

## Opinion No. 69-80

July 18, 1969

**BY:** OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

**TO:** Mr. Wandel Massey, Magistrate, Division I, Curry District Clovis, New Mexico

### QUESTIONS

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Would it be in violation of the New Mexico Optometry Act for an optometrist, doing business in the State of New Mexico, to advertise his business on radio stations located in the State of Texas?

#### CONCLUSION

If and only if such advertising would violate the New Mexico Optometry Act, Section 67-7-13, N.M.S.A., 1953 Compilation.

### OPINION

#### {\*123} ANALYSIS

Section 67-7-14 (m), N.M.S.A., 1953 Compilation provides that:

"Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings on which quotes "moderate prices" "low prices", "lowest prices", "guaranteed glasses", "satisfaction guaranteed", or words of similar import."

is a misdemeanor and shall be punished by a fine of not less than \$ 50.00 nor more than \$ 200.00 or imprisonment in the county jail for not less than 30 days nor more than 6 months, or both such fine and imprisonment. Conviction of a second offense carries an enhanced penalty.

It is our opinion that the placing of prohibited trade advertising with out-of-state media by a New Mexico optometrist would lie within the prohibition of the New Mexico Optometry Act. We regard the illegal act as the placing of the advertising itself, and specifically distinguish on that basis the case of **Midwest Video v. Campbell**, N.M. S. Ct. No. 8671, issued March 24, 1969.

It is the declared policy of the State of New Mexico to protect her citizens from the harmful effects of competitive advertising in matters of health care. In the contemplation

of this policy, the public interest will be best served when prospective patients do not choose their optometrists on the basis of claimed "low prices" or "guaranteed satisfaction."

The interest of the state in preventing such practices has been held to extend as far as enjoining New Mexico newspapers and broadcasters from accepting advertising from out-of-state optometrists who practice in localities where advertising is permitted. In **New Mexico Board of Examiners in Optometry v. Roberts, et al.**, 70 N.M. 90, 370 P.2d 811 (1962), the State Supreme Court observed:

"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."

It is necessary to distinguish the situation at hand from that which was present in the recently-decided **Midwest Video** case, supra. In **Midwest** the state attempted to prevent a Clovis cable-television company from re-broadcasting optometrists' advertisements to New Mexico cable subscribers. In that case all advertising optometrists practiced in Texas, and the advertisements originated from Texas television stations. The Clovis company took no part whatsoever in the production of the advertisements. The Supreme Court held that no action lay against the cable company since it was not engaged in "advertising" within the meaning of the statute.

It is clear that the facts on which **Midwest Video** was decided are not present in the instant situation. We are here confronted with a New Mexico optometrist who, if he attempted to advertise within this state, would be specifically liable to prosecution. By placing his advertising with an out-of-state radio station, he does not avoid the thrust of the prohibition against <sup>{\*124}</sup> certain advertising. By declaring advertising to be improper the statute regulated the conduct of the New Mexico optometrist, and not that of the Texas broadcasters. It is assumed that the purpose of such advertising would be to draw patients to the office of the practitioner located within this state, and that a number of those so attracted might further be citizens of this state. In any event, the conduct in question is that of an optometrist doing business in New Mexico, and as such he must carry on his profession in accordance with the laws of this state.