

Opinion No. 63-119

September 19, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: James R. Nicholson, O. D. President N.M. Board of Examiners in Optometry P. O. Box 1359 Santa Fe, New Mexico

QUESTION

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1. Would it be in violation of the New Mexico Optometry Act for an optometrist licensed in New Mexico and practicing in New Mexico to advertise in an out of state advertising media when such advertisements are contrary to New Mexico Optometry statutes?
2. Would it constitute a violation of the New Mexico Optometry Act for an optometrist licensed in New Mexico but practicing in another State to advertise contrary to the New Mexico Optometry laws, although such advertising may be legal in the State where the optometrist is practicing?

CONCLUSIONS

1. Yes.
2. See Analysis.

OPINION

{*271} ANALYSIS

In answer to your first question, it is our opinion that it would be in violation of the New Mexico Optometry Act for an optometrist licensed in New Mexico and practicing in this State to advertise in an out-of-state advertising media when such advertisements are contrary to the New Mexico Optometry Act.

Section 67-7-13, N.M.S.A., 1953 Compilation, specifically sets out certain acts which are declared to constitute criminal offenses. This Section states in part:

"Each of the following acts on the part of any person shall constitute a misdemeanor . . .

(M) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes

'moderate prices', 'low prices', 'lowest prices', 'guaranteed glasses', 'satisfaction guaranteed', or words of similar import."

In addition to the above provisions, paragraphs (K) and (L) of Section 67-7-13 declares unlawful certain other types of advertising or solicitation by persons offering optometric items for sale.

Since the above statute declares such advertising to be improper, we have no hesitancy in holding that such conduct even though performed outside New Mexico, if engaged in by a person licensed as an optometrist in this state, would constitute a violation of the Optometry Act and be sufficient basis for the New Mexico Board of Examiners in Optometry to suspend, reprimand, or revoke the license of such individual. In reaching this opinion, we assume that the advertising would be placed with the purpose in mind of drawing patients to the particular optometrist within this state and that such advertising {272} would not be placed in media so remotely located that there would be little or no likelihood of drawing patients as the result thereof.

In answer to your second question, it is our opinion that New Mexico could take no action in a situation of this type where the advertising was conducted entirely out of this state and is proper in the state where conducted. However, our opinion would be to the contrary if the individual sought to conduct such advertising within the State of New Mexico.

Laws prohibiting price advertising and similar advertising by professional persons have as their constitutional basis the rationale that the state has such an interest in the health of its citizens that it may prevent advertising or price promulgation by professional individuals engaged in treating the human body or any part thereof. **Semler v. Board of Dental Examiners**, (1935) 294 U.S. 608; 55 S. Ct. 570; **Williamson v. Lee Optical Company of Oklahoma**, (1955) 348 U.S. 483; 75 S. Ct. 461. It would be totally inconsistent for the state to declare such advertising violative of state law and against public policy and yet permit such advertising within the state if carried on by an optometrist practicing outside New Mexico. In **New Mexico Board of Examiners in Optometry v. Roberts, et al.**, (1962) 70 N.M. 90, 370 P.2d. 811, the state Supreme Court upheld the action of the lower court in perpetually enjoining and restraining a newspaper publisher and certain radio owners and operators from accepting, disseminating or publishing within the State any advertising from a Texas resident and which quoted prices or terms on eyeglasses, spectacles, lenses, frames, or mountings, or quotes moderate prices, or words of similar import as prohibited by Section 67-7-13, supra.

The court held the provision of the State Optometry Act was a valid exercise of the police power of the State and had a reasonable and real relation to the objects sought to be attained. The court further stated:

"We conclude as did the trial court, enjoining the appellants from aiding and abetting a non-resident in the violation of a law of New Mexico is as essential to the administration

of the provisions of our statutes relating to the practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense."

The Supreme Court of the United States upheld the New Mexico Supreme Court's decision in the case of **Head v. New Mexico Board of Examiners in Optometry**, (1963) 83 S. Ct. 1759, and held also that the New Mexico statute prohibiting such advertising does not impose an unreasonable burden on interstate commerce, nor has the Federal Communications Act preempted such subject matter from state regulation.

Under the rationale of the above decisions we conclude that if an individual is licensed to practice in New Mexico as an optometrist, but is actually engaged in practice in another state, and advertises in New Mexico for his practice here or in another state, such act is violative of New Mexico law and may be properly enjoined. In addition, in our opinion, such improper action would be sufficient basis for the New Mexico Board of Examiners in Optometry to reprimand such individual, or suspend or revoke the license of the person if he is licensed as an optometrist in this state.

A distinction should be drawn {*273} however, in cases where an individual holds a New Mexico license but does not practice in this State, and does advertise for his practice in another state **where such advertising is not held to be improper**. In such case the mere holding of a New Mexico license to practice optometry without more, would not serve as a sufficient basis under the Due Process of Law clause for the Board to revoke a license to practice optometry issued by this State.

By: Thomas A. Donnelly

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