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Final Order No. DOH-09-1044-<sup>DS</sup>-MOA  
FILED DATE - 6-16-09  
Department of Health  
By: Rachael Kh  
Deputy Agency Clerk

**STATE OF FLORIDA  
BOARD OF OPTICIANRY**

**IN RE: PETITION FOR  
DECLARATORY STATEMENT OF  
SECTION 484.002(9), FLORIDA STATUTES  
  
ANTHONY D. RECORD**

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**FINAL ORDER**

This matter appeared before the Board of Opticianry pursuant to Sections 120.565 and 120.57(2), Florida Statutes, and Chapter 120-105, Florida Administrative Code, at a duly-noticed public telephonic meeting on June 1, 2009, for consideration of a Petition for Declaratory Statement, which is attached as Exhibit "A." The Notice of Petition for Declaratory Statement was published on March 13, 2009, in Vol. 35, No. 10, of the Florida Administrative Weekly. A Petition to Intervene was filed on May 11, 2009, by the National Association of Optometrists and Opticians.

The Petition, filed by Anthony D. Record, seeks the Board's guidance about several issues relating to Section 484.002(9), Florida Statutes, regarding optical dispensing. Generally he requests more specific information of the definition of optical dispensing does not include selecting frames, transferring an optical aid to the wearer after the optician has completed fitting it, or providing instruction in the care and use of an optical aid including placement, hygiene or cleaning. Specifically, this includes a request as to:

- 1) Whether an unlicensed employee, with or without the direct supervision of an optician, could help a customer/patient pick out frames;
- 2) (a) In the case where a patient arrives to pickup glasses, is fully fitted by the optician, then realizes she forgot her wallet and asks if her husband can

pick up glasses, can the glasses be delivered to the husband without the wife present;

(b) If the frames that are selected at the time of initial sale are adjusted, can the glasses be handed to the wearer or agent of the wearer by a non-licensed employee; and

3) Is an Insertion and Removal session (contact lens instruction) excluded from Optical Dispensing? Can an unlicensed person provide such instruction without supervision of an optician?

1. The Petitioner, Anthony D. Record, is a Florida-licensed optician.

2. The Board of Opticianry has authority to issue this Final Order pursuant to

Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code.

3. Section 484.002(9), Florida Statutes, provides that:

“Optical dispensing” means interpreting but not altering a prescription of a licensed physician or optometrist and designing, adapting, fitting, or replacing the prescribed optical aids, pursuant to such prescription, to or for the intended wearer, duplicating lenses, accurately as to power without a prescription, and duplicating nonprescription eyewear and parts of eyewear. *“Optical dispensing” does not include selecting frames, transferring an optical aid to the wearer after an optician has completed fitting it, or providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning.* (emphasis added)

4. The Board of Opticianry declines to issue a declaratory statement in response to Anthony D. Record’s Petition for Declaratory Statement of Section 484.002(9), Florida Statutes. First, for all of the scenarios presented, the Board believes that Section 484.002(9), Florida Statutes, is clear with respect to optical dispensing, and that optical dispensing does not include selecting frames, transferring an optical aid to the wearer after an optician has completed fitting it, or providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning. Second, the purpose of a declaratory statement is so that the licensee asking the question will know how to act, and it is inappropriate to be used for the conduct of another. For

all of the scenarios presented, except scenario 2(a) above, to the extent the Petitioner seeks guidance as to the action of another individual, the Board declines to issue a declaratory statement.

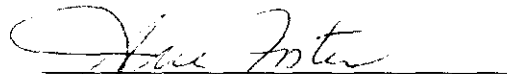
Based on the foregoing, the Board hereby **DENIES** the Petition for Declaratory Statement of Section 484.002(9), Florida Statutes, by Anthony D. Record.

Accordingly, the Petition to Intervene filed by the National Association of Optometrists and Opticians is moot.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 16<sup>th</sup> day of June, 2009.

Board of Opticianry



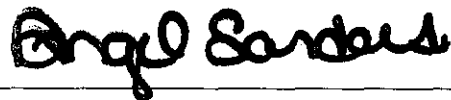
Sue Foster, Executive Director  
For Margaret Slattery, Chairperson,  
Board of Opticianry

## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.569, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Department of Health, and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Florida appellate district where the party resides. The Notice of Appeal must be filed within thirty (30) days of rendition of the Order to be reviewed.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Anthony D. Record**, 10277 Cara Street, Spring Hill, FL 34608; **Ronald A. Labasky, Esq.**, Young Van Assenderp, P.A., 225 South Adams Street, Suite 200, Tallahassee, FL 32301; and by interoffice mail to **Donna C. McNulty**, Assistant Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, this 16 day of June, 2009.



**Deputy Agency Clerk**

**Petition for Declaratory Statement Before the  
Florida Board of Opticianry**

January 26, 2009

**FILED**  
DEPARTMENT OF HEALTH  
DEPUTY CLERK  
CLERK: *Rachel Bl*  
DATE 2-3-09

**Petitioner:**

**Anthony D. Record  
10277 Cara Street  
Spring Hill, FL 34608  
Phone: (352) 848-4222  
Fax: (352) 688-6994**

**Statutory Provision:**

**FS 484.002(9)**

I am petitioning the Board for a Declaratory Statement that addresses with more specificity what the clause, "Optical Dispensing' does not include selecting frames, transferring an optical aid to the wearer after an optician has completed fitting it, or providing instruction in the general care and use of an optical aid, including placement, hygiene, or cleaning."

I am substantially affected by the meaning of this part of the statute in three ways:

1. As a licensed professional under the purview of the rules of the Board and the Department of Health, I am required to practice within the scope of opticianry, and when faced with ambiguous, 'grey' areas it becomes difficult to do so.
2. As an instructor, I have the privilege of presenting continuing education classes to thousands of other opticians each biennium, including the required two-hour law class. I would not want to communicate any information contrary to the intent of any statute. Again, because some are ambiguous, 'grey,' and in some cases archaic, without clarification by the Board the task of instruction is less effective than it could and should be.
3. As a Florida optician in private practice, and sole owner, the directives of this statute directly substantially affect my decision-making with regard to staffing, salaries, and hours of operation.

Therefore, I am asking for a specific declaratory on each of the three substantive issues inadequately addressed in the clause stated above.

*Exhibit A*

**ISSUE #1:** With regard to “‘Optical Dispensing’ does not include selecting frames...” am I correct in presuming that an unlicensed employee, with or without the direct supervision of an optician could help a customer/patient pick out frames? Certainly the employee could not process orders, take PDs, MFHs, etc., but the legislature went out of its way to recently say this is not “Optical Dispensing,” so it seems that a lay person could suggest different colors, shapes, styles, and even sizes, all as a precursor to the optician, at some point, verifying fit, taking measurements, etc. If not, what then does it mean to say that the selection of frames is not “optical dispensing?”

**ISSUE #2:** With regard to “‘Optical Dispensing’ does not include... transferring an optical aid to the wearer after an optician has completed fitting it...” there are two sub-issues that need clarification. Specifically, please issue an opinion on the following:

A. According to this, the optical aid can only be transferred to the “wearer.” So, in the case where a patient arrives to pick up glasses, is fully fitted by the optician, then realizes she forgot her wallet, and asks if her husband can pick up the glasses on his way home from work, can the glasses be delivered to the husband a few hours later without the wife present? After all, he is not the “wearer.”

B. If, as is the case with most “independent” opticians, the frames that are selected at the time of the initial sale are completely and meticulously adjusted (as they should be to obtain accurate MFHs, OC placements, etc.) can the glasses (optical aid) be simply handed to the wearer (or depending on your response to “A” above), an agent of the wearer, by a non-licensed employee? After all, as stated in the statute, a licensed optician has completed fitting it, and the physical transfer, once again, is not considered “optical dispensing.” Given the highly technical nature of the lab equipment used these days, frames sent to the lab (at least mine) are hardly even breathed upon. In fact, in some cases (given fax and trace technology) frames never even leave the dispensary! The lab sends the lenses and they are then mounted on the premises. Again, the frames are for all intents and purposes, still adjusted for the patient.

If you are inclined to say this is not the case, then please be specific about the restrictions and guidelines here. And be careful. It seems to me if the Board disagrees with the position that a scenario similar to the one described above would be okay, that would mean, by definition, that no optician would ever be able to mail a pair of eyeglasses to a patient. I think we all know that in the real world, every optician in this state has mailed eyeglasses to vacationers, tourists, and former patients. A clear violation, because how could they be fitted after the fact if they’re to be mailed? And take it a step further. If we cannot mail patients their eyeglasses, they may resort to ordering them over the Internet! In a CE class in Atlanta last week, we actually went on the Internet (the class was “Opticianry On-Line”) to see what would happen. At various websites orders were accepted without prescription verification, opposite cylinder signs, backwards PDS (60 far, 64 near), etc. It seems to me that ‘encouraging’ patients to consider this buying

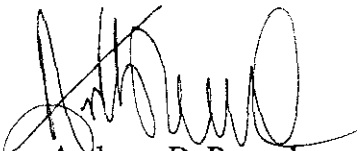
option is contraindicated by FS 484.001. After all, we are here to ensure the public's safety, health, and welfare. The other provisions of chapters 484 and 456, AC 64B12, and 64B29 speak enough to the optician's ultimate responsibility for everything that is done on his or her "watch" that the Board should allow individual licensees to make real-life decisions on a case-by-case basis, in the best interest of the patient, when it comes to the physical transfer of the aid.

It is also my fervent hope that any individual Board member who may have already had his or her mind made up on this issue might doubt a bit of his or her own infallibility, and approach this with an open mind.

**ISSUE #3:** With regard to "Optical Dispensing" does not include...providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning." "...providing instruction in the general care and use of an optical aid, including placement, removal, hygiene, or cleaning" sure sounds like what most opticians refer to as an I&R, or Insertion and Removal session – where an employee instructs (usually first-time, contact lens wearers) patients/customers on same. Would you agree? If not, what then is the statute specifically referring to? If yes, would it then be acceptable for an unlicensed, lay person to provide such instruction with or without the supervision of an optician? Again, if not, why did the legislature go out of its way to specifically indicate that such instruction is not "optical dispensing," and what then does it mean?

My thanks in advance for your consideration of these issues. As a 30-year veteran of opticianry in Florida, my first consideration is always to the best interest of the patient/customer. But not too far behind that is to make sure that I, my employees, and the attendees who seek education and counsel are operating within the parameters and guidelines as outlined by the statutes and administrative codes of the Board.

Respectfully Submitted,



Anthony D. Record