



COLLEGE OF OPTICIANS OF ONTARIO

SUBMISSION

TO

**THE COLLEGE OF OPTOMETRISTS OF ONTARIO
REGARDING:**

**PROPOSED CONFLICT OF INTEREST REGULATION
AND AMENDMENTS TO PROFESSIONAL MISCONDUCT
REGULATION**

November 30, 2005

Introduction

The College of Opticians of Ontario (COO) would like to commend the College of Optometrists on their attempt to amend their Conflict of Interest and Professional Misconduct regulations so that they better reflect current practice environments and the needs of patients. These drafts certainly contain many improvements over the current regulations, which the COO has always found to be overly restrictive. The proposed amendments address many of the restrictive requirements contained in the current regulations, however, we feel the proposed amendments to the Conflict of Interest regulation do not adequately address all of the issues nor does the proposed regulation comply fully with the Ministry of Health and Long-Term Care (MOHLTC) Guidelines.

To summarize the COO's understanding of the draft amendments:

- 1) An Optometrist will be permitted to be an employee of an Optician or an employee of a corporation such as an optical company that also employs Opticians so long as they do so as an "independent contractor".
- 2) An Optometrist will be permitted to employ an Optician without restrictions.
- 3) Under no circumstances will an Optometrist be permitted to be in a partnership with an Optician.
- 4) An Optometrist operating as an "independent contractor" may be permitted to practise in "association" with an Optician.
- 5) Generally an Optometrist will not be permitted to share fees with an Optician.
- 6) Optometrists will be permitted to be employed by Physicians without having to do so as an "independent contractor".
- 7) An Optometrist will be permitted to own an optical dispensary and may refer patients there so long as the Optometrist discloses his/her interest in the dispensary to the patient and gives the patient freedom of choice.
- 8) The College of Optometrists wants to ensure that their members will not be subject to "control" by another party in respect of their professional duties
- 9) Optometrists will be required to release prescriptions to all their patients regardless of whether the patient requests the prescription.

This submission will set out the COO's position on the proposed amendments including what is written in the regulations, the accompanying interpretation documents and the interpretations with which we have been provided verbally from the College of Optometrists.

Freedom of Association

The MOHLTC Guidelines stipulate that "A specific prohibition on association may be permitted if the Ministry is satisfied that the prohibition:

- Is required to ensure the College's effective regulation of the profession,
- Is in the public interest, and
- Does not contravene the Canadian Charter of Rights and Freedoms"

Under s. 3(2) (d) of the proposed regulation, a member would be in a conflict of interest situation if the member practised optometry as an employee, associate, etc. other than with a specified group; the group includes Physicians but not Opticians. Thus it would still be a conflict of interest for an Optometrist to practice in association with an Optician, subject to the limited exceptions set out. Section 3(2) (e) would prohibit Optometrists sharing fees related to optometry other than with another Optometrist. Section 3(2) (f) would prohibit Optometrists sharing premises or equipment used in the practice of optometry with an Optician if the amount payable by or to the Optometrist is related to the fees charge or the volume of business in the premises.

Where the proposed regulation offers change is in s. 4(3) which does allow for association between Opticians and Optometrists, but only in very restricted circumstances. An Optometrist will be permitted to be an employee of an Optician or an employee of a corporation such as an optical company that also employs Opticians so long as they do so as an “independent contractor”.

The MOHLTC Guidelines also state that the specific types of associations that may be prohibited are those that have the potential to:

- Impair the member’s professional judgment;
- Increase the risk of patients being harmed or exploited;
- Permit or promote undue influence over patients.

The College of Optometrist’s representatives stated during the consultation meetings that they would consider allowing Optometrists to be employed by Opticians if the COO introduced a section to our Professional Misconduct Regulation that would make it professional misconduct for an Optician to encourage another regulated health professional to contravene their own professional standards. The College of Optometrists is aware that the College of Physicians and Surgeons does not have such a provision in their Professional Misconduct Regulation, however, they have not prohibited their members from being employed by Physicians. It seems odd that the College of Optometrists would prohibit its members from being employed by Opticians except as an “independent contractor”, but would allow them to be employed by Physicians unfettered. This implies that the College of Optometrists believes that Opticians would subject Optometrists to undue pressure if Opticians were the employer but Physicians would not do so if they were in the employer position. The College of Optometrists has not provided any evidence to support this belief. Since all health care practitioners are regulated by the *Regulated Health Professions Act* and accordingly must meet the same legislative requirements, the reasoning behind this position is unclear to the COO .

The COO fails to see how permitting an Optometrist to be employed by an Optician would result in any of the three outcomes expressed in the MOHLTC Guidelines any more than being employed by a Physician or another Optometrist would. In fact the broad prohibitions contained in the draft regulation would hamper efficient collaboration between health care providers and discourage interdisciplinary relationships, which clearly provide optimum patient care in other health sectors.

Many Opticians are employed by others, and the COO certainly does not prohibit this. The COO has successfully regulated the profession of Opticianry within a variety of practice settings, including retail and corporate settings since the early 1960’s. The College of Opticians of Ontario makes it clear that being in an employment relationship will not relieve the Optician from his or her

professional responsibilities. The College of Optometrists should be able to impose the same requirements on its members without having to resort to prohibitions on association.

All of the restrictions around freedom of association seem to stem from a desire on the part of the College of Optometrists to ensure that Optometrists maintain control over their professional practice. It is understandable that the College of Optometrists would want to ensure its members not be subject to control over their professional activities by anyone whom they associate in practice, however, it is not clear why that requires a prohibition on their members being employed by or partners of Opticians or Optical corporations in particular. One of the basic principles of the *Regulated Health Professions Act* is that each health care profession is an equal partner in the delivery of health care for the ultimate benefit of the patient.

The COO fails to understand why the College of Optometrists would not have an issue with its members employing other regulated health professionals (with the exception of physicians), but would have an issue with their members being employed by other registered health professionals (again with the exception of physicians). This implies that the College of Optometrists feels their members would not permit or promote undue influence over Opticians or other Optometrists that were in their employ yet that if Opticians were permitted to employ Optometrists, they would do precisely that.

At our meeting in May the College of Optometrists explained this discrepancy by articulating their position that a health care provider cannot employ another health care provider that has a broader scope of practice, hence Opticians can't employ Optometrists and Optometrists can't employ Physicians. In line with this philosophy is that health care providers cannot be employed by corporations or non-regulated individuals. To suggest that a health professional's professional duties are at greatest risk if they are employed by either another health professional with a narrower scope of practice or a corporation is non-sensical. Wouldn't a reasonable person conclude that an Optometrist's professional duties would be more influenced by their personal/economic interest in a sole proprietorship or partnership, than as an employee? An Optometrist would have the most to gain if they are the owner and employer.

At our meeting in October, the College of Optometrists substantially changed its position regarding scopes of practice. At that meeting, representatives from the College of Optometrists stated that scopes of practice were in fact not the issue, but rather that the regulation simply requires that Optometrists must work as "independent contractors" when employed by Opticians but may have direct employment agreements with others.

This raises two concerns for the COO. The first concern is the unsubstantiated presumption that Opticians would exercise undue control over Optometrists while others would not as discussed above. The second concern for the COO is that the College of Optometrists has presented two entirely different interpretations of the proposed regulation while the wording has not changed from May to October. During this discussion stage of the regulation if the College of Optometrists is able to interpret the proposed regulation in such a broad manner as to offer two different interpretations what assurances are there regarding how the regulation would be interpreted if it was enacted? Further if the College of Optometrists can offer differing interpretations of this regulation how can it expect its members to interpret the legislation correctly?

Independent Contractor

As stated above, the COO does not believe it is necessary for the College of Optometrists to prohibit association between Opticians and Optometrists in any fashion. Accordingly, the COO does not see the need for the stipulation that an Optometrist may only practice with an Optician or corporation if they do so as an “independent contractor”. The COO does not believe this prohibition is necessary for the protection of the public nor does it comply with the MOHLTC Conflict of Interest Guidelines. It is in this context that the COO makes the following comments.

The proposed regulation states the prohibition against Optometrists associating with Opticians would not apply “where a reasonable person knowing the relevant facts would conclude that the member... was engaging in the practice of optometry as an independent contractor.” The COO notes that it does not simply say, “where the member was engaged in the practice of optometry as an independent contractor”, but only where “a reasonable person knowing all the relevant facts” would so conclude. According to s. 4(4), a member will not be considered an independent contractor where a “reasonable person knowing the relevant facts” would conclude that the Optometrist “could be controlled” by a person or corporation in respect of: the professional service required to meet the standards of practice of the profession; who the member can choose as a patient; the ability to provide a patient with a copy of his/her prescription; the fee to be charged; or the maintenance and custodianship of records.

While s. 4(4) does provide some assistance in understanding what is meant by an “independent contractor” it does not provide a clear definition. To further confuse matters the regulation stipulates that an Optometrist would be permitted to associate with an Optician only where a “reasonable person knowing the relevant facts” would conclude that the Optometrist was practicing as an independent contractor. This would be a very difficult test to meet. Each time an Optometrist thought of associating with an Optician as an independent contractor, he or she would have to ask himself or herself how he or she would be viewed by “the reasonable person knowing the relevant facts”. If the views of the Optometrist as to what a reasonable person would conclude were different from that of the College of Optometrists, he or she could find themselves in a conflict of interest despite their best intentions. The COO doubts that many Optometrists would take the risk.

The regulation is not clear regarding the professional responsibilities of an “independent contractor” as it relates to controlled acts being performed within a dispensary. At our meeting in October we asked the College of Optometrists if an Optometrist would be held liable and responsible for the actions of a layperson such as the dispensing of eyewear within the dispensary. We also inquired as to whether an Optometrist acting as an “independent contractor” could assign the performance of a non-controlled act to another individual. The College of Optometrists stated that an Optometrist could delegate tasks and would be responsible for the actions of a layperson within a dispensary even if the Optometrist were acting as an “independent contractor”. This is not clearly articulated in the regulation nor does either the regulation or the supporting interpretation documentation offer explanation as to the degree of responsibility or supervision required. For example the College of Optometrists delegation policy¹ requires Optometrists to be present prior to delegating a controlled act to an unregistered person. Would this still apply if an Optometrist is employed as an

¹ College of Optometrists of Ontario [College Policy on Delegation and Assignment \(2005\)](#).

“independent contractor” within a dispensary but does not normally have control of the dispensing that takes place?

The lack of clarity in the use of the term “independent contractor” and its applications raises some other questions. For example:

If the Optometrist acting as an “independent contractor” enters into a relationship with a dispensary owner (someone who may or may not be a regulated health professional):

- Would the regulation prohibit agreements between the Optometrist and the employer that requires the Optometrist to block off portions of their schedule to see walk-in patients?
- Would the regulation prevent Optometrists from agreeing to maintain particular office hours?
- Would the Optometrist be restricted from sharing support services or personnel, which could inhibit potentially efficient arrangements such as sharing receptionists or bookkeeping services? This may raise the costs of providing optometric services and this cost may be passed on to the patient.
- Would the regulation prevent an Optometrist from agreeing to have credit accounts handled by the dispensary owner? This too could preclude a potentially efficient combination of purely business functions?

These are just a few of the questions the COO feels should be addressed with this proposed regulation, as worded. The COO understands from our meeting in October that the College of Optometrists intends to address these types of issues through s. 3 (2)(c) of the regulation. The COO believes this section does not adequately address these questions and again contains language that could be interpreted differently by different readers. The COO understands from our meetings that the College of Optometrists intends to consider a business/employment contract in its totality to determine whether any aspect of the agreement would be considered a conflict of interest under this regulation. This means the College of Optometrists would be evaluating the business arrangement as it relates to the “association” and “benefit” aspects of the Conflict of Interest regulation. This approach would appear to lend itself to a broad interpretation of the regulation that again is not clearly articulated within the regulation itself. This could potentially lead to an inconsistent application of the regulation.

The College of Optometrists seems to be most concerned that freedom of association may lead to their members being subject to “control” by another party, in respect of their professional duties. The drafting would be a lot clearer if s.4 (3) left out the reference to the conclusions of a “reasonable person knowing the relevant facts” and simply provided that an Optometrist who is an independent contractor can associate with an Optician. Then s. 4(4) could add as requirements that the Optometrist not be subject to control in the areas set out.

There is wording in existing Optometric legislation from other jurisdictions that could address the concerns of the College of Optometrists and provide for a more clear regulation. For example, the following excerpt is from a piece of legislation in the United States that seeks to ensure Opticians do

not control Optometrists due to their business arrangements. The legislation includes a provision that states: “...take no instruction from an ophthalmic dispenser with regard to any aspect of optometric practice and retain authority to exercise professional judgment within accepted standards of professional care with regard to skill, diligence in examinations, allocation of time for professional services, and diagnosis and treatment of patients...” There is an abundance of existing legislation in other jurisdictions that provides a more clear reading and interpretation of conflict of interest provisions than is offered in the College of Optometrists proposed draft.

Access

The prohibitions on associating both with Opticians and non-regulated persons or corporations will unduly limit employment opportunities for Optometrists. While this should not be an important consideration for health regulatory colleges, access to care should be. The COO encourages the deletion of provisions prohibiting Optometrists from working or entering into partnerships with laypersons or other regulated health professionals. Restrictions on these types of business formats are likely to prevent the formation and development of forms of professional practice that may be innovative and more efficient and that provide comparable or higher quality services while offering competition to traditional providers.

Prescription Release

The change in the Professional Misconduct Regulation to compel Optometrists to release prescriptions to all their patients is in compliance with the MOLTC guidelines and the College of Opticians supports this amendment to the Professional Misconduct Regulation unequivocally. The COO understands from the October meeting that the some members of the College of Optometrists have expressed grave concerns with this portion of the proposed change to the Professional Misconduct Regulation. The COO believes the wording contained in the amendments is clear and trust that the College of Optometrists will be willing and able to enforce this section of the regulation. The COO would recommend that the College of Optometrists provide on-going education to its members to assist with compliance.

Conclusion

While recognizing that the proposed Conflict of Interest Regulation is an improvement over the previous regulation, the COO does not believe the draft as presented complies with the MOHLTC guidelines nor are many of its provisions necessary to protect the public. The COO does not believe that the College of Optometrists has provided a compelling reason to restrict full freedom of association. The COO also concludes that the draft deals with standards of practice issues for the Members of the College of Optometrists and not the public protection mechanisms we would expect to find in a conflict of interest regulation. The COO believes this proposed regulation will continue to limit the public’s access to Optometry services and perpetuate the uneven competition between health care providers.

The COO can support the intent of amendments as they were explained to us at our meeting with the College of Optometrists in October. Unfortunately, the COO is unable to support the amendments contained within the document as written and presented. The COO recommends that prior to the Conflict of Interest Regulation being submitted to the Ministry of Health and Long-Term Care for

approval the College of Optometrists needs to be clear on the intent of the regulation and ensure that it is articulated clearly within the language of the document. The regulation should not be confusing for practitioners or for regulators.