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TUESDAY, SEPTEMBER 7, 2004
RULE ADOPTION
LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
NEW JERSEY STATE BOARD OF OPTOMETRISTS
PERMISSIBLE BUSINESS STRUCTURES; REFERRAL FEES
INDEPENDENT DOCTOR OF OPTOMETRY

Adopted Amendments: N.J.A.C. 13:38-1.3 and 2.13

Proposed: January 5, 2004 at 36 N.J.R. 10(a).

Adopted: March 17, 2004 by the New Jersey State Board of Optometrists, Mitchell Fink, President.

Filed: August 6, 2004 as R.2004 d.336, without change.

Authority: N.J.S.A. 45:12-4.

Effective Date: September 7, 2004.

Expiration Date: September 18, 2005.

Summary of Public Comment and Agency Response:

The Board received the following comment:

Todd C. Brower, WolfBlock, Brach Eichler on behalf of New Jersey Academy of Ophthalmology (NJAO), 101 Eisenhower Parkway, Roseland, NJ 07068.

COMMENT: Mr. Brower, on behalf of NJAO, suggests that the Summary of the proposal for amendment and the deletion of section N.J.A.C. 13:38-1.3(f) may lead optometrists to mistakenly believe that rent can be set in a manner to permit the landlord to exercise control over or influence the professional judgment of the optometrists. To dispel this misunderstanding, he recommends introducing the "control predicate" into the rules by revising N.J.A.C. 13:38-1.3(e) as follows:

Optometrists shall not receive, solicit, offer, or pay any remuneration, (including, but not limited to, payments for the provision of space, facilities, equipment, products, drugs, personnel, marketing or management services used by the optometrist) as an inducement to make a referral or as compensation for a referral of a patient for a service, product, drug or device or to purchase, prescribe or recommend a service, product, drug or device.

RESPONSE: Mr. Brower correctly notes that the Appellate Division holding that has precipitated the repeal of subsection (f) should not be read to authorize leases or other dealings--if those arrangements can be construed to be remuneration intended to induce a referral. An agreed-upon discount on rent, tied to a number of referrals, would violate N.J.A.C. 13:38-1.3(e). The Board believes the regulated community fully understands that remuneration does not simply entail a straight money transaction. The focus properly lies on whether the exchange can be viewed as an inducement affecting the professional judgment of the optometrist. It does not deem a change necessary.

Federal Standards Statement

A Federal standards analysis is not required because no Federal standards or requirements are applicable to the amendments.

Full text of the adoption follows:

<<NJ ADC 13:38-1.3 >>

13:38-1.3 Permissible business structures; referral fees

(a)-(e) (No change.)

(f) Violations of (b) through (e) above shall be deemed professional misconduct pursuant to N.J.S.A. 45:1-21(e).

<< NJ ADC 13:38-2.13 >>

13:38-2.13 Independent doctor of optometry

(a) For the purpose of N.J.S.A. 45:12-9.12 and this chapter, in order to perform as an independent doctor of optometry, a licensee shall:

1. (No change.)

2. Take no instruction from a landlord with regard to any aspect of optometric practice and lease space on the basis of a written lease and only where rent is a fixed fee determined by the fair market value, is for a regular term and not for sporadic use of the space, is not contingent upon the number of patients, or the number or type of optometric services;

3.-10. (No change.)