

FORMAL OPINION

July 15, 1980

New Jersey Department of Optometrists
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 17—1980

Dear Members of the Board:

You have asked for our opinion as to the validity of N.J.A.C. 13:38-1.4 and 13:38-1.7 which deal with solicitation by optometrists for the purpose of selling optometric services or materials. For the following reasons, you are advised that those regulations of the Board are invalid.

In order to deal with the validity of these regulations it is necessary at the outset to consider the section of the Optometry Act dealing with solicitation by optometrists. N.J.S.A. 45:12-11(p) provides that the Board shall have the power to revoke or suspend any license to practice optometry where an optometrist has been found to be:

Soliciting in person or through an agent or agents for the purpose of selling ophthalmologic materials or optometric services or employing what are known as 'chasers,' 'steerers,' or 'solicitors,' to obtain business.

It may be assumed that such solicitation of business by optometrists or their agents was viewed by the Legislature to be inconsistent with appropriate professional standards governing the relationship between an optometrist and his patient. Also, a ban on in person solicitation of patients was presumably designed to prohibit those business practices which tend to exert pressure on prospective patients in order to make speedy, uninformed or ill-conceived decisions with regard to the purchase of optometric services and related goods.

The regulations adopted by the Board dealing with solicitation provide as follows:

a. Any statement, printed, written or oral, published, posted or circulated, directly or indirectly, by any person, firm, corporation, group or association, which quotes or specifies the name of any individual optometrist, firm or partnership of optometrists or any person, firm or corporation employing or having associated with him or it one or more optometrists, by way of especially recommending the professional services of said optometrist, firm or corporation in conjunction with the announcement of the consummation of any contract, agreement or arrangement for professional services with said optometrist, firm or corporation, in which announcement of the said contract, agreement or arrangement offer optometric services at a stipulated fee, or any variation of such a fee, or as being free, or at a fee which is represented to be smaller than ordinary fees or which purports to offer discounts or any other inducement or advantages to prospective recipients of such services, unless in

ATTORNEY GENERAL

conjunction with a vision service plan approved by the Board, shall be *prima facie* evidence of soliciting through agents, within the meaning of N.J.S.A. 45:12-11(p) on the part of the optometrist or optometrists so named, specified or involved.

b. This shall be conclusive if the optometrists are shown to be accessories to the contract, agreement or arrangement by satisfactory evidence of their providing or rendering optometric services in accordance with the contract, agreement or arrangement. [N.J.A.C. 13:38-1.4.]

Within the meaning of N.J.S.A. 45:12-11(p), any optometrist who offers or provides optometric services and/or contact lenses and/or eyeglasses at a fee less than his usual fee, in consideration of the patient being associated with any person, association, organization or corporation, shall be considered as soliciting for the purpose of selling ophthalmic materials or optometric services, unless such optometric services and/or contact lenses and/or eyeglasses are offered in conjunction with a vision service plan approved by the Board. [N.J.A.C. 13:38-1.7.]

It is clear at once from a reading of these regulations that they are designed to achieve objectives beyond those contemplated by the statute. N.J.A.C. 13:38-1.4 prohibits any communication of information of the identity of any optometrists or firm employing or having one or more optometrists where such communication is in conjunction with any agreement offering optometric services at a stipulated fee or smaller than ordinary fees or which purports to offer discounts, inducements, or advertising or recipients of those services. Since the statutory section was enacted to only prohibit what the Legislature regarded as unprofessional practices inherent in the in person solicitation of business for the purpose of selling ophthalmologic materials or optometric services, it is evident that a regulatory prohibition against the communication of information pertaining to either the services of an optometrist or a stipulated fee would exceed the regulatory scope contemplated by the statute. Similarly, the offering of optometric services at a fee less than the usual fee in consideration of a patient being associated with a third party plan is not encompassed within the legislative objective concerning the prohibition against in person solicitation.

This conclusion is supported by the rule of statutory construction that a legislative enactment should not be interpreted in a manner to raise substantial questions as to its constitutionality. *Woodhouse v. Woodhouse*, 17 N.J. 409 (1955); 2A *Sutherland, Statutory Construction*, (3d ed. 1973), §45.11 at 33-34. To interpret N.J.S.A. 45:12-11(p) as statutory authority to prohibit the communication of information to the public concerning the services and fees charged by optometrists, would raise a substantial question under the First Amendment to the United States Constitution. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 248, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed.2d 810 (1977). In *Ohralik v. Ohio State Bar Association*, 436 U.S. 477, 56 L.Ed.2d 444 (1978), the Supreme Court of the United States held that a state's valid concern with regard to the regulation of

FORMAL OPINION

in person solicitation in the legal profession is limited to those aspects of solicitation that involve fraud, undue influence, intimidation, over reaching and other forms of vexatious conduct. The valid objectives of the Legislature in the case of the profession of optometry under N.J.S.A. 45:12-11(p) would essentially be the same. The statute, therefore, cannot be interpreted to allow for a regulatory prohibition on the truthful advertising or communication of routine information concerning the provision of ophthalmologic materials and optometric services. For these reasons, it is our opinion that N.J.A.C. 13:38-1.4 and 13:38-1.7 are not consistent with N.J.S.A. 45:12-11(p) and are, therefore, invalid.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: DOUGLAS J. HARPER
Deputy Attorney General

October 6, 1980

DR. FRED PRICE, *Secretary*
Board of Examiners
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 18—1980

Dear Dr. Price:

On September 23, 1974 this office advised the Commissioner of Education in *Formal Opinion No. 10—1974* that statutory citizenship requirements on the employment or tenure of teachers who are aliens were constitutionally invalid. On June 13, 1979 in *Formal Opinion No. 12—1979*, we advised the Commissioner that as a result of a decision of the United States Supreme Court in *Ambach v. Norwick*, 441 U.S. 68 (1979), New Jersey statutes, which require a teaching staff member to either demonstrate that he is a citizen of the United States or has declared his intent of becoming a citizen, are supported by a legitimate governmental purpose and are valid. It is clear, therefore, that at the present time a noncitizen may not be certified by the Board of Examiners in the Department of Education to teach in the public schools unless he or she has satisfied the requirements of the governing statute dealing with United States citizenship.¹

A question has now arisen as to the status of those noncitizens who have been certified by the Board of Examiners at some point in time between the issuance of *Formal Opinion No. 10—1974* and our most recent advice to the Commissioner on June 13, 1979 in *Formal Opinion No. 12—1979* that those statutes requiring citizenship are constitutional and fully operative. From a cursory examination of those statutes, it is apparent