



Texas Association of Acupuncture and Oriental Medicine
321 W. Ben White Blvd., Suite 204B - Austin, TX 78704
Tel. (512)707-8330 Fax. (512)707-8332
taaom.org

Paula Gilbert – Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe St.
Ste. 3-825
Austin, TX 78701

11/08/2016

Dear Ms. Gilbert:

The Texas Board of Chiropractic Examiners (hereafter “the Board”) has relied exclusively on the analysis of Attorney General Opinion DM-471(1998) as a legal basis to allow its chiropractic licensees to practice acupuncture without meeting the requirements set out for the practice of acupuncture in Chapter 205 of the Occupations Code.

Based on the insertion of two words into the Acupuncture Chapter of the Occupations Code, “nonsurgical” and “nonincisive”, DM-471 reasoned that by reading the Chiropractic Chapter and Acupuncture Chapter of the Occupations Code together (“in pari materia”), acupuncture could be construed as within the scope of the practice of chiropractic.

This foundational premise was recently invalidated in an opinion issued by the Third Court of Appeals when the court affirmatively rejected “in pari materia” as a legitimate interpretation of statutory construction as pertains to the Chiropractic and Acupuncture Chapters of the Occupations Code. (NO. 03-15-00262-CV, Opinion issued 8/18/2016)

With the reasoning of DM-471 no longer applicable as the legal foundation for rules previously adopted by the Board, the Texas Association of Acupuncture and Oriental Medicine (hereafter “TAAOM”) hereby petitions the Board to initiate a formal rulemaking proceeding to consider any and all revisions necessary to appropriately conform Chiropractic Board rules with this recent Third Court of Appeals finding, and to engage in substantive stakeholder discussions under Chiropractic Chapter Sec. 201.1526 regarding rulemaking authority issues raised by the recent Third Court of Appeals decision.

TAAOM recognizes that the Court's decision in the above mentioned summary judgment case did not, as a matter of law, invalidate specific rules adopted by the Board authorizing its licensees to practice acupuncture. We recognize also that the Third Court remanded to District Court some of the questions raised in this case, because it determined the analysis required an evidentiary review and could not be decided as a matter of law in a summary judgment case.

However, the Third Court's finding invalidating DM-471 as legal guidance effectively voids the foundational argument for rulemaking authority the Board has presumed it had, and that it has used to adopt rules authorizing its chiropractic licensees to practice acupuncture. Any rulemaking activity undertaken by the Board while asserting and acting under this presumed authority from Chapter 205, now found to be unlawful, is necessarily undermined, and all relevant TBCE rules should be revised to conform with this finding regarding DM-471 and with the statutory authority granted to the Board in Chapter 201 of the Occupations Code.

We urge the Board to consider and recognize the benefits and cost efficiencies to be gained from engaging proactively to address these issues as a matter of rulemaking policy. We are hopeful that efforts by the Board to engage stakeholders in meaningful and substantive discussions envisioned in Sec. 201.1526 of Chapter 201 will generate appropriate rule revisions, avoid the expense of additional litigation that Texas taxpayers will be required to pay to defend, and preclude the need for and costs associated with possible enforcement proceedings directed by the requirements and limitations set out for the practice of acupuncture in Chapter 205.

TAAOM respectfully submits this formal rulemaking petition in writing, pursuant to the rulemaking petition rules adopted by the Board. We urge the Board to recognize the rulemaking implications of the Court's finding regarding DM-471, and to work with acupuncture stakeholders to discuss, evaluate, and implement all rule revisions identified through the stakeholder process as necessary to ensure that all rules adopted by the Board conform with authority granted to the Board in Occupations Code Chapter 201.

Sincerely,



Wally Doggett
President, TAAOM

Petition for Adoption of Rules

(1) Name and contact information of the petitioning party and his or her interest in the adoption of the rule;

Wally Doggett, L.Ac.

President of the Texas Association of Acupuncture & Oriental Medicine (TAAOM)

321 W. Ben White Blvd., STE 204B

Austin, TX 78704

Tel. 512-707-8330

Email: info@taaom.org

TAAOM petitions the Board to respond and address the rulemaking implications of the invalidation of DM-471 by the Third Court of Appeals by initiating a formal proceeding to review relevant TBCE rules authorizing acupuncture as within the practice authority of chiropractic. TAAOM remains concerned that TBCE rules allow chiropractic licensees to circumvent statutory requirements for the practice of acupuncture in Chapter 205, undermine the integrity of the practice and the efficacy of the treatment of acupuncture, mislead patients about the credentials of the chiropractic licensees to provide acupuncture, and undermine provisions of law intended to protect the health, safety and welfare of the consuming public seeking acupuncture treatments.

(2) Statement of the legal authority and jurisdiction under which the petition is filed;

The Board has previously utilized implied authority from DM-471 as a mechanism to allow it to reference the Acupuncture Act (Sec. 205.001) as granting it statutory authority for various rulemakings it has undertaken.

The Third Court of Appeals decision clarifies that the AG Opinion DM-471 erred in its reading of statutory construction, and that the Board has inappropriately assumed authority not granted to it by the Legislature because it is not legally allowed to borrow language from Chapter 205 which governs the practice of acupuncture. Because of this, all rulemakings undertaken asserting authority granted to the Board from the Acupuncture Act must be reviewed and revised to ensure that the Board's rulemaking authority is exercised based only on authority granted to it in Chapter 201 to regulate the practice of chiropractic.

(3) Exact language of the proposed rule requested to be adopted;

RULE §78.13 Scope of Practice:

~~(e)(2)(C) acupuncture and other reflex techniques;~~

RULE §78.14 Acupuncture:

~~RULE §78.14 Acupuncture~~

~~(a) Acupuncture, and the related practices of acupressure and meridian therapy, includes methods for diagnosing and treating a patient by stimulating specific points on or within the musculoskeletal system by various means, including, but not limited to, manipulation, heat, cold, pressure, vibration, ultrasound, light electrocurrent, and short-needle insertion for the purpose of obtaining a biopositive reflex response by nerve stimulation. All therapeutic modalities provided by Doctors of Chiropractic in Texas must comply with the chiropractic scope of practice as defined by the Texas Occupations Code §201.002.~~

~~(b) In order to practice acupuncture, a licensee shall either:~~

~~—(1) successfully complete at least one hundred (100) hours training in undergraduate or post-graduate classes in the use and administration of acupuncture provided by a bona fide reputable chiropractic school or by an acupuncture school approved by the Texas State Board of Acupuncture Examiners;~~

~~—(2) successfully complete either:~~

~~—(A) the national standardized certification examination in acupuncture offered by the National Board of Chiropractic Examiners; or~~

~~—(B) the examination offered by the National Certification Commission for Acupuncture and Oriental Medicine; or~~

~~—(3) successfully complete at least one hundred (100) hours training in the use and administration of acupuncture in a course of study approved by the board.~~

~~(c) Existing licensees that have been trained in acupuncture, that have been practicing acupuncture, and that are in good standing with the Texas Board of Chiropractic Examiners and other jurisdictions where they are licensed, may meet the requirements of subsection (b) of this section by counting each year of practice as ten hours of training in the use and administration of acupuncture.~~

~~(d) Beginning on January 1, 2010, an applicant for licensure must successfully complete either the national standardized certification examination in acupuncture offered by the National Board of Chiropractic Examiners or the examination offered by the National Certification Commission for Acupuncture and Oriental Medicine in order to practice acupuncture. This requirement will supersede the provisions of subsection (b) of this section.~~

(4) Statement and legal references regarding whether, to the petitioner’s knowledge, the requested rule is in conflict with any existing rule, ruling, order or opinion of the Board or any other rules or statutes; and

TAAOM petitions the Board to affirmatively review under the standards of the APA any rule adopted by the Board utilizing provisions from Chapter 205 of the Occupations Code as a grant of authority to the Board, and to make appropriate rule revisions in light of this Third Court of Appeals finding regarding the invalidity of DM-471 as a legal grant of authority to the TBCE Board.

As reflected in various legal briefs and documents filed by the Board, along with Board’s SER to the Sunset Advisory Commission, the Board has relied historically on the now defunct AG Opinion, DM-471, to defend a statutory construction that it says allowed it to “borrow” language from the Acupuncture statute (Occupations Code 205.001) to construct the authority to grant its chiropractic licensees authority to practice acupuncture by misconstruing the statutes to create an alleged exemption for licensed chiropractors to practice acupuncture by borrowing or using language from the Acupuncture Act.

Rules as they now stand conflict with:

Third Court of Appeals finding rejecting DM-471 (NO. 03-15-00262-CV, Opinion issued 8/18/2016)

Chiropractic Chapter, Occupations Code

Acupuncture Chapter, Occupations Code

Chapter 2001, Government Code

(5) Statement of the purpose of the requested rule.

The Board’s foundational legal argument that it had been granted statutory authority to undertake acupuncture rulemaking activities based on an amendment to the Acupuncture Act has now been rejected affirmatively by the Third Court of Appeals, which clearly disrupts the purported legal authority expressed and used by the Board in adopting these specific rulemakings.

We believe the Third Court of Appeals decision voiding DM-471 raises significant legal and policy issues that not only merit Board consideration and attention, but also require action on the part of the Board. TAAOM respectfully requests that these issues be discussed and considered in a meaningful policy format with all interested stakeholders, and officially petitions the Board to conform its current rules to Chapter 201 of the Occupations Code.