

CHAPTER 5

GIBSON vs. BERRYHILL: THE CASE THAT HELPED CHANGE THE FACE OF AMERICAN HEALTH CARE

INTRODUCTION

Since the beginning of the optometric profession it has faced opposition from the medical profession and, in particular, ophthalmology. Optometry had legally been able to prove that it had existed as a separate entity before medicine tried to usurp the area of refraction as its own (1, 2). At this time in history, vision care was provided by many types of providers, including ophthalmologists, oculists, refracting opticians, dispensing opticians, jewelers, watchmakers or haberdashers, and traveling peddlers. The American Ophthalmological Society was formed in 1864 almost 50 years before the first optometry law was enacted (3). However, it did not broadly support the concept of correcting refractive error with spectacles. During the last several decades of the 19th century and the early part of the 20th century, much of vision care was provided by itinerant spectacle vendors or “peddlers” who traveled throughout America, especially rural America, providing rudimentary “examinations” and glasses for many of its citizens. In the large cities there existed a small number of ophthalmologists, oculists, and refracting opticians, such as Charles F. Prentice, who provided an even greater scope of practice than most refracting opticians. Much of the opposition from ophthalmology stemmed from the economic competition that naturally existed in the area of refraction. As the scope of practice expanded for optometry there existed even greater overlap in the professional services rendered (1).

Usually optometry’s critics had historically denigrated the professions lack of quality education and the commercial element that had existed in the profession since its inception. This latter issue had also been a matter of great concern within the profession because of its conveyance to the public of a less than professional image. As a matter of course, spectacle peddlers had, over time, evolved into established businesses where, in many communities, “practices” were opened for the examination of eyes or the fabrication of glasses. In many communities these businesses were associated with jewelers, watchmakers, or haberdashers. It was from this beginning that optometry evolved into a profession. (The highlights of the evolution of optometry into a healthcare profession have been summarized in **Appendix I**).

EVOLUTION OF THE PROFESSION

Optometry has, to its great credit, listened to the concerns of its critics by embracing such criticism and endeavoring to improve all aspects of the profession. In a certain sense the critics of the profession have helped make it much better. From the first decade of the 20th Century it began to place effort and resources into the establishment of public or private university affiliated programs. It also endeavored to eliminate all of the proprietary colleges while supporting those private independent colleges who sought accreditation and recognized the unique role these institutions had played, and continued to play, in the development of the profession. This effort continued through the next decade and beyond.

The oldest optometric educational institution in the United States is the Illinois College of Optometry, whose predecessor institution was the Chicago College of Ophthalmology and Otology, which had begun in 1872, as a proprietary college (4). The first university affiliated program was with Columbia University in 1910. The optometry course was a two-year program offered in the Department of Physics (1). The Pennsylvania College of Optometry was the first institution to award the Doctor of Optometry (O.D.) degree in 1923 (5).

Organized optometry also sought to reduce or eliminate the commercial aspect of the profession. Although somewhat of a two edge sword, the profession has, over the years, become very comfortable with delivering professional services and providing a product in the form of glasses and later contact lenses. This model of care is considered one that is uniquely valuable by the profession in that the patient does not unnecessarily need to take the prescription to another source to be filled. In fact, during the time until the 1970s many optometrists would charge a separate fee to patients who wanted to take their prescription elsewhere.

EFFORTS TO ELIMINATE COMMERCIAL OPTOMETRY

The Promise of Cooperation

The events that began this effort on the part of optometry to eliminate commercial optometry actually had occurred several decades earlier. In 1928, a very well-known and prominent ophthalmologist, Dr. W. B. Lancaster, delivered an address before the House of Delegates of the American Medical Association. In this address, Dr. Lancaster held out the promise of acceptance by medicine if optometry could divest itself of commercial practice (5). Beginning in the 1930's and continuing until the early to mid-1970s, optometry, primarily through its state associations, state boards of optometry or state attorneys general, acting on behalf of the state boards, had actions against corporations in every state. Many of these decisions were eventually decided in appellate courts. This effort was further stimulated when, in 1935 the United States Supreme Court held, that a state law prohibiting advertising by dentists was a proper application of state law (5). By the time the Federal Trade Commission (FTC) published its trade regulation rule in 1978 investigators from the FTC maintained that 45 states had laws that restricted ophthalmic advertising in some form.

By the 1970's commercial optometrists, now relegated to a minority, began to vigorously oppose legislative efforts to restrict or eliminate commercial practice and advertising. One of the leading battles in this effort occurred in Alabama (6)*.

The ALOA's History of Opposing Commercial Optometry

As part of the profession's long history of opposing commercial optometry, the ALOA also had taken legal action against specific entities operating in the State of Alabama. Some of these actions had been introduced in the Alabama Legislature as early as the 1950's, or perhaps even the 1940's, but failed to gain any meaningful support. However, by 1965 the efforts of the ALOA had proven successful and the optometry law had been amended to prevent business entities from advertising any direct reference to optical departments maintained by corporations or other business establishments under the direction of employee optometrists. This law change is discussed in greater detail later in this chapter. It is a poignant story considering that after all the time and resources expended by the state associations, these efforts were eliminated by federal rule,

THE ALABAMA OPTOMETRIC ASSOCIATION FILES A COMPLAINT

After several decades spent in time and resources the Alabama Optometric Association (ALOA) seemed to be on the verge of eliminating commercial optometry. In 1965, the ALOA was successful in changing Alabama state law such that it restricted the corporate practice of optometry. Prior to 1965, the optometry laws of Alabama permitted any person, including a business firm or corporation, to maintain a department in which eyes were examined or glasses dispensed (fitted), provided the department was in the charge of an optometrist duly licensed in Alabama. In 1965, Section 210 of Title 46 of the Alabama Code 940 was repealed in its entirety, by the Alabama Legislature. Furthermore, Section 211 of the Alabama Code, which regulated the advertising practices of optometry, was amended so as to eliminate any direct reference to optical departments maintained by corporations or other business establishments under the direction of employee optometrists.

In October, 1965 soon after the Alabama Code was amended, the ALOA filed charges against various duly licensed optometrists who were salaried employees of Lee Optical Company. These charges were filed with the Alabama Board of Optometry who had statutory authority for the practice of optometry. These charges included unprofessional conduct, unlawful practice of optometry, aiding and abetting a corporation in the illegal practice of optometry, practicing optometry under a false name, unlawfully soliciting the sale of glasses, lending their licenses to Lee Optical Co., and splitting fees with Lee Optical Co. It should be noted that all ALOA members were independent optometrists since employment by others disqualified an optometrist from membership in the organization. Furthermore, all of the members of the Alabama Board of Optometry were members of the ALOA (6).

THE ALABAMA BOARD OF OPTOMETRY FILED A LAW SUIT

Two days after the ALOA had filed charges, the Alabama State Board of Examiners in Optometry filed a suit in state court against Lee Optical Company. This complaint also named 13

optometrists employed by Lee Optical as party's defendant. The charges made by the Board were very similar to those charged by the ALOA in its complaint to the Alabama Board of Optometry.

The Board made the decision to not move forward with the ALOA complaints but to first pursue its own state suit. The individual defendants in the suit were dismissed on the grounds that did not adequately appear in the record before the United States Supreme Court. The reason for the five and one-half year delay was attributable to procedural questions as to whether the Board had the authority to bring an injunction against those believed to be practicing optometry unlawfully. During this pending litigation, the Alabama Legislature passed a statute expressly conferring such power retroactively and prospectively on state licensing boards. Suffice it to say that on March 17, 1971 the state trial court rendered judgment in favor of the Board and enjoined Lee Optical both from practicing optometry without a license and from employing licensed optometrists.

Following this judgment from the state court, the Alabama Board of Optometry reactivated the suit it had pending since October, 1965 against the individual optometrists employed by Lee Optical Co. These individuals were notified of a hearing to be held May 26, 27 1971 (6, 7). It seemed likely that commercialism would finally be greatly limited if not eliminated.

THE PLAINTIFF'S FILE A FEDERAL LAW SUIT

Before this hearing could be held, those individual optometrists employed by Lee Optical countered on May 14, 1971, by filing a complaint in United States District Court. This complaint named as defendants the Alabama Board of Optometry and its individual members and the ALOA and other individuals. This suit was brought under the Civil Rights Act of 1871 and sought an injunction against these hearings on the grounds the statutory scheme regulating the practice of optometry in Alabama was unconstitutional insofar as it permitted the Board to hear pending charges against individual plaintiffs in the Federal suit (6, 7).

The primary thrust of the complaint was that the Board was biased and could not provide a fair and impartial hearing in conformity with due process of law. More specifically, the plaintiffs attacked Sections 206 and 192, which provided that the Board had the power to consider the revocation of licensing proceedings and that its membership shall be limited to members of the ALOA.

A three-judge court was convened in August, 1971 and shortly thereafter entered a judgment in favor of the plaintiffs, enjoining the members of the Alabama Board of Optometry or their successors from conducting a hearing on charges and from revoking their licenses to practice optometry in the State of Alabama (6, 7).

The deficiencies of the charges against the plaintiffs amounted basically to sustaining the plaintiff's allegations of bias. In this case several factors were found to support the possibility of bias. First, was the fact the Board, which acted as both prosecutor and judge in de-licensing proceedings, had previously brought suit against the plaintiffs on virtually identical charges in state court. Secondly, Lee Optical did a large business in Alabama and that if forced to suspend operations the Board members and other private optometrists would fall heir to this business. This raised the question of a personal financial stake in the matter on the part of Board members. Finally, the District Court appeared to regard the Board of Optometry as a suspect adjudicative body in cases pending before it since only members of the ALOA could be Board members and because the ALOA excluded from membership optometrists employed by other persons or entities (7).

This resulted in 92 of the 192 practicing optometrists in Alabama denied participation in the governance of their profession. Ultimately the District Court felt that to require the plaintiffs to resort to protection offered by the state law would effectively deprive them of their property without due process of law and irreparable injury would follow (6, 7).

GIBSON VS. BERRYHILL

On March 30, 1972 the Supreme Court of Alabama reversed the judgment of the state trial court in the Lee Optical Co. case holding that nothing in the Alabama statutes pertaining to optometry prevented a duly qualified and licensed optometrist, under the laws of the state, from being employed by another to examine eyes for the purposes of prescribing glasses.

On June 26, 1972 appeal was made to the United States Supreme Court and probable jurisdiction was noted. In 1973, in *Gibson vs. Berryhill*, the U. S. Supreme Court agreed with the District Court that neither statute nor case law precluded it from adjudicating the issues before it or from issuing the injunction, if its decisions on the merits of the case, were correct. (Dr. Tom Gibson was a member of the Alabama Board of Optometry and his name was used, presumably because his name was first alphabetically, to represent the Board in these proceedings). Although Title 28 of the United States Code, Section 2203 prohibits federal courts from enjoining state court proceedings, however, the statute excepts from prohibition injunctions which are "expressly authorized" by another Act of Congress. The Supreme Court determined that actions brought under the Civil Rights Act of 1871 were within this "expressly authorized" exception. The court was also of the opinion that state administrative remedies did not need to be exhausted where the federal court plaintiff states an otherwise good cause for action. Therefore, the question of the adequacy of the administrative remedy, an issue which under federal law the District Court was required to decide, was for all practical purposes identical with the merits of the appellee's lawsuit (7).

Furthermore, the Supreme Court noted that those with substantial pecuniary interest in legal matters should not adjudicate these disputes and this applied with equal force to administrative adjudicators. No good reason was seen to overturn the District Court decision and it was affirmed.

The Alabama Supreme Court rendered its decision in 1972 and entered judgment on behalf of the individual optometrists in a companion case. The Board had also brought suit against the House of \$8.50 Eyeglasses but the Court ruled that nothing in the State's optometry law prohibited a licensed optometrist from accepting employment from a business corporation. The majority of the court thought that considerations of equity, comity (courtesy) and federalism warrant vacating the judgment of the District court and remanded the case to that court for reconsideration in light of the Alabama Supreme Courts judgments in the Lee Optical Co., and House of \$8.50 Eyeglasses. The court in no way intimated whether the injunction should be reinstated by the District Court.

Chief Justice Warren Burger concurred with the opinion, but noted the three-judge District Court would have been better advised to refrain from acting until the outcome of the Lee Optical appeal (was known). Justice's Marshall and Brennan each joined the opinion of the court except they felt the inapplicability of the exhaustion requirement to any suit brought under Section 1983 had been firmly settled by this Court's prior decisions.

Counsel for the appellants was Richard A. Billups, Jr., Jackson, Mississippi and for the appellees Harry Cole, Montgomery, Alabama.

THE FEDERAL TRADE COMMISSION AND ITS ROLE IN HEALTH CARE ADVERTISING

In 1976 events occurred that were to affect the decades old effort by optometry to rid itself of commercialism. During the past 40 years many of the state associations had spent much in the way of time and resources in an effort to eliminate commercialism. Many of these efforts, either by state board action, attorney general's decision, or state legislation action had been very successful.

Supreme Court Rulings

In two cases the United States Supreme Court ruled the professions had a legally protected right to advertise. The first case involved pharmacy, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976) and the second case involved the legal profession in, *Bates v. State Bar of Arizona* (1977). These rulings meant they were also applicable to optometry, medicine, dentistry and all other health professions as well as the legal profession and other non-health related professions (6).

Federal Trade Commission

The Federal Trade Commission (FTC), in 1978, proposed a trade regulation that specifically purported to preempt the optometry laws of 45 states. These laws, which had been passed with great difficulty had utilized many of the resources of the state associations. However, over many years, optometry had been successful in passing legislation that prohibited or restricted commercial solicitation and advertising. After a series of hearings, during 1978, the FTC put into effect the so-called Eyeglasses I Rule. In this same year, the American Optometric Association (AOA) sued the FTC alleging that the preemption of state law was outside the power of the FTC and recent Supreme Court rulings made such a rule unnecessary (6). In 1979 the case was decided in favor of the AOA. The only portion of the Eyeglasses I Rule left in effect was a prescription release requirement. The 45 state laws remained intact, although most had to be modified to meet the requirements of the Supreme Court as expressed in the pharmacy and law cases (6).

At the time of these events, the U. S. Senate Subcommittee on Monopoly announced hearings on “the restrictive and anticompetitive practices in the sale of eyeglasses”. These hearings only served to further fuel the debate over restrictions on price advertising of ophthalmic goods. The consumer movement of the nation was clearly contrary to optometry’s effort to clean its house and attain a national level of professionalism. However, in 1979 a U. S. Supreme Court decision indicated there would be limits to consumerism. In the Texas case of *Friedman v. Rogers*, which involved the use of trade names in the practice of optometry, the Texas Supreme Court ruled such restrictions as unconstitutional. The U. S. Supreme Court upheld such a restriction thereby limiting the commercial incursion into an area previously uncertain (6).

In 1980 the FTC announced the results of its investigation into services offered by professional and commercial practitioners. While maintaining that the quality of materials between the two types of optometrists was not significantly different, the FTC did concede that professional examinations were more “thorough”. Nevertheless, the FTC moved forward in its efforts to make unenforceable all state restrictions and limitations on the commercial practice of optometry, known as Eyeglasses II. In 1988, the FTC Commissioners voted to approve Eyeglasses II even though a study of the matter concluded the studies conducted by the FTC were flawed. This was the same conclusion reached by the officer who presided over the Eyeglasses II hearings (6).

In contemporary optometric practice every patient requiring a prescription is provided a copy of the prescription. The patient is free to use whatever source they want for the purchase of glasses or contact lenses. The optometric model of providing glasses to the patient ensured that the quality of the frames and lenses were carefully monitored before being dispensed. It has resulted in a very convenient form of care for patients over the years and one that

continues to this day. What continues to be disturbing are the no cost examinations and the bait and switch tactics that have historically been used to mislead patients. Unfortunately, these commercial practices are still prevalent in the landscape of contemporary eye care.

SUMMARY AND LONG-TERM OUTCOMES OF THIS RULING

As a result of the Supreme Court decision the method of selecting Alabama State Board of Optometry members throughout the nation had to be revised. Also, no longer was it permissible, to exclude corporate or commercial optometrists from membership in the ALOA. The Board then began convening an annual meeting in August open to every duly licensed optometrist in the State of Alabama. This meeting was to be held at a place of the Board's choosing to select from a list of nominated or eligible individuals who received the largest number of votes. This election is held such that one rotating legislative district is voted on each year. The five (5) individuals receiving the largest number of votes have their names submitted to the Governor. The Governor then selects from this list one individual for appointment to the Alabama Board of Optometry. Had such a procedure been in effect before the 1965 board action, the outcome might have been different.

In the Regular Session of the 1973 Alabama Legislature, legislation was introduced by the ALOA in an attempt to more clearly define the composition and duties and responsibilities of State Board. However, the election process for selection of names for submission to the Governor was now open to all optometrists who held an Alabama license.

The *Gibson vs Berryhill* case was one of the leading legal actions taken to open membership in all such organizations regardless of the type of practice. However, perhaps its greatest impact is how it has changed the landscape for all professions, including the legal profession, as regards the marketing of goods and services.

It is now very common to see advertisements on television, billboards, mail outs, telephone book yellow pages and many other venues for all categories of health care providers as well as other professions. Perhaps worthy of some note is that optometry does not stand out so much in this aspect of practice in today's health care environment. It should also be kept in mind that in contemporary times the public does not place the type of negative connotation on advertising by professionals as it once did

September 25, 2102

February 16, 2013, reviewed and revised

April 26, 2017, reviewed and revised

September 12, 2017, reviewed and revised

September 20, 2018, reviewed and revised

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APPENDIX I

HIGHLIGHTS OF THE EVOLUTION OF OPTOMETRY INTO A HEALTHCARE PROFESSION

- From 1901 until 1924 the state optometric societies or associations spent time passing original optometric practice acts in all of the states, some territories and the District of Columbia. Thus optometry, as a legalized profession, came into existence in a relative short period of time during the first quarter of the 20th century.
- During the period from the 1920's through the 1960's there had been significant emphasis on improving the development of professionalism within optometry. Clinicians were encouraged to open offices that appeared professional. The epitome of this time period was an office on the second or third floor of a building that also had other health professionals. Later this trend would be replaced by free standing offices or office complexes. The American Optometric Association and the Optometric Extension Program (OEP) played a significant role in this drive toward professionalism. Although OEP is best known for its formation of study groups and embracing a functional model of vision, this organization also placed great importance on the transition from business to profession that occurred during this time.
- During the 1930's and into the 1940's the Council on Optometric Education (COE) began to establish standards for optometric education that have helped the optometric institutions and the profession grow in terms of the quality, content, and length of optometric education. This process assisted in the evolution of the profession's education growing from proprietary entities into what is now, for most institutions, a curriculum that requires four years of pre-optometry and four years of professional education. These changes in education have helped graduates enter practice with the appropriate entry-level knowledge required to practice contemporary optometry.
- The large influx of optometrists into optometry schools and colleges following World War II assisted the profession significantly in that the graduates provided much greater geographic distribution of optometrists than had existed before the War. This in turn provided more accessible eye care to a growing U. S. population. It also served to assist the profession to evolve in that this distribution of optometrists provided personal contacts to legislators in almost every county of each state. This geographic distribution would be of great importance in the legislative activities in the years to come.

- The importance of the development of contact lenses beginning in the 1950's and continuing forward cannot be underestimated. Optometrists were the clinicians who gave great impetus to the growth of the popularity of hard contact lenses made of polymethylmethacrylate (PMMA). They also provided much of the original research that led to a greater understanding of the contact lens relationship to corneal physiology and mechanics of contact lens movement.
- An additional facet of contact lenses is that they required the application of contact lenses to the eye. From the 1930's until the 1950's contact lenses development changed from scleral molded to lathe cut corneal contact lenses. The touching of the lids, cornea, and conjunctiva became more of a familiar and common aspect of optometric care. The proper fitting of contact lenses also required the use of magnification, first in the form of the Burton Lamp, and then with the use of the bio-microscope or slit-lamp. The bio-microscope enabled the optometrist to view the cornea in much greater detail and instilled a greater confidence in the optometrist's ability to diagnose and treat eye disease, especially those diseases involving the contact lens cornea, and anterior segment of the eye. This evolution in lens design also helped make the bio-microscope an indispensable instrument in every practice.
- The development of the electronic tonometer (1958) and later the non-contact tonometer (1971) during the time period from the late 1950's through the 1970's allowed the optometrist techniques by which they could measure the intraocular pressure without the use of drugs. This technology was of critical importance to the profession since the profession was under attack for not being able to measure intraocular pressure. Prior to the mid 1950's impression tonometry had been the standard technique. However, in 1954, Goldman described a technique for mechanically applanating, or flattening, the cornea, using a probe that required a topical corneal anesthetic. This technique quickly became the standard for the measurement of intraocular pressure. Since optometry could not use drugs for either diagnostic or therapeutic purposes during this time period, the electronic and later non-contact instruments were vitally important. Each of these techniques was based on the theory of corneal applanation.
- The LaGuardia meeting, while not an official meeting of organized optometry, proved in hindsight to be of monumental importance to the profession because of the decisions made during this meeting. Influential leaders of the profession had met for two days in January 1968 in a hotel at LaGuardia Airport and came to the conclusion that the profession of optometry must expand its scope of practice if it was to continue to grow.

This led to Dr. Norman Haffner's address to the New England Council of Optometrists on March 17, 1968 that inspired optometrists in the audience (see Chapter 7).

- The American Optometric Revolution began in 1971. On July 16, 1971 the Rhode Island Optometric Association was successful in passing legislation that specifically authorized the use of drugs for diagnostic purposes. For optometrists this was the equivalent of the "shot heard around the world". Within the next 10 years the number of states to pass similar legislation had grown to 30. By 1999 every state, the District of Columbia and Puerto Rico, had either enacted or had by Attorney General ruling diagnostic authority.
- In January 1973 several ophthalmologists filed suit against a Colorado optometrist "and all those similarly situated". The suit specifically asked the court to stop all optometrists from fitting soft contact lenses and "from holding themselves out to the public as persons qualified to diagnose the presence or absence of glaucoma". The Colorado Optometric Association set about raising funds to hire an attorney to defend this case. On February 5, 1975, after a ten-day trial in Denver District Court, Judge Kingsley agreed with the position of the optometrists related to what they could and should do to discharge their duties as a matter of public health under the Colorado optometry practice act. Had their defense not been successful it is very likely this lawsuit, or something similar to it, would have been filed in every state (1, 8).
- In an interesting and somewhat unexpected turn of events, the West Virginia Optometric Association was successful in overriding a Governor's veto and on March 4, 1976 passed the first law authorizing the use of drugs for therapeutic purposes. The enactment of this legislation changed the dynamic of the orderly process of what most assumed would be first "diagnostic" followed by "therapeutic" drug legislation. However, in hindsight it was the correct strategy if only for the reason it moved the entire legislative process forward by many years. By 1998 every state, Guam and the District of Columbia had enacted legislation that granted therapeutic authority. (Puerto Rico is still working to pass this legislation).
- This most remarkable metamorphosis of the optometry profession has gone largely unnoticed and unreported in terms of the national healthcare landscape or the history of healthcare. The one exception to this, of course, is that ophthalmology has been acutely aware of this change. It is important to note that as of June 1, 2012, 185 state laws have been passed that have dramatically expanded the scope of practice of the profession. Oklahoma was the first state to authorize optometrists to use lasers. This

legislation was passed on March 16, 1998. Every state except Massachusetts is authorized to treat glaucoma and 47 states have oral prescription authority (9). Since June 2012 more than 15 additional laws have been enacted to increase the scope of optometric practice across the country.

- It is obvious that such a radical change in the scope of practice would have a dramatic impact on the profession and the public's access to eye care. This has occurred gradually over a time period of almost 40 years. Now optometrists routinely treat all anterior segment diseases and glaucoma. Most optometrists believe the profession would not exist today if the visionary leaders of the past had not made bold decisions and moved forward.
- In the mid 1970's the American Optometric Association (AOA) began to identify optometry as "The Primary Eye Care Profession" to its members, the profession and the public. Although largely symbolic in terms of its meaning, it created a perception within the profession that changed not only the member's perspective, but how the profession viewed itself as a health care profession. Ultimately the public came to understand this as well and this in turn boosted the profession's public image.
- In 1986, twenty-one years after its inception, optometry was included in Medicare. The Medicare parity legislation allowed optometrists to be reimbursed for health-related services performed on non-aphakic patients. From the time of its enactment in 1965, optometrists could only be reimbursed for care related to services for aphakic patients. Perhaps this legislation has done more than anything to assist in the growth of the profession of optometry.
- Over the past 41 years the state optometric associations, all affiliates of the American Optometric Association, have undertaken the challenge of passing over 220 changes in laws affecting the scope of optometric practice. These laws have included the use of drugs for diagnostic purposes, therapeutic purposes, the use of lasers, and other procedures such as the removal of foreign bodies (9). The State of Alaska passed a law in 2017 that allows the optometrist to practice as taught. This permits the State Board of Optometry to determine the scope of practice.