicant must be actively engaged in the practice of optometry and have the following:[34]

- A license from another jurisdiction;
- No disciplinary or adverse action imposed in another jurisdiction; and
- Credentials and qualifications substantially equivalent to those required for licensure in Colorado.

Licenses are renewed according to a schedule determined by the Director of the Division of Registrations. The Board is required to develop a renewal questionnaire to determine if the licensee has acted in violation of the Act or has been disciplined for actions that may be a violation of the Act or that may make the licensee unfit to practice with reasonable care and safety. The Board must refuse to renew a license if the licensee fails to submit the renewal questionnaire, and failure to respond accurately to the questionnaire is grounds for discipline.[35]

Upon renewal of a license, optometrists are required to provide proof of completing 24 hours of Board-approved continuing education.

If a license has been expired for two or more years, the optometrist must submit an application for reinstatement, pay a fee and provide proof of a current license in good standing in another jurisdiction. If the optometrist does not have a current license in another jurisdiction, then the optometrist must pass a Board-approved examination.

Disciplinary Action

The Board may impose probation, issue a letter of admonition, suspend, revoke, or refuse to renew a license or certificate of any licensee who is guilty of unprofessional conduct.

The grounds for unprofessional conduct include, among other things:[36]

- Having an addiction to, dependence on, or the habitual or excessive using or abusing of intoxicating liquors, habit-forming drugs, or any controlled substance;
- Disobeying the lawful rule or order of the Board or its officers;
- Practicing optometry as the partner, agent, or employee of or in joint venture or arrangement with any proprietor or with any person who does not hold a license to practice optometry within this state;
- Sharing any professional fees with any person, partnership, or corporation which sends or refers patients to him or her, except with licensed optometrists with whom he or she may be associated in practice;

[34] § 12-40-108(3), C.R.S.
[35] §§ 12-40-113(1)(b) and (c), C.R.S.
[36] § 12-40-118, C.R.S.

- Practicing while having a physical or mental disability which renders the optometrist unable to treat with reasonable skill and safety or which may endanger the health and safety of persons under the care of the optometrist;
- Failing to refer a patient to the appropriate healthcare practitioner when the services required by the patient are beyond the scope of competency of the optometrist or the scope of practice of optometry;
- Having any disciplinary action against a license to practice optometry in another state or country, which is *prima facie* evidence of unprofessional conduct if the grounds for the disciplinary action would be unprofessional conduct or otherwise constitute a violation of the Act;
- Failing to notify the Board of a malpractice final judgment or settlement within 30 days;
- Engaging in any act or omission which fails to meet the generally accepted standard of care whether or not actual injury to a patient is established;
- Being convicted of a felony or accepting a plea of guilty or *nolo contendere*, or a plea resulting in a deferred sentence to a felony;
- Administering, dispensing, or prescribing any prescription drug, or any controlled substance other than in the course of legitimate professional practice;
- Engaging in a sexual act with a patient while a patient-optometrist relationship exists;
- Failing to provide a patient with copies of patient medical records;
- Failing to provide a patient with a valid written contact lens prescription, if appropriate; and
- Practicing beyond the scope of education and training.

The Board may require a licensee to be evaluated by a physician if it has reasonable cause to believe that he or she is unable to practice with reasonable skill and safety.[37]

The Board may conduct disciplinary hearings or use an administrative law judge to conduct disciplinary hearings.[38]

The Board may issue a letter of admonition if it finds that although a complaint does not merit formal action, it does reveal a case of misconduct that should not be dismissed.[39] The licensee has 20 days after the receipt of the letter of admonition to request adjudication. If the licensee requests adjudication, the letter is vacated and the formal disciplinary proceedings begin.

[37] § 12-40-118.5(1), C.R.S.
[38] §§ 12-40-119(1)(c) and 12-40-119(2)(d), C.R.S.
[39] § 12-40-119(2)(f)(I), C.R.S.

When a complaint or investigation discloses an instance of conduct that does not warrant formal action by the Board and, in the opinion of the Board, the complaint should be dismissed, but the Board has noticed indications of possible errant conduct that could lead to serious consequences if not corrected, a confidential letter of concern may be issued.[40]

Professional Service Corporations

The corporate practice of optometry is prohibited except through an established professional service corporation or through a nonprofit organization established to assist indigent persons.[41]

Licensed optometrists may organize professional service corporations created exclusively for the purpose of conducting the practice of optometry only through optometrists licensed by the Board. All shareholders of the corporation must be licensed optometrists who are actively engaged in the practice of optometry, and the president and director of the corporation must be shareholders.[42]

A professional service corporation is prohibited from conducting itself in any way which would violate the standards of professional conduct for licensed individuals.[43]

Financial Responsibility

An optometrist is required to maintain professional liability insurance at a minimum of $500,000 per claim and $1.5 million for all claims in a year.[44] The Board may establish, by rule, lesser minimum liability insurance requirements for those optometrists who practice on a limited or occasional basis only.[45]

[40] § 12-40-119(2.1), C.R.S.
[41] § 12-40-122, C.R.S.
[42] § 12-40-125(1)(d), C.R.S.
[43] § 12-40-125(3), C.R.S.
[44] § 12-40-126(1)(a), C.R.S.
[45] § 12-40-126(2), C.R.S.

Program Description and Administration

The Colorado State Board of Optometric Examiners (Board) is authorized to regulate Doctors of Optometry in the state of Colorado. The seven-member Board meets quarterly to approve licenses, review complaints, take disciplinary action, promulgate rules, and make policy decisions.

The Board is housed in the Department of Regulatory Agencies (DORA), Division of Registrations (Division), which performs the operational and administrative functions of the Board. Table 1 shows the Board expenditures and staffing over the last five fiscal years.

Table 1
Agency Fiscal Information

Fiscal Year	Expenditures	FTE
04-05	$108,166	0.7
05-06	$123,084	0.7
06-07	$75,973	0.6
07-08	$135,050	0.7
08-09	$112,711	0.6

The full-time equivalent (FTE) employees listed in Table 1 do not include staffing in the centralized offices of the Division. Centralized offices include the Director's Office, Office of Investigations, Office of Examination Services, Office of Expedited Settlement, Office of Licensing, and Office of Support Services. However, the cost of those FTE is reflected in the expenditures. The Board pays for those FTE through a cost allocation methodology developed by the Division and the Executive Director's Office.

The fluctuation in the expenditures from year to year is primarily the result of higher legal expenses in fiscal year 05-06 and again in fiscal year 07-08.

The Board-dedicated staff for fiscal year 09-10 (0.78 FTE) includes the health services section director (0.08 FTE General Professional VI), the program director (0.25 FTE General Professional V), and an Administrative Assistant III (0.45 FTE).

The section director oversees the health services section of the Division. The program director communicates with the Board, manages Board meetings, supervises staff, handles the budget, reviews license applications not approved administratively, reviews initial complaints, and performs case management duties associated with disciplinary items.

The Administrative Assistant III receives all incoming calls and questions, prepares correspondence, reviews and determines jurisdiction of complaints, processes complaints, and sends out 30-day letters or sends cases to the Office of Investigations for additional information, and handles compliance monitoring of disciplinary cases. The Administrative Assistant III also coordinates Board meetings and prepares the agendas for Board meetings.

The Board is cash funded by the license fees it collects from optometrists. Table 2 includes the Board licensing fees in fiscal year 08-09.

Table 2
Board Licensing Fees
Fiscal Year 08-09

Fee Type	Amount
Original License by Examination	$113
Original License by Endorsement	$188
Renew Active License	$192
Renew Inactive License	$182
Reinstatement	$207
Reactivate Inactive License	$207

Licensing

In Colorado, it is illegal to practice optometry or to refer to oneself as an optometrist or an OD without a license.

Applicants for licensure must submit a completed application with the fee and the required documentation to the Office of Licensing in the Division. A licensing specialist reviews the completed application and documentation, and if the application is without issues, a license may be administratively issued. Applications that are incomplete are kept on file for one year. If the application is still incomplete after a year, an applicant must submit a new application, the required documentation, and pay the fee again.

Optometry licenses must be renewed on March 31 every other year. To renew a license, optometrists are required to have completed 24 hours of clinically relevant continuing education.

Table 3 shows the licensing activity for optometrists over the last five fiscal years.

Table 3
Licensing Activity

Fiscal Year	Examination	Endorsement	Reinstatement	Renewal
04-05	29	19	5	1,025
05-06	34	15	11	0
06-07	37	25	8	1,057
07-08	61	15	6	0
08-09	53	20	8	1,097

The number of licensed optometrists increased significantly in fiscal years 07-08 and 08-09. The Board staff could not account for this increase.

An optometrist may change the status of his or her license to inactive if he or she is not actively practicing. Table 4 breaks down the number of active and inactive optometry licenses in Colorado over the last five fiscal years.

Table 4
Licenses by Status

Fiscal Year	Active	Inactive	Total
04-05	1,039	8	1,047
05-06	1,097	11	1,108
06-07	1,069	18	1,087
07-08	1,152	15	1,167
08-09	1,124	20	1,144

Although the difference in fees is almost negligible ($10), the benefit of inactivating a license is significant because an optometrist is not required to fulfill the continuing education requirements while his or her license is inactive.

Applicants for licensure must have the following qualifications:

- Be at least 21 years of age;
- Graduate from a college of optometry; and
- Pass a national written examination.

Applicants must also attest that they are not addicted to or dependent on, nor habitually or excessively using or abusing, intoxicating liquors, habit-forming drugs, or controlled substances.

Optometrists may employ the use of certain pharmaceuticals for examination purposes. In order to use certain pharmaceuticals for the treatment of eye disease or for any therapeutic purpose, an optometrist must be certified as a therapeutic optometrist.

Out of 1,186 licensed optometrists, 1,121, approximately 95 percent, are certified at the therapeutic level.

Examinations

To be licensed in Colorado, optometrists are required to pass a national examination developed and administered by the National Board of Examiners in Optometry (NBEO). The examination is administered in three parts. All parts may be completed prior to graduation from optometry school.

Part I of the examination, or Applied Basic Science, tests clinical expertise and knowledge of the basic sciences. Students typically take Part I in the third year of optometry school. Part II, or Patient Assessment Management, is taken in the fourth year and consists of simulated patient cases. Part III, or Clinical Skills, is a practical examination that is taken in April before graduation. Students who fail Part III may retake the examination in August.

All parts of the examination are given at or near optometry schools in the United States and Puerto Rico. The fee for each part is $625. There are no optometry schools in Colorado; however, the NBEO began offering the Part II examination in Denver some years ago due to numerous optometry externships in the area. There are no other optometric examinations administered in Colorado.

Table 5 shows the number of Part III examinations taken nationally in April and August and the pass rates over the last five years. Examination statistics specific to Colorado candidates were not available.

Table 5
Part III Examinations

Calendar Year	April Examinations	Pass Rate	August Examinations	Pass Rate
2005	1,319	91%	104	77%
2006	1,285	93%	95	75%
2007	1,366	96%	61	56%
2008	1,369	94%	74	58%
2009	1,398	94%	96	53%

The April examination is taken by nearly all the students in the graduating class. Those who did not pass the April examination may take it again in August.

The pass rates in April are fairly consistent from year to year. On average 94 percent of examinees pass the April examination. For the August examination, the pass rates dropped significantly in 2007 from 75 percent to 56 percent. Division staff could not explain the change, and NBEO did not respond to queries.

Previously, optometrists were also able to take the Treatment and Management of Ocular Disease (TMOD) examination in order to be privileged as a therapeutic optometrist. However, the TMOD examination is no longer administered separately and is now included in Part II. Because many states, including Colorado, have licensing privileges dependent on passage of the TMOD examination, a separate TMOD score is available based on the relevant questions included in Part II.

Complaints/Disciplinary Actions

The Board takes complaints from any person or entity, including but not limited to patients and their families, and other healthcare professionals. The Board may also initiate a complaint on its own motion. The Board may take the appropriate disciplinary action if it determines that the licensee has violated the Act or the Board's rules.

Table 6 shows the type and number of complaints received by the Board over the last five fiscal years.

Table 6
Complaint Information

Type of Complaint	FY 04-05	FY 05-06	FY 06-07	FY 07-08	FY 08-09
Practicing without a License	1	2	1	1	0
Standard of Practice	15	15	12	11	9
Substance Abuse	0	0	0	0	2
Felony Conviction	0	0	0	1	0
Advertising	0	1	0	0	0
Title Protection Violations	0	0	0	11	1
Other	0	0	0	3	2
Discipline in Another State	0	0	0	1	0
Corporate Practice	0	0	0	1	0
Total	**16**	**18**	**13**	**29**	**14**

The complaints above do not include complaints received by the Board that were outside the Board's jurisdiction. Complaints categorized as "other" include violations such as failure to notify the Board of a change of address and failure to advise patients that they may have the purpose for the prescription included on the prescription order.

Overall the Board receives relatively few complaints against optometrists.

In fiscal year 07-08, the number of complaints is much higher than other years because one person filed a number of complaints based on violations of protected titles that were found in the yellow pages. During the investigation, this issue was resolved with the publisher, and the Board subsequently dismissed these complaints.

As Table 6 demonstrates, complaints citing standard of practice issues are by far the most common type of complaint filed with the Board. To prove a standard of care violation, the Board must determine that a reasonable and prudent optometrist would consider the care substandard.

If the Board determines that the complaint is within its jurisdiction and credible, it will initiate an investigation and send a letter requesting that the optometrist respond to the complaint. The Board may also request copies of patient records, direct the Division staff to interview witnesses, or send the case to be reviewed by an expert.

The Board has the authority to revoke a license, suspend a license, place a license on probation, limit an optometrist's practice, issue a letter of admonition, issue a confidential letter of concern, or issue a cease and desist order.

Table 7 charts the Board's disciplinary actions and dismissals over the last five fiscal years.

Table 7
Final Agency Actions

Type of Action	FY 04-05	FY 05-06	FY 06-07	FY 07-08	FY 08-09
Revocation	0	0	0	0	0
Suspension	0	0	0	0	0
Probation/Practice Limitation	0	3	1	1	2
Letter of Admonition	2	1	1	0	0
License Denied	0	0	0	0	0
Cease & Desist	1	1	0	0	0
Injunction	0	0	1	1	0
Total Actions	**3**	**5**	**3**	**2**	**2**
Dismissals	14	8	9	26	2
Letter of Concern	1	0	2	5	4
Total Dismissals	**15**	**8**	**11**	**31**	**6**

The Board has not revoked or suspended any licenses over the last five fiscal years. Overall, few optometrists have been disciplined by the Board which is consistent with the low number of complaints over the past five fiscal years.

Analysis and Recommendations

Recommendation 1 – Continue the Colorado State Board of Optometric Examiners for 11 years, until 2022.

Optometrists examine eyes and prescribe eye glasses and contact lenses. They also test for glaucoma and other eye diseases, diagnose conditions caused by systemic diseases, such as diabetes and high blood pressure, and refer patients to other healthcare providers as appropriate. Unlike ophthalmologists, optometrists are not permitted to perform surgery.

The scope of practice has increased over the years to allow certified therapeutic optometrists to prescribe certain pharmaceuticals to treat conditions of the eye, including treatment of glaucoma and anterior uveitis, and to remove superficial foreign bodies from the eye. Therefore, the need to protect the public from incompetent and untrained practitioners has increased.

The Colorado State Board of Optometric Examiners (Board) ensures competency through the qualifications that it requires optometrists to meet, consistent with Article 40, Title 12, Colorado Revised Statutes (C.R.S.), (Act), including passage of advanced education and an examination in the treatment and management of ocular disease. Additionally, the Board protects the public with enforcement and disciplinary activities which ensure that optometrists maintain a generally accepted standard of care.

Optometrists diagnose and treat conditions of the eye that cause blindness, including glaucoma and macular degeneration. Early treatment of glaucoma,[46] a leading cause of blindness in the United States, can help prevent damage to the optic nerve and minimize vision loss. Likewise, early treatment of macular degeneration[47] can help slow vision loss.

Treatment performed by an unqualified optometrist could result in serious harm, including permanent loss of vision. Considering the potential for harm, regulation is necessary.

Overall, regulation of optometrists is working efficiently and effectively. Therefore, the General Assembly should continue the Board for 11 years, until 2022.

[46] Glaucoma: A group of conditions in which the optic nerve is damaged, usually caused by abnormally high pressure in the eye.

[47] Macular degeneration: A disease that destroys central vision, caused by deterioration of the tissue at the back of the eye.

Recommendation 2 – Create a volunteer license to be provided at a reduced fee, for those optometrists who are no longer charging for services.

For optometrists who have retired their practice and no longer have an income from that practice, the cost of a full license could deter them from volunteering. Reducing the license fee could encourage more optometrists to volunteer upon retirement, which may increase access to optometric services for indigent and underserved populations.

Other licensed healthcare professionals, such as dentists,[48] physicians,[49] podiatrists,[50] and nurses,[51] can obtain a retired-volunteer or pro bono status license.

In all of these cases, the applicant must attest that he or she will no longer earn an income from his or her profession. These licensees are subject to the same discipline as full license types and are offered the retired-volunteer status license at a reduced fee.

For these reasons, the General Assembly should create a new license type, provided at a reduced fee for optometrists who are no longer charging for services. Optometrists with a volunteer license should still be required to have the same qualifications, maintain the same liability insurance, and be subject to the same regulatory oversight as an optometrist with a full license.

Recommendation 3 – Restate the definition of unprofessional conduct such that failing to properly address the practitioner's own physical or mental condition is unprofessional conduct, and authorize the Board to enter into confidential agreements with practitioners to address their respective conditions.

The definition of unprofessional conduct includes:[52]

> Practicing while having a physical or mental disability which renders an optometrist unable to treat with reasonable skill and safety or which may endanger the health and safety of persons under the care of any optometrist.

Also, the Board may order a licensed optometrist to undergo a mental or physical examination if it has reasonable cause to believe that a licensee is unable to practice safely.[53]

[48] § 12-35-123(1), C.R.S.
[49] § 12-36-114.3(1), C.R.S.
[50] § 12-32-107.2, C.R.S.
[51] § 12-38-112.5(1), C.R.S.
[52] § 12-40-118(1)(m), C.R.S.
[53] § 12-40-118.5(1), C.R.S.

To determine if an optometrist has a condition that impacts his or her ability to practice, the application for initial licensure and the license renewal questionnaire ask, "Do you have any physical or mental condition which may impact your ability to practice safely?"[54]

This question is valid given that the health of a practitioner may impact his or her ability to practice safely and competently, and the Board's primary mission is to ensure safe, competent practitioners.

An optometrist is obligated to disclose to the Board that he or she has a condition that impacts his or her ability to practice. The Board has the authority to order an examination of the optometrist to determine whether and under what conditions the optometrist may be able to continue to practice, and to order the license of the optometrist restricted to such conditions.

The problem arises, however, in the fact that in order to impose these restrictions, the Board must "discipline" the optometrist.

Discipline of this nature is not, in the legal sense, career-ending. As far as the Board is concerned, the optometrist may continue to practice.

The rest of the world, however, views this situation a bit differently. As discipline, the restricted license is reportable to the federally run National Practitioner Data Bank (NPDB), which serves as a national clearinghouse for disciplinary actions taken against a wide variety of healthcare practitioners.

Discipline can negatively impact an optometrist's:

- Ability to participate in insurance provider networks;
- Clinical privileges; and
- Malpractice insurance premiums.

Additionally, as discipline, the restricted license is reportable under the Michael Skolnik Medical Transparency Act of 2010 and would be reported as discipline in DORA's online computer system.

In short, then, the optometrist has done nothing wrong, but because he or she suffers from a disability and discloses the condition to the Board as he or she is obligated to do, he or she is disciplined.

The current system creates every disincentive for the practitioner to do the right thing, and every incentive not to.

[54] Colorado State Board of Optometric Examiners, Application for Original License by Examination, May 2010, p. 2, question 4; State Board of Optometric Examiners, Mandatory 2009 Active License Renewal Questionnaire, p. 1, question 4.

First, by disciplining a practitioner merely for having a disability or illness, the Act perpetuates the negative stigmas associated with such conditions. The Act creates a system whereby an optometrist, who contracts an illness or who is disabled, is treated as if he or she has done something wrong.

Worse, perhaps, is the fact that not only does the Act require discipline in such situations, it defines the underlying conduct as unprofessional. In other words, having a disability is unprofessional.

In no context outside of the Act would having a disability be considered unprofessional conduct. The term "conduct" implies the person has actively done something. However, contracting an illness or having a disability is, in most cases, an inherently passive exercise. Very few people actively seek to become ill or disabled. Therefore, it is not conduct.

Further, outside of the Act, having an illness or disability is not unprofessional. Failing to properly limit one's practice may be unprofessional. Failing to seek treatment so that one can safely and competently continue to practice may be unprofessional. But merely having an illness or disability is not unprofessional.

Therefore, at the very least, the General Assembly should clarify that it is unprofessional conduct to suffer from an illness, or a physical or mental condition, *and fail to act within the limitations created by the illness or condition*.

One way to help ensure that practitioners act within the limitations created by an illness or condition, thus avoiding discipline, is to authorize the Board to enter into confidential agreements with such practitioners whereby the practitioner agrees to limit his or her practice and in failing to do so, agrees that the Board may then publicly discipline his or her license.

Because many illnesses and physical and mental conditions evolve over time, periodic re-evaluations or monitoring may also be appropriate.

The key is that the optometrist is allowed to continue to practice with dignity and is not disciplined. Additionally, the Board is satisfying its mandate to protect the public.

The disincentives discussed earlier, therefore, are at least considerably mitigated, if not removed outright.

Importantly, it does not appear as though these types of agreements would be reportable to NPDB because so long as the optometrist addresses the condition, there would be no violation of the Act. Therefore, discipline is avoided.

Additionally, this process should not be available to those practitioners with substance abuse problems. Practicing with such a condition already constitutes a separate statutory violation,[55] and this Recommendation 3 is not intended to, in any way, limit the Board's authority to discipline such practitioners.

For all these reasons, the General Assembly should clarify that it is unprofessional conduct to fail to practice within the limitations created by an illness or mental or physical condition, and authorize the Board to enter into confidential agreements with such optometrists in order to confirm that the optometrist is addressing the condition.

Recommendation 4 – Restate the definition of unprofessional conduct regarding addiction to or dependence on alcohol and drugs.

In section 12-40-118, C.R.S., unprofessional conduct is defined as:

> Addiction to, dependence on, or the habitual or excessive use or abuse of intoxicating liquors, a habit-forming drug, or any controlled substance as defined in 12-22-303(7).

This provision should be amended to simply prohibit the habitual or excessive use or abuse of alcohol, a habit-forming drug, or a controlled substance, and the references to "addiction" and "dependence" should be repealed.

Addiction and dependence to alcohol or drugs is difficult to prove, and punishing someone for an addiction may be unconstitutional.

The Colorado Court of Appeals ruled in the *Colorado State Board of Nursing v. Crickenberger*,[56] that in order for addiction or dependency to be grounds for discipline, an addiction or dependency must be proven at the time of the hearing.

Moreover, the U.S. Supreme Court ruled in *Robinson v. California*,[57] that addiction is an illness, which may be contracted innocently or involuntarily, and, therefore, the State of California could not punish a person based on such grounds. While this was a criminal case, it could be argued similarly in an administrative one.

The "excessive use or abuse of alcohol or a controlled substance" has been established as the standard for disciplinary action in Colorado, in which it is the act of excessively using or abusing that is grounds for discipline, and not the condition of being an addict.

[55] § 12-40-118(1)(e), C.R.S.
[56] 757 P.2d 1167 (Colo. App. 1988)
[57] 370 U.S. 660 (1962)

This was supported by the Colorado Court of Appeals decision in *Colorado State Board of Medical Examiners v. Davis*,[58] when it ruled that disciplinary action based on excessive use of alcohol or a controlled substance does not require current addiction or use of alcohol or controlled substances at the time of the disciplinary hearing.

Thus, the General Assembly should amend the definition of unprofessional conduct to remove references to "addiction" and "dependence," and to simply state "the habitual or excessive use or abuse of alcohol, a habit-forming drug, or a controlled substance" is unprofessional.

Recommendation 5 – Repeal the terms "willfully" and "willful" from the definition of unprofessional conduct.

In section 12-40-118(1)(a), C.R.S., unprofessional conduct is defined as "*willfully* deceiving or attempting to deceive the Board or its agents with reference to any proper matter under investigation by the Board," and in section 12-40-118(1)(dd), C.R.S., as "*willful* and repeated ordering or performance, without clinical justification, of demonstrably unnecessary laboratory tests or studies."

The terms "willfully" and "willful" imply that an act was intentional. Regulatory oversight focuses on whether a regulated professional has violated the Act or rules, which could harm consumers, not whether the violation was intentional. As such, the Board should be able to pursue formal discipline if a violation of the Act or rules has occurred, and not whether the violation was intentional or "willful."

In order to clarify the prohibited activities in the Act, the General Assembly should remove the terms "willful" and "willfully" from the definition of unprofessional conduct.

Recommendation 6 – Include in the definition of unprofessional conduct failure to respond in an honest and materially responsive, and timely manner to a complaint.

The Act is silent on whether the Board has the authority to formally discipline an optometrist for failing to respond to a complaint.

When a complaint is filed against an optometrist, the Board sends a letter outlining the nature of the complaint and requires the optometrist to respond within 30 days. Although a response is required, no formal authority is delineated in the Act enabling the Board to formally discipline optometrists for failing to respond to a complaint within 30 days.

[58] 893 P.2d 1365 (Colo. App. 1995)

A response to the letter is important because it could provide valuable information to the Board that would assist it in determining whether a violation occurred. For example, the Board could receive a complaint alleging that an optometrist did not provide the generally accepted standard of care and provided an incorrect prescription for eyeglasses. However, the optometrist may respond that the patient did not follow up with the optometrist to apprise her of the situation and to give her a chance to adjust the prescription if necessary.

Without a response, the Board may decide to initiate a costly and unnecessary investigation only to find that the complaint has no merit. The same would be true of a response that is dishonest or that merely denies the complaint without any relevant or significant explanation.

Other healthcare providers, such as physicians and podiatrists, have similar provisions that authorize the boards to discipline a licensee who fails to respond fully and honestly to a complaint.

Therefore, the General Assembly should include in the definition of unprofessional conduct failure to respond in an honest and materially responsive, and timely manner to a complaint issued by the Board.

Recommendation 7 – Add language to the Act authorizing the Board to suspend a license for not complying with an order of the Board.

At this time, the Board must initiate a new complaint against an optometrist who does not comply with a Board order, by for example failing to submit to an examination of his or her mental condition or failing to take courses deemed necessary to correct deficiencies. Initiating a new complaint proves to be a time consuming and costly practice. Allowing the Board to suspend the license of an optometrist who does not comply with a Board order would be a more efficient use of legal resources.

The General Assembly should authorize the Board to suspend a license if the licensee fails to comply with any conditions imposed by the Board until such time as the licensee complies with such conditions.

Recommendation 8 – Add language to the Act authorizing the Board to impose a fine on a licensee.

Currently the Board does not have the authority to impose a fine. The Colorado State Board of Medical Examiners,[59] the Board of Chiropractic Examiners,[60] and the Board of Nursing,[61] are among the healthcare boards that have the authority to impose fines for violations of their respective practice acts.

Optometrists may treat some of the same conditions of the eye that ophthalmologists, who are licensed by the Colorado Medical Board, may treat. The Colorado Medical Board has the authority to fine an ophthalmologist, but the Board does not have the authority to fine an optometrist.

In order to effectively and efficiently regulate the practice of optometry, the Board should be authorized to impose a fine on a licensee for a violation of the Act.

Allowing the Board to impose fines would improve the Board's ability to regulate the profession of optometry by adding another instrument that it may use when other means of discipline including suspension, revocation, or probation are not appropriate. A violation that is administrative, rather than below the standard of care, would be an appropriate use for a fine. An example of this could be an optometrist who fails to renew his or her license within the grace period but continues to practice without a license.

The General Assembly should authorize the Board to impose a fine only for violations of the Act that are administrative in nature and do not rise to the level of standard of practice violations. A fine should be no more than $5,000 per violation, and all collected fines should be credited to the General Fund.

Fining authority is an important enforcement tool for regulators. However, it is also important that the use of fines be consistent with the rationale laid out in this recommendation. Therefore, the General Assembly should require the Board to create a fining schedule that reflects fines in lesser amounts for first violations and increased amounts for subsequent violations. Predictable, uniform discipline can provide both a desired deterrent to Act violations and predictability in the administration of justice.

[59] §12-36-118(5)(g)(III), C.R.S.
[60] §12-33-117(1.5), C.R.S.
[61] Senate Bill 09-239

Recommendation 9 – Increase the minimum financial responsibility requirement to $1 million per incident and $3 million aggregate per year.

Professional liability insurance provides consumers with an avenue to seek compensation in case they are injured due to negligent care.

Establishing the appropriate minimums for coverage is important. Minimums that are too low leave consumers without adequate compensation. Minimums that are too high may result in excessive premiums, forcing optometrists to leave practice or leave Colorado.

Section 12-40-126(1), C.R.S., requires optometrists to maintain professional liability insurance of at least $500,000 per incident and $1.5 million aggregate per year.

Optometrists do not only prescribe contact lenses and glasses; they also examine and treat diseases and conditions of the eye. Optometrists may also prescribe medication and perform certain procedures including removing foreign particles such as metal from an eye.

Such care, if practiced negligently, may result in serious harm.

Failure to diagnose a condition of the eye, such as glaucoma or macular degeneration, may result in blindness. Additionally, poor or inadequate treatment could result in the loss of an eye.

A person who suffers serious permanent injury such as blindness may require compensation in excess of the current statutory minimum insurance requirements in order to be made whole.

In one study of malpractice insurance claims, payouts were highest for claims of serious permanent injury, such as blindness or loss of an eye, and death. In the states with the best data available, approximately 17 percent of malpractice payouts for healthcare professionals were above $500,000.[62]

According to the American Optometric Association, the average malpractice payout for optometrists is $40,000. Most claims are in the $10,000 to $25,000 range, and large claims of between $750,000 and $1 million are rare.

According to the insurance broker endorsed by the American Optometric Association, optometrists typically hold policies that provide coverage of $1 million per incident and $3 million per year, or $2 million per incident and $4 million per year. Significantly, the broker does not offer policies at the statutory minimum.

[62] U.S. Department of Justice. *Bureau of Justice Statistics Special Report: Medical Malpractice Insurance Claims in Seven States, 2000-2004.*

Based on this it is reasonable to question the adequacy of the current financial responsibility requirements. A requirement that optometrists maintain liability insurance of $1 million per incident and $3 million per year may be more reasonable.

Optometrists who carry the higher liability insurance, such as the $1 million/$3 million policy, are not overly burdened since the premiums for optometrists are low. For those who increase their insurance policy from the minimum to $1 million/$3 million, the premium would not increase significantly. For example, the premium for a $1 million/$3 million policy is $595 a year, while the premium for a $2 million/$4 million policy is only $695 a year.

Moreover, raising financial responsibility requirements need not force part-time or semi-retired optometrists out of practice. The Board is already authorized by statute to establish lesser financial responsibility requirements for optometrists who occasionally practice, practice on a limited basis, or for whom the Board deems the requirements to be unreasonable or unattainable.[63]

Therefore, the General Assembly should require optometrists to carry professional liability insurance of at least $1 million per incident and $3 million aggregate per year.

Recommendation 10 – Authorize the Board to waive or establish lesser financial responsiblity requirements for optometrists who have an inactive license.

The Board should be authorized to waive financial responsibility requirements for those persons who are taking time off from practicing. An optometrist may decide to take time off for various personal reasons, such as, having a baby.

While the Act allows the Board to establish lesser financial responsibility standards in certain circumstances, it is unclear if the Board may waive financial responsibility entirely.[64]

As a condition of receiving and maintaining an active license, optometrists are required to provide proof of compliance with financial responsibility requirements at initial licensure and upon renewal.[65] This suggests that optometrists are only required to maintain financial responsibility requirements if their license is active. However, the Board has not promulgated any rules to clarify the Act.

[63] § 12-40-126(2), C.R.S.
[64] § 12-40-126(2), C.R.S.
[65] § 12-40-126(3), C.R.S.

Optometrists who interpret the statute to mean that they may let their liability insurance lapse while their license is inactive could be in jeopardy of discipline if the Board interprets the Act otherwise. Additionally, they would not be able to renew their license without providing proof of compliance.

Other healthcare boards, such the Colorado Podiatry Board[66] and the Colorado Medical Board,[67] are authorized to waive financial responsibility for licensees who are not actively practicing. The Act should be clarified so that the Board may promulgate similar rules.

Accordingly, the General Assembly should authorize the Board to waive or establish lesser financial liability requirements, by rule, for optometrists who have an inactive license.

Recommendation 11 – Make technical amendments to the Act.

During the course of this sunset review, the Board, its staff and researchers found several places in statutes administered by the Board that need to be updated and clarified to reflect current practices, conventions, and technology. While recommendations of this nature generally do not rise to the level of protecting the health, safety, and welfare of the public, unambiguous laws make for more efficient implementation. Unfortunately, all of the statutes pertaining to optometrists are commonly only examined by the General Assembly during a sunset review.

The following list of such technical changes is provided as a means of illustrating examples only. It is not exhaustive of the types of technical changes that should be made:

- Repeal the following obsolete language in section 12-40-106(1), C.R.S.: "Persons holding office on June 15, 1987, are subject to the provisions of section 24-1-137, C.R.S."
- Amend the language in section 12-40-108(1), C.R.S., that requires applicants to file an application for a license on a form and allow it to be provided "in a form and manner approved by the Board," in order to facilitate a paperless process.
- Repeal section 12-40-108(2), C.R.S., which is unnecessary considering the language in section 12-40-108(1), C.R.S.

Therefore, the General Assembly should make technical changes to the Act.

[66] § 12-32-102(2)(b), C.R.S.
[67] 3 CCR 713-12 (2)(b) Rule 220