

Comments to the Federal Trade Commission
Contact Lens Study, Project No. V040010

The Americans for Prosperity Foundation (“AFPF”) is pleased to submit these comments to the FTC for the Contact Lens Study, Project No. V040010 docket. AFPF is a nationwide non-partisan grassroots organization established to advocate and protect individual rights to economic freedom and opportunity to pursue prosperity through educating consumers and promoting the adoption of free-market policies.

AFPF applauds the passage of the Fairness to Contact Lens Consumers Act (“FCLCA”), and is pleased that the Federal Trade Commission (“FTC”) is embarking on a study of the contact lens industry. Thirty five million Americans wear contact lenses. These Americans frequently rely on the product on a daily basis. They should have the freedom to obtain lenses based on the pricing and service that best meets their needs. Unfortunately, this freedom is impeded by artificial barriers to competition.

While the scope of the study (and the comments submitted to the FTC) will focus on a variety of issues impacting competition, AFPF wishes to focus these comments on but one such issue – the use by eye care practitioners (“ECPs”) of state regulatory boards to impede competition. The actions of the Texas Optometry Board (“TOB”) are a case in point.

Prior to the enactment of the FCLCA, Texas contact lens consumers wishing to purchase lenses from alternative sellers found themselves subject to a “positive verification” regime. Under this system, consumers could not obtain their lenses from a seller other than the prescriber, unless that seller contacted the prescriber and received from the prescriber positive affirmation of the prescription.

Even though ECPs were required to provide patients with copies of their prescriptions upon request, and to verify accurate prescriptions, because of ECP non-compliance, thousands of Texas consumers were denied their freedom to purchase lenses from the seller of their choice.

As a result, the TOB received tens of thousands of complaints. Consistent with the law, many complaints were filed by a seller on behalf of its customers when the customer’s ECP refused to release or verify a prescription in accordance with the law. Some were filed directly by consumers, though most consumers found it difficult to determine how to file complaints and just what their consumer rights were.

The TOB improperly ignored all of the complaints filed by the seller - despite the fact that consumers likely would not have known how to complain but for the avenue provided them by the seller. Notably, the TOB’s website (<http://www.tob.state.tx.us/>) still does not include a means for consumers to file complaints. At one point, the TOB admitted that it had received 2,400 complaints from consumers who were denied verification of their lens prescriptions. However, without little apparent investigation, the TOB summarily determined that only two (2) of those 2,400 complaints were legitimate, effectively dismissing the rest.

(In May, 2003, the chairman of the Texas Optometry Board testified before the House Public Health Committee and stated that of the over 2,400 complaints filed before the Board, only two had validity. At that time, the TOB actually had received over 27,000 complaints.)

Following that hearing, in an attempt to assess the validity of the complaints filed by thousands of consumers, two other individuals and I contacted nearly 100 of these consumers. Based on this survey, we found the TOB had failed to act in response to the complaints, despite the fact that the complaints were substantiated. There is no reason to believe that a survey of the remaining consumers – or for that matter of the tens of thousands of other consumers on whose behalf complaints have been filed – would yield any different result.

In testimony before the Texas Sunset Commission, a panel of appointed citizens and elected members charged with assessing the role of the TOB for a report to the Texas Legislature, the TOB refused to acknowledge the validity of the complaints and obfuscated the facts. Dr. Joe DeLoach, chairman of the TOB stated before the Commission that:

. . . the Texas Optometry Board has received, in the past several years, less than a dozen complaints from individual consumers related to the issue of contact lens release. (emphasis added)

This figure is in stark contrast to the 2,400 complaints the TOB previously acknowledged but never pursued.

In their testimony, recently before the Texas Sunset Commission, the TOB representatives also tried to discount the now 35,000 consumer complaints that had been properly submitted through an alternative seller, implying that the sheer volume of such complaints made them suspect. The representatives of the TOB provided no evidence to show why the means by which the complaints were filed were invalid or to support its conclusion that the infractions alleged in the complaints were unfounded.

Currently, our concern is not as focused on the optometrists' practices as it is on the TOB in their failure to adequately protect consumers. The TOB's attitude toward a single retailer appears to be used as an excuse to dismiss the thousands – 35,000 – complaints consumers filed when that retailer informed customers HOW to complain. It appears those 27 boxes of complaints have not been taken seriously by anyone other than the FTC. And the TOB leadership is eager to mislead the Texas Sunset Commission members into thinking that these individual consumer complaints don't matter.

The hearing, in fact, provided a public glimpse into how the leadership of the TOB views its obligation (or rather lack of obligation) to Texas consumers. It also reveals their perspective on a reported investigation into the Board's activities by the FTC. A transcript of this hearing is attached.

We urge the FTC to consider fully the testimony contained within the transcript, the TOB's track record of ignoring complaints filed by consumers, and the TOB's history of actions aimed at impeding competition in the contact lens market. The impact self-regulatory boards, such as the TOB, have had on consumers and the dynamics of the marketplace has been considerable, and we hope that any study by the FTC into the contact lens industry will include a thorough investigation into the activities of such state regulatory boards and their effect on consumers and competition.

Should you need additional information, please contact me. Thank you.

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Texas Optometry Board Sunset Advisory Commission Hearing

C: Burt Solomons; Sunset Advisory Board; Chairman, Representative Texas
C: Sen. Jane Nelson; Sunset Advisory Board; Vice Chairperson, Senator Texas
C: Rep. Vickie Truitt; Sunset Advisory Board; Representative District 126
C: John Shields; Sunset Advisory Board; House Public Member Texas
C: Rep. Peggy Hamric; Sunset Advisory Board; Representative Texas District 126
S: Christian Nino; Texas Optometry Board; Sunset Project Manager
S: Dr. Joe DeLoach; Texas Optometry Board; O.D., Chairman
S: Chris Kloeris; Texas Optometry Board; Executive Director
S: Judy Eidson; Texas Optometry Board; Public Member
S: Dr. Laurie Sorenson; Texas Optometric Association; O.D., Volunteer Chairperson TOA
S: Sam Johnson; Registered Optician Texas
S: David Forest; Optician Texas
S: Bruce Richardson; Registered Opticians Association; O.D., Executive Director
S: Sam Tempa; Registered Optician Texas
S: Sam Stone; Brown McCarroll LLC; Attorney, Texas Ophthalmological Association.
S: Sen. A.R. Schwartz; Texas Association of Retail Optical Companies; Senator Texas
S: Steven Mills; Texas Department of Health;

Abbreviation key: C = Commission member S = Speaker

+++ presentation

Sen. Jane Nelson: The Chair now recognizes Christian Nino [ph], Sunset Project Manager, to present Sunset Staff Report on Texas Optometry Board.

Christian Nino: Good afternoon, members. My name is Christian Nino, Sunset Staff and Project Manager of the review of the Texas Optometry Board (TOB).

The Board regulates approximately 3200 licensees, which includes a three-tier kind of system of optometrists, therapeutic optometrists, and optometric glaucoma specialists. The agency has a budget of approximately \$340,000 and a staff of seven here in Austin. In FY03, the Board had approximately 200 complaints, of which 412 were on contact lens prescription release issues.

Our report on the Optometry Board makes several recommendations addressing requirements to release contact lens prescriptions and the Board's ability to enforce standards of practice (SOP). I'll summarize the key recommendations and answer any questions you might have.

Under Issue 1, currently under state law patients can only get their contact lens prescription by requesting it, which conflicts with federal requirements to automatically provide those prescriptions. As a result, the Board lacks adequate authority to address complaints about prescription release. While the Federal Trade Commission (FTC) enforces the federal law, the commission itself does not address individual complaints and that would provide limited recourse for patients here in Texas.

Our recommendation would be to require the release of a contact lens prescription without a patient having to ask for it and clarify the Board's authority to address complaints in this area. Additionally, state law requires the contact lens seller to provide lenses only from the original prescription and does not authorize verification of the prescription by other means, such as email or telephone.

As a result, consumers have more difficulty in purchasing lenses by mail or Internet and the state lacks regulations to ensure consumer choice in this area. Our recommendation would authorize prescription verification and require rules to govern this process.

Additionally, in Issue 2, we've applied the licensing model to the Board's functions and while we have 17 recommendations in that area, I'll just briefly highlight a few. We'd like to authorize the Board to inspect optometry offices and patient records, require the Board to develop a penalty matrix for more serious standard of care violations, and authorize the Board to suspend a license and issue cease and desist orders.

If you have any questions, I'd be glad to answer them.

Sen. Jane Nelson: Question, member? Former Representative, now normal person, John Shields.

John Shields: Thank you. On the most frequent complaint against optometrists, is there some concern about the time frame within which a patient calls to get that prescription?

In other words, I've talked to an optometrist. I've said, you know, what's the deal here and he said, well, sometimes a patient will call a year later and ask for the

prescription. If you give that prescription and it turns out it doesn't work then the optometrist is in trouble, even possibly with legal liabilities.

Tell me, how do you understand that time frame issue?

Christian Nino: My understanding is that currently there's no requirement that a prescription remain valid for at least a year. A prescription could be valid for less than one year for medical reasons. However, optometrists have the option of writing a prescription for longer than one year and certainly an optometrist would not release a prescription that was not valid.

John Shields: So, in your opinion, you've looked at this and you've heard this question before, right?

Christian Nino: Yes.

John Shields: Or you've heard the idea. So, in your opinion, there's no validity to the time frame objection?

Christian Nino: I would have to defer a question to that more to the Board and their expertise on that. What we have found is that as long as that prescription is valid and also, state law has allowed patients to ask for a two-month extension of their prescription, which they have an option to do, then they could possibly receive it that way.

John Shields: So a prescription is valid for what length of time?

Commission Rep: A year.

Christian Nino: State law does not currently proscribe what that length of time would be. It could be up to a year or potentially longer or less than a year.

John Shields: And then the patient can ask for two more months?

Christian Nino: Yes. The patients currently have the ability to ask for a two-month extension of their prescription.

John Shields: But it could be for more than a year?

Christian Nino: Yes.

John Shields: Thank you.

Sen. Jane Nelson: Other questions? No? Then let's invite the members of the Optometry Board and agency staff to give agency response to Sunset recommendations. Board members come on up here and please identify yourself for the record and whoever wants to be the spokesperson can begin. Did each of you fill out a Witness Affirmation Form?

Speaker: I did. Yes.

Speaker: I did.

Sen. Jane Nelson: Okay. State your name.

Dr. Joe DeLoach: I'll start off. My name is Dr. Joe DeLoach. I'm currently Chairman of the TOB. I want to thank you for opportunity to come and discuss some of the issues before the Board during this Sunset process.

I've served on the Optometry Board for about eight years now and Chairman for about the last three years. The current physician and public members do an excellent job in trying to enforce the statutes in trying to enforce the statute as it is currently written, thus protecting the consumers of the state. Although there's always room for improvement, we feel the Board does a very, very good job of enforcing the statute as it is written.

We're very pleased with Christian's work and the work of his committee, and in general, agree with most of their recommendations, with some clarification on a few issues, but we are very pleased at the way they understood our profession and our law as written. They spent a lot of time talking to us and we thought it was very, very good.

But I would like to address just a couple of issues. A tremendous amount of attention has been directed by some at the issue of contact lens prescriptions. Legislatures, consumer groups, professional associations have spent countless hours and moneys on this issue over the past several years. I see this as unfortunate.

With the help of the Texas legislature, some currently sitting before me right now, we did pass -- Texas was one

of the first states to take the bull by the horns and pass legislation back in 1997 that assured release of contact lens prescriptions for patients. This law has served Texas consumers for almost seven years now.

The blatantly clear reality is that there is no contact lens prescription issue in Texas or in any other part of the country. There is only an issue created by the deception, fueled by greed, of a single contact lens distributor: 1-800-ContactLens. Of the thousands of contact lens distributors in Texas and the tens of thousands across this country, only one company, 1-800, has generated any complaints from consumers related to contact lens prescription release - only one.

Commission Rep: Really?

Dr. Joe DeLoach: Outside of the complaints from this single company, the Texas Optometry Board has received, in the past several years, less than a dozen complaints from individual consumers related to the issue of contact lens release.

Sen. Jane Nelson: I have to interrupt you and ask how many that adds up to be - ballpark figure. Of the numbers that you just told us, the 1-800 whatever, how many complaints, ballpark figure?

Dr. Joe DeLoach: 30,000.

Sen. Jane Nelson: Oh my!

Speaker: It's 35,000.

Dr. Joe DeLoach: 35,000, something like that.

Sen. Jane Nelson: Over what period of time?

Dr. Joe DeLoach: A couple years.

Rep. Vickie Truitt: Between, if I may, Madame Chairman?

Sen. Jane Nelson: Representative Truitt?

Rep. Vickie Truitt: Between August 2002 and January '04, over 35,000 complaints.

Dr. Joe DeLoach: Correct.

Sen. Jane Nelson: And repeat what you told us: only one?

Dr. Joe DeLoach: They are the only company that has ever generated a complaint regarding contact lens release to the TOB.

Sen. Jane Nelson: Oh my, interesting. Okay, just wanted to make sure.

Dr. Joe DeLoach: I can only hope the legislators do not see the need to spend our great state's time and money to address the whims of a single company's self interest.

On a more important note, there are several recommendations proposed, that I would like to make some comments on, that do address the needs of consumers. These include the following. The Optometry Board has always conducted random investigations, as far back as I've been involved and even before that. These are not based on only complaints, but we do have random investigations.

The currently authority of the Board to conduct these investigations is ambiguous. Statutory language confirming the Board's authority to protect consumers seeking care from Texas optometrists through this process is needed and welcomed. The Optometry Board currently does an excellent job of conducting informal investigations in a timely and efficient manner. I'm glad we don't have some of the problem I've been hearing prior to this.

Despite this, we currently have a committee. We've taken it upon ourselves to investigate our own process and see if there's anything we could do to make it better. We would certainly welcome any changes that would improve our efforts in this area. The Optometry Board is - now, that I'm learning - one of several healthcare boards that does not have the authority to temporarily suspend a license based on rare cases of gross incompetence or unscrupulous behaviour. Public health would be greatly served by extending this authority to our Board as well.

The Board would embrace actions that would allow consumers greater access to the Board and the complaint process. We've used our limited resources to accomplish this and would only hope that any additional requirements in this

area would keep in mind the limited financial ability of the Board to make these changes.

Most importantly, I encourage the Commission to recognize the necessity of the Texas Optometry Board remaining an independent agency. The public can only best be served by a healthcare board that is narrowly focused. Healthcare is far too complex for multidisciplinary boards to adequately understand and address the needs of consumers related to each individual healthcare profession.

I could serve no reasonable and fair function in the decision regarding the care rendered by a podiatrist any more than a dentist or nurse could render a fair decision regarding care rendered by an optometrist. While we support consolidation of business efforts, when reasonable, decisions regarding care of patients must be made only by the professionals who render that care.

Thank you for allowing me to express some of our opinions and I would be happy to answer any questions that the Committee might have.

Sen. Jane Nelson: Sunset reported that the Board is currently under investigation by FTC. Has the FTC completed its investigation and what conclusions did it reach?

Dr. Joe DeLoach: To our knowledge they have not concluded that investigation, which was also prompted by 1-800-ContactLenses. But, as far as our knowledge is, they have not completed that investigation.

Sen. Jane Nelson: And was this all? Can you sum it up? I mean, are we -- these 35,000 complaints you tell us about, how did that relate to what was taking place with this investigation?

Dr. Joe DeLoach: I'm not sure. I'd ask --

Sen. Jane Nelson: What were they investigating?

Dr. Joe DeLoach: The charge was that the Board was in some way restraining free trade.

Sen. Jane Nelson: By--?

Dr. Joe DeLoach: By hindering the distributors from having access to the consumers in order to fill their contact lens prescriptions.

Sen. Jane Nelson: Well, so -- and the AG has indicated the Board lacks the authority to enforce the federal provisions?

Dr. Joe DeLoach: No. Let me clarify that. As you know, we have a Texas law and now we have a federal law.

Sen. Jane Nelson: Right.

Dr. Joe DeLoach: Now, obviously, our state statutes don't correlate to the federal law, because the federal law was just passed, as a matter of fact, just became in effect a few months ago. The only substantial difference between the federal law and the state law is that in the federal law prescription release is without request. In the state law, prescription release is with request.

Sen. Jane Nelson: I get it.

Dr. Joe DeLoach: That's the only real difference between the two.

Sen. Jane Nelson: Okay.

Dr. Joe DeLoach: Our Attorney General, or the attorney general assigned to the Board -- the attorney from the AG's office states that we don't have the authority to uphold the federal law, only the state requirements. So, in that one issue of whether or not it was released by request or not request, we can't uphold the federal law.

Sen. Jane Nelson: I get it now. I get it. Okay. Okay. Questions, members? Very interesting.

Rep. Vickie Truitt: [inaudible - off mic]

Sen. Jane Nelson: Representative Truitt? I'm sorry, I didn't see your light.

Rep. Vickie Truitt: What does this state do to ensure that contact lens distributors are dispensing from legitimate prescriptions?

Dr. Joe DeLoach: The dispensers are regulated by the Department of Health, not by the Optometry Board. That would be something that, you know, you would have to ask them, because we have no regulation over that at all.

Sen. Jane Nelson: Good and I think, Representative, there is a person here from TDH that can clarify that at the appropriate time.

Rep. Vickie Truitt: Because, I mean, this whole issue seems to have come up, the timing, coincidence of timing of all these complaints, there's more than coincidence here.

Dr. Joe DeLoach: Oh yes there is.

Rep. Vickie Truitt: And it's clearly an interest out to promote itself for financial gain and I think part of the initiation or their issue with Texas and all these complaints, that the 1-800-Contacts people would fax requests to an optometrist's office. But they would do it after hours and they had X-number of hours to respond and it was impossible.

There was no one in the office and then, when the optometrist would come into the office, say on Monday morning and find this, well by then the time is expired. So, then 1-800-Contacts tells the customer, "You need to turn in a complaint on this guy" and that's how that ball got rolling.

Dr. Joe DeLoach: Yeah. It's not without coincidence that the whole ball got rolling after the Optometry Board won a lawsuit against 1-800s for illegally filling prescriptions, in 2001.

Rep. Vickie Truitt: Right and I know for a fact that -- in fact, there was a young man who was on the senate staff here told me, during regular session in 2003, that he says, "Don't -- before you call them, that's where I get my contacts." I said, "When's the last time you had your eyes examined?" He said, "About four years ago."

Now, did you ask that they -- did the Board ask 1-800-Contacts for some kind of documentation and how did they respond? Something to do with the lawsuit or maybe it was -- was it the FTC?

Dr. Joe DeLoach: The FTC asked for everything we had. What was it, 17 boxes full?

Chris Kloeris: 25 boxes.

Dr. Joe DeLoach: 25 boxes full of things. But that requested by the FTC.

Rep. Vickie Truitt: Okay.

Sen. Jane Nelson: All right. Other questions, members? Sunset reported that in 2002-2003, 60% of the complaints that were filed were for failure to release a contact lens prescription. Let's assume that your Board receives authorization to address complaints for failure to release contact lens prescriptions. Will the Board then perform a retroactive review of the past complaints that it was unable to investigate?

Dr. Joe DeLoach: Actually, our hands have not been tied on investigating the current law. The current law states that the doctor -- that an optometrist in Texas has to release a contact lens prescription unless there is a medical reason not to.

Sen. Jane Nelson: But 40% of the complaints weren't for failure to release.

Dr. Joe DeLoach: But those all came from 1-800-Contacts' process.

Sen. Jane Nelson: Oh my gosh. Okay. Well -- related to this issue.

Dr. Joe DeLoach: Or all the -- maybe 9 or 10 of them came related to that issue.

Sen. Jane Nelson: You dealt with the other complaints that weren't related?

Dr. Joe DeLoach: Yes we have and we have sanctioned and fined optometrists who have not complied with the law.

Sen. Jane Nelson: Uh-huh. Okay. Other questions members, other comments on other issues? Or, if you can state your name, [inaudible].

Chris Kloeris: I'm Chris Kloeris. I'm the Executive Director of the Texas Optometry Board and I just want to emphasize that the recommendation for a temporary emergence suspension of licenses, the Board does not have the authority. At least 28 other health-related professions do have that authority in their boards and it is a recommendation to Sunset staff and we really agree with that recommendation. We'd like to see that. That's all the comments I have.

Sen. Jane Nelson: Okay. Other comments, questions?

Judy Eidson: I'm just Judy Eidson. I'm the Public Member of the Board. I've been on since 1997 and I'd just like to say I think the Board's efficient and they do a good job for the consumer.

Sen. Jane Nelson: And that's unbiased [inaudible].

Judy Eidson: I know.

Sen. Jane Nelson: Thank you. Public input is always valuable.

Dr. Randall Reichle: Excuse me, I'm Dr. Randall Reichle from Houston. I've been on the Board now about six months and I would just echo Dr. DeLoach's comments. Thank you.

Sen. Jane Nelson: All right. Let me ask you, briefly, about outsourcing the administration of the Board's jurisprudence exam. What would be the added cost? Do you know or [inaudible] may know some of the [inaudible].

Dr. Joe DeLoach: Chris can probably answer that better than I can.

Chris Kloeris: We haven't explored that, because we believe that the costs are pretty small right now to give the exam. We give it in our office. Three of the four times that we do give the exam and the only time we give it outside the office -- we just got back from Houston, where we give it.

We're the only optometry school in Texas and that's a one-day trip for three staff members. We would -- because of the Sunset's recommendations we are going to look at if it would be cost effective to outsource the exam.

Sen. Jane Nelson: Okay. It'd be interesting to know how much that would cost. Let me ask you briefly about Sunset's report that the Board's use of probation - and I'm using their words here - appears to reward licensees who violate its statutes and rules. Why would the Board probate a licensee's suspension for illegally prescribing drugs? What --?

Dr. Joe DeLoach: Well, I think there may two separate issues here.

Sen. Jane Nelson: I guess your duty is to -- I mean, your duty is, and I don't guess, is to protect the citizens out here.

Dr. Joe DeLoach: Right.

Sen. Jane Nelson: Doesn't the Board's duty require you to punish those who --?

Dr. Joe DeLoach: I think there's two different issues here. One is the issue of the use of probation, which of course is a commonly used penalty and it is a penalty.

Sen. Jane Nelson: Sure.

Dr. Joe DeLoach: It doesn't mean that you didn't do anything wrong. But the application of probation is certainly a judgment based on the severity of the 'crime' (as you might call it) and fortunately within Texas we don't have to deal with a great number of bad issues among our licensees. And a lot of times when we hear, well, you know, you haven't jerked anybody's license or haven't done this or that, you know it's because we haven't had to.

Sen. Jane Nelson: Which is great.

Dr. Joe DeLoach: Which is great.

Sen. Jane Nelson: [inaudible] is more determines [inaudible].

Dr. Joe DeLoach: But there was one case that they looked at where we did issue probation, but I think there was some confusion on the second part of that issue about requiring continuing education.

Sen. Jane Nelson: Uh-huh.

Dr. Joe DeLoach: It was actually an issue where we weren't really requiring continuing education. As you know, we have three levels of licensure and what we required was that the licensee obtain the appropriate level of licensure, which does require continuing education, if they were going to practice at that level.

Sen. Jane Nelson: Uh-huh.

Dr. Joe DeLoach: So it wasn't like were rewarding them in any way. We were actually requiring them to do additional things if they were going to practice at that level.

Sen. Jane Nelson: Now, does the Board view the requirement to obtain a therapeutic license as a punitive thing or not?

Dr. Joe DeLoach: Well, no, not always. As you know, we don't issue anything but therapeutic licensure anymore. We don't issue non-therapeutic license anymore.

Sen. Jane Nelson: Let me ask you one last question and then I'm sure they may be some other questions. Or I guess maybe not a question, but the Recommendation 2.8 requires that at least two optometric members of the Board review complaints requiring professional expertise. That change would be consistent with one that we made in Senate Bill 104, the Board of Medical Examiners' bill.

I think it's very important for complaints that involve standard of care issues to have more than one person and preferably those with the appropriate expertise to review the complaint, to determine the best course of action. Are you in agreement with that recommendation?

Dr. Joe DeLoach: I can comment, I guess, or [inaudible - cross talk] --

Sen. Jane Nelson: Or anybody, jump right in here.

Dr. Joe DeLoach: Personally, I think when it's a -- and I don't know if I can really speak for the Board. I can only speak for myself on this issue.

Sen. Jane Nelson: Speak for yourself.

Dr. Joe DeLoach: On issues that are severe, related to patient care --

Sen. Jane Nelson: Yes.

Dr. Joe DeLoach: -- I would tend to agree with that premise. The only issue there is it's a logistics issue, since we only have six doctor members on the Board. If we use two during the investigation process, they are essentially recused from voting as far as the final outcome goes and we can get into a quorum issue if two of them can't vote and one of them is missing. That's the only real issue with that recommendation.

Sen. Jane Nelson: Okay.

Dr. Joe DeLoach: Is that --?

Chris Kloeris: And currently, although we only have -- we have one optometrist that covers a certain part of the state, so all the optometrists are hearing standard of care issues. We do not prohibit those doctors from discussing the cases with other Board members, so there's not a prohibition that they do not.

Sen. Jane Nelson: Uh-huh.

Chris Kloeris: And that's just the current practice.

Sen. Jane Nelson: Yeah.

Dr. Joe DeLoach: And one final comment on that. The one person that's holding the investigation process does not have final say-so.

Sen. Jane Nelson: Right.

Dr. Joe DeLoach: He only recommends to the full Board and the full Board has to make final recommendations.

Sen. Jane Nelson: Yeah. Okay. Other questions, members? Oh, we don't have a witness affirmation form from our last person. Fill it out. There's a trapdoor that will drop if we don't have that from you very soon.

Chris Kloeris: I apologize. I was only informed moments ago.

Rep. Peggy Hamric: [Inaudible] continuance [inaudible]

Sen. Jane Nelson: Oh-oh -- you're saved, by Representative Hamric.

Chris Kloeris: Thank you so much.

Sen. Jane Nelson: If you would, fill that out, please, before you leave here. Thank you. If there are no other questions, thank you all very much.

Dr. Joe DeLoach: Thank you.

Sen. Jane Nelson: The Chair calls Dr. Laurie Sorenson, Sam Johnson, David Forest, and Bruce Richardson. That's all the room we have. I see we may have some written testimony and if it's written, bring it to us. We can read. If you won't read to us I would greatly appreciate it. You'd be Dr. Sorenson?

Dr. Laurie Sorenson: Yes.

Sen. Jane Nelson: You got here first, so you get to go first.

Dr. Laurie Sorenson: Okay.

Sen. Jane Nelson: State your name and you know our time limits. I don't see our time --

Dr. Laurie Sorenson: Yeah and I don't have --

Sen. Jane Nelson: I'm a three-minute person myself.

Dr. Laurie Sorenson: Okay.

Sen. Jane Nelson: So, if you can't say it in three minutes you probably need to go for it.

Dr. Laurie Sorenson: Okay. I'm Dr. Laurie Sorenson. I'm an optometrist here in Austin. I'm also the volunteer Chairperson for the Texas Optometric Association and today I'm here representing the Association. In the audience, we also have the current TOA President, Dr. Dennis Neely, from Midland and several other doctors from around the state that a few of you know from hearing attendance today.

The staff report had three recommendations, basically, and we'll comment real briefly on the three recommendations. The first one was that Texas law conformed more closely with the new federal contact lens release problem. To me, this change doesn't seem absolutely necessary, because the federal government, particularly the FTC, will be in charge of enforcing it. But as an association, we really don't have problems with the state playing a role in enforcing it also, so we don't have any real issues with it.

The second recommendation concerning licensing and regulatory changes all seem to make sense to us, on the surface, when we look at it. But the Optometry Board is really the one that's going to have input on that to you guys, so we don't have a whole lot of comments on that either.

The third recommendation concerns continuation of the Board, possibly with some type of consolidation with the other agencies, with some other agencies. This recommendation, of course, as I'm sure you would expect it, concerns us somewhat primarily because of the vagueness of the recommendation and we'd like to have input as it goes along.

And we have concerns regarding anything that puts the licensing and regulatory functions of the Optometry Board under any other agency, particularly an agency that's dominated by the medical profession. We understand the desire to save the state money by consolidating administrative functions and we'd like to work with the Commission and try to come up with ideas and talk to the other states and come up with some ideas to save the state money.

But we need to make sure that whatever structure is recommended, that it has no chance of having policy matters affecting optometry determined or influenced by the people that are, in essence, our competitors, the medical profession.

So, on the whole, we don't have any major objections to the report and we have a lot of praise for the thoroughness of the report. It was interesting to meet with them and read the report. They really do understand our profession and some of our issues. I was like, wow, these guys know their

stuff and so I was really surprised with that and impressed. They really did a good job.

So, if you guys have any more questions, I'll be happy to answer them. Was that two minutes?

Sen. Jane Nelson: You are good. Just two minutes.

Chair Burt Solomons: Thank you. Yeah. That was good. Any questions?

Sen. Jane Nelson: Well, I've got more of a comment than a question, but I would very much urge you, if you feel like it's being too vague, to get some clarification language in with the recommendation before whatever the cutoff date the Chairman announces would be.

Chair Burt Solomons: [inaudible]

Sen. Jane Nelson: And it's so nice to hear how smart our staff is, because they really are.

Dr. Laurie Sorenson: Well, they do a good job.

Sen. Jane Nelson: They do.

Chair Burt Solomons: Thanks. Who else wants to go?

Sam Johnson: My name is Sam Johnson.

Sen. Jane Nelson: Okay.

Sam Johnson: I'm a registered optician. In Texas there's both registered and non-registered opticians.

Sen. Jane Nelson: Uh-huh.

Sam Johnson: As a registered optician, I serve the public under the Texas Department of Health.

I'm here to state that the Optometry Board enforcement division has, unfortunately, been used by optometrists to eliminate competition. I refer to the Optometry Board's Self-Evaluation Report, which most of you probably already have that. Basically a question is asked: do they feel that the enabling law correctly reflects the agency's mission, key functions, and powers and duties.

Their answer is yes, in general, but however, additional authority to regulate and discipline those practicing optometry without a license would be beneficial. We see that as a real problem, giving the Optometry Board more power. The fact is the enforcement division has been used as a tool by neighborhood optometrists when there's a registered optician across the street or nearby who is practicing opticianry, in an obvious effort to push us out of business and the industry in general.

Even their literature talks about there only being two O's and that when you look at when they list the professions out there, they don't even mention registered opticians when they teach it in their schooling. They just talk about opticianry in general. They don't talk about registered opticians separate from non-registered.

With the history of the Board harassing opticians, I am very concerned that additional powers not be given to them. If you look at Issue 3, which Dr. Sorenson brought up, it states there that all 50 states regulate optometrists, but generally within an umbrella-licensing agency. And the conclusion that I see here is that they feel that it needs to be on the table that their possibility of consolidation or reorganization of the state's health licensing agencies and that optometry should be included in that.

If that cannot be possible, then I ask that there would be -- that if there should be any complaints against registered opticians at any time, that those complaints should be channeled through the Optician's Registry, which is a division of the Texas Department of Health, in the future.

This would eliminate our competitors in the marketplace from being allowed to directly regulate our profession through the Optometry Board. Optometrists using the Optometry Board's Enforcement Division should no more be allowed to regulate registered opticians than registered opticians should be allowed to regulate optometrists.

And I would say that -- they said there was only one complaint, what you were bringing up earlier and I really hadn't planned on talking about this, but I heard that over and over, from their Board Chairman. I'd just like to say that I've been in this business since 1970 and I work

mostly through physician's offices. That's basically where I get most of my referrals to take care of patients' needs and contact lenses and eyewear.

I hear them every day. It's kind of funny to me that they only hear them from one company, because there are a lot of complaints out there. The public has been taken advantage of by optometry trying to protect their turf and keep money within their own pockets. You can protect the public, but you don't have to do it in such way that it has to be always about the money and that's really what it needs to come down to.

Chair Burt Solomons: Any questions, members? Boy, Mr. Shields has just been so quiet.

John Shields: Reserved.

Chair Burt Solomons: Reserved. Okay. Thank you for your testimony. If you could --

David Forest: First of all, I want you to know I'm not 1-800-ContactLens up here. I'm not anti-optometry or anti anyone.

Chair Burt Solomons: What's your name?

David Forest: My name is David Forest.

Chair Burt Solomons: Okay.

David Forest: I'm an old man from Pasadena, Texas. I've been practicing opticianry. I've been in private practice for 32 years in my office. I have been harassed by the Optometry Board for 32 years. There are a lot of things you people need to know that you don't know.

Chair Burt Solomons: Okay.

David Forest: Optometry -- there are more and more optometrists now going to work for chains. They do not like the work "competition". They don't like that word. They do not like opticianry, because we are competition. We manufacture eyeglasses and we sell them. We also sell and fit contact lenses.

When I opened my office in 1972, we started being harassed

by the Optometry Board. It would take me a month to sit here and go through all of the things that happened to me. We don't have a month. I'm going to move forward to the early 1990's. I had 10 stores. I was doing a lot of business. Not a little bit, in the millions. Optometry didn't like that, because I was up and coming. I was a small chain fixing to be a large one. They didn't like that. What did they do?

I used to work for a man by the name of Clinton DeWolf. Dr. DeWolf is an optometrist, was the former Chairman of the Board of Optometry. When he got involved in the Optometry Board, he sent out letters to the optometrists that were all working for Dr. W.H. Smith, M.D. He took care of all the optometrists, hired them, and fired them. I didn't have anything to do with that. He sent a letter threatening to take their license if they did not cease working and having a relationship with Dr. Smith M.D. As a result, I closed 9 stores. I lost millions. I had no recourse.

The optometrists in Texas have put most opticians out of business. They're gone because of the harassment. If you give this Board more authority there won't be an optician left in this state. It'll all be controlled by optometry, just like the big oil companies. And you think you're not going to pay a lot for your gasoline? You're going to pay a lot for your glasses, because you're eliminating your competition.

I have here -- you all got my packets that I gave you. Would you please pick up the one that says "Texas Optometry Board", dated May 1996 and look at it? And it has my name on it, where the Board had sent me -- it should have my name here, where they had sent that to me.

Let's go over some of this stuff - this is why the federal government and why they had to pass laws pertaining to release of prescriptions.

They're saying you cannot fax a prescription. You cannot do it by telephone. You have to have an original prescription, which means that if you have an eye exam and you bring me the prescription, I have to keep that. But if I give you a copy of that prescription and you have a problem in another city, that prescription is not valid. It's just a copy. You cannot get a pair of eyeglasses with

that. Okay?

They passed a law pertaining to release of contact lens prescriptions. In Texas, you could hardly get any of the optometrists -- we never had a problem with physicians, but with optometry we had nothing but problems trying to get a prescription. They just didn't want to release them and they'd always want to recheck the patient, to re-sign the prescription, charge an extra fee. Consumers paid more money.

There was an optometrist, supposedly one that complained to the Optometry Board. I got a call from a Mr. Young, who is an investigator, in 2003 and I explained to Mr. Young that I worked in a physician's office, which is perfectly legal for me to do refractions directly in his office. He agreed. He said have your physician send me a letter, problem solved.

The problem, like always, was not solved. We had our physician send a letter to the Optometry Board and then he sent me back this letter.

It says, "This letter is to advise you that we have received Dr. Mundocinos's [ph] letter verifying that you work under his supervision. Since you are working for him, there appears to be no violation of the Texas Optometry Act. The Investigation Enforcement Committee has not yet had the opportunity to review this case. Should the Committee disagree with the staff's determination you will be notified after they meet in April."

In other words, the Optometry Enforcement Committee is going to decide whether this M.D. can allow me to work in his office. They're not only trying to regulate opticianry, sir. They're trying to regulate physicians as well. They want to be the only provider for optical goods in the State of Texas.

Chair Burt Solomons: Okay [inaudible] testimony.

David Forest: I thank you.

Chair Burt Solomons: Your testimony is well taken. Any questions members, Ms. Truitt, Representative Truitt?

Rep. Vickie Truitt: This [came] out, dated May 1996, from

the Texas Optometry Board, talking about requiring original prescriptions, what's the issue with the original prescription?

David Forest: Well, for years opticians worked with physicians and they're constantly calling us and they're telling us -- we're not talking about optometrists. We're talking about physicians now. They come under the Texas State Medical Board of Examiners, not the Optometry Board -- not at all. They're not supposed to be regulating physicians, but they're trying to.

Rep. Vickie Truitt: Well, my question relates to the original prescription.

David Forest: Okay.

Rep. Vickie Truitt: Versus a copy. If I was a pharmacist and somebody walked in with a copy of a prescription and asked me to fill it, I'd be a little suspect. Why shouldn't they be suspect about --?

David Forest: Because a pharmacist can call that physician. The physician will okay that prescription or he will say no. Most prescriptions are done over the telephone, not by writing. If you have a prescription -- you have diabetes and you're taking Actose and you're out of prescriptions and you need the medicine for your diabetes, what happens? Your pharmacist calls the physician. He okays it on the phone, problem solved.

Rep. Vickie Truitt: And under current law, optometrists can't call prescriptions to the dispenser?

David Forest: Well, that has been -- I think optometrists now, with this new prescription law -- see, what happened all these years optometrists were just holding the prescriptions. They didn't want to release them, period. You couldn't get any. I couldn't get anything in Pasadena.

Rep. Vickie Truitt: But the law changed.

David Forest: Yeah. But what happened was, in '97, I believe it was the first time they passed that prescription release law pertaining to contact lenses, and then FTC came in and did an investigation and said, well, gee, these optometrists are not compliant. They're not releasing

prescriptions. So what happened? Congress passed a law. They passed a federal law.

Rep. Vickie Truitt: [inaudible]

David Forest: Yes they did.

Rep. Vickie Truitt: The law in Texas requires them to release the prescriptions. That's the law.

David Forest: That is the law. They're supposed to do that.

Rep. Vickie Truitt: Well what's your issue?

David Forest: My issue is this. If you break your lens - you're wearing eyeglasses - and you live here in Austin and you happen to be in Pasadena or you lose your glasses, your vision is bad, you need a pair of glasses to get back home. You just had your eyes checked. You don't need to pay for another eye exam. I should be able to call your physician, which I can do. I can --

Rep. Vickie Truitt: So you're telling me that you can't -- that an optometrist can't give a prescription over the telephone to a dispenser?

David Forest: Well, he should be able to verify a prescription, yes. He should be able to do that. If you have a current prescription for eyeglasses, whether the optometrist or physician, you're entitled to get a copy and I should be able to fill from a copy, not just from an original. And what they were saying is that every time you break a lens, every time you scratch your lens, you have to go back and get an original signed by a doctor.

Rep. Vickie Truitt: Thank you.

David Forest: Every time it has to be re-signed by a physician, even if it was a week old. You had to go back to him and have him re-sign a new prescription and if I fill the prescription, you give it to me, I have to keep the original, because that's to protect me. The Optometry Board's going to come after me.

Well, I give you copy, which is legal, but that copy is worthless to you as a consumer. You cannot fill it.

You've got to go back to your doctor and in the past, the optometrists were charging. They were charging before this law came in effect. They can't charge for a copy now. The law plainly says they cannot charge. They were charging.

When I went down there in the Houston area, almost every optometrist would say, *"Well you want me to re-sign it? It's only been three months, four months or six months. Come on back. We have to recheck you. For me to sign this I have to be sure it's right."* La-de-da-de, there would be an exam fee of some kind, give them a prescription.

It was a total circuit, closed circuit, which affects the consumer. The consumer is really the one that's losing.

Rep. Vickie Truitt: Thank you.

Chair Burt Solomons: Thank you, Mr. Forest. I think you've made your point. As to a consumer, this is a balancing issue with consumers and the Board and the profession itself.

David Forest: I understand.

Chair Burt Solomons: And I think I do understand your concern. Next?

Bruce Richardson: Bruce Richardson.

Chair Burt Solomons: Want to get that microphone in front of you, Mr. Richardson?

Bruce Richardson: I'm sorry. Thank you, sir, my name is Bruce Richardson. I'm the Executive Director of the Registered Opticians Association of Texas. We have some concerns about the idea of the Texas Optometry Board being given additional authority to regulate people who are not optometrists.

Well that's us, in some cases. As Mr. Johnson said, there are registered opticians. We are regulated. We have the Opticians Registry Act, which is administered by the Texas Department of Health. One of the concerns really dates back and this involved me. I was the President of the Contact Lens Society of Texas in the 1980's and I noticed, in one of the Texas Optometric Association publications, that they were talking about the next legislature and some

issues.

One of the issues had to do with duplication of eyewear without a prescription. That's if you break your glasses. Actually, right now, you can take the pieces and someone can measure them and make glasses. It's not an ideal way to do it. Being able to do it by telephone would be the best way to do it, but there are times when that is a good thing to be able to do. And fortunately, one of the good state representatives was able to intervene and consumers in Texas are still able to get duplications under those circumstances.

The other issue was the fitting of contact lenses by unlicensed persons. Well, opticians in Texas, at that time, were not licensed and the Optician's Registry, depending on who you talk to, is a sort of licensure. It's not. It's certification and registration, but we have definition of scope of practice and all that in the Act. So, it looks a lot like a licensing act. We don't have anything that's mandatory about it. But we do have competency standard and all built into it.

Well, about the same time, the Texas Optometry Board started doing some investigations, some random investigations, supposedly, but it was very interesting timing. Well, the investigations were very aggressive. What was happening was an optician who normally fills or fits contact lenses, when it's delegated by a physician, would get normally a refraction from a physician and it would have some instructions: fit contact lenses. It would be directed to you and signed by the physician and then we can fit lenses. We've been doing it, well, since contact lenses started.

But what the Optometry Board was doing was sending investigators and in one case it was a third-year optometry student, with a prescription written exactly like an ophthalmologist would write it. "Okay to fit contact lenses" and all and then they'd take that to the optician and he would look at it and it would look just like a thousand other prescriptions he had filled. And so he would fit contact lenses and then the Optometry Board would charge him with practicing optometry without a license and seek an injunction.

Well, we got really interested in that and we filed a cross

action on one of the cases and we're involved in a second case. Fortunately, the judge kind of saw things our way. He pointed out to the Optometry Board that, wait a minute, that's an illegally written prescription and did not grant the injunction and we had dismissal with prejudice where we did win in that case.

Our concern is something else has happened later and I don't remember when it happened but we had the two associations that were then represented on the Board and that seemed to settle things down. It wasn't just the Texas Optometric Association using the Texas Optometry Board. We had two associations and then we had consumers and so that really did help a lot.

Last session, though, we didn't do that anymore. The Texas Optometric Association is now in the position of dominating the Optometry Board again, which causes us some concern. What I would like to see -- I don't know whether this is the place to do it. But I think we need some language in the Optometry Act that makes it very clear that if a registered optician is accused of something - practicing optometry without a license or whatever - that should go to the Texas Optician's Registry and not the Texas Optometry Board. And the Department of Health can deal with that.

I have the same concern that Dr. Sorenson has about being regulated by our competitors. Are there any questions? I'd be happy to --

Chair Burt Solomons: I think that's a prevalent concern that most of the healthcare groups and other groups are concerned about, when they compete. And you know you kind of want it not to be, but it really is and it's our responsibility to try to figure out a way to make sure it's balanced and the language is so that it protects everybody being able to do their job. It's really more difficult than it looks.

Bruce Richardson: No registered optician wants illegal activities to occur.

Chair Burt Solomons: Well, there's just -- everybody seems to have a turf issue and it's everybody that's all about money, turf, clients, consumers, you know. I mean, we hear the same terminology all the time. It's just hard sometimes for us to put it -- we're not in your business

and we're not in some of the other businesses and it's hard, sometimes, to put it all in perspective and make the right decisions sometimes. We're trying, but sometimes it's hard.

Anybody have any questions? Thank you, doctor, appreciate it. Okay, we have -- I think the Chair is going to call Sam Tempa, A.R. Schwartz, and Sam Stone. We're actually making pretty good time and that's because everybody has kind of stuck to trying to a minimum table to try to present highlights of what concerns them. So, I don't care what order you go in. Just state your name for the record and you have five minutes.

Sam Tempa: My name is Sam Tempa and I'm a registered optician.

Chair Burt Solomons: Okay.

Sam Tempa: I've been an optician for 45 years. There are three generations in my family and I've done all of the things that opticians do over the years.

I was interested to note that the Optometry Board Chairman alluded to our history past. It's true that our history with the Optometry Board has been one of contention over the years and it seems that we got some relief for that when the two optometry groups were required to come together on the Board. The TOA and TAO both have representatives on the Board and they kind of worked out their issues themselves and that gave us a great deal of relief.

Now that's not the situation any longer and now we're concerned that the Optometry Board, once again, is just going to become an extension of the TOA and we've experienced that and it was not happy years for any of us. And what I'm concerned about is what the Optometry Board can manage to accomplish in concert with the legislature.

Through all history it seems like the legislature, every session asks the same question: who knows the most about hens and well, let's think. The fox knows the most about hens. Let's put the fox in charge of the hen house and that seem to be our point of view. Every legislative session gives the Optometry Board more power and more power.

When I first began, years ago as a young man, my job was to teach ophthalmologists to fit contact lenses. I would go to the ophthalmologist's office. I would fit several cases while they observed. Then I would observe them fitting several cases and then, if they needed help, they would call on me to help them with their problem patients.

Now, through rules and laws, things have completely turned around over the years so now I'm not even qualified to touch an optometrist's prescription. And all of that's done just by passing rules, passing a law here and there, and finally they've weeded their competition, you know, off to the side.

One of the ways they've done this is create a situation where an optometrist's prescription is totally different from a prescription written by an ophthalmologist. An ophthalmologist writes a prescription for eyewear, contact lenses, whatever, and sends it to an optician and an optician does what an optician does. He makes the glasses. He fits the contact lenses.

If there's a problem, the optician speaks to the doctor and the doctor says, *"You can fix that problem, can't you?"* *"Yes we can."* *"Well, fix it and get the patient happy and make them comfortable. Do what you need to do."*

Now, an optometrist's prescription has now become the Holy Grail. It is something entirely different, that opticians are to be aware of, keep their hands off of, watch closely. Don't handle and optometrist's prescription. It's been an excellent tool for them to, over the years -- now not recently, I'll admit, but over the years when the TOA had total control of the Optometry Board, it was an excellent tool for them to use to harass opticians, saying, *"Well you filled my prescription. You're practicing optometry. That's no good."*

Oh and speaking of prescriptions and there's been a lot of talk about release of prescriptions here, and new federal rulings saying you have to release prescriptions. Personally, I don't think there's enforce power in the whole legislature to cause optometry to release their prescriptions. It's just not going to happen.

Are any of you familiar with the term called "the hand

off"? Okay. Well, recently, I spent the last couple of years --

Chair Burt Solomons: If you could describe it fairly quickly that would --

Sam Tempa: Yeah, I can do that. I can do that. I spent the last couple of years working in an optometrist's office and I think it was Dr. Sorenson that came to us to teach us the rules about HIPAA.

Chair Burt Solomons: Yeah. All right.

Sam Tempa: She kept referring to "before the hand off" you have to do this or "during the hand off" or "after the hand off" you have to do this.

The hand off is when the optometrist comes out of the office with a patient, with a chart, walks the patient into the optician's or into the optical shop - whatever arrangement they have - and sits the patient down and hands the chart to the optician and tells the optician what the patient needs and the optician gleans the prescription out of the chart.

Then, when the optician's through, he takes the patient and walks him to the pay out window and hands the chart to another assistant and the patient does not get a prescription. They do not see a prescription. There's not a prescription written. If the patient wants a copy of the prescription, the rule was the optician should do everything in his power to keep the patient in the office, making sure they understood that we can do anything, that we can meet or beat anybody's price.

If the optician failed at that, then the customer had to go to the store manager and if the store manager still failed, then the customer was told, "You can get your prescription, but it'll have to be signed by the doctor so you can't have it today".

Chair Burt Solomons: Yeah. It kind of sounds like the car business. Go ahead.

Sam Tempa: Yeah, pretty much like the car business. Yes. So, I don't know about this prescription release rule. You have to understand that he who controls the prescription

controls the marketplace. It's as simple as that. If you can control the prescription, you control the market.

We have total fear that the Optometry Board will become some autonomous and so powerful. I think it's probably already the most powerful board in Austin and --

Participant: No.

Chair Burt Solomons: No.

Sam Tempa: No?

Chair Burt Solomons: No. Well, it's trying to move up the ladder, but it's not there yet.

Sam Tempa: Well trust me. From our point of view it certainly is. They've had their heel in our throat for so many years that's the way we see them.

Chair Burt Solomons: Okay. So your concern is --

Sam Tempa: More power.

Chair Burt Solomons: -- that they'll have too much power, regulating, and that the vision that currently exists is going to weaken even further?

Sam Tempa: I think that they need oversight.

Now, they say that, you know, in their response to you, to your question, they say almost all optometry boards have an independent board of licensees. Actually, 33 states place regulation of optometry under an umbrella agency.

So, the question that you asked them, does the agency enable them, or all correctly reflect the agency's mission, key functions, powers, and duties -- and once again, they said yes, however give us more power.

Chair Burt Solomons: Well that's what it's all about.

Sam Tempa: That's what it's all about and we're here to say that we're scared to death you're going to give them more power.

Chair Burt Solomons: Well, I appreciate your testimony.

Sam Stone: Mr. Chairman, my name is Sam Stone. I'm an attorney here in Austin with the firm of Brown McCarroll and I'm legal counsel for the Texas Ophthalmological Association. I've had -- my testimony is written out and I'll just summarize it. It's passed out to you, I think, and we will supplement this testimony with some additional comments --

Chair Burt Solomons: I hope you do.

Sam Stone: -- with regard to what I think you could call "scope creep" that you have been concerned with for the last two meetings, where agencies tend to broaden the authority or the scope of practice by rule-making and by interpretation rather than by legislative action. And we're concerned about that, too.

But today I'd like to address two specific recommendations to the Commission and they both involve the 1999 co-management of glaucoma legislation between ophthalmologists and optometrists.

That 1999 legislation first established an advisory committee called the Optometric Healthcare Advisory Committee, made up of two board-certified ophthalmologists, two therapeutic optometrists, and two pharmacologists. And that committee establishes recommendations, which become rules when passed by the Medical Board and the Optometry Board to delineate the education requirements for the optometric glaucoma specialist who, under the legislation, co-manages cases with an ophthalmologist.

The second recommendation is that we, the Texas Ophthalmological Association, strongly believe that the Board should be required to maintain a registry of those optometric glaucoma specialists and ophthalmologists who are co-managing a patient. Because right now there's no -- it's almost impossible to get any information from the Board.

They don't maintain such a registry and in 1999, of course the argument for the legislation was that it was needed in order to provide access to patients in geographic areas where there weren't really ophthalmologists or ophthalmology clinics. In fact, there are ophthalmology clinics within 45 minutes or 30 minutes of almost any town,

no matter the size, in the State of Texas.

Nevertheless, in the rule-making process, we requested that there be some sort of face-to-face meeting between a patient and an ophthalmologist before the ophthalmologist and the optometrist got together and decided what the course of action ought to be. Because that's what the statute called for.

That rule did not make it to the rules and nor did the requirement that a patient file be maintained by both the ophthalmologist and the optometrist. We think that's important also, in order to better track whether or not there really is an access problem and whether the statutes meet the access problem.

Among the rules adopted, however, is one that requires a clinical skills evaluation of the optometrist by an ophthalmologist and the ophthalmologist must directly observe and then confirm in writing that he or she has seen the optometrist perform five essential skills and that they've done it adequately. This check-off seem to be, flawed as it may be, the only way of deciding whether or not the law has been effective and the check-off statistics and data themselves are concerning.

In late 2001, well almost the first of 2002, there were 807 optometrists from 205 individual cities, of which 190 were in Texas and 15 out of state, who had been issued certification. Only 48 small towns outside of the major metropolitan areas had a glaucoma specialist and did not have a practicing ophthalmologist nearby. So, you can debate whether the access situation was really a problem or whether it's been really helped.

But I'd like to point out that that check-off situation raises some alarming figures. Twenty-five percent (25%) of 202 of the optometric glaucoma specialists were approved and checked off skills by six ophthalmologists in the State of Texas. One ophthalmologist approved the skills of 81 optometrists, saying that he had watched them do these things with a patient and seen that it was properly done. Two approved 28 optometrists, one approved 26 optometrists, one approved 22, and one approved 17.

So that number raises a lot of questions as to whether this law that the legislature passed is being implemented

properly.

Participant: [Inaudible - off mic]

Sam Stone: Yes sir? Yes?

Chair Burt Solomons: I got to get my light on.
Representative Truitt has a question.

Rep. Vickie Truitt: Did the ophthalmological association raise issue or concerns during the comment period before the rules were enacted?

Sam Stone: Yes and we also sent a letter, which is attached to the packet, to the Board of Medical Examiners with these same statistics, asking them if they'd look into this, because we don't know whether those ophthalmologists were members of our association or not. But whether they are or not, it doesn't make any difference if they're evading or not following the spirit and the letter of the law and they're clearly not.

As a matter of fact, there are ophthalmologists who have certified optometrists from El Paso certifying them in Houston and vice versa. There are ophthalmologists from San Angelo, McAllen, Cleburne, all around the State, saying we will certify that these optometrists are good in their field and that ophthalmologist lives in Houston.

So, the co-management, we don't know for sure, because they don't maintain this registry like we're suggesting the legislature impose on them. But we're thinking that the co-management is not being properly adhered to and the people of Texas may be suffering because glaucoma, as this Commission knows, is an insidious disease. It's the greatest cause of blindness and it doesn't happen overnight. It doesn't happen in one year's time. This has got to be a disease that is properly managed over the long haul.

Rep. Vickie Truitt: I appreciate your elaboration. A yes or no would have worked.

Sam Stone: Sorry.

Chair Burt Solomons: Thank you, Representative Truitt.
Thank you. Senator Schwartz?

Sen. A.R. Schwartz: Mr. Chairman and members. Thank you very much for the opportunity. I'm going to take just one minute. I just wanted to take my place at the table in the Sunset Commission. My association is the Texas Association of Retail Optical Companies. My association is an association of companies such as Eye Masters in San Antonio, Lens Crafters, Pearl Vision in Dallas, Cole Vision all over the nation.

Chair Burt Solomons: All right.

Sen. A.R. Schwartz: They are the largest of the companies, which lease and franchise to these optometrists and people in the eyewear business. Our interest is and has always been in the Optometry Board, that our business is not unnecessarily interfered with by laws that are basically protective laws. Nor do we seek any laws to interfere with the professional aspect optometry.

So, we just wanted to let you know we're here. Reggie Vasher [ph] and I represent the Association. We are at your leisure any time you need us to explain any aspect of this business side of this profession. Why, we'd be perfectly happy to do that. Thank you very much and I think I've got under a minute.

Chair Burt Solomons: You did well. Senator, you've been here. You know the process. Any members have any questions? Senator, does each one of those stores have a registered optician?

Sen. A.R. Schwartz: They are optometrists and opticians with a wall separating the stores in instances where there is an optician and an optometrist working out of the same facility. But the law requires a wall separating the two offices.

Chair Burt Solomons: Okay, well -- okay.

Sen. A.R. Schwartz: That's one of the vestiges -- and this is my personal comment. That's one of the vestiges of history, which was designed to limit the opportunity of retail chains to lease their space or to franchise into what might be a merged operation.

Chair Burt Solomons: Okay. I appreciate it. Thank you.

Sen. A.R. Schwartz: Uh-huh.

Chair Burt Solomons: Any members? Thank you, Senator, I appreciate it.

Sen. A.R. Schwartz: Thank you.

Chair Burt Solomons: Thank you, gentlemen. We have some resource witnesses. Let's see who else. Anybody wanting to -- let's see.

Participant: [Inaudible - off mic]

Chair Burt Solomons: Okay. Let's see. We have some resource witnesses listed: Dennis Neely, John Todd Cornett, Dr. Deborah Burnet, B.J. Avery, Mark Hansen [ph], and Phil Stiles [ph] and Stephen Mills. They are resource witnesses in case anyone has a resource question. Does anybody have any questions? Oh is that a - Ms. Truitt?

Rep. Vickie Truitt: There's the TDH representative still.

Chair Burt Solomons: TDH? Stephen Mills?

Rep. Vickie Truitt: Uh-huh.

Chair Burt Solomons: Is Mr. Mills still here? Come on up and I think Representative Truitt has a question for you.

Rep. Vickie Truitt: Does he have to identify himself?

Chair Burt Solomons: Oh. Go ahead and identify yourself.

Stephen Mills: My name is Steven Mills and I'm with the Texas Department of Health.

Rep. Vickie Truitt: Thank you, Stephen. What does the State do to ensure that contact lens distributors are dispensing from legitimate prescriptions?

Stephen Mills: The Contact Lens Prescription Act requires that these businesses and individuals hold a permit. There are no educational qualifications to get the permit. We accept complaints filed by consumers, optometrists, any organizations --

Rep. Vickie Truitt: I'm sorry, I can't hear you. Could you speak a little louder.

Chair Burt Solomons: You'll have to speak up, please.

Stephen Mills: We accept complaints filed by consumers, optometrists, any organizations, and we investigate those complaints.

Rep. Vickie Truitt: Okay. So, if a prescription is valid for a year, but a consumer is getting their prescription refilled through an organization by mail and they haven't gotten their prescription renewed in a matter of years, do you think that customer is going to complain about that?

Stephen Mills: Typically we don't get complaints from the customers. We usually get complaints from the optometrists or the ophthalmologists if they learn about it.

Rep. Vickie Truitt: So there essentially is no enforcement of that?

Stephen Mills: We don't have that specific authority granted to us through the Contact Lens Prescription Act.

Rep. Vickie Truitt: I'm just wondering is there a way. What should we do to make sure that the law is followed?

Stephen Mills: We had hoped that the new federal law would assist in that. As you're aware, there's a long history of these issues.

The verification, which is actually passive verification as its written in the federal law, the dispenser faxes or calls or in some way communicates with the prescriber. The prescriber has, under the law, under the federal law, eight working hours or a time period as determined by the FTC, to respond to inform the dispenser whether or not that prescription is valid.

The passive part comes in where if they do not receive that response within a certain period of time, then they presume that the prescription is valid and the lenses are dispensed.

Rep. Vickie Truitt: So it would conceivably be pretty easy to dispense lenses without a prescription?

Stephen Mills: Conceivably, yes.

Rep. Vickie Truitt: And what if the request was sent to the wrong provider? What if the provider wasn't -- for that patient -- the patient request was sent to the wrong provider and they weren't a patient of that provider?

Stephen Mills: Presumably that prescriber would immediately communicate back with the dispenser and say, "*This is not my patient*". I think that there's a question as to why would a person choose to obtain contact lenses, give a false provider and give a false power, where that they would obtain a lens that wouldn't enable them to see.

We haven't really seen those kinds of issues come up. Typically what we hear from consumers is kind of the same thing that was discussed earlier, "*I haven't been able to get my prescription*" or "*There was some resistance in getting my prescription*".

Rep. Vickie Truitt: Can damage be done to an unknowing public by not having a legitimate prescription? If, say, a prolonged period of time without an examination or not wearing the lenses as they're directed to by the provider, you know, wearing them overnight when you're not supposed to or wearing a week. If it's a disposable lens that's good for a week and you wear it for a month is there damage that can be done to a person's eye and would they know that it was happening?

Stephen Mills: I'm not an optometric expert and I'm not trained in the field.

Rep. Vickie Truitt: Oh, okay. All right.

Stephen Mills: I can tell you what I know based on what optometrists and ophthalmologists have said on our Optician's Registry Advisory Committee, have informed us and that we've incorporated into our public information. But I'm probably not the best person to address that question.

Rep. Vickie Truitt: Okay. All right. Thank you.

Chair Burt Solomons: Okay, Ms. Truitt, anybody? Well, nobody on this side. Anybody over here want to do

anything? Okay. Thank you.

Stephen Mills: Thank you.

Chair Burt Solomons: Is John Cornett still here?

Participant: He just left.

Chair Burt Solomons: He just left. Well, he didn't sign his Affirmation and that's a real big no-no, so I can't sign that he was really here for a resource witness. Strike him from the record. I don't think there's anybody else registered to testify, so there'll be no other witnesses registered.

Public testimony on the Texas Optometry Board is closed. The comment period will remain open through May 28, 2004 for submission of additional written testimony. I encourage you to do so, if you have any comment. That's about a week from Friday, I think.