



TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS

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Via Interagency Mail: Opinion_committee@texasattorneygeneral.gov

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Abbott:

The Texas State Board of Acupuncture Examiners ("Board" or "Acupuncture Board") is seeking an Attorney General Opinion regarding the following issue:

Whether the performance of acupuncture is within the scope of practice of a licensed Texas chiropractor?

Background and Discussion

The Third Court of Appeals recently considered the issue of the scope of chiropractic practice as it relates to needles. In *Tx. Bd. of Chiropractic Examiners v. Tex. Med. Ass'n.*, 375 S.W.3rd 464 (Tex. App.-Austin 2012)(Pet for review filed August 15, 2012). In *Chiropractic Examiners*, the Court affirmed a district court's summary judgment decision invalidating portions of the Texas Board of Chiropractic Examiner's (TBCE) scope of practice rules regarding needle EMG, finding that "the insertion of a needle EMG needle having a beveled edge would "cut" tissue as it is designed to do, under any definition of the term... [c]onsequently, the Chiropractors Parties construction is contrary to the text of its own definition of "incision" as well as the underlying statutes." *Id.* at 481. In light of this decision and its extended discussion of the definitions of "incisive or surgical procedure" as they relate to the scope of practice for chiropractic, the Acupuncture Board requests that the Attorney General issue an opinion on the question of *whether the performance of acupuncture is within the scope of practice of a licensed Texas chiropractor?*

The Texas Attorney General has twice considered the question of whether the practice of acupuncture is within the scope of practice of a licensed Texas chiropractor. In Texas Attorney General Opinion DM-415, the Attorney General opined that the practice of acupuncture was not within the scope of practice for a licensed chiropractor because the use of needles, and by extension

the practice of acupuncture, were incisive procedures, excluded under the scope of practice for chiropractors, and “the practice of chiropractic as delineated in V.T.C.S. Article 4512b, section 1, does not clearly encompass the practice of acupuncture.” Tex. Att’y Gen. Op. DM-471, page 6. (1996).

Two years later, following legislative changes made to the Occupations Code chapter regulating the practice of acupuncture, the Attorney General reversed course, holding that “the conclusion in Attorney General Opinion DM-415 with respect to the practice of acupuncture by chiropractors is superseded by statute.” Tex. Att’y Gen. Op. DM-471 (1998). The Attorney General found that the legislature’s amendment of the definition of acupuncture in V.T.C.S. article 4495b F (the “acupuncture statute”¹), to define acupuncture, in part, as “the non-surgical, non-incisive insertion of an acupuncture needle,” should be read *in pari material* with V.T.C.S. article 4512b (“the chiropractic statute”²) governing the scope of chiropractic practice and thus, the practice of acupuncture was non-incisive and within the scope of chiropractic practice.

The Acupuncture Code Governs the Regulation of Acupuncture in the State of Texas

§205.001(1) of the acupuncture statute defines “Acupuncture” as:

- (A) the nonsurgical, nonincisive insertion of an acupuncture needle and the application of moxibustion to specific areas of the human body as a primary mode of therapy to treat and mitigate a human condition, including evaluation and assessment of the condition; and
- (B) the administration of thermal or electrical treatments or the recommendation of dietary guidelines, energy flow exercise, or dietary or herbal supplements in conjunction with the treatment described by Paragraph (A).

The Acupuncture Act governs the licensure and regulation of the practice of acupuncture in the State of Texas. Tex. Occ. Code §§205.101, 205.201. “A person may not practice acupuncture in this state unless the person holds a license to practice acupuncture in this state issued by the acupuncture board under this chapter.” Tex. Occ. Code §205.201. The Texas Legislature established requirements for acupuncture licensing examination and training, including the requirement that acupuncture schools require resident instruction of not less than 1,800 instructional hours, and course instruction at reputable acupuncture schools in anatomy-histology, bacteriology, physiology, symptomatology, pathology, meridian and point locations, hygiene, and public health. Tex. Occ. Code §§205.203, 205.204, 205.205, and 205.206.

A health care professional licensed under another statute of the State of Texas may practice acupuncture without obtaining a license from the Texas State Board of Acupuncture Examiners. so long as that health care professional is acting within the scope of their license. Tex. Occ. Code

¹ Now codified as Tex. Occ. Code §205.001-205.457

² Now codified as Tex. Occ. Code §201.01-201.606

§205.003(a). However, the Attorney General opined that the legislature intended to limit this exception to the training and examination requirements for practicing acupuncture to “only health care professionals whose licenses clearly encompass the practice of acupuncture.” Texas Attorney General Opinion DM-415, page 6 (1996). The Attorney General went on to write “in our opinion, the practice of chiropractic as delineated in V.T.C.S. article 4512b, Section 1, does not clearly encompass the practice of acupuncture.” *Id.* at page 6.

The Statutory Scope of Chiropractic Practice Does Not Include Acupuncture

The chiropractic statute and rules promulgated pursuant to that statute define the allowed scope of practice for chiropractors in the state of Texas. Tex. Occ. Code. §201.002. A person practices chiropractic if the person “(1) uses objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; and (2) performs nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve subluxation complex or the biomechanics of the musculoskeletal system.” Tex. Occ. Code §201.002(b)(1) and (2).

The term “incisive or surgical procedure” includes “making an incision into any tissue, cavity, or organ by any person or implement. The term does not include the use of a needle for the purpose of drawing blood for diagnostic testing.” Tex. Occ. Code §201.002(a)(3). The TBCE has further defined the definition of incisive, by defining “incision” to mean “cut or surgical wound; also a division of the soft parts made with a knife or hot laser.” 22 TAC §75.17(b)(4). Similarly the TBCE has by rule further defined the scope of chiropractic in relation to use of needles: “Needles may be used in the practice of chiropractic under standards set forth by the Board but may not be used for procedures that are incisive or surgical.” 22 TAC 75.17(a)(3).

Despite the chiropractic statute’s silence on the practice of acupuncture and lack of any clear authorization for the practice of acupuncture by chiropractors, the TBCE has promulgated Rule 75.21 regarding the practice of acupuncture by chiropractors. 22 TAC §75.21. This rule defines acupuncture as:

- (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 purposes of obtaining a biopositive reflect responsive by nerve stimulation.

Subchapter B of Rule 75.21 sets out training requirements for training in acupuncture at a “bona fide chiropractic school,” or acupuncture school. 22 TAC §75.21. It should be noted that the required 100 hours of training for chiropractors is significantly less than the 1800 hours required of acupuncturists. In promulgating Rule 75.21, the TBCE clearly assumed that acupuncture was within the scope of chiropractic practice.

The determination of whether acupuncture is within the scope of chiropractic practice and whether the TBCE rules governing the practice of acupuncture by chiropractors are valid, must be made based upon the specific language contained in the chiropractic statute. The practice of chiropractic is directed toward evaluating and treating the biomechanical condition of the spine and musculoskeletal system of the human body. Tex. Occ. Code 201.002. The specific types of procedures performed by chiropractors mentioned in the statute are “adjustment and manipulation to improve the subluxation complex or biomechanics of the musculoskeletal system.” Tex. Occ. Code 201.002.

Nowhere in the statute does the legislature mention the practice of acupuncture or authorize its practice by chiropractors. It is unclear how the practice of acupuncture relates to the biomechanical condition of the spine and the musculoskeletal system of the human body. The only two procedures mentioned in the statute authorizing the practice of chiropractic are “manipulation” and “adjustment.” The Attorney General’s conclusion in DM-471 that acupuncture was within the scope of practice of chiropractic was seemingly based on the assumption that any practice not specifically excluded from the scope of practice of chiropractic as “incisive” or “surgical” under §201.002(b)(2), is within the scope of practice of chiropractic. However, there are many obvious examples of practices that are neither surgical nor incisive that are outside the scope chiropractic practice. For example, the interpretation of a radiographic image is not a surgical procedure, nor is it incisive, yet such a practice is barred to chiropractors because it is considered to be the practice of medicine and outside the scope of chiropractic practice.

Since acupuncture is outside the practice of chiropractic practice, chiropractors should only be allowed to practice acupuncture after complying with the licensing and regulatory requirements of the acupuncture statute.

The Acupuncture Chiropractor Act Should Not be Read in Pari Materia

In DM-471, the Attorney General based its finding that acupuncture was within the scope of chiropractic practice by reading the acupuncture statute’s definition of acupuncture as “the nonsurgical, nonincisive insertion of an acupuncture needle,” in pari materia with the term “nonsurgical, nonincisive procedures” in the chiropractic statute. DM-471 page 2. Reading these terms in pari materia, the Attorney General found that the practice of acupuncture was within the scope of practice of chiropractors.

Statutes are said to be statutes in pari materia if they relate to the same general subject matter and have the same object or purpose, though they contain no reference to one another and though they were passed at different times. *Foshee v. Nat. Bank of Dallas*, 600 S.W.2d 358, 362 (Civ. App.—Tyler 1980) *rev’d on other grounds* 617 S.W. 2d 675 (Tex. 1981). Statutes in pari material are to be construed together, whenever possible, in order to give full effect to the legislative intent behind them. *Id.* at 363. However, statutes that are related to the same subject but that have different objects or purposes are not statutes in pari materia. *Alejos v. State*, 555 S.W.2d 444, 450-451 (Crim. App. 1977)(statute prohibiting evasion of arrest and statute prohibiting an attempt to elude a police officer were not in pari materia because the respective acts have different objects, intended

to cover different situations). To determine whether two statutes share a common purpose, courts consider whether the two statutes were clearly written to achieve the same objective. *In re JMR*, 149 S.W.3d 289, 292-294 (Tex. App.—Austin 2004, no pet.)(finding two statutes being construed were not written to achieve the same objective, and thus not in para materia).

DM-471 reasoned that “because the acupuncture statute and the chiropractic statute both regulate health care professions, we believe they may be read in *pari materia*.” DM-471 page 2. This reasoning is suspect. First, although the general overall subject matter of both statutes is the regulation of health care professionals is the same, the specific subjects of both statutes are quite different. Both statutes deal with the licensing and regulation of distinct types of health care practitioners, each with its own unique training and philosophy of practice. The legislature has recognized the need to separately license and regulate health care professionals by its promulgation of independent statutes dealing with physicians (“Medical Practice Act, “ Tex Occ. Code §§151.001-168.3202), physician assistants (“Physician Assistant Licensing Act,“ §§ 204.002-204.353); nurses (Tex. Occ. Code §§ 301.001-305.006), dentists (Tex. Occ. Code §§251.001-267.006), chiropractors, (Tex. Occ. Code §§201.002-201.606); acupuncturists (Tex. Occ. Code §§205.001-205.458), and podiatrists (Tex. Occ. Code §§202.001-202.606). Each of the respective statutes establishes an independent board in charge of licensing and regulation of its own practitioners.

Second, the object of both statutes are different by definition, as the object of one statute is to govern the licensing, regulation, and scope of practice of chiropractors, while the object of the other statute is to govern the licensing, regulation, and scope of practice of acupuncturists. Each school of medicine has significantly different histories and philosophies of practice. The required training, certification testing, and licensing requirements for each profession are different. The statutes cannot be said to deal with the same subject matter and objectives simply because both statutes deal with health care licensing, in general.

The legislature intended the definition of “acupuncture” in the acupuncture statute to govern the scope of practice of trained and licensed acupuncturists, not chiropractors. Had the legislature intended to include the practice of acupuncture within the scope of practice of chiropractic, it could have simply listed the practice of acupuncture along with “adjustment and manipulation to improve subluxation complex or the biomechanics of the musculoskeletal system.” Alternatively, the legislature could have excluded the practice of acupuncture from the prohibition against incisive or surgical procedures in the same way it excluded the use of needles for drawing blood for diagnostic purposes. However, the legislature chose to take neither action.

Because the statutes have different subject matter and different objectives, the acupuncture statute’s definition of acupuncture as “the nonsurgical, nonincisive insertion of an acupuncture needle” should not be determinative of whether acupuncture is considered “incisive” under the specific statutory definitions set out in the chiropractor statute.

Acupuncture is Outside the Statutory Scope of Chiropractic Practice

The chiropractic statute clearly prohibits surgical and incisive procedures by chiropractors. Tex. Occ. Code. §201.002(b)(2). The legislature provided a definition of “incisive” that governs the scope of practice of chiropractic: “Incisive or surgical procedure” includes making an incision into any tissue, cavity, or organ by any person or implement. The term does not include the use of a needle for the purpose of drawing blood for diagnostic testing.” Tex. Occ. Code §201.002(a)(3). The legislature’s exclusion of the use of needles for drawing blood, demonstrates that the legislature believes that other uses of a needle by chiropractors are “incisive or surgical.” “The purpose of exclusion is to take something out...that otherwise would have been included in it.” *Liberty Mutual Insurance Co. v. American Employers Insurance Co.*, 556 S.W.2d 242, 245 (Tex. 1977). The legal doctrine of *expressio unis est exclusio* holds that when the legislature includes one thing of a particular type, it must be read as excluding all other things of a similar type. *Bryan v. Sundberg*, 5 Tex. 418, 422-423 (1849); *Johnson v. Second Injury Fund*, 668 S.W.2d. 107, 108-109; *Dallas Merchants and Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 493 (Tex. 1993). In *Johnson*, the Texas Supreme Court stated:

[W]hen the Legislature has undertaken to enumerate what shall be received, the enumeration must, we think, be taken to include all that was intended; and consequently, to exclude all that is not included in the enumeration... [a]nd where a statute limits a thing to be done in a particular form, it includes in itself a negative, viz, that it shall not be done otherwise.

Under this reasoning, the legislature’s specific allowance of the use of needles by chiropractors necessarily excluded all other non-specified uses by chiropractors. See *Lenhard v. Butler*, 745 S.W.2d 101, 105-106 (Tex. App.- Fort Worth, 1988, no pet.)(superseded by statute)(inclusion of certain professionals in definition of “health care providers” in former Art. 4590i § 1.02(a)(3) excludes all others not listed). The use of acupuncture needles is thus necessarily excluded from the scope of practice of chiropractic.

Sincerely,



Allen Cline, L.Ac.
TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS
Presiding Officer

cc: Mari Robinson, Executive Director
Scott Freshour, General Counsel
Rob Blech, Assistant General Counsel