

CAUSE NO. D-1-GN-14-000355

TEXAS ASSOCIATION OF	§	IN THE DISTRICT COURT OF
ACUPUNCTURE AND ORIENTAL	§	
MEDICINE,	§	
PLAINTIFF,	§	
	§	
v.	§	
	§	
TEXAS BOARD OF CHIROPRACTIC	§	
EXAMINERS,	§	TRAVIS COUNTY, TEXAS
DEFENDANT,	§	
	§	
v.	§	
	§	
TEXAS CHIROPRACTIC	§	
ASSOCIATION,	§	
INTERVENOR.	§	201ST JUDICIAL DISTRICT

**PLAINTIFF TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL
MEDICINE’S REBUTTAL TO DEFENDANTS’ CLOSING STATEMENTS¹**

Defendants repeat the same tired refrain: that the shape of acupuncture needle tips is key and TBCE is entitled to deference where **acupuncture** is concerned. But the evidence demonstrates Defendants’ focus on needle tips is absurd, and TBCE’s adoption of rules usurping a separate regulated profession (acupuncture) is unprecedented. The evidence leads to one conclusion: the Acupuncture Rules (22 Texas Administrative Code sections 78.1(e)(2)(C) and 78.14) exceed the scope of chiropractic.

ARGUMENT

A. TBCE is entitled to no deference for acupuncture.

TBCE is entitled to no deference in its adoption of the Acupuncture Rules because:

1. it has no expertise in acupuncture, *Tex. Bd. of Chiropractic Exam’rs v. Tex. Med. Ass’n*, 375 S.W.3d 464, 475 (Tex. App.—Austin 2012, pet. denied); *Rogers v. Tex. Bd. of Architectural Exam’rs*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.), and

¹ “TAAOM” means Texas Association of Acupuncture and Oriental Medicine. “TBCE” means Texas Board of Chiropractic Examiners. “TCA” means Texas Chiropractic Association. “Defendants” means TBCE and TCA.

2. its Acupuncture Rules are unreasonable, *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

TAAOM's burden is to overcome the Acupuncture Rules' presumption of validity by demonstrating either that the Rules (1) contravene specific statutory language, or (2) run counter to the general objectives of the statutes. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 569 (Tex. 2021). But TBCE is entitled to no deference where acupuncture is concerned; this Court need not "tip the scales" or resolve ambiguities in TBCE's favor in evaluating the validity of the Rules. This is a critical distinction between this case and similar challenges.

In the VONT case, the Texas Supreme Court's deference to TBCE's interpretation of the Chiropractic Chapter as including VONT (a simple eye-movement test to diagnose imbalance and determine whether chiropractic treatment is appropriate) was a primary reason TBCE prevailed in that case. *Id.* at 571-72, 573-74. Here, TBCE claims it can decide that acupuncture is within the scope of chiropractic due to its expertise in chiropractic. But the Acupuncture Rules concern, and are entitled, "acupuncture"—which is a separate profession in Texas, not a simple technique like VONT.² The uncontroverted evidence shows TBCE has no expertise in acupuncture, whereas the Texas State Board of Acupuncture Examiners ("Acupuncture Board") does. The Acupuncture Board has publicly stated acupuncture is an incisive procedure and is not chiropractic. Ex.P-126-P-129.

Defendants incorrectly contend that the court of appeals already deferred to TBCE related to its Acupuncture Rules. The court of appeals deferred to TBCE and found reasonable its rules

² TBCE's VONT rule required chiropractors to complete "150 hours of clinical and didactic training" just to perform this one, nonincisive procedure. *Id.* at 564, 573.

defining “incision” as a “cut” and providing that “needles may be used in the practice of chiropractic... but may not be used for procedures that are incisive or surgical.” 22 TEX. ADMIN. CODE §§ 78.1(a)(4), 78.1(b)(2); *TAAOM v. TBCE*, 524 S.W.3d 734, 742-43 (Tex. App.—Austin 2017, no pet.). Those rules do not concern acupuncture—and the court of appeals has never deferred to TBCE regarding acupuncture. Instead, the court of appeals reversed and remanded those Rules for **this** Court to determine whether they are invalid.

B. The Acupuncture Rules do not authorize a “limited range of acupuncture.”

Defendants contend the Acupuncture Rules only authorize chiropractors to perform a “limited range of acupuncture” and, therefore, are reasonable. The Rules’ text and the evidence demonstrate the opposite.

First, the Acupuncture Rules provide **no limitations** on what acupuncture a chiropractor may perform. Instead, Rule 78.14 broadly defines acupuncture as “**includ[ing]** methods for diagnosing and treating a patient by stimulating specific points on or within the musculoskeletal system ... and the insertion of acupuncture needles or solid filiform needles for the purpose of obtaining a bio-positive reflex response by nerve stimulation.” Ex.P-001. “Includes” is a term of enlargement. TEX. GOV’T CODE § 311.005(13).

Second, TBCE does not treat the Acupuncture Rules as having a limited scope. In fact, TBCE-approved acupuncture courses do not merely train chiropractors to treat the musculoskeletal system—instead, these are full-scope acupuncture courses condensed into a “cliffs notes” version of acupuncture training. Ex.P-021 at pp.47-48, P-120-122. TAAOM brought to TBCE’s attention numerous examples of chiropractors using acupuncture to treat conditions beyond the musculoskeletal system. Ex.P-112, P-114, P-115, P-116. Nonetheless, TBCE has **never** brought any enforcement proceedings related to chiropractors performing acupuncture.

Further, the Acupuncture Rules authorize chiropractors to perform “acupuncture.” While chiropractors cannot call themselves “acupuncturists” under the Acupuncture Rules (though some chiropractors do, without consequence—Ex.P-116), they can hang up signs advertising they run “acupuncture” clinics. They can say they are “board certified” in acupuncture. Ex.P-001. The Acupuncture Rules authorize chiropractors to perform two professions—chiropractic and acupuncture—for the price of one.

The example of plumbers and electricians is apt. Plumbers and electricians both know the inner workings of a building, just like chiropractors and acupuncturists are both healthcare providers. That does not mean plumbers are experts in electrical work and could, by a Plumbing Board rule, perform such work. The Acupuncture Rules are no different from TBCE authorizing chiropractors to practice “medicine” or “dentistry”—but then claiming all is well because they can only practice medicine or dentistry on the musculoskeletal system. Defendants cannot identify one example of a state agency usurping a separate profession in this manner.

C. The overwhelming evidence demonstrates acupuncture is an incisive procedure.

Defendants weakly claim that acupuncture is nonincisive. The overwhelming evidence proves the opposite.

1. TCA’s Books

TCA asserts this Court need only consult the Chiropractic Chapter, the *TAAOM* opinion, and 12 book excerpts that state that acupuncture needles do not cut, contradicting its own claim that only dictionary definitions matter. Yet TCA knows more evidence matters. That is why it designated experts, why the court of appeals remanded the Acupuncture Rules, and why the court of appeals and Texas Supreme Court denied Defendants’ mandamus petition seeking to limit the issues in dispute.

The books are not reliable for the purpose of proving acupuncture needles do not cut. These books are not used in acupuncture schools. While Dr. Levy and Dr. Schnyer testified that few of the excerpts may be from reliable sources, they testified that the excerpts themselves were unreliable because they are unsupported and scientifically inaccurate. TCA mischaracterizes Dr. Schnyer's testimony. She explained a book would not exist stating that acupuncture needles cut—it is not a research topic anyone would study because this issue, and these semantics, only matter in evaluating TBCE's unique rules. She further explained that research she has reviewed supports the conclusion that acupuncture needles cut because they must cut, penetrate, and interact with tissue within and below the skin for acupuncture to be effective. Notably, Dr. Hanson, TCA's expert, admitted he had not looked at most of the books. Further, several are duplicates, several are mere excerpts, and none have citation or research supporting that acupuncture needles do not cut. Needles may have different tips and serve different purposes, and none are used to slash the skin like a scalpel. But all are sharp and pointed, regardless of the shape of the tip, and all cut and puncture the skin—as even Dr. Hanson essentially admitted. Defendants cannot explain how a sharp, pointed acupuncture needle that routinely causes bleeding and is multitudes larger than human skin cells can “slip through tissues” without making a single cut.

2. The *TAAOM* Opinion

Defendants incorrectly claim that the court of appeals already determined TBCE reasonably construed “incisive procedure” as a “cut.” TBCE has only defined “**incision**” as a “cut,” and the court of appeals solely upheld the definition of “**incision**” as reasonable. *TAAOM*, 524 S.W.3d at 740-42. The court of appeals did **not** conclude that “incisive procedure” is limited to incisions. It could not without running afoul of the Chiropractic Chapter's broad prohibition against incisive procedures as **including** making incisions. TEX. OCC. CODE § 201.002(a)(3).

3. Focusing on needle tips is absurd.

Defendants double down on their contention that the only relevant inquiry is acupuncture needle tips—specifically pointed versus beveled. The absurdity of this position was revealed at trial.

Contrary to TBCE’s assertion that TAAOM’s experts provided only “conclusory” testimony, these experts explained that, regardless of whether an acupuncture needle has a pointed or beveled tip, the needle cuts (or pierces or punctures, with no meaningful distinction between these terms)—and the extent of the cut is just a matter of degree. They explained that all needles (including acupuncture needles) can:

- penetrate and cut through the skin;
- cause bleeding and bruising;³ and
- puncture organs.

Dr. Levy, the only medical doctor who testified, has extensive experience and education with needles and anatomy. Dr. Levy, designated as an expert in needles and their use, testified unequivocally that acupuncture needles cut when inserted into the skin. He did not concede acupuncture needles might “slip” between skin cells if the needle is thin enough. Dr. Levy testified instead that needles “slipping” between skin cells is a medical impossibility and that they always cut through skin cells, no matter their shape. Further, Dr. Schnyer testified that acupuncture would not work effectively if the needles did not penetrate the skin and disrupt cells. Otherwise, the procedure would be “sham” acupuncture, which is less effective than incisive acupuncture.

³ The Legislature does not distinguish between implements causing a little bleeding or a lot of bleeding—all incisive procedures are prohibited.

Defendants stumbled in attempting to rebut this evidence. No expert could identify any distinction between how a needle with a beveled tip and a needle with a pointed tip impacts the human body. Dr. Hanson essentially agreed that the shape of a needle tip is not determinative to whether a needle is “incisive” or not, struggling to articulate at what length, diameter, and so forth a needle becomes “incisive.” He could not:

- distinguish between needles cutting/piercing/tearing;
- stick to Defendants’ storyline that beveled tip needles “cut” while pointed tip needles somehow slip through skin cells—a phenomenon he has never viewed (and which Dr. Levy testified is a medical impossibility); or
- keep straight whether 100 hours or 200 hours of acupuncture training is the bare minimum chiropractors should receive.

Dr. Hanson’s opinions regarding chiropractors performing acupuncture have been, at best, inconsistent. Ex.P-096-P-097, P-099.

Dr. Bronson testified solely as a (biased) lay witness. Opinion regarding whether acupuncture needle can “slip” between skin cells as opposed to cutting through them at a microscopic level requires obvious expertise. TEX. R. EVID. 702. Lay opinion is no evidence in expert matters. *Helena Chemical Co. v. Cox*, 664 S.W.3d 66, 75 (Tex. 2023). Dr. Bronson is no expert in this microscopic theory—nor was he designated one. Moreover, his testimony is not even “helpful” lay witness testimony because it is not based on his actual “perception” (as he did not personally observe or experience microscopic cell slippage). *Old Republic Ins. Co. v. Weeks*, No. 13-07-00451-CV, 2009 WL 1740820, at *6 (Tex. App.—Corpus Christi June 11, 2009, pet. denied). This Court should particularly view Dr. Bronson’s testimony with skepticism when he cannot keep straight whether he performs dry needling or not.

4. The Acupuncture Chapter's Definition of Acupuncture

TBCE claims TAAOM has “disdain” for the Acupuncture Chapter’s acupuncture definition. *See* TEX. OCC. CODE § 205.001(2). It is unclear why Defendants fixate on this definition when the court of appeals held it cannot inform the meaning of “incisive procedure” in the Chiropractic Chapter. *TAAOM*, 524 S.W.3d at 743-45. As TAAOM’s experts testified, this definition is absurd and confusing—which the Acupuncture Board has confirmed. Ex.P-128. Any legislation proposed to amend this confusing definition is neither here nor there when that definition has no bearing on whether chiropractors can perform acupuncture under the Chiropractic Chapter. *TAAOM*, 524 S.W.3d at 743-45.⁴

D. The uncontroverted evidence establishes dry needling is also an incisive form of acupuncture.

Defendants barely respond to TAAOM’s arguments that dry needling is a form of acupuncture. Oddly, TCBE relies on Dr. Bronson’s lay witness testimony that dry needling is not acupuncture because Dr. Bronson has “used acupuncture for many years.” If dry needling is not a form of acupuncture, then how can Dr. Bronson’s experience in acupuncture qualify him to testify regarding dry needling?

TAAOM’s experts testified that dry needling is a form of acupuncture, supported by numerous medical and acupuncture organizations. And this testimony was uncontroverted except by a lay witness (Dr. Bronson), whose inconsistent testimony regarding dry needling is dubious at best.

⁴ TBCE claims Mr. Doggett testified he has bloody cotton balls all over the floor of his acupuncture clinic. Rather, he testified there are cotton balls with blood each day at his clinic since acupuncture is an incisive procedure, but never testified to improperly disposing of medical waste.

E. The overwhelming evidence demonstrates that the Acupuncture Rules contravene the objectives of the Chiropractic Chapter.

Section 201.002 of the Chiropractic Chapter—and the chapter as a whole—authorizes chiropractors to perform chiropractic, not acupuncture. The chapter authorizes TCBE to regulate chiropractic, not acupuncture. TEX. OCC. CODE § 201.152, .1525. Another regulatory board regulates acupuncture—the Acupuncture Board. *Id.* § 205.101. By adopting a rule usurping the separate regulated profession of acupuncture, the Acupuncture Rules contravene the objectives of section 201.002 and the Chiropractic Chapter.

Additionally, the Acupuncture Rules authorize chiropractors to perform acupuncture with a fraction of the training the Legislature requires for the safe, effective performance of acupuncture. *Id.* §§ 205.201, .203, .206. The Chiropractic Chapter requires chiropractors to complete training in chiropractic—not acupuncture. *Id.* §§ 201.303-.305. This is not “free-floating policy” untethered to statutory text.

1. TCA’s Risk v. Benefit Argument

TCA argues this Court must perform a risk-versus-benefit analysis regarding chiropractors performing acupuncture, baselessly claiming chiropractors performing acupuncture fill healthcare gaps in rural areas and prevent opioid addiction. No experts were designated to testify about healthcare provider shortages or opioid addiction—including no defense experts. This theory is TCA’s counsel’s invention, untethered to any expert testimony.

Additionally, the accusation that TAAOM’s experts vaguely testified that “bad things can happen” when improperly trained individuals perform acupuncture is disingenuous. TAAOM’s experts specifically explained the risks of acupuncture (bleeding, bruising, infections, organ puncture) and the harm of ineffective treatment in acupuncture—both on patients and on the profession of acupuncture. Defendants ignore this testimony because they have no answer to it.

2. The Acupuncture Chapter’s Exemption and “Legislative History”

Defendants point to the Acupuncture Chapter’s exemption for healthcare professionals licensed under another statute of this state and acting within that license’s scope of practice. *Id.* § 205.003(a). But the Chiropractic Chapter does not authorize chiropractors to practice acupuncture—and the Legislature has repeatedly rejected such legislation.

TCA also claims “legislative history” supports that the Legislature intends for chiropractors to be subject to this exemption. It first relies on a Sunset Commission report from 1992 (before acupuncture became a licensed profession in Texas). Ex.D-032. This report is hardly “legislative history”—and of course TCA ignores other Sunset Commission and Comptroller reports suggesting the opposite. Ex.P-007-P-009. TCA also points to purported testimony from Representative Gray, who was the House sponsor of the bill that amended the Acupuncture Chapter’s definition of acupuncture. *See* S.B. 361, 75th Leg., R.S. (1997).⁵ Legislative history shows that the House version of the bill—which did not pass—attempted to amend the **Chiropractic Chapter** to authorize chiropractors to perform acupuncture. *E.g.*, House Committee Amendment No. 3 to S.B. 361. Any comment by the House sponsor inevitably concerned the **House** version of the bill authorizing chiropractors to perform acupuncture—which did not pass. Additionally, these statements do not evince “legislative history.” *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 191-92 (Tex. 2010). Further, the Acupuncture Chapter’s definition of acupuncture cannot inform the scope of chiropractic. *TAAOM*, 524 S.W.3d at 743-45.⁶ But to the

⁵ The complete bill file, including all amendments and versions of the bill, can be found at <https://lrl.texas.gov/legis/billsearch/billdetails.cfm> and https://lrl.texas.gov/LASDOCS/75R/SB361/SB361_75R.pdf.

⁶ TBCE incorrectly claims the Acupuncture Chapter is only relevant if the Court were to determine acupuncture is an incisive procedure. This incorrectly assumes the sole issue in dispute is whether acupuncture is an incisive procedure.

extent this Court entertains legislator statements, the Chiropractic Chapter’s prohibition on incisive procedures was put in place to “take out any ability by the chiropractors to put needles in people.”

Tex. Bd. of Chiropractic Exam’rs, 375 S.W.3d at 469 n.7.

3. Chiropractic is a limited scope of practice.

TCA next claims that the Acupuncture Rules do not contravene governing statutory objectives because Texas law “enmeshes” acupuncture with other professions, referencing “acudetox,” that certain providers can provide referrals to acupuncturists, and that the Acupuncture Board operates under the authority of the Texas Medical Board, whereas TCBE has independent rulemaking authority and chiropractors are portal of entry providers.

It is unclear TCA’s point here. No one has ever disputed that chiropractic is an independent profession, that chiropractors can serve as portal of entry providers, or that the Acupuncture Board operates under the Texas Medical Board’s supervision. None of these things show chiropractors have the statutory right—or the expertise—to perform the separate profession of acupuncture. Additionally, in Texas, chiropractic is a limited-scope practice (unlike some other states), and chiropractors must strictly practice within the scope of chiropractic in Texas rather than usurping other professions. TEX. OCC. CODE § 151.052(a)(3).

4. The Training Disparity

Finally, Defendants claim the Acupuncture Rules’ training requirements are reasonable and within the Chiropractic Chapter’s objectives. But the evidence is undisputed that chiropractors receive **zero** training in acupuncture at chiropractic school. Further, the Acupuncture Rules—on their face—authorize chiropractors to perform acupuncture with (at most) 100 hours of training and no hands-on clinical training in acupuncture. Ex.P-001.

Defendants claim there is no evidence that chiropractors perform acupuncture with no clinical training. They ignore that TBCE amended its Acupuncture Rules in 2020 to **remove** clinical training requirements—not wanting to “burden” chiropractors. Ex.P-040, P-042. TBCE has yet to articulate **why** it removed the clinical training component if the intent was **not** to remove this requirement. Additionally, Dr. Hanson admitted knowing of online acupuncture courses (though flipfopped on this at trial). He admitted in his 100-hour course, students might practice acupuncture on each other but do **not** perform acupuncture in clinics as part of their training. In contrast, acupuncturists must complete over a thousand hours of clinical training in acupuncture before they can obtain an acupuncture license. Ex.P-082, P-083.

TCA also includes a chart regarding training recommendations with notable mischaracterizations. For instance, the World Health Organization recommends 200 hours of acupuncture training—twice as many as Defendants claim is adequate—**only for physicians** to practice limited scope acupuncture, not chiropractors. TAAOM’s experts did not provide opinions that “full acupuncture education” (undefined by TCA) is required for chiropractors to safely and effectively perform acupuncture. They opined that the Rule-required 100 hours (with no clinical component) is insufficient, even when purportedly limited to the musculoskeletal system. Dr. Howlett quantified what specific training chiropractors are missing. That some other states statutorily authorize chiropractors to perform acupuncture says nothing about Texas—which has repeatedly rejected legislative attempts to authorize chiropractors to perform acupuncture. Further, TAAOM provided a draft curriculum for 200 hours of training in acupuncture during the stakeholder meetings to encourage TBCE to adopt more than 100-hours of training. At the stakeholder meetings, **all** participants—including Dr. Hanson—urged TBCE to increase the quantity and quality of training. TBCE rejected these proposals.

The overwhelming evidence demonstrated that 100 hours of training is insufficient for chiropractors to safely and effectively perform acupuncture.⁷ TAAOM is unaware of any organization that promotes 100-hours of training with no clinical component.

TAAOM has not claimed a chiropractor can only safely and effectively perform acupuncture with 3,000 hours of training (what acupuncturists receive). But 100 hours is certainly not enough—and acupuncture is not statutorily authorized under the Chiropractic Chapter. That is all this Court needs to know to invalidate the Acupuncture Rules.⁸

CONCLUSION

TAAOM urges this Court to invalidate the TCBE’s Acupuncture Rules because they are outside the statutory scope of chiropractic.

Respectfully submitted,

By: /s/ Shelby O'Brien

Shelby L. O'Brien (SBN 24037203)

sobrien@enochkever.com

Amy L. Prueger (SBN 24041842)

aprueger@enochkever.com

ENOCH KEVER PLLC

7600 N. Capital of Texas Hwy

Building B, Suite 200

Austin, Texas 78731

512.615.1200 / 512.615.1198 (fax)

**ATTORNEYS FOR PLAINTIFF
TEXAS ASSOCIATION OF ACUPUNCTURE
AND ORIENTAL MEDICINE**

⁷ Only the National Board of Chiropractic Examiners and Dr. Hanson (albeit inconsistently) support 100 hours of training.

⁸ This Court should reject TCA’s “split the baby” proposal inviting this Court to invalidate Rule 78.14 but keep intact Rule 78.1(e)(2)(C), generally authorizing chiropractors to perform acupuncture. This Court should give a thumbs up or down vote on the Acupuncture Rules together because the Acupuncture Rules contravene specific statutory text and the objectives of the governing statutes.

CERTIFICATE OF SERVICE

I hereby certify that, on September 27, 2023, a true and correct copy of the above and foregoing has been served by electronic filing service on the following:

Karen Watkins
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711
512.475.4300 / 512.320.0167 (fax)
karen.watkins@oag.texas.gov

Matt C. Wood
WEISBART SPRINGER HAYES LLP
212 Lavaca Street, Suite 200
Austin, Texas 78701
512.652.5780 / 512.682.2074 (fax)
mwood@wshllp.com

/s/ Shelby O'Brien

Shelby O'Brien