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

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, Plaintiff	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND YVETTE YARBROUGH, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY, Defendants	§	**201ST JUDICIAL DISTRICT**

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Texas Association of Acupuncture and Oriental Medicine ("Acupuncture Association") files this Motion for Summary Judgment against Defendants Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director, in her official capacity (collectively "Chiropractic Board"), and asks that the court render judgment for Plaintiff.

INTRODUCTION

As an exercise of the State's police power, the State regulates professions to protect the public. Consistent in these regulating statutes is a requirement to receive training and obtain a license to engage in a profession. Texas courts have long observed that statutes regulating the practice of certain types of professions are necessary to ensure practitioners possess the "requisite degree of skill in learning in professions which affect the public" to protect the public "against fraud [and] deception as the consequence of ignorance and incompetence." *Tex. State Bd. of Public Accountancy v. Fulcher*, 515 S.W.2d 950, 954 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

This is particularly true for healthcare professions because, absent adequate training, the very lives and safety of the public are at stake. *See, e.g., Patel v. Tex. Dep't of Licensing and Regulation*, No. 03–11–00057–CV, 2012 WL 3055479, at *13 (Tex. App.—Austin 2012, pet. granted); *Tex. State Bd. of Barber Exam'rs v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 731 (Tex. 1970). Statutes governing medical practices are intended to ensure baseline standards that the public can assume have been met when seeking a particular treatment, with specific statutory directives regarding the scope and standards of practice. It is for this reason that the Texas Legislature has enacted distinct statutory schemes—one governing chiropractors and one governing acupuncturists. Texas Occupations Code, Chapter 201 governs the practice of chiropractic ("Chiropractic Chapter"), and Chapter 205 governs the practice of acupuncture ("Acupuncture Chapter").[1] Each of these chapters sets forth regulations for these discrete medical practices and establishes standards to ensure the safety and effectiveness of these practices.

For years, a subset of chiropractors has engaged in the practice of acupuncture, despite never having received the training or license statutorily required for this practice. And the Chiropractic Board has encouraged this practice by improperly adopting and amending rules authorizing the unlicensed practice of acupuncture by chiropractors, even though the Chiropractic Chapter regulates chiropractic—not acupuncture—and even though the Chiropractic Board has no expertise in acupuncture. The Chiropractic Chapter further prohibits chiropractors from using needles (with one narrow exception for diagnostic blood draws). As recently as last year, the Chiropractic Board amended its rules to confirm its stance that chiropractors may practice acupuncture, despite the absence of any statutory authority to do so.

[1] The Chiropractic Chapter, Texas Occupations Code, Chapters 201, is attached as **Exhibit A.** The Acupuncture Chapter, Chapter 205, is attached as **Exhibit B**.

And even as it has adopted and amended these rules, the Chiropractic Board has exercised no regulatory oversight of acupuncture training or practice by chiropractors to ensure public safety. The Chiropractic Board does not know which chiropractors practice acupuncture in Texas or even if those chiropractors have met the standards laid out by the Chiropractic Board to practice acupuncture.[2] This is part of a pattern for the Chiropractic Board—authorizing medical practices that far exceed what is "chiropractic," even after being censored by the legislature, the courts, and other state agencies.

In adopting and improperly amending rules authorizing the unlicensed practice of acupuncture, the Chiropractic Board has exceeded the scope of its statutory authority and the rules should be declared invalid. Further, the Chiropractic Board should be enjoined from enforcing its rules or otherwise authorizing chiropractors to practice acupuncture.

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[2] The Chiropractic Board's discovery responses are attached as **Exhibit G**. *See* pp. 4-5, Admissions 12-15.

GROUNDS FOR SUMMARY JUDGMENT

The Acupuncture Association moves for summary judgment as follows:

(1)

The Court should grant declaratory relief invalidating the Chiropractic Board's rules authorizing chiropractors to practice acupuncture. Under Texas Government Code, Section 2001.038, the Court should declare that 22 Texas Administrative Code 75.17(a)(3), (b)(4), (e)(2)(C) (resulting in the inclusion of acupuncture in the chiropractic scope of practice), and 75.21 (governing the practice of acupuncture by chiropractors), are invalid because:

- the Chiropractic Board lacked statutory authority to adopt, and later inappropriately amended, these rules as they unlawfully authorize chiropractors to practice acupuncture in violation of the Chiropractic Chapter;

- the rules unlawfully authorize chiropractors to engage in the practice of acupuncture in violation of the Acupuncture Chapter; and

- the rules unlawfully authorize chiropractors to engage in the unauthorized practice of medicine in violation of the Medical Practice Act.

(2)

The Court should, alternatively, hold that the statutory scheme purportedly authorizing chiropractors to practice acupuncture is unconstitutional. If the Court determines that the statutory scope of chiropractic includes acupuncture and the challenged rules authorizing chiropractors to practice acupuncture are valid, the Court should, under Texas Civil Practice and Remedies Code, Chapter 37, declare that:

- the statutory scheme purportedly authorizing chiropractors to practice acupuncture with significantly less education and training in acupuncture than licensed acupuncturists is invalid and unconstitutional in violation of Texas Constitution, Article 16, Section 31; and

- the legislation that purportedly authorizes chiropractors to practice acupuncture is invalid and unconstitutional in violation of the one-subject rule in Texas Constitution, Article 3, Section 35(a).

(3)

The Court should grant an injunction barring the Chiropractic Board from enforcing its rules or otherwise authorizing chiropractors not licensed under the Acupuncture Chapter to practice acupuncture.

(4)

The Court should conclude that the Acupuncture Association is entitled to attorney's fees and costs in an amount to be determined following an evidentiary hearing.

REFERENCE MATERIALS

In support of this motion, the Acupuncture Association relies on:

- **Exhibit A**: Chiropractic Chapter: Texas Occupations Code, Chapter 201
- **Exhibit B**: Acupuncture Chapter: Texas Occupations Code, Chapter 205
- **Exhibit C**: Chiropractic Board Rules: 22 Texas Administrative Code 75.17 and 75.21
- **Exhibit D**: Tex. Att'y Gen. Op. DM-415 (1996)
- **Exhibit E**: Tex. Att'y Gen. Op. DM-471 (1998)
- **Exhibit F**: Tex. Att'y Gen. Op. DM-472 (1998)
- **Exhibit G**: Chiropractic Board's responses to the Acupuncture Association's discovery requests
- **Exhibit H**: *Texas Board of Chiropractic Examiners v. Texas Medical Association*, 375 S.W.3d 464 (Tex. App.—Austin 2012, pet. denied)
- **Exhibit I**: Texas Acupuncture Association position statement (Jan. 17, 1998)
- **Exhibit J**: Texas State Board of Acupuncture Examiners' Request for Opinion (2013)

BACKGROUND

A. Acupuncture and chiropractic are distinct practices regulated by separate regulatory agencies.

The Texas Occupations Code is delineated into chapters, each regulating distinct professions. Each of those chapters requires specific training and licensing unique to each

profession to ensure persons practicing those professions are well-trained in their chosen field. Because the State sets forth educational and training requirements unique to each profession, Texas consumers are able to safely choose from providers who are appropriately qualified to practice their particular professions. As relevant here, the Chiropractic Chapter, Chapter 201 governs the practice of chiropractic; the Acupuncture Chapter, Chapter 205 governs the practice of acupuncture.

As is true with other regulated professions, chiropractors may only perform procedures that are within the statutory scope of the practice of chiropractic, and the Chiropractic Board may only adopt rules within that statutory scope. *See* TEX. OCC. CODE §§ 201.002, 201.152. And under the Chiropractic Chapter, incisive and surgical procedures—defined by that chapter as "making an incision into any tissue, cavity, or organ by any person or implement"—are expressly identified as outside the scope of chiropractic practice. *See id.* §§ 201.002(a)(3), (b)(2).

The Chiropractic Chapter's provision prohibiting incisive procedures identifies only one exception: "the use of a needle for the purpose of drawing blood for diagnostic testing." *Id.* § 201.002(a)(3). The Chiropractic Chapter additionally limits the practice of chiropractic to analyzing, examining, or evaluating the biomechanical condition of the spine and musculoskeletal system, and performing nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system. *Id.* § 201.002(b)(1)-(2). Nothing in the chapter cross-references the Acupuncture Chapter, lists acupuncture as an exception to the prohibition on incisive procedures, or otherwise specifies that a chiropractor can practice acupuncture or any other procedure involving needles, except diagnostic blood draws.

Finally, though chiropractic is a form of medicine, the Chiropractic Board is not overseen by the Texas Medical Board, and chiropractors are exempt from complying with the Texas

Medical Practice Act, but only to the extent they engage ***strictly*** in the practice of chiropractic. *See id.* §§ 151.002(13), 151.052. The Chiropractic Chapter prohibits the use of needles by chiropractors. Thus, when chiropractors practice acupuncture, they are not strictly engaged in the practice of chiropractic. Conversely, the use of acupuncture needles by acupuncturists is expressly granted by the Acupuncture Chapter in the practice of acupuncture. *See* TEX. OCC. CODE § 205.001(2). Acupuncture is treated as a subset of—rather than an exemption from—the Texas Medical Practice Act. *See, e.g.*, *id*. §§ 151.052, 205.101. And while the Acupuncture Board regulates the practice of acupuncture, it does so with oversight by the Texas Medical Board. *Id.*

B. Despite the Chiropractic Chapter's prohibition on needle use, the Chiropractic Board has asserted that chiropractors may practice acupuncture.

Since the 1990s, the Chiropractic Board has controversially asserted that acupuncture and other procedures involving needles, such as needle electromyography ("needle EMG"), are within the scope of the practice of chiropractic. *See Tex. Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d 464, 469 (Tex. App.—Austin 2012, pet. denied).[3] The legislature responded to this controversy in 1995 by enacting the current statutory language in the Chiropractic Chapter prohibiting chiropractors from practicing incisive procedures, with only one exception—the use of needles for diagnostic blood draws. *Id.* Soon after, in light of these amendments, the attorney general issued an opinion declaring that acupuncture is outside the scope of the practice of chiropractic. Tex. Att'y Gen. Op. No. DM-415 (1996).[4] The attorney general reached this conclusion because the sole exception to the prohibition on the performance

[3] The *Texas Medical Association* case is attached as **Exhibit H.** As discussed further below, the Austin Court of Appeals recently concluded that the practice of needle EMG is outside the scope of the practice of medicine.

[4] Tex. Att'y Gen. Op. DM-415 (1996) is attached as **Exhibit D**.

of incisive procedures was diagnostic blood draws. *Id.* Thus, the attorney general reasoned that all other procedures involving needles were outside the statutory scope of chiropractic. *Id.*

In 1997, in the course of the Texas State Board of Acupuncture Examiners' ("Acupuncture Board") sunset review, the legislature amended the Acupuncture Chapter to limit acupuncture to the "nonincisive, nonsurgical" insertion of acupuncture needles. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1170 (Senate Bill 361) (codified as TEX. OCC. CODE § 205.001(2)). The legislature did not amend the Chiropractic Chapter to allow chiropractors to practice acupuncture, despite attempts to do so during that legislative session and subsequent sessions. Specifically, during the course of Senate Bill 361's consideration in the legislature, language was inserted to amend the Chiropractic Chapter to expressly authorize chiropractors to practice acupuncture. *See* Committee Amendments No. 3, 4 to Tex. S.B. 361, 75th Leg., R.S. (1997). On the House floor, however, these amendments were struck because the sunset bill was limited to the function of the ***Acupuncture Board*** and the proposed amendments to the ***scope of chiropractic*** were not germane to the bill.[5]

Nonetheless, because of the amendment to the Acupuncture Chapter, the attorney general reversed course, reasoning that the Chiropractic Chapter and Acupuncture Chapter should be read *in pari materia* since both regulate healthcare professions. Improperly reading the chapters together to import a definition in the Acupuncture Chapter into the Chiropractic Chapter, the attorney general reached the unsound conclusion that acupuncture had become within the statutory scope of the practice of chiropractic simply by virtue of the amendment to the Acupuncture Chapter. Tex. Att'y Gen. Op. DM-471 (1998).[6] That same day, the attorney general issued a contradictory opinion concluding that the use of needles continued to exceed the

[5] Texas Acupuncture Association's January 1998 position statement is attached as **Exhibit I.**

[6] Tex. Att'y Gen. Op. DM-471 (1998) is attached as **Exhibit E**.

statutory scope of chiropractic, with the statutory exception of blood draws and the new exception of acupuncture recognized in DM-471. Tex. Att'y Gen. Op. DM-472 (1998).[7]

C. The Chiropractic Board has a history of acting unilaterally to impermissibly define the practice of chiropractic far beyond that authorized by statute.

For decades, the Chiropractic Board has professed that chiropractors may practice many procedures that are prohibited by the Chiropractic Chapter,[8] leading to repeated assailment by the legislature, the courts, and other state agencies:

- The Chiropractic Board claimed that chiropractors may perform needle EMG. An administrative law judge found that needle EMG was not within the scope of chiropractic, but the Chiropractic Board nonetheless continued to advise chiropractors that they could continue performing the procedure.[9] It continued to do so until the Austin Court of Appeals shut down this practice by concluding it is prohibited because needle EMG is an incisive procedure. *See Tex. Med. Ass'n*, 375 S.W.3d at 481-82, 497.

- The Chiropractic Board claimed that chiropractors may perform manipulation under anesthesia ("MUA"). Consequently, the legislature amended the Chiropractic Chapter to prohibit chiropractors from performing the procedure.[10] But the Chiropractic Board again continued advising chiropractors that they could perform the procedure.[11] And again it was not until the Austin Court of Appeals mandated that MUA is a surgical procedure prohibited under the Chiropractic Chapter that the Chiropractic Board finally conceded that MUA was outside the scope of chiropractic. *Id.* at 488.

- The Chiropractic Board contended that chiropractors could inject substances into patients. The attorney general opined that the injection of substances is the use of a needle and is thus outside the scope of chiropractic. *See* Tex. Att'y Gen. Op. DM-472 (1998). The Chiropractic Board ignored this opinion and continued advising chiropractors that they could perform procedures involving needles until

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[7] Tex. Att'y Gen. Op. DM-472 (1998) is attached as **Exhibit F**.

[8] The Chiropractic Board admitted as much in its discovery responses. *See* **Exhibit G,** Bates No. 0029-31.

[9] *See* Sunset Advisory Committee, Texas Board of Chiropractic Examiners, Staff Report (Feb. 2004), p. 8, available at https://www.sunset.texas.gov/public/uploads/files/reports/Board%20of%20Chiropractic%20Examiners%20Staff%20Report%202004%2079th%20Leg.pdf

[10] *See id.* at 9.

[11] *See id.* at 9.

the Austin Court of Appeals mandated otherwise in the *Texas Medical Association* opinion.[12]

- Following the attorney general's initial opinion concluding that acupuncture was incisive and outside the scope of chiropractic, the Chiropractic Board nonetheless continued claiming that it was an authorized practice under the Chiropractic Chapter.[13]

- The comptroller found that the Chiropractic Board had refused to comply with the legislation prohibiting the Chiropractic Board from performing incisive, surgical procedures and recommended that the Chiropractic Board adopt rules clarifying the restrictions of this legislation. The Chiropractic Board declined to do so.[14]

- The Chiropractic Board evaded rule challenges and obtaining input by stakeholders by simply issuing opinions informing chiropractors that they could perform various procedures rather than adopting rules. *Tex. Med. Ass'n*, 375 S.W.3d at 470.[15]

- The Chiropractic Board continues to subvert the will of the legislature by proclaiming authority to ***define*** the scope of the practice of chiropractic rather than ***clarifying*** what is and is not within the practice of chiropractic. *See* TEX. OCC. CODE § 201.1525.[16]

In 2004, in the course of the Chiropractic Board's sunset review, the Sunset Advisory Committee called the Chiropractic Board out on its systematic refusal to comply with the confines of the Chiropractic Chapter's scope of practice provision. It found that "[t]he Board has a history of acting unilaterally to expand scope of practice in a way that seems to indicate a greater interest in promoting the profession than following the law and protecting patients."[17] In response, during 2005 legislative session, the legislature enacted a provision requiring the Chiropractic Board to adopt rules clarifying which specific activities are included in the scope of

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[12] *See id.* at 8.

[13] *See id.* at 9.

[14] *See id.*

[15] *See id.* at 5-11.

[16] *See* **Exhibit G,** pp. 3, Admission 7, and 5, Interrogatory 1 (denying that the Chiropractic Board is only authorized to clarify the scope of the practice of chiropractic).

[17] *See* Sunset Advisory Committee, Texas Board of Chiropractic Examiners, Staff Report (Feb. 2004) at 5, 8.

the practice of chiropractic. *See* Act of May 27, 2005, 79th Leg., R.S., ch. 1020, § 8 (codified at TEX. OCC. CODE §§ 201.1525-.1526). The Chiropractic Board responded by promulgating 22 Texas Administrative Code 75.17, but the rule continued authorizing chiropractors to perform procedures such as manipulation under anesthesia, as well as procedures involving needles, including acupuncture and needle EMG.

D. After the Austin Court of Appeals invalidated several Chiropractic Board rules, including a rule authorizing chiropractors to use needles, the Chiropractic Board has refused to repeal its rules authorizing needle use.

The Texas Medical Association challenged several of the Chiropractic Board's newly adopted scope of practice rules, including those authorizing chiropractors to perform needle EMG, on grounds that needle EMG is an incisive procedure involving a needle and thus is outside the statutory scope of chiropractic. *See Tex. Med. Ass'n*, 375 S.W.3d at 472. The district court agreed and invalidated several of the rules, including 22 Texas Administrative Code 75.17(a)(3), which authorizes chiropractors to use needles. At the time the rule was invalidated by the district court, it stated:

> (3) 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.
>
> > (A) The use of a needle for a procedure is incisive if the procedure results in the removal of tissue other than for the purpose of drawing blood.
> >
> > (B) The use of a needle for a procedure is surgical if the procedure is listed in the surgical section of the CPT Codebook.

The Austin Court of Appeals affirmed this portion of the district court's judgment, concluding that needle EMG is an incisive procedure involving the use of a needle. *See Tex.*

Med. Ass'n, 375 S.W.3d at 497.[18] The court of appeals' conclusion and reasoning undermines the attorney general's rationale in DM-471 and suggests that the Chiropractic Board lacks the authority to adopt rules authorizing needle use by chiropractors. *See id.* at 479-80.

In response to the Austin Court of Appeals' decision, the Chiropractic Board repealed or amended the rules related to needle EMG that were declared invalid by the district court, but declined to repeal Rule 75.17(a)(3) and other rules authorizing needle use. As amended, the rules continue to constitute a violation of several chapters of the Occupations Code, and the Board continues to allow chiropractors to practice acupuncture in violation of state law.[19]

Rule 75.17 narrowly defines an incision as "a cut or surgical wound; also, a division of the soft parts made with a knife or hot laser," TEX. ADMIN. CODE § 75.17(b)(4), despite the fact that the Chiropractic Chapter broadly defines incisive or surgical procedure as meaning an incision into "any tissue, cavity, or organ by ***any*** person or implement," TEX. OCC. CODE § 201.002(a)(3) (emphasis added). Rule 75.17 currently provides that a person practices chiropractic if he or she performs specified "nonsurgical, nonincisive procedures," and excludes from the practice of chiropractic "incisive or surgical procedures." 22 TEX. ADMIN. CODE §§ 75.17(a)(1)(B), (2)(A). Thus, by crafting a definition of "incision" by rule that is far narrower than the Chiropractic Chapter's broad definition of incisive, the Chiropractic Board has impermissibly enlarged the class of invasive procedures chiropractors are allowed to perform beyond that specified in the Chiropractic Chapter. In other words, the Chiropractic Board has defined incision in a way that allows chiropractors to use needles in procedures besides diagnostic blood draws—in direct

[18] The Texas Medical Association also challenged rules related to other procedures, including manipulation under anesthesia. These rules were also invalidated by the district court. The court of appeals affirmed most of the district court's judgment, including the portion invalidating the manipulation under anesthesia rule, but remanded other claims.

[19] The Chiropractic Board's Rules are attached as **Exhibit C**.

contravention of the Chiropractic Chapter and the *Texas Medical Association* decision. And so, despite the Chiropractic Chapter's prohibition on all needle use, with only one exception for diagnostic blood draws, and the *Texas Medical Association* case's invalidation of the Chiropractic Board's rules authorizing needle use, Rule 75.17 continues to authorize needles to be used in the practice of chiropractic. *Id.* § 75.17(a)(3). Further, Rules 75.17(e)(2)(C) and 75.21 specifically authorize chiropractors to practice acupuncture in violation of the Chiropractic Chapter.

These rules authorize a practice that is well beyond the statutory scope of chiropractic. The Chiropractic Chapter limits chiropractic to matters affecting the spine and musculoskeletal system and prohibits the use of needles, with a narrow exception for diagnostic blood draws. Nothing in the Chiropractic Chapter grants the Chiropractic Board the authority to adopt rules authorizing its practitioners to perform a medical practice regulated by an entirely separate regulatory board. The legislature has granted the authority to regulate acupuncture to the Acupuncture Board. Under the Chiropractic Chapter, and in light of the *Texas Medical Association* opinion, the Acupuncture Association urges this Court to conclude that the Chiropractic Board lacked statutory authority to enact, and later inappropriately amend, these rules allowing chiropractors to use needles and practice acupuncture.

ARGUMENT AND AUTHORITIES

I.

The Court should grant declaratory relief, under Texas Government Code, Section 2001.038, invalidating the Chiropractic Board's rules authorizing chiropractors to practice acupuncture.

A. The Chiropractic Chapter must be interpreted based on its plain language, and the Chiropractic Board only has authority to enact rules that are consistent with that plain statutory language.

When interpreting a statute, a court must determine the legislature's intent as expressed by the specific language of the statute. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). The words of a statute must be construed according to their plain and common meaning, unless the words have acquired a more technical meaning or the construction leads to absurd results. *Nw. Austin Mun. Util. Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 828 (Tex. App.—Austin 2008, pet. denied). The intent of a statute is ascertained "first and foremost" from the statute's language as written. *Tex. State Bd. of Chiropractic Examiners v. Abbott*, 391 S.W.3d 343, 347 (Tex. App.—Austin 2013, no pet.); *Rogers v. Tex. Bd. of Architectural Examiners*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.). If the meaning of a statute is clear and unambiguous, it is inappropriate for a court to resort to extrinsic aids and rules of construction. *Collins v. Cnty. of El Paso*, 954 S.W.2d 137, 147 (Tex. App.—El Paso 1997, pet. denied).

As specific to whether an agency has adopted rules that exceed its statutory authority, an agency's power to make law is completely dependent on a valid statutory grant. *Pub. Util. Comm'n of Tex. v. City of Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001); *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992). As such, an agency's authority to promulgate rules is limited to "those powers that the Legislature expressly confers upon it or that are implied to carry out the express functions or duties given or imposed by statute." *Tex. Workers' Compensation Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 657-58 (Tex. 2004). "In deciding whether a particular administrative agency has exceeded its rule-making powers, the determinative factor is whether the rule's provisions are in harmony with the general objectives of the Act involved." *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 452 (Tex. 2008) (internal quotations omitted). "In other words, when determining whether an agency's rule is valid, [a court] must ascertain whether the rule is contrary to the relevant governing statutes or whether the rule is in harmony with the general objectives of the

statutes involved." *Tex Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Med. Examiners*, 254 S.W.3d 714, 719 (Tex. App.—Austin 2008, pet. denied). In determining whether rules were adopted or amended within an agency's statutory grant, a court must consider whether each rule (1) contravened specific statutory language, (2) ran counter to the objectives of the underlying statute, or (3) imposed additional burdens, conditions, or restrictions in excess of or inconsistent with the statutory provisions. *Tex. Med. Ass'n*, 375 S.W.3d at 474.

Further, though courts give great weight to an agency's interpretation of a statute, this deferential standard of review only applies if the language of a statute is ambiguous, and courts give even less deference when legislative intent is at issue. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011); *In re Smith*, 333 S.W.3d 349, 356 (Tex. 2011). Additionally, an agency's construction of a statute must be reasonable and alternative, unreasonable constructions do not render a statute ambiguous. *Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d at 625. But notably, if an agency attempts to regulate activities outside the scope of its statutory grant, the rule is void regardless of how reasonable it may be. *Pruett*, 249 S.W.3d 452. And even if a statute is ambiguous, a court grants no deference to an agency's interpretation in regard to issues that do not lie within the agency's expertise. *Rogers*, 390 S.W.3d at 384.

B. Under the Chiropractic Chapter, the Chiropractic Board lacked statutory authority to adopt, and later amend, rules that unlawfully authorize chiropractors to practice acupuncture.

1. The Chiropractic Chapter does not authorize chiropractors to use needles (except for diagnostic blood draws), nor does it grant the Chiropractic Board rulemaking authority to override this statutory prohibition by utilizing definitions in other chapters of the Occupations Code.

Acupuncture is an invasive procedure in which acupuncturists use needles to penetrate skin. The scope of practice provision in the Chiropractic Chapter plainly states that chiropractors

may not engage in incisive, surgical procedures, except for the use of needles for diagnostic blood draws. TEX. OCC. CODE §§ 201.002(a)(3), (b)(2). In the *Texas Medical Association* case, the Austin Court of Appeals observed that, in the medical context, "incisive" refers to cutting, while in the ordinary context, the term refers to cutting and piercing. 375 S.W.3d at 479-80. But whether one applies the medical or ordinary definition to this dispute is irrelevant. Under well-accepted principles of statutory interpretation, the fact that needle use for diagnostic purposes is the ***only*** exception to the Chiropractic Chapter's prohibition on "incisive" procedures conveys the legislature's intent to prohibit chiropractors from using needles for other purposes.

The legislature is presumed to choose its words carefully and include or exclude particular words purposefully. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); *Tex. Orthopaedic Ass'n*, 254 S.W.3d 719. When a statute lists specific exceptions to its application, "the intent is usually clear that no others shall apply." *Mid-Century Ins. Co. of Tex. v. Kidd*, 997 S.W.2d 265, 273 (Tex. 1999). This is especially true when the exception is of the same type expressly included—here, procedures involving needles. *Fazio v. Cypress/GR Houston I, L.P.*, 403 S.W.3d 390, 421 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *CenterPoint Energy Houston Elec., LLC v. Gulf Coast Coal. of Cities*, 263 S.W.3d 448, 464 (Tex. App.—Austin 2008), *aff'd* 324 S.W.3d 95 (Tex. 2010). Further, when words are grouped together in a statute, the meaning of the particular words should be ascertained by reference to other words associated with them in the same statute. *Ritchie v. Rupe*, __ S.W.3d __, 2014 WL 2788335, at *8 (Tex. June 24, 2014).

In adopting and later amending rules authorizing chiropractors to practice acupuncture, the Chiropractic Board has read into its scope of practice statute an additional exception to the prohibition on needle use that is simply not there. The Austin Court of Appeals has rejected similar efforts to read into scope of practice statutes terms that are not included. *See Kuntz v.*

Khan, No. 03–10–00160–CV, 2011 WL 182882, at *7-8 (Tex. App.—Austin 2011, no pet.) (concluding that because eyebrow threading was not included in the cosmetology chapter's express definition of cosmetology, it was not within the cosmetology scope of practice). Had the legislature intended for chiropractors to practice other procedures involving needles, including acupuncture, it could easily have listed acupuncture as a second exception to the prohibition against needle use. Or the legislature could have defined chiropractic as including acupuncture, along with the other practices expressly listed, such as the adjustment and manipulation of the musculosketal system. *See* TEX. OCC. CODE §§ 201.002(a)(3), (b). It did neither. And the Chiropractic Board may not imply the practice of acupuncture into its scope of practice statute where it has been excluded.

The Chiropractic Chapter's scope of practice statute is unambiguous. The only way to create ambiguity is to import the definition of acupuncture from the Acupuncture Chapter. But a definition in the Acupuncture Chapter does not create ambiguity in the Chiropractic Chapter when the Chiropractic Chapter is read according to its plain language, as it must be. *See Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 869 (Tex. 2014). And nothing in the Chiropractic Chapter authorizes the Chiropractic Board to use a definition in another chapter of the Occupations Code to inform its own scope of practice. Accordingly, under the plain and unambiguous language of the Chiropractic Chapter's scope of practice provision, chiropractors may not perform procedures involving needles, except for needles used for diagnostic blood draws. The Chiropractic Board's rules authorizing needle use for acupuncture contravenes the specific statutory language defining the scope of chiropractic and is therefore invalid.

2. Because the Chiropractic Board's construction of the Chiropractic Chapter is unreasonable and the practice of acupuncture is outside the Board's expertise, the Court should grant no deference to the Board's rules.

Texas courts have repeatedly admonished that even when a statute an agency is charged with implementing is ambiguous, an agency's interpretation of the statute is afforded no deference when the agency's construction is unreasonable and outside the agency's expertise. *See, e.g., Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d at 625; *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.). Even if the Court believes the Chiropractic Chapter's scope of practice provision does not unambiguously prohibit chiropractors from using needles, including for acupuncture, the Court should not defer to the Chiropractic Board's interpretation of the provision because its construction is unreasonable and acupuncture is outside the Chiropractic Board's expertise.

First, the Chiropractic Board's interpretation is unreasonable because it contravenes the very purpose of the Occupation Code's regulation of healthcare professions and the objectives of the chiropractic scope of practice statute. *Tex. Med. Ass'n*, 375 S.W.3d at 474. The primary purpose of healthcare regulations is to protect public health and safety. *Patel*, 2012 WL 3055479, at *13; *see also State v. Richards*, 301 S.W.2d 597, 602 (Tex. 1957). This is why each chapter of the Occupations Code sets forth specific educational and training requirements for a person to become licensed to perform that particular profession. Indeed, it is noteworthy that the Chiropractic Board does not even regulate the practice of acupuncture by chiropractors.[20] It instead has adopted rules authorizing chiropractors to practice acupuncture, without any requirement for a chiropractor to obtain permission from (or even inform) the Chiropractic Board, and without any meaningful standards to ensure that chiropractors are practicing the procedure safely.

[20] *See* **Exhibit G,** pp. 4-5, Admissions 12-15.

Under the Acupuncture Chapter, acupuncturists licensed by the Acupuncture Board are statutorily required to complete an intensive course of study in order to lawfully practice acupuncture. The legislature prescribed this intensive course of study to protect public health. Before an acupuncturist may become licensed to practice acupuncture, the legislature has mandated that a prospective licensee must complete at least 1,800 instructional hours from an accredited acupuncture school and satisfy at least two terms of a resident course of instruction in order to become licensed. *See* TEX. OCC. CODE §§ 205.203, 205.206; 22 TEX. ADMIN. CODE § 183.4. Acupuncturists must receive training in subjects pertinent to acupuncture, including meridian and point locations, bacteriology, hygiene, and public health. TEX. OCC. CODE § 205.206. In addition to these requirements, an applicant must attend an acupuncture school approved by the Acupuncture Board, and to gain this approval the school must be accredited or be at a candidate for accreditation by the Accreditation Commission for Acupuncture and Oriental Medicine ("ACAOM"). *See* TEX. ADMIN. CODE §§ 183.2(2), 183.4(a)(4). ACAOM requires a minimum of four years of oriental medicine and acupuncture study (a minimum of 146 semester credits or 2,625 hours).[21] All three acupuncture schools in Texas exceed these minimum requirements. Likewise, to gain licensure in Texas, a candidate must sit for the full series of National Certification Commission for Acupuncture and Oriental Medicine examinations, the requirements of which parallel ACAOM program criteria. *See* TEX. ADMIN. CODE §§ 183.2(19), 183.4(a)(5), (6). Additionally, each year, the legislature requires acupuncturists to complete seventeen hours of continuing education, including at least eight hours that ensure the licensee's overall acupuncture knowledge, skills, and competence are enhanced. TEX. OCC. CODE § 205.255; 22 TEX. ADMIN. CODE § 183.20.

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[21] *See* National Certification Commission of Acupuncture and Oriental Medicine Eligibility Requirements, available at http://www.nccaom.org/applicants/eligibility-requirements.

Notably, in the Chiropractic Chapter, the legislature does not grant chiropractors any exception from the Acupuncture Chapter's requirement to obtain a license from the Acupuncture Board if they wish to practice acupuncture. Instead, the Chiropractic Board—attempting to substitute its own judgment for that of the legislature—has created and adopted by rule its own definition of acupuncture and its own acupuncture educational requirements. Those rules require chiropractors to complete a meager 100 hours of acupuncture training in order to practice the procedure, with no specifications as to the content of that training[22]—grossly inadequate not only as compared to the course of study mandated by the legislature in the Acupuncture Chapter, but also under standards recommended for acupuncture training by other medical organizations. *See* 22 TEX. ADMIN. CODE § 75.21[23]; *see also, e.g.*, World Health Organization, Guidelines on Basic Training and Safety in Acupuncture, available at http://apps.who.int/medicinedocs/pdf/whozip56e/whozip56e.pdf. In fact, as the Chiropractic Board has admitted, chiropractors can complete the bulk of this training online. *See* TEX. ADMIN. CODE § 75.21.[24]

Further, the Chiropractic Board does not impose any oversight as to whether even these minimal requirements are being met. Because the Chiropractic Board does not require chiropractors to receive a certificate or license endorsement from the Board to practice acupuncture, the Board does not, and cannot, track which chiropractors are practicing

[22] *See* **Exhibit G,** pp. 3-4, Admissions 8-11.

[23] Section 75.21(d) mandates that effective January 1, 2010, a chiropractor must successfully complete either the 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 to practice acupuncture. But to sit for the National Board of Chiropractic Examiners' acupuncture examination, an applicant need only complete 100 hours of instruction in acupuncture. See https://www.nbce.org/examinations/acupuncture/acu_eligibility/. Thus, the meager 100 hours required by the Chiropractic Board is still what is required for chiropractors to practice acupuncture in Texas.

[24] *See* **Exhibit G,** p. 4, Admission 9.

acupuncture or what acupuncture education has been completed by those chiropractors.[25] And the Chiropractic Board does not require chiropractors to complete any continuing education in acupuncture.[26] As observed by the Sunset Advisory Committee in the course of the Chiropractic Board's sunset review, the Chiropractic Board's position appears to be "buyer beware": the Board declines to regulate the practice of acupuncture by chiropractors while simultaneously authorizing them to perform the procedure.[27]

In construing a statute, a court should consider the consequences of a particular construction. *City of Houston v. Clark*, 197 S.W.3d 314, 318 (Tex. 2006); *Tex. Med. Ass'n*, 391 S.W.3d 343 at 347. The consequence of the Chiropractic Board's construction that acupuncture is within the scope of the practice of chiropractic is the potential for a significant threat to public safety and health because, by the very terms of the rules, chiropractors lack the education and training that the legislature has determined is statutorily required for safe performance of the procedure of acupuncture. *See* TEX. OCC. CODE §§ 205.203, 205.206; *see also Andrews v. Ballard*, 498 F. Supp. 1038, 1054 (S.D. Tex. 1980) ("An acupuncture needle in unskilled hands can cause serious damage."); *Commonwealth v. Schatzberg*, 371 A.2d 544, 547 (Pa. Cmwlth. 1977) (chiropractors should not practice acupuncture because "acupuncture can cause immediate and serious medical problems requiring the attention of a physician").

As such, to construe the Chiropractic Chapter as authorizing the entirely distinct practice of acupuncture, in the absence of any statutorily required educational or training requirements, is unreasonable.

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[25] *See id* at 4-5, Admissions 13-15.

[26] *See id*. at 5, Admission 16.

[27] *See* Sunset Advisory Committee Staff Report, at 8.

Second, there can be little dispute that the Chiropractic Board's expertise is chiropractic—not acupuncture. The Chiropractic Board's determination that chiropractors can perform acupuncture is based on construction of a definition in a different chapter of the Occupations Code—the Acupuncture Chapter—and application of that definition to its own profession, without any legislative authority to do so. Likewise, the Chiropractic Board's wrongful determination signals that the Board believes the intensive educational and training requirements mandated by the legislature for the practice of acupuncture are not in fact necessary.

To defer to the Chiropractic Board's construction would be akin to deferring to a conclusion by the Acupuncture Board that acupuncturists may practice the distinct professions of nursing or physical therapy without the same intensive training in those fields, simply because the Acupuncture Board was interpreting its own scope of practice statute in reaching that conclusion. In that situation, the Acupuncture Board would be no more qualified to second-guess the legislatively mandated education requirements for safe performance of nursing or physical therapy than the Chiropractic Board is in attempting to grant chiropractors the right to practice acupuncture while exempting them from nearly all mandated education and training requirements.[28] And the agencies that do possess expertise about the scope of the practice of acupuncture—the Acupuncture Board, as overseen by Texas Medical Board—believe that the scope of the practice of chiropractic does ***not*** include acupuncture. *See Tex. Med. Ass'n*, 375

[28]Interestingly, at least one major chiropractic association disagrees with the Chiropractic Board that chiropractic includes the practice of acupuncture. As the President of the International Federal of Chiropractors and Organizations has stated: "The introduction of acupuncture into the chiropractic scope of practice is a blurring of professional boundaries that in combination with other allopathic modalities erodes our separate and distinct status that the profession has worked so hard to obtain." *See* http://chiropractic.prosepoint.net/81954.

S.W.3d at 477-78.[29] If the Court is going to grant deference, it should defer to the Acupuncture Board, not the Chiropractic Board.

Finally, as discussed previously, the Chiropractic Board has a pattern of attempting to aggrandize the scope of the practice of chiropractic far beyond that authorized by statute. If the Court interprets the Chiropractic Chapter as the Chiropractic Board proposes, it will condone one of the Chiropractic Board's many efforts to seize a separate medical practice, regulated and subject to licensing by another regulatory board, and make that practice its own. The Court should not sanction the Chiropractic Board's fast and loose interpretation of its scope of practice statute. In light of the Chiropractic Board's long history of skirting the requirements of its own chapter, the Court should afford the Chiropractic Board no deference.

3. The attorney general opinion concluding that acupuncture is within the statutory scope of chiropractic is poorly reasoned and should be disregarded.

The Chiropractic Board justifies its adoption of the challenged rules by latching onto the definition of acupuncture in the Acupuncture Chapter, which is "the nonsurgical, nonincisive insertion of an acupuncture needle." TEX. OCC. CODE § 205.001(2)(A). In Opinion No. DM-471, the Texas attorney general similarly latched onto this definition in concluding that the chiropractic scope of practice includes acupuncture. The Court should decline to construe the Acupuncture and Chiropractic Chapters in this manner for several reasons.

At the outset, an attorney general opinion is simply advisory and is not binding authority on a court. As the Austin Court of Appeals has observed, "[t]he attorney general's opinions … are purely ministerial and advisory." *City of San Antonio v. Tex. Att'y Gen.*, 851 S.W.2d 946, 950 (Tex. App.—Austin 1993, writ denied); *see also White v. Eastland Cnty.*, 12 S.W.3d 97, 101

[29] *See also* **Exhibit I**, pp. 10-11; **Exhibit J** (Texas State Board of Acupuncture Examiners' Request for Opinion (2013)). The attorney general declined to accept the Acupuncture Board's request for opinion due to the ongoing *Texas Medical Association* litigation.

(Tex. App.—Eastland 1999, no pet.). But to the extent the Court looks to the attorney general's opinion for guidance, it is unpersuasive. The opinion was animated by two separate arguments: first, that the Chiropractic Chapter and Acupuncture Chapter should be read *in pari materia* so as to import the definition of "acupuncture" from the Acupuncture Chapter into the Chiropractic Chapter, and, second, that the statement of a legislator confirmed that the amendment to the Acupuncture Chapter was made to grant chiropractors the right to practice acupuncture. Both of these fatally flawed arguments should be rejected by this Court.

a) The attorney general impermissibly read the Chiropractic Chapter and Acupuncture Chapter "*in pari materia*" to conclude that chiropractic includes the practice of acupuncture.

Before the legislature limited the definition of "acupuncture" in the Acupuncture Chapter to the nonincisive insertion of acupuncture needles, the attorney general concluded that the Chiropractic Chapter's prohibition against any incisive procedure other than needles used for blood draws meant that chiropractors could not practice any other procedure involving needles, including acupuncture. *See* Tex. Att'y Gen. Op. DM-415 (1996). It was only after the amendment to the Acupuncture Chapter's definition of "acupuncture" that the attorney general reversed course and concluded that acupuncture now constituted a second exception to the Chiropractic Chapter's prohibition on needle use. Tex. Att'y Gen. Op. DM-471 (1998). The attorney general's fundamental reasoning regarding needle use, however, never changed: the very day it issued DM-471, it released a second opinion concluding that the injection of substances also outside the statutory scope of chiropractic because it involved the use of needles. Tex. Att'y Gen. Op. DM-472. Inconsistent with DM-471, in DM-472, the attorney general reasoned that "the legislature intended the use of needles for any purpose other than the drawing of blood for diagnostic purposes to be excluded from the scope of chiropractic." *Id.*

While concluding that the Chiropractic Chapter unambiguously prohibits needle use except for diagnostic blood draws, the attorney general relied on the doctrine of *in pari materia* to conclude that, through the Acupuncture Chapter, the chiropractic scope of practice includes a second exception to the prohibition on needle use: the use of a needle for acupuncture. In other words, the attorney general "imported" the definition of "acupuncture" from the Acupuncture Chapter into the Chiropractic Chapter to expand the scope of the practice of chiropractic. This Court should reject this faulty reasoning and conclude, as the attorney general did previously, that the Chiropractic Chapter unambiguously prohibits needle use except for diagnostic blood draws.

First, it is impermissible for a court to use extrinsic aids of construction, such as the tool of *in pari materia*, when there is no ambiguity in a statute. *See Cnty. of El Paso*, 954 S.W.2d at 147. As explained above, the clear and unambiguous statute establishing the chiropractic scope of practice does not authorize the use of needles by chiropractors, including for acupuncture, with the narrow exception of needle use for diagnostic blood draws. *See* TEX. OCC. CODE § 201.002. There is no ambiguity in the statute. The only way for there to be ambiguity is to create it by importing a definition from an entirely distinct chapter of the Occupations Code.

Second, the doctrine of *in pari materia* is inapplicable. Texas Government Code, Section 311.026(b) codified this common-law doctrine, and the statute only applies if a conflict between statutes is irreconcilable. *Abbott*, 391 S.W.3d at 348. While it is true that courts read conflicting statutes together to harmonize them, there is no conflict here. *See Rodriguez v. Tex. Workforce Comm'n*, 986 S.W.2d 781, 783 (Tex. App.—Corpus Christi 1999, pet. denied). The Acupuncture Chapter governs the practice of acupuncture—not any other profession—while the Chiropractic Chapter governs the practice of chiropractic. One does not need to read—and should not read—the Acupuncture Chapter to determine the scope of chiropractic since that scope is found solely

in the Chiropractic Chapter. Thus, not only are the two chapters not "irreconcilable," there is no conflict at all since each chapter discreetly applies to a different profession.

Third, for two statutes that do not reference each other to be *in pari materia*, they must have been enacted with the ***same object or purpose*** in mind. *See, e.g.*, *Nat'l Media Corp. v. City of Austin*, No. 03-12-00188-CV, 2014 WL 4364815, at *2 (Tex. App.—Austin Aug. 27, 2014, no pet.); *Abbott*, 391 S.W.3d at 348; *Howlett v. Tarrant Cnty.*, 301 S.W.3d 840, 846 (Tex. App.—Fort Worth 2009, pet. denied). "The adventitious occurrence of like or similar phrases, or even of similar subject matters, in laws enacted for wholly different ends will not justify applying the doctrine." *Abbott*, 391 S.W.3d at 349; *see also In re JMR*, 149 S.W.3d 239, 292 (Tex. App.—Austin 2004, no pet.). To determine whether two statutes share a common purpose, courts must consider whether the statutes were ***clearly written to achieve the same objectives***. *See In re JMR*, 149 S.W.3d at 292-94 (emphasis added); *Abbott*, 391 S.W.3d at 350. Moreover, as the Texas Supreme Court has observed, it is when two acts are enacted in the ***same legislative session*** that they should be read together. *Garrett v. Mercantile Nat'l Bank of Dallas*, 168 S.W.2d 636, 637 (Tex. 1943) (emphasis added). And if two statutes were enacted "many years apart for different purposes and objective," they are not to be read *in pari materia*. *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407, 410 (Tex. App.—Dallas 2010, pet. denied).

Based on these principles, the Austin Court of Appeals has repeatedly refused to read *in pari materia* separate statutory or regulatory provisions that do not clearly share the same purpose:

- In *In re JMR*, at issue was whether the criminal trespass statute in the Penal Code and a criminal trespass statute in the Education Code could be read *in pari materia*. 149 S.W.3d at 294. The court refused, concluding that while both statutes expressly concerned criminal trespass, they were not written to achieve the same objective. The objective of prohibiting trespass on school grounds was to protect the safety of those on school grounds, while the purpose of the general trespass statute was to protect a property interest. *Id.*

- In *National Media Corp.*, the court considered whether to read two separate ordinances *in pari materia* after the City of Austin used a Zoning Code provision to deny a sign registry application, even though the Sign Regulations Code governed signs. 2014 WL 4364815, at *1. The court concluded that the ordinances were not *in pari materia* because the Zoning Code regulates property use within the City's zoning jurisdiction, while the Sign Regulations Code specifically regulates signs. *Id.* at *2. Because the two codes did not touch on the same subject, have the same purpose, or relate to the same objective, the court held that one could not reasonably conclude there was a similarity of object or purpose when there was no specific reference to signs in the Zoning Code. *Id.*

- In *Abbott*, the attorney general urged the court to read two provisions of the Chiropractic Chapter *in pari materia* so that one of the provisions would constitute an exception to the other one. 391 S.W.3d at 347-348. Specifically, the attorney general argued that provisions regarding patient access to medical records acted as an exception to a provision governing the confidentiality afforded to the Chiropractic Board's investigation files. *Id.* The court concluded that the provisions regarding patient confidentiality did not share the same purpose as provisions regarding the confidentiality of the Chiropractic Board's investigation files: the former was intended to protect patient confidentiality, while the latter was intended to protect the Chiropractic Board's investigative process. *Id.* at 349.

As in these cases, the legislation limiting chiropractic to "nonincisive" procedures, and the later legislation limiting "acupuncture" to nonincisive needle insertion, do not share the same object or purpose, nor were they enacted during the same legislative session. To the contrary, the legislation limiting chiropractic to nonincisive, nonsurgical procedures, except for diagnostic blood draws, was enacted to prohibit chiropractors from performing procedures involving needles. *See Tex. Med. Ass'n*, 375 S.W.3d at 469 n.7, 477-78. And the legislation limiting acupuncture to the nonincisive insertion of an acupuncture needle was enacted as part of the Acupuncture Board's sunset bill—not as part of any legislation concerning chiropractic. The Chiropractic Board may not apply legislation defining the practice of acupuncture to end-run the Chiropractic Chapter's express prohibition on needle use. In other words, the Chiropractic Board may not use an isolated provision in another Occupations Code chapter that contains no reference to the practice of chiropractic to ***expand*** its own limited scope of practice.

Further, the Occupations Code is delineated into chapters with each regulating a distinct profession, such as physicians, physician assistants, nurses, chiropractors, and acupuncturists. Each chapter has its own board regulating its own profession, not any other profession. The statutory scope of chiropractic is established by the Chiropractic Chapter, not any other chapter of the Occupations Code. *See Tex. Med. Ass'n*, 375 S.W.3d at 467. And the Legislature has granted the Chiropractic Board the power to regulate, and adopt rules governing the practice of, ***chiropractic***, not any other medical profession. TEX. OCC. CODE §§ 201.151-.152. To conclude that the Chiropractic Board also has the authority to adopt rules regulating acupuncture—a practice that is under the domain of an separate state agency—is to strip the specific powers the legislature has delegated to each agency of any purpose. If each profession regulated under the Occupations Code can creatively "borrow" terms from entirely separate regulatory regimes governing other professions to expand its own limited scope of practice, then what was the purpose of creating specific scopes of practice for distinct professions, each with its own statutorily mandated educational and training requirements?

Indeed, as previously discussed, the purpose of the Occupations Code provisions regulating healthcare professionals is to protect public safety and health. For this reason, courts have repeatedly declined to conflate entirely separate chapters of the Occupations Code. *See, e.g., Neasbitt v. Warren*, 22 S.W.3d 107, 111 (Tex. App.—Fort Worth 2000, no pet.); *Lenhad v. Butler*, 745 S.W.2d 101, 105 (Tex. App.—Fort Worth 1988, writ denied). Further, nothing in the Occupations Code grants the Chiropractic Board rulemaking authority outside the confines of the Chiropractic Chapter.

When the legislature intends to assign a meaning from one chapter of the Occupations Code into another, it does so explicitly. *See, e.g.,* TEX. OCC. CODE §§ 157.051, 162.052. The reason for this is apparent: it is nonsensical for a reader of the Occupations Code to be required

to consult an entirely separate chapter that is neither cross-referenced nor mentioned in a governing chapter to determine the actual scope of a profession's practice. See *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). Thus, when the legislature does not incorporate a term from one statute explicitly into another statute, courts will not assume it intended to do so. *See, e.g., DLB Architects*, 305 S.W.3d at 410; *In re Doe* 3, 19 S.W.3d 300, 304 (Tex. 2000) (Gonzales, J., concurring). And it is particularly improper to "import[] a definition from a different statute adopted for different purposes." *Matagorda Cnty. Appraisal Dist. v. Coastal Liquids Partners, L.P.*, 165 S.W.3d 329, 335 (Tex. 2005). If statutes concern unrelated subjects, "[a] word defined in one act does not necessarily determine the word's meaning in another act dealing with a different subject." *Brookshire v. Houston Indep. Sch. Dist*., 508 S.W.2d 675, 678 (Tex. Civ. App.—Houston [14th] 1974, no writ). Nothing in the Chiropractic Chapter indicates any legislative intent to apply the definition of "acupuncture" in the entirely separate, unrelated Acupuncture Chapter to the Chiropractic Chapter in order to determine—and exceed—its governing chapter's statutory scope.[30] No such intent can be implied.

Acupuncture also—by its very definition—treats conditions beyond what chiropractors are authorized to treat. In addition to the prohibition against incisive procedures, the Chiropractic Chapter also limits chiropractic to the performance of procedures involving the spine and musculoskeletal system and the subluxation and biomechanics of those systems. *See* TEX. OCC. CODE § 201.002. In comparison, acupuncture is defined as the nonincisive insertion of an acupuncture needle for an entirely different purpose: "as a primary mode of therapy to mitigate a

[30] While some professional acts, such as those governing architects and engineers, cross-reference each other and have significant overlap so that at times both chapters encompass the same scopes of practice, the same is not true here. *See Rogers*, 390 S.W.3d at 384-85. The term "acupuncture" is not used in the Chiropractic Chapter in any manner, let alone to refer back to the definition of "acupuncture" in the Acupuncture Chapter. And as explained, the statutory scope of the practice of chiropractic is limited and cannot reasonably be read to encompass the practice of acupuncture.

human condition, including the evaluation and assessment of the condition." *Id.* § 205.001(2). Courts from other states have expressly held that acupuncture is not within the scope of chiropractic precisely because acupuncture and chiropractic are not the same and do not treat the same conditions. *See, e.g.*, *Schatzberg*, 371 A.2d at 546-47. In adopting rules authorizing chiropractors to practice acupuncture by virtue of the Acupuncture Chapter's definition of "acupuncture," the Chiropractic Board has enabled chiropractors to perform procedures beyond the treatment of the subluxation complex or the biomechanics of the musculoskeletal system in violation of the Chiropractic Chapter. *See* TEX. OCC. CODE § 201.002(b).

The attorney general's decision to use a definition from a separate chapter of the Occupations Code to expand the scope of chiropractic stands on shaky legal footing and should not withstand this Court's scrutiny. Contrary to the attorney general's opinion in DM-471, every court to consider the issue of needle use by chiropractors has concluded that chiropractors may not perform any procedures involving needles except for diagnostic blood draws (as the attorney general himself concluded in a contradictory opinion released the same day). For these reasons, it is impermissible for the Chiropractic Board to import the definition of "acupuncture" from the Acupuncture Chapter into the Chiropractic Chapter, and the attorney general erred in construing the two chapters in this manner.

b) The attorney general impermissibly concluded that statements of individual members of the legislature were determinative of legislative intent.

The attorney general also purported to rely on stray statements of members of the legislature to reach his conclusion that the chiropractic scope of practice includes acupuncture. But statements of individual legislators have no bearing on legislative intent. Thus, to the extent any such statements were made, they should be disregarded by this Court.

First, it is impermissible to consider legislative history when statutory language is plain and unambiguous. *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 137 (Tex. 2013). The Chiropractic Chapter's scope of practice provision unambiguously prohibits chiropractors from performing procedures using needles; thus, legislative history is irrelevant to this Court's analysis. But even if the Court believes the Chiropractic Chapter's scope of practice provision is ambiguous, it is well-established that comments and testimony by members of the legislature do not evince legislative intent. As the Texas Supreme Court has repeatedly counseled, "a single statement by a single legislator does not evidence legislative intent and does not determine legislative intent." *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 191-92 (Tex. 2010); *see also AT&T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co.*, 186 S.W.3d 528-29 (Tex. 2006). "The Legislature does not speak through individuals—even its members—in committee hearings, in bill analyses and reports, in legislative debate, or in pre- and post-enactment commentary; it speaks through its enactments." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 447 (Tex. 2009) (Hecht, J., concurring).

Further, any isolated statements of a legislator are belied by other aspects of legislative history. Before 1995, the Chiropractic Chapter did not expressly prohibit chiropractors from performing procedures involving needles, leading to disputes as to whether those sorts of practices were within the statutory scope of chiropractic. *See Tex. Med. Ass'n*, 375 S.W.3d at 469. To resolve those disputes, in 1995, the legislature amended the Chiropractic Chapter to explicitly prohibit chiropractors from performing "incisive, surgical" procedures (with the exception of using needles for diagnostic blood draws). *See id.* During the course of this enactment, amendments were proposed specifying acupuncture as an additional exception to the prohibition on incisive procedures and requiring the Chiropractic Board to adopt procedures for

certifying chiropractors to practice acupuncture. *See id.* The legislature ultimately refused to adopt those amendments.

Later, during the Acupuncture Board's sunset review, amendments were added to the sunset bill expressly authorizing chiropractors to practice acupuncture, but these amendments were stripped from the bill before enactment because they were not germane. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1170. The legislature's germaneness rules mirror the Texas Constitution's prohibition on legislation containing more than one subject. *Compare, e.g.*, Texas House Rules for the 83rd Legislature, Rule 4, § 41, and Rule 11, § 2, *with* TEX. CONST. art. 3, § 35(a). The fact that the legislature could not permissibly—or even constitutionally—authorize chiropractors to practice acupuncture in the Acupuncture Board's sunset bill negates any argument that the sunset bill's change in the definition of acupuncture impacted the practice of acupuncture by chiropractors. "The legislature cannot do by indirection what it cannot do directly." *See West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 600 (Tex. 2003) (quoting *Jernigan v. Finley*, 38 S.W. 24, 26 (Tex. 1896)).

More recently, in 2011, legislation was again proposed authorizing chiropractors to practice acupuncture, but this legislation also failed to pass. *See* Tex. S.B. 1601, 82nd Leg., R.S. (2011). Thus, the legislature has repeatedly rejected attempts to amend the Chiropractic Chapter to include acupuncture within the scope of chiropractic, and "[n]o court could justify putting into a statute by implication what both Houses of the Legislature had expressly rejected by decisive votes." *Grasso v. Cannon Ball Motor Freight Lines*, 81 S.W.2d 482, 485 (Tex. Com. App. 1935); *see also Tex. Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 23 (Tex. 1996) ("courts should decline to infer a limitation in a statute that the Legislature has explicitly rejected"); *Transp. Ins. Co. v. Maksyn*, 580 S.W.2d 334, 338 (Tex. 1979) ("Courts should be

slow to put back that which the legislature has rejected."). As such, the Court should not heed any isolated statements made by legislators.

Because the Chiropractic Board's rules authorizing chiropractors to practice the procedure of acupuncture exceed the statutory scope of the practice of chiropractic established by the Chiropractic Chapter, this Court should grant summary judgment declaring the challenged rules invalid.

C. The Chiropractic Board's rules are additionally invalid because they impermissibly allow chiropractors to practice acupuncture in violation of the Acupuncture Chapter.

Additionally or alternatively, the Court should declare that the challenged rules are invalid because they unlawfully authorize chiropractors to practice acupuncture in violation of the Acupuncture Chapter. To practice acupuncture, a person must hold a license to practice acupuncture issued by the Acupuncture Board under the Acupuncture Chapter. *See* TEX. OCC. CODE § 205.201. The Acupuncture Chapter specifically mandates that "a person may ***not*** practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter." *Id.* § 205.201. The only exception is for health care professionals licensed under another statute of this state and ***acting within the scope of the license***—something that chiropractors who practice acupuncture fail to do. *See id.* § 205.003(a) (emphasis added). Thus, the Chiropractic Board's rules contravene the Acupuncture Chapter.

Because the challenged rules authorize chiropractors to practice acupuncture in violation of the Acupuncture Chapter, this Court should grant summary judgment declaring the rules invalid.

D. The rules are also invalid because they authorize chiropractors to engage in the unauthorized practice of medicine.

Again, additionally or alternatively, the Court should declare that the rules are invalid because they authorize chiropractors to engage in the unauthorized practice of medicine. Historically, only physicians could perform many medical procedures, including chiropractic and acupuncture. *See Thompson v. Tex. State Bd. of Med. Exam'rs*, 570 S.W.2d 123, 130 (Tex. App.—Tyler 1978, writ refused n.r.e.); *Teem v. State*, 183 S.W. 1144, 1147-48 (Tex. Crim. App. 1916). Over time, the legislature exempted various health care professionals, including chiropractors, from adhering to the requirements of the Medical Practice Act. But the legislature has never severed the practice of acupuncture from its historical roots as a practice of medicine under the authority of the Texas Medical Board. *See, e.g.*, *Andrews*, 498 F. Supp. at 1039-40. As a result, acupuncturists continue to be subject to the supervision of the Texas Medical Board, though with separate licensing requirements, and are not fully excluded from the scope of the Medical Practice Act. *See, e.g.*, TEX. OCC. CODE §§ 151.052, 205.101.

Other states similarly have historically considered acupuncture to constitute the practice of medicine. *See, e.g.*, *People v. Roos*, 514 N.E.2d 993, 996 (Ill. 1987). And many courts—including in Texas—have expressly held that a chiropractor's practice of acupuncture constitutes the unauthorized practice of medicine. *See Kelley v. Raguckas*, 270 N.W.2d 665, 625-26 (Mich. App. 1978); *Schatzberg*, 371 A.2d at 46-47; *State v. Rich*, 339 N.E.2d 630, 197 (Ohio 1975); *State v. Won*, 528 P.2d 594, 595-96 (Ore. App. 1974); *Ex parte Halsted*, 182 S.W.2d 479, 485 (Tex. Crim. App. 1944).

The Medical Practice Act expressly excludes chiropractors from its scope and requirements, but only to the extent chiropractors are engaged ***strictly*** in the practice of chiropractic. *See* TEX. OCC. CODE §§ 151.002(13), 151.052. The reason for the exemption of chiropractors (and certain other healthcare professionals) from the scope of the Medical Practice Act is to allow a chiropractor to practice medicine, but only to the extent the chiropractor stays

within the statutory scope of chiropractic. *Tex. Med. Ass'n*, 375 S.W.3d at 467. And the broader purpose of the Medical Practice Act, as found by the legislature, is to "protect the public interest" and protect the grant of the privilege of practicing medicine. TEX. OCC. CODE § 151.003(1). But if a chiropractor is not engaged strictly in the scope of chiropractic, the chiropractor is practicing medicine unlawfully and is outside the grant of that privilege. *Id.* Thus, though exempting chiropractors from the Medical Practice Act constitutes the legislature's recognition that there is some overlap between chiropractors' and physicians' scopes of practice, the exemption only applies to the extent chiropractors are engaged ***strictly*** in the practice of chiropractic. *See Tex. Orthopaedic Ass'n*, 254 S.W.3d at 717.

The Austin Court of Appeals has steadfastly refused to allow an occupational board to adopt rules that have the effect of allowing non-physician healthcare professionals to engage in the unauthorized practice of medicine. For example, in *Texas Orthopaedic Association*, the court concluded that a rule adopted by the Texas State Board of Podiatric Medical Examiners exceeded the statutory scope of podiatry because it allowed podiatrists to treat parts of the body above the foot that were outside the scope of podiatry training. *Id.* at 721. Consequently, the court held that the rule authorized podiatrists to engage in the unauthorized practice of medicine because they were treating parts of the body "outside the traditional scope of podiatry without satisfying the requirements of the Medical Practice Act," and the rule exceeded the limited exemption from the Medical Practice Act by allowing podiatrists to engage in acts that were not ***strictly*** the practice of podiatry. *Id.* Similarly, as discussed, the Austin Court of Appeals recently concluded that chiropractors were engaged in the unauthorized practice of medicine by performing needle EMG. *See Tex. Med. Ass'n*, 375 S.W.3d at 497.

The challenged rules authorize chiropractors to engage in a practice that is not strictly the practice of chiropractic and therefore are beyond the limited exception granted to them by the

Medical Practice Act. As such, the rules authorize chiropractors to engage in the unauthorized practice of medicine. By authorizing chiropractors to practice acupuncture, the Chiropractic Board thwarts the purpose of the State's regulation of the practice of medicine, which is to "provide for the general health and welfare of its citizens." *Thompson*, 570 S.W.2d at 128.[31] Instead, the Chiropractic Board promotes its own profession rather than following the law and protecting patients.[32] Accordingly, this Court should grant summary judgment declaring the rules invalid.

II.

The Court should, alternatively, hold that the statutory scheme purportedly authorizing chiropractors to practice acupuncture is unconstitutional under Texas Constitution, Article 16, Section 31, and Texas Constitution, Article 3, Section 35(a).

In the event this Court determines that the legislature did somehow intend to expand the statutory scope of chiropractic to include acupuncture through an amendment to the Acupuncture Board's sunset legislation, and that the challenged rules purportedly authorizing chiropractors to practice acupuncture are valid, the Acupuncture Association alternatively requests that the Court declare (1) the statutory scheme purportedly authorizing chiropractors to practice acupuncture with significantly less education or training in acupuncture than acupuncturists invalid and unconstitutional in violation of Texas Constitution, Article 16, Section 31; and

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[31] Indeed, in a 1984 legislative study on the regulation of acupuncture in Texas, the Senate Committee on Health and Human Services reiterated that "[a]cupuncture constitutes the practice of medicine and should be regulated in order to protect the public health and safety" and that "[t]he goal of regulating a health care profession is to protect the public health, welfare and safety by maximizing the public's access to safe, qualify services." Senate Committee on Health and Human Services, "The Regulation of Acupuncture in Texas, Report to the 69th Legislature, at 17, 23 (Dec. 1984), available at http://www.lrl.state.tx.us/scanned/interim/68/ac93.pdf. The committee further confirmed that "[i]t is the Legislature's duty to ensure that acupuncture treatments are provided by skilled, competent practitioners." Id. at 23.

[32] *See* Sunset Advisory Committee, Texas Board of Chiropractic Examiners, Staff Report (Feb. 2004), at 5, 8.

(2) Senate Bill 361 violates the one-subject rule in Texas Constitution, Article 3, Section 35(a). *See* TEX. CIV. PRAC. & REM. CODE §§ 37.004, 37.006; *Sefzik*, 355 S.W.3d at 622. The Acupuncture Association seeks this declaration under Texas Civil Practice and Remedies Code, Chapter 37.

A. The statutory scheme purportedly authorizing chiropractors to practice acupuncture with significantly less education and training in acupuncture than licensed acupuncturists violates Texas Constitution, Article 16, Section 31.

The Texas Constitution broadly states: "The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for mal-practice, but ***no preference shall ever be given by law to any schools of medicine***." *See* TEX. CONST. art. XVI, § 31 (emphasis added). Texas courts have interpreted this provision to prohibit the legislature from unfairly and arbitrarily "preferring" one branch of medicine over another by allowing one category of healthcare providers to obtain licenses with less burdensome conditions. *See, e.g.*, *Schlichting v. Tex. State Bd. of Medical Exam.*, 310 S.W.2d 557, 564 (Tex. 1958); *Wilson v. State Bd. of Naturopathic Examiners*, 298 S.W.2d 946, 948-50 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

In *Schlichting*, the Texas Supreme Court held that to allow one school of medicine to be licensed on easier terms than those required for a similar practice of medicine would violate article XVI, section 31. *Id.* at 564. And the violation is even more obvious when one group is allowed to practice without any license at all, while practitioners of a similar form of medicine must be licensed on onerous conditions. *Id.*; *see also Wilson*, 298 S.W.2d at 949-50. Indeed, the Court of Criminal Appeals has held that a broad interpretation of the scope of chiropractic would violate this provision of the constitution. The Court considered the chiropractic statute in effect at that time and concluded:

> Assuming, then, that under the Act before us, the legislature has set up, recognized, and defined chiropractic as a system, means, and method for the treatment of diseases and disorders of the human body, and that practitioners thereof are authorized to treat, by chiropractic, patients for diseases and disorders, ***it is evident that the legislature has preferred such science and such practitioners over all others engaged in doing the same thing***, that is, in treating the human body for diseases and disorders, ***because the chiropractor is not required to have the same educational qualifications***, nor is he required, as a condition precedent to his right to so treat patients, to pass a satisfactory examination upon the same subjects that are required of all others similarity situated.

Ex parte Halsted, 182 SW.2d at 487 (emphasis added).

Here, the Acupuncture Chapter requires acupuncturists to complete significant education and training in acupuncture in order to practice the procedure. As discussed above, the legislature has mandated that a practitioner must complete at least 1,800 instructional hours in acupuncture education and complete residencies to become licensed, then must complete at least eight hours of acupuncture continuing education annually. *See* TEX. OCC. CODE §§ 205.203, .206, .255. In contrast, if the legislature has allowed chiropractors to practice acupuncture, it has done so without requiring them to complete ***any*** education or training in acupuncture. The ***only*** requirements for any education or training are found in a Chiropractic Board rule, and these requirements are—at best—paltry, requiring only 100 hours initially and no continuing training requirements. *See* 22 TEX. ADMIN. CODE § 75.21. If the statutory scheme governing chiropractors and acupuncturists allows chiropractors to practice acupuncture with significantly less education or training in acupuncture than acupuncturists, the legislature unconstitutionally prefers chiropractic over acupuncture.

B. The legislation that purportedly authorizes chiropractors to practice acupuncture violates the one-subject rule in Texas Constitution, Article 3, Section 35(a).

The Texas Constitution prohibits the legislature from enacting a bill that contains more than one subject. TEX. CONST. art. 3, § 35(a). For a bill to pass muster, its provisions must relate,

directly or indirectly, to the same subject, and have a mutual connection. *LeCroy v. Hanlon*, 713 S.W.2d 335, 337 (Tex. 1986); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 601 (Tex. 1976); *C. Hayman Constr. Co. v. Am. Indem. Co.*, 471 S.W.2d 564, 566 (Tex. 1971). In other words, to be valid, a provision must be germane to the subject of the bill. *Jessen Assocs.*, 531 S.W.2d at 601. As specific to amendments to a bill, to be germane, the subject matter of an amendment must be reasonably related to the content of the original act. *Sommermeyer v. State*, 713 S.W.2d 183, 184-85 (Tex. App.—Houston [14th Dist.] 1986, pet. ref'd). Additionally, while courts lack the power to declare legislation unconstitutional on the basis of an insufficient caption, the title of a bill may be examined for the limited purpose of determining the general subject of a bill. *Ex parte Jones*, 2014 WL 2478134, at *5 (Tex. Crim. App. June 4, 2014); *see also Tex. Alcohol Beverage Comm'n v. Silver City Club*, 315 S.W.3d 643, 645-46 (Tex. App.—Dallas, 2010, pet. denied).[33] The policy reason behind the one-subject rule is:

> [I]f the provisions of the law or section to be amended involve a subject different from that actually dealt with in the body of the amending act, a reading of the former will not disclose to the reader the true subject of the amending act but, on the contrary, will mislead him as to the latter.

Bd. of Water Eng'gs v. City of San Antonio, 283 S.W.2d 722, 727 (Tex. 1955).

Senate Bill 361 was the Acupuncture Board's sunset bill. It related to the Acupuncture Board's continuation and functions, as plainly indicated from the bill's caption and its content. If the bill was intended to additionally expand the scope of the practice of chiropractic, it violated

[33] Section 35 previously stated that a bill was invalid if the caption did not give adequate notice of the content of the bill. The section was amended, however, in 1986 so that courts may no longer declare a statute unconstitutional on the basis of an insufficient caption. See *Ford Motor Co. v. Shelden*, 22 S.W.3d 444, 452 (Tex. 2000). As the Austin Court of Appeals has observed, the majority of cases interpreting section 35 were pre-1986 and concerned whether an act had an insufficient title rather than whether it violated the one-subject rule. *See State Bd. of Ins. v. Nat'l Employee Benefit Adm'rs, Inc.*, 786 S.W.2d 106, 109 (Tex. App.—Austin 1990, no writ).

the one-subject rule because it embraced two subjects: the continuation and function of the Acupuncture Board and the statutory scope of the practice of chiropractic.

As discussed above, during Senate Bill 361's journey through the legislature, the bill was amended to expressly authorize chiropractors to practice acupuncture. Those amendments directly amended the Chiropractic Chapter's scope of practice provision. But on the House floor, those provisions were challenged and ultimately struck from the bill on germaneness grounds because the ***chiropractic*** scope of practice has no relationship or connection to the functions of the ***Acupuncture Board***. As previously discussed, the legislature could not have expressly authorized chiropractors to practice acupuncture without violating the one-subject rule. It cannot do indirectly what it could not do directly. *West Orange-Cove*, 107 S.W.3d at 600.

In sum, if the Court interprets the Chiropractic Chapter as the Chiropractic Board urges, both Texas Constitution, Article 16, Section 31 and Texas Constitution, Article 3, Section 35(a) are violated. This Court should decline to interpret the Chiropractic Chapter in a manner that would render the statute unconstitutional. *City of Pasadena v. Smith*, 292 S.W.3d 14, 19 (Tex. 2009); *see also* TEX. GOV'T CODE § 311.021(1). Alternatively, the Court should grant summary judgment declaring that (1) the statutory scheme purportedly authorizing chiropractors to practice acupuncture with significantly less education and training than acupuncturists is unconstitutional and (2) Senate Bill 361 violates the Constitution's one-subject requirement.

III.

The Court should grant an injunction barring the Chiropractic Board from authorizing chiropractors not licensed under the Acupuncture Chapter to practice acupuncture.

To obtain a permanent injunction, an applicant must demonstrate (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *See* TEX. CONST. art. V § 8; TEX. CIV. PRAC. &

REM. CODE §§ 65.001-.045; *see also e.g., Jordan v. Landry's Seafood Rest., Inc.*, 89 S.W.3d 737, 742 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The Austin Court of Appeals has repeatedly held that injunctive relief is proper in a declaratory judgment action under both the Administrative Procedures Act and the Uniform Declaratory Judgment Act. *See, e.g., Tex. Dep't of State Health Servs. v. Balquinta*, No. 03–13–00063–CV, 2014 WL 1415192, at *13-15 (Tex. App.—Austin April 9, 2014, pet. filed). Whether to grant a permanent injunction is within the sound discretion of the trial court. *See, e.g., Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 383 (Tex. App.—Dallas 2009, no pet.); *Tex. Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 851 (Tex. App.—Austin 2002, pet. denied).

All of these elements are satisfied. First, as explained above, the challenged rules and the Chiropractic Board's actions authorizing chiropractors to engage in practices beyond the statutory scope of chiropractic are wrongful acts. Second, the rules and the Chiropractic Board's actions diminish the value of the licenses held by members of the Acupuncture Association, harming those members who were required to expend much greater time and financial resources to obtain authority to practice acupuncture in Texas. Third, because the Chiropractic Board's rules and actions unlawfully expand the activities in which chiropractors can engage in contravention of the Chiropractic Chapter, Acupuncture Chapter, and Medical Practice Act, the members of the Acupuncture Association suffer irreparable injury as a matter of law. Further, the practice of acupuncture by a person who has not completed the education and training mandated by the legislature to obtain a license in the profession poses an immediate danger to the public from unlicensed and unskilled practitioners. *Kelley v. Tex. State Bd. of Med. Examiners*, 467 S.W.2d 539, 546 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.). Finally, the Acupuncture Association has no adequate remedy at law because, in the absence of an injunction, the declaratory relief sought by the Acupuncture Association could otherwise potentially be

nullified. *See, e.g.*, *Balquinta*, 2014 WL 1415192, at *13-15; *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903-04 (Tex. App.—Austin 2009, no pet.).

The Court should grant an injunction barring the Chiropractic Board from enforcing its rules or otherwise authorizing chiropractors not licensed under the Acupuncture Chapter to practice acupuncture.

IV.

The Court should conclude that the Acupuncture Association is entitled to attorney's fees and costs in an amount to be determined following an evidentiary hearing.

The Uniform Declaratory Judgment Act grants courts the discretion to "award costs and reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE § 37.009. The Acupuncture Association has brought an alternative claim for declaratory relief under the Uniform Declaratory Judgment Act. Thus, if the Acupuncture Association prevails on this claim, it would be equitable and just for the Court to award the Acupuncture Association attorney's fees. *See id.*

Accordingly, the Court should conclude that the Acupuncture Association is entitled to attorney's fees and costs in an amount to be determined following an evidentiary hearing.

CONCLUSION AND PRAYER

This Court should refuse to condone the latest chapter in the Chiropractic Board's attempt to defy the licensing authority of another regulatory board and annex a practice that is simply not chiropractic. Plaintiff Texas Association of Acupuncture and Oriental Medicine prays that the Court grant its motion for summary judgment against Defendants Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director, in her official capacity, and grant the following relief:

(1) A declaratory judgment under Texas Government Code, Section 2001.038 declaring that 22 TEX. ADMIN. CODE 75.17(a)(3), (b)(4), (e)(2)(C) and 75.21 are invalid;

(2) In the alternative, a declaratory judgment under Texas Civil Practice and Remedies Code, Chapter 37 declaring that (1) the statutory scheme purportedly authorizing chiropractors to practice acupuncture with significantly less education and training than licensed acupuncturists is unconstitutional; and (2) the legislation purportedly authorizing chiropractors to practice acupuncture violates the one-subject provision of the Texas Constitution;

(3) An injunction barring the Chiropractic Board from enforcing its rules or otherwise authorizing chiropractors not licensed under the Acupuncture Chapter to practice acupuncture;

(4) Reasonable and just attorney's fees and costs; and

(5) Any further relief to which Plaintiff may be justly entitled, at law or in equity.

Respectfully submitted,

By: /s/ *Craig T. Enoch*

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CERTIFICATE OF SERVICE

Counsel for Defendants has been served by electronic service and email on October 31, 2014 as follows:

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Exhibit A

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE C. OTHER PROFESSIONS PERFORMING MEDICAL PROCEDURES

CHAPTER 201. CHIROPRACTORS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 201.001. DEFINITIONS. In this chapter:

(1) "Board" means the Texas Board of Chiropractic Examiners.

(2) "Chiropractor" means a person licensed to practice chiropractic by the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.002. PRACTICE OF CHIROPRACTIC. (a) In this section:

(1) "Controlled substance" has the meaning assigned to that term by Section 481.002, Health and Safety Code.

(2) "Dangerous drug" has the meaning assigned to that term by Section 483.001, Health and Safety Code.

(3) "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.

(4) "Surgical procedure" includes a procedure described in the surgery section of the common procedure coding system as adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services.

(b) A person practices chiropractic under this chapter 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;

(2) performs nonsurgical, nonincisive procedures,

including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system;

(3) represents to the public that the person is a chiropractor; or

(4) uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms or initials in connection with the person's name.

(c) The practice of chiropractic does not include:

(1) incisive or surgical procedures;

(2) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription; or

(3) the use of x-ray therapy or therapy that exposes the body to radioactive materials.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 1, eff. September 1, 2005.

Sec. 201.003. APPLICATIONS AND EXEMPTIONS. (a) This chapter does not apply to a registered nurse licensed under Chapter 301, a vocational nurse licensed under Chapter 301, a person who provides spinal screening services as authorized by Chapter 37, Health and Safety Code, a physical therapist licensed under Chapter 453, or a massage therapist or a massage therapy instructor qualified and registered under Chapter 455 if:

(1) the person does not represent to the public that the person is a chiropractor or use the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms or initials in connection with the person's name or practice; and

(2) the person practices strictly within the scope of the license or registration held in compliance with all laws relating to the license and registration.

(b) This chapter does not limit or affect the rights and powers of a physician licensed in this state to practice medicine.

(c) This section does not affect or prevent a student enrolled in a college of chiropractic in this state from engaging in all phases of clinical practice if the practice is:

(1) part of the curriculum; and

(2) conducted under the supervision of a licensed chiropractor or a licensed physician.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 553, Sec. 2.014, eff. Feb. 1, 2004.

Sec. 201.004. APPLICATION OF SUNSET ACT. The Texas Board of Chiropractic Examiners is subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the board is abolished and this chapter expires September 1, 2017.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 2, eff. September 1, 2005.

SUBCHAPTER B. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

Sec. 201.051. BOARD; MEMBERSHIP. (a) The Texas Board of Chiropractic Examiners consists of nine members appointed by the governor with the advice and consent of the senate as follows:

(1) six chiropractors who are reputable practicing chiropractors and who have resided in this state for at least five years preceding appointment; and

(2) three members who represent the public.

(b) Appointments to the board shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.052. MEMBERSHIP ELIGIBILITY. (a) A person is not eligible to serve as a member of the board if the person:

(1) is a member of the faculty or board of trustees of a chiropractic school or a doctor of chiropractic degree program;

(2) is a stockholder in a chiropractic school or college;

or

(3) has a financial interest in a chiropractic school or college.

(b) A person is not eligible for appointment as a public member of the board if the person or the person's spouse:

(1) is registered, certified, or licensed by an occupational regulatory agency in the field of health care;

(2) is employed by or participates in the management of a business entity or other organization regulated by or receiving funds from the board;

(3) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization regulated by or receiving funds from the board; or

(4) uses or receives a substantial amount of tangible goods, services, or funds from the board, other than compensation or reimbursement authorized by law for board membership, attendance, or expenses.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2007, 80th Leg., R.S., Ch. 802, Sec. 1, eff. June 15, 2007.

Sec. 201.053. MEMBERSHIP AND EMPLOYEE RESTRICTIONS. (a) In this section, "Texas trade association" means a cooperative and voluntarily joined statewide association of business or professional competitors in this state designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest.

(b) A person may not be a member of the board and may not be a board employee employed in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.), if:

(1) the person is an officer, employee, or paid consultant of a Texas trade association in the field of health care; or

(2) the person's spouse is an officer, manager, or paid consultant of a Texas trade association in the field of health care.

(c) Repealed by Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff.

September 1, 2005.

(d) A person may not be a member of the board or act as the general counsel to the board if the person is required to register as a lobbyist under Chapter 305, Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 3, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff. September 1, 2005.

Sec. 201.054. TERMS; VACANCY. (a) Members of the board are appointed for staggered six-year terms. The terms of one-third of the members expire on February 1 of each odd-numbered year.

(b) A person may not be appointed to serve more than two terms.

(c) If a vacancy occurs because of the death or resignation of a board member, the governor shall appoint a replacement to fill the unexpired term.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.055. OFFICERS. (a) The governor shall designate a chiropractic member of the board as the board's president. The president serves in that capacity at the will of the governor.

(b) The board shall elect one of its members as vice president and one of its members as secretary-treasurer at the first board meeting after the biennial appointment of board members.

(c) Repealed by Acts 2003, 78th Leg., ch. 285, Sec. 31(31).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 285, Sec. 31(31), eff. Sept. 1, 2003.

Sec. 201.056. GROUNDS FOR REMOVAL. (a) It is a ground for removal from the board that a member:

(1) does not have at the time of taking office the qualifications required by Sections 201.051 and 201.052(b);

(2) does not maintain during service on the board the qualifications required by Sections 201.051 and 201.052(b);

(3) is ineligible for membership under Section 201.052 or 201.053;

(4) cannot, because of illness or disability, discharge the member's duties for a substantial part of the member's term; or

(5) is absent from more than half of the regularly scheduled board meetings that the member is eligible to attend during a calendar year without an excuse approved by a majority vote of the board.

(b) The validity of an action of the board is not affected by the fact that it is taken when a ground for removal of a board member exists.

(c) If the executive director has knowledge that a potential ground for removal exists, the executive director shall notify the president of the board of the potential ground. The president shall then notify the governor and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the president, the executive director shall notify the next highest ranking officer of the board, who shall then notify the governor and the attorney general that a potential ground for removal exists.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 4, eff. September 1, 2005.

Sec. 201.057. PER DIEM; REIMBURSEMENT. (a) A board member is entitled to a per diem as set by the General Appropriations Act for each day the member engages in the business of the board.

(b) A member may not receive reimbursement for travel expenses, including expenses for meals and lodging, other than transportation expenses as provided by the General Appropriations Act.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.058. MEETINGS. (a) The board shall hold regular meetings to examine applicants and transact business at least twice

each year at the times and places determined by the board.

(b) A special meeting may be held at the call of three board members.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.060. BOARD SEAL. The seal of the board consists of a five-point star with the words, "The State of Texas," and the words, "Texas Board of Chiropractic Examiners," around the margin.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.061. TRAINING. (a) A person who is appointed to and qualifies for office as a member of the board may not vote, deliberate, or be counted as a member in attendance at a meeting of the board until the person completes a training program that complies with this section.

(b) The training program must provide the person with information regarding:

(1) this chapter and the board's programs, functions, rules, and budget;

(2) the results of the most recent formal audit of the board;

(3) the requirements of laws relating to open meetings, public information, administrative procedure, and conflicts of interest; and

(4) any applicable ethics policies adopted by the board or the Texas Ethics Commission.

(c) A person appointed to the board is entitled to reimbursement, as provided by the General Appropriations Act, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 5, eff. September 1, 2005.

SUBCHAPTER C. BOARD PERSONNEL

Sec. 201.101. DIVISION OF RESPONSIBILITIES. The board shall develop and implement policies that clearly separate the policymaking responsibilities of the board and the management responsibilities of the executive director and the staff of the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 6, eff. September 1, 2005.

Sec. 201.102. QUALIFICATIONS AND STANDARDS OF CONDUCT INFORMATION. The board shall provide as often as necessary to its members and employees information regarding their:

(1) qualifications for office or employment under this chapter; and

(2) responsibilities under applicable laws relating to standards of conduct for state officers or employees.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.103. CAREER LADDER PROGRAM; PERFORMANCE EVALUATIONS. (a) The executive director or the executive director's designee shall develop an intra-agency career ladder program. The program must require intra-agency postings of all nonentry level positions concurrently with any public posting.

(b) The executive director or the executive director's designee shall develop a system of annual performance evaluations. All merit pay for board employees must be based on the system established under this subsection.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.104. EQUAL EMPLOYMENT OPPORTUNITY; REPORT. (a) The executive director or the executive director's designee shall prepare and maintain a written policy statement to ensure implementation of an equal employment opportunity program under which all personnel

transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The policy statement must include:

(1) personnel policies, including policies relating to recruitment, evaluation, selection, application, training, and promotion of personnel, that are in compliance with Chapter 21, Labor Code;

(2) a comprehensive analysis of the board workforce that meets federal and state guidelines;

(3) procedures by which a determination can be made of the significant underuse in the board workforce of all persons for whom federal or state guidelines encourage a more equitable balance; and

(4) reasonable methods to appropriately address those areas of significant underuse.

(b) A policy statement prepared under Subsection (a) must be:

(1) prepared to cover an annual period;

(2) updated annually;

(3) reviewed by the Commission on Human Rights for compliance with Subsection (a)(1); and

(4) filed with the governor.

(c) The governor shall deliver a biennial report to the legislature based on the information received under Subsection (b). The report may be made separately or as part of other biennial reports made to the legislature.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER D. BOARD POWERS AND DUTIES

Sec. 201.151. GENERAL POWERS AND DUTIES. The board shall administer the purposes of and enforce this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.152. RULES. (a) The board may adopt rules and bylaws:

(1) necessary to:

(A) perform the board's duties; and

(B) regulate the practice of chiropractic; and

(2) relating to the board's proceedings and the board's examination of an applicant for a license to practice chiropractic.

(b) The board shall adopt rules for the enforcement of this chapter. The board shall issue all rules based on a vote of a majority of the board at a regular or special meeting. The issuance of a disciplinary action or disciplinary order of the board is not limited by this subsection.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 7, eff. September 1, 2005.

Sec. 201.1525. RULES CLARIFYING SCOPE OF PRACTICE OF CHIROPRACTIC. The board shall adopt rules clarifying what activities are included within the scope of the practice of chiropractic and what activities are outside of that scope. The rules:

(1) must clearly specify the procedures that chiropractors may perform;

(2) must clearly specify any equipment and the use of that equipment that is prohibited; and

(3) may require a license holder to obtain additional training or certification to perform certain procedures or use certain equipment.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 8, eff. September 1, 2005.

Sec. 201.1526. DEVELOPMENT OF PROPOSED RULES REGARDING SCOPE OF PRACTICE OF CHIROPRACTIC. (a) This section applies to the process by which the board develops proposed rules under Section 201.1525 before the proposed rules are published in the Texas Register and before the board complies with the rulemaking requirements of Chapter 2001, Government Code. This section does not affect the duty of the board to comply with the rulemaking requirements of that law.

(b) The board shall establish methods under which the board, to the extent appropriate, will seek input early in the rule development process from the public and from persons who will be most affected by a proposed rule. Methods must include identifying persons who will be

most affected and soliciting, at a minimum, the advice and opinions of those persons. Methods may include negotiated rulemaking, informal conferences, advisory committees, and any other appropriate method.

(c) A rule adopted by the board under Section 201.1525 may not be challenged on the grounds that the board did not comply with this section. If the board was unable to solicit a significant amount of advice and opinion from the public or from affected persons early in the rule development process, the board shall state in writing the reasons why the board was unable to do so.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 8, eff. September 1, 2005.

Sec. 201.153. FEES. (a) The board by rule shall set fees in amounts reasonable and necessary to cover the costs of administering this chapter. The board may not set a fee in an amount that is less than the amount of that fee on September 1, 1993.

(b) Each of the following fees imposed under Subsection (a) is increased by $200:

(1) the fee for an annual renewal of a license;

(2) the fee for issuance of a license to an out-of-state applicant;

(3) the fee for an examination; and

(4) the fee for a reexamination.

(c) For each $200 fee increase collected under Subsection (b), $50 shall be deposited in the foundation school fund and $150 shall be deposited in the general revenue fund.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 899, Sec. 2.

Sec. 201.154. CERTIFICATION FOR MANIPULATION UNDER ANESTHESIA PROHIBITED. Notwithstanding any other provision of this chapter, the board may not adopt a process to certify chiropractors to perform manipulation under anesthesia.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.155. RULES RESTRICTING ADVERTISING OR COMPETITIVE BIDDING. (a) The board may not adopt rules restricting advertising or competitive bidding by a person regulated by the board except to prohibit false, misleading, or deceptive practices by that person.

(b) The board may not include in rules to prohibit false, misleading, or deceptive practices by a person regulated by the board a rule that:

(1) restricts the use of any advertising medium;

(2) restricts the person's personal appearance or use of the person's voice in an advertisement;

(3) relates to the size or duration of an advertisement by the person; or

(4) restricts the use of a trade name in advertising by the person.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.1555. FRAUD. (a) The board shall strictly and vigorously enforce the provisions of this chapter prohibiting fraud.

(b) The board shall adopt rules to prevent fraud in the practice of chiropractic, including rules relating to:

(1) the filing of workers' compensation and insurance claims; and

(2) records required to be maintained in connection with the practice of chiropractic.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 9, eff. September 1, 2005.

Sec. 201.156. BOARD DUTIES REGARDING COMPLAINTS. (a) The board by rule shall:

(1) adopt a form to standardize information concerning complaints made to the board; and

(2) prescribe information to be provided to a person when the person files a complaint with the board.

(b) The board shall provide reasonable assistance to a person

who wishes to file a complaint with the board.

(c) The board by rule shall adopt procedures concerning:

(1) the retention of information files on license holders; and

(2) the expunction of files on license holders, including complaints, adverse reports, and other investigative information on license holders.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.157. IMMUNITY. In the absence of fraud, conspiracy, or malice, a member or employee of the board, a witness called to testify by the board, or a consultant or hearing officer is not liable in a civil action for any alleged injury, wrong, loss, or damage for any investigation, report, recommendation, statement, evaluation, finding, order, or award made in the course of performing the person's official duties.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.158. BOARD COMMITTEES. (a) The board may appoint committees from its own members.

(b) A committee appointed from the members of the board shall:

(1) consider matters referred to the committee relating to the enforcement of this chapter and the rules adopted by the board; and

(2) make recommendations to the board.

(c) The board may delegate to a committee of the board an authority granted to the board under Section 201.505(c).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.159. RECORDS. (a) The board shall preserve a record of its proceedings in a register that contains:

(1) the name, age, place, and duration of residence of each applicant for a license;

(2) the amount of time spent by the applicant in the study

of chiropractic in respective doctor of chiropractic degree programs; and

(3) other information the board desires to record.

(b) The register shall show whether an applicant was rejected or licensed.

(c) The information recorded in the register is prima facie evidence of the matters contained in the register. A certified copy of the register with the seal of the board is admissible as evidence in any court of this state.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.051(a), eff. Sept. 1, 2001. Amended by:

Acts 2007, 80th Leg., R.S., Ch. 802, Sec. 2, eff. June 15, 2007.

Sec. 201.160. PAYMENT OF OTHER EXPENSES. The board shall pay the necessary expenses of an employee of the board incurred in the performance of the employee's duties.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 285, Sec. 24, eff. Sept. 1, 2003.

Sec. 201.161. APPROPRIATION FROM STATE TREASURY PROHIBITED. The legislature may not appropriate money, other than fees, from the state treasury for an expenditure made necessary by this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.163. POLICY ON TECHNOLOGICAL SOLUTIONS. The board shall implement a policy requiring the board to use appropriate technological solutions to improve the board's ability to perform its functions. The policy must ensure that the public is able to interact with the board on the Internet.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 10, eff. September 1, 2005.

Sec. 201.164. NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION POLICY. (a) The board shall develop and implement a policy to encourage the use of:

(1) negotiated rulemaking procedures under Chapter 2008, Government Code, for the adoption of board rules; and

(2) appropriate alternative dispute resolution procedures under Chapter 2009, Government Code, to assist in the resolution of internal and external disputes under the board's jurisdiction.

(b) The board's procedures relating to alternative dispute resolution must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.

(c) The board shall designate a trained person to:

(1) coordinate the implementation of the policy adopted under Subsection (a);

(2) serve as a resource for any training needed to implement the procedures for negotiated rulemaking or alternative dispute resolution; and

(3) collect data concerning the effectiveness of those procedures, as implemented by the board.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 10, eff. September 1, 2005.

SUBCHAPTER E. PUBLIC INTEREST INFORMATION AND COMPLAINT PROCEDURES

Sec. 201.201. PUBLIC INTEREST INFORMATION. (a) The board shall prepare information of public interest describing the functions of the board and the procedures by which complaints are filed with and resolved by the board.

(b) The board shall make the information available to the public and appropriate state agencies.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.202. PUBLIC PARTICIPATION. (a) The board shall develop and implement policies that provide the public with a reasonable opportunity to appear before the board and to speak on any

issue under the board's jurisdiction.

(b) The board shall prepare and maintain a written plan that describes how a person who does not speak English may be provided reasonable access to the board's programs.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.203. COMPLAINTS. (a) The board by rule shall establish methods by which consumers and service recipients are notified of the name, mailing address, and telephone number of the board for the purpose of directing complaints to the board. The board may provide for that notice:

(1) on each registration form, application, or written contract for services of a person regulated by the board; or

(2) on a sign prominently displayed in the place of business of each person regulated by the board.

(b) The board shall list with its regular telephone number any toll-free telephone number established under other state law that may be called to present a complaint about a health professional.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.204. RECORDS OF COMPLAINTS. (a) The board shall keep an information file about each complaint filed with the board. The board's information file must be kept current and contain a record for each complaint of:

(1) each person contacted in relation to the complaint;

(2) a summary of findings made at each step of the complaint process;

(3) an explanation of the legal basis and reason for a complaint that is dismissed;

(4) the schedule required under Section 201.205 and a notification of any change in the schedule; and

(5) other relevant information.

(b) Except as provided by Subsection (c), if a written complaint is filed with the board that the board has authority to resolve, the board, at least quarterly and until final disposition of the complaint, shall notify the parties to the complaint of the status

of the complaint unless the notice would jeopardize an undercover investigation.

(c) If a written complaint that the board has authority to resolve is referred to the enforcement committee, the board at least semiannually and until final disposition of the complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.205. GENERAL RULES REGARDING COMPLAINT INVESTIGATION AND DISPOSITION. (a) The board shall adopt rules concerning the investigation of a complaint filed with the board. The rules adopted under this section must:

(1) distinguish between categories of complaints;

(2) require the board to prioritize complaints for purposes of determining the order in which they are investigated, taking into account the seriousness of the allegations made in a complaint and the length of time a complaint has been pending;

(3) ensure that a complaint is not dismissed without appropriate consideration;

(4) require that the board be advised of a complaint that is dismissed and that a letter be sent to the person who filed the complaint explaining the action taken on the complaint;

(5) ensure that the person who filed the complaint has the opportunity to explain the allegations made in the complaint; and

(6) prescribe guidelines concerning the categories of complaints that require the use of a private investigator and the procedures for the board to obtain the services of a private investigator.

(b) The board shall:

(1) dispose of a complaint in a timely manner; and

(2) establish a schedule for conducting each phase of the complaint process that is under the control of the board not later than the 30th day after the date the board receives the complaint.

(c) The board shall notify the parties to the complaint of the projected time requirements for pursuing the complaint.

(d) The board shall notify the parties to the complaint of any

change in the schedule not later than the seventh day after the date the change is made.

(e) The executive director shall notify the board of a complaint that is unresolved after the time prescribed by the board for resolving the complaint so that the board may take necessary action on the complaint.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 11, eff. September 1, 2005.

Sec. 201.206. CONFIDENTIALITY OF INVESTIGATION FILES. (a) The board's investigation files are confidential, privileged, and not subject to discovery, subpoena, or any other means of legal compulsion for release other than to the board or an employee or agent of the board.

(b) The board shall share information in investigation files, on request, with another state or federal regulatory agency or with a local, state, or federal law enforcement agency regardless of whether the investigation has been completed. The board is not required to disclose under this subsection information that is an attorney-client communication, an attorney work product, or other information protected by a privilege recognized by the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

(c) On the completion of the investigation and before a hearing under Section 201.505, the board shall provide to the license holder, subject to any other privilege or restriction set forth by rule, statute, or legal precedent, access to all information in the board's possession that the board intends to offer into evidence in presenting its case in chief at the contested case hearing on the complaint. The board is not required to provide:

(1) a board investigative report or memorandum;

(2) the identity of a nontestifying complainant; or

(3) attorney-client communications, attorney work product, or other materials covered by a privilege recognized by the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

(d) Notwithstanding Subsection (a), the board may:

(1) disclose a complaint to the affected license holder;

and

(2) provide to a complainant the license holder's response to the complaint, if providing the response is considered by the board to be necessary to investigate the complaint.

(e) This section does not prohibit the board or another party in a disciplinary action from offering into evidence in a contested case under Chapter 2001, Government Code, a record, document, or other information obtained or created during an investigation.

Added by Acts 2003, 78th Leg., ch. 329, Sec. 1, eff. Sept. 1, 2003.

Sec. 201.207. INSPECTIONS. (a) The board, during reasonable business hours, may:

(1) conduct an on-site inspection of a chiropractic facility to investigate a complaint filed with the board; and

(2) examine and copy records of the chiropractic facility pertinent to the inspection or investigation.

(b) The board is not required to provide notice before conducting an inspection under this section.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 12, eff. September 1, 2005.

Sec. 201.208. COOPERATION WITH TEXAS DEPARTMENT OF INSURANCE. (a) In this section, "department" means the Texas Department of Insurance.

(b) This section applies only to information held by or for the department or the board that relates to a person who is licensed or otherwise regulated by the department or the board.

(c) The department and the board, on request or on the department or board's own initiative, may share confidential information or information to which access is otherwise restricted by law. The department and the board shall cooperate with and assist each other when either agency is conducting an investigation by providing information that is relevant to the investigation. Except as provided by this section, confidential information that is shared under this section remains confidential under law, and legal restrictions on access to the information remain in effect unless the

agency sharing the information approves use of the information by the receiving agency for enforcement purposes. The provision of information by the board to the department or by the department to the board under this subsection does not constitute a waiver of privilege or confidentiality as established by law.

(d) The department and the board shall develop and maintain a system for tracking investigations conducted by each agency with the cooperation and assistance of the other agency, including information on all disciplinary actions taken.

(e) The department and the board shall collaborate on taking appropriate disciplinary actions to the extent practicable.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 12, eff. September 1, 2005.

Sec. 201.209. INFORMATION ON STATUS OF CERTAIN INVESTIGATIONS. The board shall include in the annual financial report required by Section 2101.011, Government Code, information on all investigations conducted by the board with the cooperation and assistance of the Texas Department of Insurance and the Texas Workers' Compensation Commission during the preceding fiscal year.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 12, eff. September 1, 2005.

SUBCHAPTER F. PEER REVIEW COMMITTEES

Sec. 201.251. APPOINTMENT OF PEER REVIEW COMMITTEES; TERMS. (a) The board shall appoint local chiropractic peer review committees. Members of a local chiropractic peer review committee serve staggered terms of three years, with as near to one-third of the members' terms as possible expiring December 31 of each year.

(b) The board may seek input from state chiropractic associations in selecting persons to appoint to a local peer review committee.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 13, eff. September 1, 2005.

Sec. 201.252. COMMITTEE MEMBER ELIGIBILITY. (a) Only a chiropractor who has completed a program of peer review training approved by the board is eligible to serve on a chiropractic peer review committee.

(b) A member of a local peer review committee may not be a consultant to or an employee of any company or carrier of health care insurance.

(c) The board shall establish requirements for peer review training programs that do not discriminate against any chiropractor. A peer review training program must include training in the investigation of complaints in accordance with this chapter and board rules.

(d) The board by rule shall adopt additional requirements for eligibility to serve on a chiropractic peer review committee, including a requirement that a member have:

(1) a clean disciplinary record; and

(2) an acceptable record regarding utilization review performed in accordance with Article 21.58A, Insurance Code.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 14, eff. September 1, 2005.

Sec. 201.253. EXECUTIVE PEER REVIEW COMMITTEE. (a) The board shall appoint an executive chiropractic peer review committee to direct the activities of the local committees. The executive peer review committee consists of six volunteer members. Members of the executive peer review committee serve staggered terms of three years, with one-third of the members' terms expiring December 31 of each year. The executive peer review committee shall elect a presiding officer from its members.

(b) The executive peer review committee shall conduct hearings relating to disputes referred by a local peer review committee and shall make its recommendations based solely on evidence presented in the hearings.

(c) A member of an executive peer review committee may not be a consultant to or an employee of any company or carrier of health care insurance.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 15, eff. September 1, 2005.

Sec. 201.254. DUTIES OF PEER REVIEW COMMITTEE WITH REGARD TO CERTAIN DISPUTES. (a) Each local chiropractic peer review committee shall:

(1) review and evaluate chiropractic treatment and services in disputes involving a chiropractor and a patient or a person obligated to pay a fee for chiropractic services or treatment; and

(2) mediate in a dispute involving a chiropractor and a patient or person obligated to pay a fee for chiropractic services or treatment.

(b) Each local peer review committee shall report its findings and recommendations to the executive chiropractic peer review committee. A local peer review committee shall refer a dispute that is not resolved at the local level to the executive peer review committee.

(c) Repealed by Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff. September 1, 2005.

(d) Repealed by Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff. September 1, 2005.

(e) Repealed by Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff. September 1, 2005.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 16, eff. September 1, 2005.
Acts 2005, 79th Leg., Ch. 1020, Sec. 36, eff. September 1, 2005.

Sec. 201.2545. COMPLAINT INVESTIGATION BY PEER REVIEW COMMITTEE. (a) The board may refer to a local chiropractic peer review committee for investigation a complaint regarding whether

chiropractic treatment or services provided by a chiropractor were provided according to the standard of care in the practice of chiropractic.

(b) In conducting an investigation of a referred complaint, the committee shall review the records and other evidence obtained by the staff of the board in the course of the staff's investigation of the complaint.

(c) The committee shall report to the board its findings regarding the complaint, including a statement of:

(1) the standard of care in the practice of chiropractic governing the chiropractic treatment or services provided by the chiropractor;

(2) whether the chiropractor met the standard of care in providing the treatment or services; and

(3) the clinical basis for the committee's finding under Subdivision (2).

(d) The board may request a member of the committee to attend an informal conference or testify at a contested case hearing.

(e) The board, with input from the executive chiropractic peer review committee, shall adopt rules necessary to implement this section.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 17, eff. September 1, 2005.

Sec. 201.2546. IMMUNITY; ELIGIBILITY TO PARTICIPATE IN COMMITTEE ACTIVITIES. (a) In the absence of fraud, conspiracy, or malice, a member of a peer review committee is not liable in a civil action for a finding, evaluation, recommendation, or other action made or taken by the member as a member of the committee or by the committee. The immunity granted by this subsection does not limit the operation of federal or state antitrust laws as applied to the conduct of a local or executive peer review committee that involves price fixing or any other unreasonable restraint of trade.

(b) A member of a peer review committee may not participate in committee deliberations or other activities involving chiropractic services or treatment rendered or performed by the member.

(c) Except for the express immunity provided by Subsection (a),

this section does not deprive any person of a right or remedy, legal or equitable.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 17, eff. September 1, 2005.

Sec. 201.255. REQUEST FOR INFORMATION; REPORT TO BOARD ON DISPUTES MEDIATED. (a) The board may request from a chiropractic peer review committee information pertaining to actions taken by the peer review committee.

(b) The executive chiropractic peer review committee shall file annually with the board a report on the disputes mediated by the local chiropractic peer review committees under Section 201.254 during the preceding calendar year. The report must include:

(1) the number of disputes referred to the committees;

(2) a categorization of the disputes referred to the committees and the number of complaints in each category; and

(3) the number of disputes resolved and the manner in which they were resolved.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 18, eff. September 1, 2005.

Sec. 201.256. PUBLIC ACCESS TO INFORMATION REGARDING PEER REVIEW COMMITTEES. The board shall maintain on the board's Internet website information regarding local chiropractic peer review committees, including:

(1) the services committees provide; and

(2) the types of disputes committees mediate.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 19, eff. September 1, 2005.

SUBCHAPTER G. LICENSE REQUIREMENTS

Sec. 201.301. LICENSE REQUIRED. A person may not practice

chiropractic unless the person holds a license issued by the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.302. LICENSING EXAMINATION APPLICATION. (a) An applicant for a license by examination must present satisfactory evidence to the board that the applicant:

(1) is at least 18 years of age;

(2) is of good moral character;

(3) has completed 90 semester hours of college courses other than courses included in a doctor of chiropractic degree program; and

(4) is either a graduate or a final semester student of a bona fide reputable doctor of chiropractic degree program.

(b) An application for examination must be:

(1) made in writing;

(2) verified by affidavit;

(3) filed with the secretary-treasurer of the board on a form prescribed by the board; and

(4) accompanied by a fee.

(c) Each applicant shall be given reasonable notice of the time and place of the examination.

(d) Notwithstanding Subsection (a)(3), if the Council on Chiropractic Education or another national chiropractic education accreditation organization recognized by the board requires a number of semester hours of college courses other than courses included in a doctor of chiropractic degree program that is greater or less than the number of hours specified by that subsection to qualify for admission to a doctor of chiropractic degree program, the board may adopt the requirement of that organization if the board determines that requirement to be appropriate.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 20, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 802, Sec. 3, eff. June 15, 2007.

Sec. 201.303. EDUCATIONAL REQUIREMENTS. (a) To comply with the requirements of Section 201.302, the applicant must submit to the board a transcript of credits that certifies that the applicant has satisfactorily completed at least the number of semester hours of college credits required by that section at a college or university that issues credits accepted by The University of Texas at Austin for a bachelor of arts or bachelor of science degree.

(b) Repealed by Acts 2003, 78th Leg., ch. 329, Sec. 5.

(c) The board may charge a fee of not more than $50 for verifying that the applicant has satisfied the requirements of this section.

(d) A bona fide reputable doctor of chiropractic degree program that satisfies Section 201.302(a)(4) is one that:

(1) has entrance requirements and a course of instruction as high as those of a better class of doctor of chiropractic degree programs in the United States;

(2) maintains a resident course of instruction equivalent to:

(A) not less than four terms of eight months each; or

(B) not less than the number of semester hours required by The University of Texas for a bachelor of arts or bachelor of science degree;

(3) provides a course of instruction in the fundamental subjects listed in Section 201.305(b); and

(4) has the necessary teaching staff and facilities for proper instruction in all of the fundamental subjects listed in Section 201.305(b).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 329, Sec. 5.

Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 21, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 802, Sec. 4, eff. June 15, 2007.

Sec. 201.304. EXAMINATION REQUIREMENTS. (a) To receive a license, an applicant for a license by examination must pass:

(1) the required and optional parts of the examination given by the National Board of Chiropractic Examiners, as required by

and under conditions established by board rule; and

(2) an examination prepared by the board that tests the applicant's knowledge and understanding of the laws relating to the practice of chiropractic in this state.

(b) The board shall periodically determine whether applicants who hold National Board of Chiropractic Examiners certificates have been adequately examined. If the board determines that those applicants have not been adequately examined, the board shall require those applicants to submit to an additional examination prepared by the board.

(c) The board may give an examination during the applicant's last semester of college if the board receives evidence indicating the applicant has satisfactory grades. Immediately after the applicant graduates from chiropractic college, the applicant must forward to the board evidence of satisfactory completion of the applicant's course of study.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 721, Sec. 1, eff. Sept. 1, 2001.

Sec. 201.305. EXAMINATION PROCEDURE. (a) Each examination for a license to practice chiropractic shall be conducted in the English language and in a fair and impartial manner.

(b) An examination given under Section 201.304(a)(1) shall be conducted on practical and theoretical chiropractic and in the subjects of anatomy-histology, chemistry, bacteriology, physiology, symptomatology, pathology and analysis of the human spine, and hygiene and public health.

(c) Applicants may be known to the examiners only by numbers, without a name or another method of identification on examination papers by which members of the board could identify an applicant, until after the general averages of the applicants' numbers in the class are determined and the licenses are granted or refused.

(d) The board by rule shall ensure that the examination is administered to applicants with disabilities in compliance with the Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 721, Sec. 2, eff. Sept. 1, 2001.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 22, eff. September 1, 2005.

Sec. 201.306. EXAMINATION RESULTS. (a) The board shall notify each applicant of the results of an examination given by the board not later than the 30th day after the date the licensing examination is administered.

(b) If requested by a person who fails an examination given by the board, the board shall review with the person the circumstances surrounding the adverse score.

(c) To pass the examination under Section 201.304(a)(2), an applicant must score a grade of at least 75 percent.

(d) All questions and answers from an examination given by the board, with the grades attached, authenticated by the signature of the examiner, shall be preserved in the executive office of the board for at least one year.

(e) Each license shall be attested by the seal of the board and signed by all members of the board or a quorum of the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 721, Sec. 3, eff. Sept. 1, 2001.

Sec. 201.307. REEXAMINATION. (a) An applicant who fails to pass a required examination may take another examination.

(b) The board by rule shall establish the number of times an applicant may retake the examination required by Section 201.304(a)(1) or (b), as applicable. An applicant must pass the examination required by Section 201.304(a)(2) within three attempts. The board by rule shall establish the conditions under which an applicant may retake an examination. The board may require an applicant to fulfill additional educational requirements.

(c) If the applicant makes a satisfactory grade on reexamination, the board shall grant to the applicant a license to practice chiropractic.

(d) The board's decision under this section is final.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 721, Sec. 4, eff. Sept. 1, 2001.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 23, eff. September 1, 2005.

Sec. 201.308. TEMPORARY LICENSE. (a) The board by rule may provide for the issuance of a temporary license.

(b) The board by rule shall provide a time limit for the period a temporary license is valid.

(c) The board may issue a temporary faculty license to practice chiropractic to a person as provided by this section. The person:

(1) must hold a current chiropractic license that is unrestricted and not subject to a disciplinary order or probation in another state or a Canadian province;

(2) may not hold a chiropractic license in another state or a Canadian province that has any restrictions, disciplinary orders, or probation;

(3) must pass the examination required under Section 201.304(a)(2);

(4) must have been engaged in the practice of chiropractic:

(A) for at least the three years preceding the date of the application under this section; or

(B) as a chiropractic educator in a doctor of chiropractic degree program accredited by the Council on Chiropractic Education for at least the three years preceding the date of the application under this section; and

(5) must hold a salaried faculty position of at least the level of assistant professor and be working full-time at:

(A) Parker College of Chiropractic; or

(B) Texas Chiropractic College.

(d) A person is eligible for a temporary license under Subsection (c) if the person holds a faculty position of at least the level of assistant professor, the person works at least part-time at an institution listed in Subsection (c)(5), and:

(1) the person is on active duty in the United States armed forces; and

(2) the person's practice under the temporary license will fulfill critical needs of the citizens of this state.

(e) A chiropractor who is issued a temporary license under Subsection (c) must sign an oath on a form prescribed by the board swearing that the person:

(1) has read and is familiar with this chapter and board rules;

(2) will abide by the requirements of this chapter and board rules while practicing under the chiropractor's temporary license; and

(3) will be subject to the disciplinary procedures of the board.

(f) A chiropractor holding a temporary license under Subsection (c) and the chiropractor's chiropractic school must file affidavits with the board affirming acceptance of the terms and limits imposed by the board on the chiropractic activities of the chiropractor.

(g) A temporary license issued under Subsection (c) is valid for one year.

(h) The holder of a temporary license issued under Subsection (c) is limited to the teaching confines of the applying chiropractic school as a part of the chiropractor's duties and responsibilities assigned by the program and may not practice chiropractic outside of the setting of the chiropractic school or an affiliate of the chiropractic school.

(i) The application for a temporary license under Subsection (c) must be made by the chiropractic school in which the chiropractor teaches and must contain the information and documentation requested by the board. The application must be endorsed by the dean of the chiropractic school or the president of the institution.

(j) A chiropractor who holds a temporary license issued under Subsection (c) and who wishes to receive a permanent unrestricted license must meet the requirements for issuance of a permanent unrestricted license, including any examination requirements.

(k) The board shall adopt:

(1) rules governing the issuance of a renewal temporary faculty license, including a rule that permits a person licensed under Subsection (c) to continue teaching while an application for a renewal temporary license is pending;

(2) fees for the issuance of a temporary license and a renewal temporary license; and

(3) an application form for temporary licenses and renewal temporary licenses to be issued under this section.

(l) The fee for a renewal temporary license issued under Subsection (k)(1) must be less than the amount of the fee for a temporary license issued under Subsection (c).

(m) A chiropractic school shall notify the board not later than 72 hours after the time:

(1) except as provided by Subdivision (2), a chiropractor licensed under Subsection (c) ceases to hold a full-time salaried position of at least the level of assistant professor at the school; and

(2) a chiropractor described by Subsection (d) ceases to hold a part-time salaried position of at least the level of assistant professor at the school.

(n) The board shall revoke a license issued under this section if the license holder no longer satisfies the requirements of this section.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2009, 81st Leg., R.S., Ch. 957, Sec. 1, eff. September 1, 2009.

Sec. 201.309. LICENSE ISSUANCE TO CERTAIN OUT-OF-STATE APPLICANTS. The board shall issue a license to practice chiropractic to an out-of-state applicant who:

(1) submits a written application to the board on a form prescribed by the board, accompanied by the application fee set by the board and any other information requested by the board;

(2) is licensed in good standing to practice chiropractic in another state or foreign country that has licensing requirements substantially equivalent to the requirements of this chapter;

(3) has not been the subject of a disciplinary action and is not the subject of a pending investigation in any jurisdiction in which the applicant is or has been licensed;

(4) has graduated from a doctor of chiropractic degree program accredited by the Council on Chiropractic Education and approved by rule by the board;

(5) has passed a national or other examination recognized by the board relating to the practice of chiropractic;

(6) has passed the board's jurisprudence examination;

(7) has practiced chiropractic:

(A) for at least the three years immediately preceding the date of the application under this section; or

(B) as a chiropractic educator in a doctor of chiropractic degree program accredited by the Council on Chiropractic Education for at least the three years immediately preceding the date of the application under this section; and

(8) meets any other requirements adopted by rule by the board under this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 899, Sec. 1.
Amended by:
Acts 2007, 80th Leg., R.S., Ch. 802, Sec. 5, eff. June 15, 2007.

Sec. 201.311. INACTIVE STATUS. (a) The board by rule shall adopt a system by which a license holder may place the license on inactive status. A license holder must apply for inactive status, on a form prescribed by the board, before the expiration date of the license.

(b) A license holder whose license is on inactive status:

(1) is not required to pay license renewal fees; and

(2) may not perform an activity regulated under this chapter.

(c) A license holder whose license is on inactive status may return to active practice by notifying the board in writing. The board shall remove the license holder's license from inactive status after the holder pays an administrative fee and complies with any educational or other requirements established by board rules.

(d) The board by rule shall establish a rule setting a limit on the time a license holder's license may remain on inactive status.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.312. REGISTRATION OF FACILITIES. (a) The board by

rule shall adopt requirements for registering chiropractic facilities as necessary to protect the public health, safety, and welfare.

(b) The rules adopted under this section must:

(1) specify the registration requirements for a chiropractic facility;

(2) prescribe the standards for the chiropractic facility registration program;

(3) provide for the issuance of a separate certificate of registration to an owner of a chiropractic facility for each chiropractic facility owned by the owner; and

(4) provide for the board to send notice to an owner of a chiropractic facility and to each chiropractor practicing in the facility of the impending expiration of the facility's certificate of registration before the expiration of the certificate.

(c) The standards adopted under Subsection (b)(2) must be consistent with industry standards for the practice of chiropractic.

(d) To register a chiropractic facility, the owner of the facility must:

(1) file with the board a written application for registration; and

(2) pay, with the application, a registration fee in an amount set by the board not to exceed $75.

(e) The board may issue a certificate of registration only to a chiropractic facility that complies with the requirements of this section.

(f) A certificate of registration under this section must be renewed annually. To renew the certificate, the certificate holder shall apply to the board and pay an annual fee equal to the amount of the registration fee under Subsection (d)(2).

(g) A person licensed to practice chiropractic in this state is subject to disciplinary action under this chapter if the person practices chiropractic in a chiropractic facility that the person knows is not registered under this section.

(h) An owner of a chiropractic facility who violates this section or a rule adopted under this section is subject to disciplinary action by the board in the same manner as a license holder who violates this chapter or a rule adopted under this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 227, Sec. 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 329, Sec. 2.

SUBCHAPTER H. ANNUAL REGISTRATION AND LICENSE RENEWAL

Sec. 201.351. ANNUAL REGISTRATION. A chiropractor may not practice chiropractic in this state unless the chiropractor annually registers with the board not later than January 1 of each year.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.352. APPLICATION FOR ANNUAL REGISTRATION. (a) A person required to register shall:

(1) file annually with the board a written application for registration; and

(2) pay, with the application, an annual registration fee to the board.

(b) The application must include:

(1) the person's full name, age, post office address, and place of residence;

(2) each place where the person is engaged in the practice of chiropractic;

(3) the college of chiropractic from which the person graduated; and

(4) the number and date of the person's license.

(c) On receipt of the application and registration fee, the board shall determine whether the applicant is licensed to practice chiropractic in this state based on the records of the board or other sources the board considers reliable.

(d) If the board determines that the applicant is licensed to practice chiropractic in this state, the board shall issue an annual registration receipt certifying that the applicant has filed an application and paid the registration fee.

(e) The registration receipt is not evidence in a prosecution for the unlawful practice of chiropractic under Section 201.605 that the person is lawfully entitled to practice chiropractic.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.353. LICENSE EXPIRATION DATE. (a) The board by rule may adopt a system under which licenses expire on various dates during the year.

(b) For a year in which the license expiration date is changed, license fees payable on January 1 shall be prorated on a monthly basis so that each license holder pays only the portion of the fee that is allocable to the number of months during which the license is valid. On renewal of the license on the new expiration date, the total license renewal fee is payable.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.354. LICENSE RENEWAL. (a) A person may renew an unexpired license by paying the required renewal fee to the board before the expiration date of the license.

(b) At least 30 days before the expiration of a person's license, the board shall send written notice of the impending license expiration to the person at the person's last known address according to the board's records.

(c) The annual renewal fee applies to each person licensed by the board, even if the person is not practicing chiropractic in this state.

(d) A person whose license has been expired for 90 days or less may renew the license by paying to the board a renewal fee that is equal to the sum of 1-1/2 times the annual renewal fee set by the board under Section 201.153(a) and the increase in that fee required by Section 201.153(b). If a person's license has been expired for more than 90 days but less than one year, the person may renew the license by paying to the board a renewal fee that is equal to the sum of two times the annual renewal fee set by the board under Section 201.153(a) and the increase in that fee required by Section 201.153(b).

(e) Except as provided by Subsection (g) and Section 201.355, a person may not renew a license that has been expired for one year or more. The person may obtain a new license by submitting to reexamination and complying with the requirements and procedures for

obtaining an original license.

(f) A person who practices chiropractic without an annual renewal receipt for the current year practices chiropractic without a license.

(g) A person may renew a license that has been expired for at least one year but not more than three years if:

(1) the board determines according to criteria adopted by board rule that the person has shown good cause for the failure to renew the license; and

(2) the person pays to the board:

(A) the annual renewal fee set by the board under Section 201.153(a) for each year in which the license was expired;

(B) an additional fee in an amount equal to the sum of:

(i) the annual renewal fee set by the board under Section 201.153(a), multiplied by the number of years the license was expired, prorated for fractional years; and

(ii) two times the annual renewal fee set by the board under Section 201.153(a); and

(C) the increase in the annual renewal fee required by Section 201.153(b).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 230, Sec. 1, eff. Sept. 1, 2001.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 24, eff. September 1, 2005.

Sec. 201.355. RENEWAL OF EXPIRED LICENSE BY OUT-OF-STATE PRACTITIONER. (a) The board may renew without reexamination an expired license of a person who was licensed in this state, moved to another state or foreign country, and is currently licensed in good standing and has been in practice in the other state or foreign country for the two years preceding application.

(b) The person must pay to the board a fee that is equal to the normally required renewal fee for the license.

(c) For purposes of this section, a person is currently licensed if the person is licensed by another chiropractic licensing board recognized by the board. The board shall adopt requirements for

recognizing another chiropractic licensing board that:

(1) has licensing requirements substantially equivalent to the requirements of this chapter; and

(2) maintains professional standards considered by the board to be equivalent to the standards under this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2003, 78th Leg., ch. 329, Sec. 3.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 25, eff. September 1, 2005.

Sec. 201.356. CONTINUING EDUCATION. (a) The board by rule shall:

(1) assess the continuing education needs of license holders;

(2) adopt requirements for mandatory continuing education for license holders in subjects relating to the practice of chiropractic;

(3) establish a minimum number of hours of continuing education required to renew a license; and

(4) develop a process to evaluate and approve continuing education courses.

(b) The board may require license holders to attend continuing education courses specified by the board. The board shall adopt a procedure to assess a license holder's participation and performance in continuing education programs.

(c) The board shall identify the key factors for the competent performance by a license holder of the license holder's professional duties.

(d) The board shall notify license holders of approved continuing education courses at least annually.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER I. PATIENT CONFIDENTIALITY

Sec. 201.401. DEFINITION OF PATIENT. In this subchapter, "patient" means any person who consults or is seen by a

chiropractor to receive chiropractic care.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.402. PATIENT CONFIDENTIALITY. (a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404 (a) who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

(d) The prohibitions of this section apply to confidential communications or records concerning any patient regardless of when the patient received the services of a chiropractor.

(e) The privilege of confidentiality may be claimed by the patient or chiropractor acting on the patient's behalf. The authority of a chiropractor to claim the privilege of confidentiality on behalf of a patient is presumed in the absence of evidence to the contrary.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.403. EXCEPTIONS TO CONFIDENTIALITY FOR ADMINISTRATIVE PROCEDURE. (a) Section 201.402 does not apply in a court or administrative proceeding:

(1) brought by a patient against a chiropractor, including:

(A) a malpractice proceeding; and

(B) any criminal or license revocation proceeding in which the patient is a complaining witness and disclosure is relevant to the claims or defense of the chiropractor;

(2) in which the patient or a person authorized to act on the patient's behalf submits a written consent to the release of

confidential information, as provided by Section 201.405;

(3) brought to substantiate and collect on a claim for chiropractic services rendered to the patient;

(4) brought by the patient or a person on the patient's behalf who is attempting to recover monetary damages for any physical or mental condition, including death of the patient;

(5) brought in connection with a disciplinary investigation of a chiropractor under this chapter, except as provided by Subsection (b);

(6) brought in connection with a criminal investigation of a chiropractor if the board is participating or assisting in the investigation or proceeding by providing certain records obtained from the chiropractor, except as provided by Subsection (c); and

(7) brought in connection with a criminal prosecution in which the patient is a victim, witness, or defendant except as provided by Subsection (d).

(b) The board shall protect the identity of any patient whose chiropractic records are examined in connection with an investigation or proceeding described by Subsection (a)(5), excluding patients described by Subsection (a)(1) and patients who have submitted written consent to the release of their chiropractic records as provided by Section 201.405.

(c) The board shall protect the identity of any patient whose records are provided in connection with an investigation or proceeding described by Subsection (a)(6), excluding patients described by Subsection (a)(1) and patients who have submitted written consent to the release of their chiropractic records as provided by Section 201.405. The board does not authorize the release of any confidential information for the purpose of instigating or substantiating criminal charges against a patient.

(d) In a proceeding described by Subsection (a)(7), records or communications are not discoverable until the court in which the prosecution is pending makes an in camera determination of relevancy. A determination of relevancy by a court under this subsection is not a determination of the admissibility of any record or communication.

(e) Information is discoverable in a court or administrative proceeding in this state if the court or administrative body has jurisdiction over the subject matter of the proceeding.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.404. EXCEPTIONS TO CONFIDENTIALITY FOR OTHER CIRCUMSTANCES. (a) In circumstances other than court or administrative proceedings, exceptions to Section 201.402 exist only for:

(1) a governmental agency, if the disclosure is required or permitted by law except as provided by Subsection (b);

(2) medical or law enforcement personnel, if the chiropractor determines that a probability of imminent physical injury to the patient, the chiropractor, or others exists or a probability of immediate mental or emotional injury to the patient exists;

(3) qualified personnel for the purpose of management audits, financial audits, program evaluations, or research, under the conditions provided by Subsection (c);

(4) those parts of the records reflecting charges and specific services performed, if necessary to collect fees for services provided by a chiropractor, a professional association, or another entity qualified to render or arrange for services;

(5) any person who possesses a written consent described by Section 201.405;

(6) an individual, corporation, or governmental agency involved in paying or collecting fees for services performed by a chiropractor;

(7) another chiropractor or personnel under the direction of the chiropractor who participate in the diagnosis, evaluation, or treatment of the patient; or

(8) an official legislative inquiry of state hospitals or state schools under the conditions provided under Subsection (d).

(b) A governmental agency shall protect the identity of any patient whose chiropractic records are examined under Subsection (a)(1).

(c) Personnel described by Subsection (a)(3) may not directly or indirectly identify a patient in any report of research, audit, or evaluation or otherwise disclose a patient's identity in any manner.

(d) Information released under Subsection (a)(8) may not include:

(1) information or records that identify a patient or client for any purpose without proper consent given by the patient; and

(2) records that were not created by the state hospital or school or its employees.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.405. CONSENT FOR RELEASE. (a) In this section, "chiropractic records" means any record relating to the history, diagnosis, treatment, or prognosis of a patient.

(b) Consent for the release of confidential information must be in writing and signed by:

(1) the patient;

(2) a parent or legal guardian if the patient is a minor;

(3) a legal guardian if the patient has been adjudicated incompetent to manage the patient's personal affairs;

(4) an attorney ad litem appointed for the patient, as authorized by:

(A) Subtitle B, Title 6, Health and Safety Code;

(B) Subtitle C, D, or E, Title 7, Health and Safety Code;

(C) Chapter XIII, Texas Probate Code;

(D) Chapter 107, Family Code; or

(E) another applicable provision; or

(5) a personal representative if the patient is deceased.

(c) The written consent must specify:

(1) the information records covered by the release;

(2) the reason or purpose for the release; and

(3) the person to whom the information is to be released.

(d) The patient or the person authorized to consent to disclosure under this section may withdraw consent to the release of any information. Withdrawal of consent does not affect any information disclosed before written notice of the withdrawal.

(e) A person who receives information made confidential by this chapter may disclose the information to another only to the extent that disclosure is consistent with the authorized purposes for which consent to release the information was obtained.

(f) A chiropractor shall furnish copies of chiropractic records or a summary or narrative of the records requested under a written consent for release of the information. The chiropractor shall furnish the information within a reasonable time. The patient or a person acting on the patient's behalf shall pay a reasonable fee for the information provided by the chiropractor. The chiropractor may delete confidential information about another person who has not consented to the release.

(g) A chiropractor who determines that access to information requested under Subsection (f) would be harmful to the physical, mental, or emotional health of the patient may refuse to release the information requested under this section.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER J. PRACTICE BY LICENSE HOLDER

Sec. 201.451. DELEGATION TO ASSISTANTS. (a) The board by rule shall establish guidelines relating to the tasks and procedures that a chiropractor may delegate to an assistant.

(b) A chiropractor who delegates a task or procedure under this section retains full responsibility for the task or procedure.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.452. USE OF X-RAY. (a) The board may require evidence of proper training and safety in the use of analytical and diagnostic x-ray in conformity with:

(1) Chapter 401, Health and Safety Code; and

(2) rules of the Texas Radiation Control Agency and the Texas Department of Health.

(b) This section does not modify or amend:

(1) Section 201.002 by enlarging the scope of the practice of chiropractic or the acts that a chiropractor is authorized to perform; or

(2) Chapter 151.

(c) The board shall implement any federal and state requirements relating to radiologic training of the employees of a

chiropractor.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.453. MALPRACTICE SETTLEMENT INFORMATION AND EXPERT REPORTS. (a) The Texas Department of Insurance shall provide to the board any information received by the department regarding a settlement of a malpractice claim against a chiropractor.

(b) An insurer who delivers or issues for delivery in this state professional liability insurance coverage to a chiropractor who practices in this state shall provide to the board a copy of any expert report served under Section 74.351, Civil Practice and Remedies Code, in a malpractice action against the chiropractor.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 27, eff. September 1, 2005.

SUBCHAPTER K. DISCIPLINARY PROCEDURES

Sec. 201.501. DISCIPLINARY POWERS OF BOARD. (a) On a determination that a person has violated this chapter or a rule adopted by the board under this chapter, the board:

(1) shall revoke or suspend the person's license, place on probation a person whose license has been suspended, or reprimand a license holder; or

(2) may impose an administrative penalty.

(b) If a license suspension is probated, the board may require the license holder to:

(1) report regularly to the board on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the board; or

(3) continue or review continuing professional education until the license holder attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

(c) In addition to other disciplinary actions authorized by this chapter, the board may require a license holder who violates this chapter to participate in a continuing education program. The board

shall specify the continuing education programs that the license holder may attend and the number of hours that the license holder must complete.

(d) Disciplinary proceedings of the board are governed by Chapter 2001, Government Code.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.502. GROUNDS FOR REFUSAL, REVOCATION, OR SUSPENSION OF LICENSE. (a) The board may refuse to admit a person to examinations and may revoke or suspend a license or place a license holder on probation for a period determined by the board for:

(1) violating this chapter or a rule adopted under this chapter, including committing an act prohibited under Section 201.5025;

(2) engaging in deception or fraud in the practice of chiropractic;

(3) presenting to the board or using a license, certificate, or diploma or a transcript of a license, certificate, or diploma that was illegally or fraudulently obtained, counterfeited, or materially altered;

(4) presenting to the board an untrue statement or a document or testimony that was illegally used to pass the examination;

(5) being convicted of a crime involving moral turpitude or a felony;

(6) procuring or assisting in the procuring of an abortion;

(7) engaging in grossly unprofessional conduct or dishonorable conduct of a character likely to deceive or defraud the public;

(8) having a habit of intemperance or drug addiction or another habit that, in the opinion of the board, endangers the life of a patient;

(9) using an advertising statement that is false or that tends to mislead or deceive the public;

(10) directly or indirectly employing or associating with a person who, in the course of the person's employment, commits an act constituting the practice of chiropractic when the person is not licensed to practice chiropractic;

(11) advertising professional superiority, or advertising

the performance of professional services in a superior manner, if that advertising is not readily subject to verification;

(12) purchasing, selling, bartering, using, or offering to purchase, sell, barter, or use a chiropractic degree, license, certificate, or diploma or transcript of a license, certificate, or diploma in or relating to an application to the board for a license to practice chiropractic;

(13) altering with fraudulent intent a chiropractic license, certificate, or diploma or transcript of a chiropractic license, certificate, or diploma;

(14) impersonating or acting as proxy for another in an examination required by this chapter for a chiropractic license;

(15) impersonating a licensed chiropractor;

(16) allowing one's chiropractic license to be used by another person to practice chiropractic;

(17) being proved insane by a person having authority to make that determination;

(18) failing to use proper diligence in the practice of chiropractic or using gross inefficiency in the practice of chiropractic;

(19) failing to clearly differentiate a chiropractic office or clinic from another business or enterprise;

(20) personally soliciting a patient or causing a patient to be solicited by the use of a case history of another patient of another chiropractor;

(21) using for the purpose of soliciting patients an accident report prepared by a peace officer in a manner prohibited by Section 38.12, Penal Code; or

(22) advertising using the term "physician" or "chiropractic physician" or any combination or derivation of the term "physician."

(b) Notwithstanding Subsection (a)(22), the term "chiropractic physician" may be used for the express purpose of filing a claim for necessary services within the definition of chiropractic under this chapter if the billing for the services has universally applied, predetermined coding or description requirements that are a prerequisite to appropriate reimbursement.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 28, eff. September 1, 2005.

Sec. 201.5025. PROHIBITED PRACTICES BY CHIROPRACTOR OR LICENSE APPLICANT. (a) A chiropractor or an applicant for a license to practice chiropractic commits a prohibited practice if that person:

(1) submits to the board a false or misleading statement, document, or certificate in an application for a license;

(2) commits fraud or deception in taking or passing an examination;

(3) commits unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 201.5026, or injure the public;

(4) engages in conduct that subverts or attempts to subvert an examination process required by this chapter for a chiropractic license;

(5) directly or indirectly employs a person whose license to practice chiropractic has been suspended, canceled, or revoked;

(6) associates in the practice of chiropractic with a person:

(A) whose license to practice chiropractic has been suspended, canceled, or revoked; or

(B) who has been convicted of the unlawful practice of chiropractic in this state or elsewhere; or

(7) directly or indirectly aids or abets the practice of chiropractic by a person that is not licensed to practice chiropractic by the board.

(b) For purposes of Subsection (a)(4), conduct that subverts or attempts to subvert the chiropractic licensing examination process includes, as prescribed by board rule, conduct that violates:

(1) the security of the examination materials;

(2) the standard of test administration; or

(3) the accreditation process.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 29, eff. September 1, 2005.

Sec. 201.5026. UNPROFESSIONAL OR DISHONORABLE CONDUCT. (a) For purposes of Section 201.5025(a)(3), unprofessional or dishonorable conduct that is likely to deceive or defraud the public includes conduct in which a chiropractor:

(1) commits an act that violates any state or federal law if the act is connected with the chiropractor's practice of chiropractic;

(2) prescribes or administers a treatment that is nontherapeutic in nature or nontherapeutic in the manner the treatment is prescribed or administered;

(3) violates Section 311.0025, Health and Safety Code;

(4) fails to supervise adequately the activities of those acting under the supervision of the chiropractor; or

(5) delegates professional chiropractic responsibility or acts to a person if the delegating chiropractor knows or has reason to know that the person is not qualified by training, experience, or licensure to perform the responsibility or acts.

(b) A complaint, indictment, or conviction of a violation is not necessary for the enforcement of Subsection (a)(1). Proof of the commission of the act while in the practice of chiropractic or under the guise of the practice of chiropractic is sufficient for the board's action.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 29, eff. September 1, 2005.

Sec. 201.503. SCHEDULE OF SANCTIONS. (a) The board by rule shall adopt a schedule of the maximum amount of sanctions that may be assessed against a license holder for each category of violation of this chapter. In establishing the schedule of sanctions or in imposing the amount of an administrative penalty under this chapter, the board shall consider:

(1) the seriousness of the violation, including the nature, circumstances, extent, or gravity of any prohibited acts and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the economic harm to property or the environment

caused by the violation;

(3) the history of previous violations;

(4) the amount necessary to deter a future violation;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

(b) The State Office of Administrative Hearings shall use the schedule of sanctions for any sanction imposed as the result of a hearing conducted by that office.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.504. INFORMAL PROCEEDINGS; REFUNDS. (a) The board by rule shall adopt procedures governing:

(1) informal disposition of a contested case under Section 2001.056, Government Code; and

(2) an informal proceeding held in compliance with Section 2001.054, Government Code.

(b) Rules adopted under Subsection (a) must:

(1) provide the complainant and the license holder an opportunity to be heard; and

(2) require the presence of a representative of the attorney general or the board's legal counsel to advise the board or the board's employees.

(c) Subject to Subsection (d), the board may order a license holder to pay a refund to a consumer as provided in an agreement resulting from an informal settlement conference instead of or in addition to imposing an administrative penalty under this chapter.

(d) The amount of a refund ordered as provided in an agreement resulting from an informal settlement conference may not exceed the amount the consumer paid to the license holder for a service regulated by this chapter. The board may not require payment of other damages or estimate harm in a refund order.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 1020, Sec. 30, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 1020, Sec. 31, eff. September 1, 2005.

Sec. 201.505. HEARINGS. (a) A person is entitled to a hearing before the board if the board proposes to:

(1) refuse the person's application for a license;

(2) suspend or revoke the person's license; or

(3) place on probation or reprimand the person.

(b) The board is not bound by strict rules of evidence or procedure in conducting its proceedings and hearings, but the board must base its determination on sufficient legal evidence.

(c) The board may:

(1) issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records, and other documents;

(2) administer oaths; and

(3) take testimony concerning all matters within its jurisdiction.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.506. ENFORCEMENT COMMITTEE. (a) The board shall appoint an enforcement committee to:

(1) oversee and conduct the investigation of complaints filed with the board under this chapter; and

(2) perform other enforcement duties as directed by the board.

(b) The enforcement committee consists of three board members. Two members must be chiropractors, and one member must be a representative of the public.

(c) The attorney general shall provide legal counsel to the enforcement committee concerning enforcement matters, including the investigation and disposition of complaints.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.5065. REQUIRED SUSPENSION OR REVOCATION OF LICENSE FOR CERTAIN OFFENSES. (a) The board shall suspend a chiropractor's license on proof that the chiropractor has been:

(1) initially convicted of:

(A) a felony;

(B) a misdemeanor under Chapter 22, Penal Code, other than a misdemeanor punishable by fine only;

(C) a misdemeanor on conviction of which a defendant is required to register as a sex offender under Chapter 62, Code of Criminal Procedure;

(D) a misdemeanor under Section 25.07, Penal Code; or

(E) a misdemeanor under Section 25.071, Penal Code; or

(2) subject to an initial finding by the trier of fact of guilt of a felony under:

(A) Chapter 481 or 483, Health and Safety Code;

(B) Section 485.033, Health and Safety Code; or

(C) the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.).

(b) On final conviction for an offense described by Subsection (a), the board shall revoke the chiropractor's license.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 32, eff. September 1, 2005.

Sec. 201.507. TEMPORARY LICENSE SUSPENSION. (a) The enforcement committee may temporarily suspend the license of a license holder on an emergency basis if the enforcement committee determines from the evidence or information presented to the committee that the continued practice of chiropractic by the license holder constitutes a continuing or imminent threat to the public welfare.

(b) The board by rule shall adopt procedures for the temporary suspension of a license under this section.

(c) A license temporarily suspended under this section may be suspended without notice or hearing if, at the time the suspension is ordered, a hearing on whether disciplinary proceedings under this chapter should be initiated against the license holder is scheduled to be held not later than the 14th day after the date of the suspension.

(d) A second hearing on the suspended license shall be held not later than the 60th day after the date the suspension is ordered. If the second hearing is not held in the time required by this subsection, the suspended license is automatically reinstated.

(e) A temporary suspension may also be ordered on a vote of two-thirds of the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.508. POWERS OF DISTRICT COURTS; DUTIES OF DISTRICT AND COUNTY ATTORNEYS. (a) A district court may revoke or suspend a chiropractor's license on proof of a violation of the law relating to the practice of chiropractic.

(b) On the request of the board, a district or county attorney shall represent the state by filing and prosecuting a judicial proceeding for the revocation, cancellation, or suspension of the chiropractor's license.

(c) The district or county attorney may institute the judicial proceeding by filing a petition that:

(1) is in writing;

(2) states the grounds for prosecution; and

(3) is signed officially by the prosecuting officer.

(d) Citation must be issued in the name of the state in the manner and form as in other cases and shall be served on the defendant, who is required to answer within the time and manner provided by law in civil cases.

(e) If a chiropractor, after proper citation, is found guilty or fails to appear and deny the charge, the court shall:

(1) enter an order to suspend or revoke the chiropractor's license; and

(2) give proper judgment for costs.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.509. REPRESENTATION BY ATTORNEY GENERAL. (a) The board may apply to the attorney general for representation by stating that the board previously requested the representation of a district or county attorney under Section 201.508 and the district or county attorney failed to prosecute or proceed against the person accused of violating this chapter.

(b) The attorney general shall institute a civil or criminal proceeding against the person in the county of the person's residence.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.510. RIGHT TO APPEAL. (a) A person whose license to practice chiropractic has been revoked or suspended or against whom the board has imposed an administrative penalty may appeal to a Travis County district court.

(b) The decision of the board may not be enjoined or stayed unless the person appeals the board's decision as provided by Subsection (a) and provides notices to the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 228, Sec. 1, eff. Sept. 1, 2001.

Sec. 201.511. REISSUANCE OF LICENSE. (a) On application, the board may reissue a license to practice chiropractic to a person whose license has been canceled or suspended.

(b) An applicant whose license has been canceled or revoked:

(1) may not apply for reissuance before the first anniversary of the date the license was canceled or revoked; and

(2) must apply for reissuance in the manner and form required by the board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER L. ADMINISTRATIVE PENALTY

Sec. 201.551. IMPOSITION OF ADMINISTRATIVE PENALTY. The board may impose an administrative penalty on a person licensed or regulated under this chapter if the person violates this chapter or a rule or order adopted under this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.552. AMOUNT OF PENALTY. (a) The amount of an administrative penalty may not exceed $1,000.

(b) Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.553. ENFORCEMENT COMMITTEE RECOMMENDATIONS. (a) On a determination by the enforcement committee that a violation of this chapter or a rule or order adopted under this chapter occurred, the committee may issue a report to the board stating:

(1) the facts on which the determination is based; and

(2) the enforcement committee's recommendation on the imposition of the administrative penalty, including a recommendation on the amount of the penalty.

(b) Not later than the 14th day after the date the report is issued, the executive director shall give written notice of the violation by certified mail to the person on whom the penalty may be imposed.

(c) The notice issued under this section must:

(1) include a brief summary of the alleged violation;

(2) state the amount of the recommended penalty; and

(3) inform the person of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.554. PENALTY TO BE PAID OR HEARING REQUESTED. (a) Not later than the 20th day after the date a person receives the notice under Section 201.553, the person may:

(1) accept in writing the enforcement committee's determination and recommended administrative penalty; or

(2) make a written request for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) If the person accepts the enforcement committee's determination and recommended penalty, the board by order shall approve the determination and impose the recommended penalty.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.0515, eff. Sept. 1, 2001.

Sec. 201.555. HEARING ON ENFORCEMENT COMMITTEE

RECOMMENDATIONS. (a) If the person requests a hearing or fails to respond timely to the notice, the executive director shall set a hearing and give notice of the hearing to the person.

(b) A hearing set by the executive director under Subsection (a) shall be held by an administrative law judge of the State Office of Administrative Hearings.

(c) The administrative law judge shall:

(1) make findings of fact and conclusions of law; and

(2) promptly issue to the board a proposal for a decision as to the occurrence of the violation and the amount of a proposed administrative penalty.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.556. DECISION BY BOARD. (a) Based on the findings of fact, conclusions of law, and proposal for a decision, the board by order may determine that:

(1) a violation has occurred and impose an administrative penalty; or

(2) a violation did not occur.

(b) The notice of the board's order given to the person under Chapter 2001, Government Code, must include a statement of the right of the person to judicial review of the order.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.557. OPTIONS FOLLOWING DECISION: PAY OR APPEAL. (a) Not later than the 30th day after the date the board's order becomes final, the person shall:

(1) pay the administrative penalty;

(2) pay the penalty and file a petition for judicial review contesting the fact of the violation, the amount of the penalty, or both; or

(3) without paying the penalty, file a petition for judicial review contesting the fact of the violation, the amount of the penalty, or both.

(b) Within the 30-day period, a person who acts under Subsection (a)(3) may:

(1) stay enforcement of the penalty by:

(A) paying the penalty to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond that is approved by the court and that:

(i) is for the amount of the penalty; and

(ii) is effective until judicial review of the board's order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and

(B) giving a copy of the affidavit to the executive director by certified mail.

(c) If the executive director receives a copy of an affidavit under Subsection (b)(2), the director may, at the direction of the enforcement committee, file with the court a contest to the affidavit not later than the fifth day after the date the copy is received.

(d) The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and stay the enforcement of the penalty on finding that the alleged facts are true. The person who files the affidavit has the burden of proving that the person is financially unable to pay the penalty and to give a supersedeas bond.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.558. COLLECTION OF PENALTY. If the person does not pay the administrative penalty and the enforcement of the penalty is not stayed, the executive director may, at the direction of the enforcement committee, refer the matter to the attorney general for collection of the penalty.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.559. DETERMINATION BY COURT. (a) If a court sustains the finding that a violation occurred after the court reviews the order of the board imposing an administrative penalty, the court may

uphold or reduce the amount of the penalty and order the person to pay the full or reduced penalty.

(b) If the court does not sustain the finding that a violation occurred, the court shall order that an administrative penalty is not owed.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.560. REMITTANCE OF PENALTY AND INTEREST. (a) If after judicial review, the administrative penalty is reduced or not imposed by the court, the court shall, after the judgment becomes final:

(1) order the appropriate amount, plus accrued interest, be remitted to the person if the person paid the penalty; or

(2) order the release of the bond in full if the penalty is not imposed or order the release of the bond after the person pays the penalty imposed if the person posted a supersedeas bond.

(b) The interest paid under Subsection (a)(1) is the rate charged on loans to depository institutions by the New York Federal Reserve Bank. The interest shall be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.561. ADMINISTRATIVE PROCEDURE. All proceedings under this subchapter are subject to Chapter 2001, Government Code.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER M. OTHER PENALTIES AND ENFORCEMENT PROVISIONS

Sec. 201.601. INJUNCTIVE RELIEF. (a) The board may institute in the board's name an action to restrain a violation of this chapter. An action under this subsection is in addition to any other action authorized by law.

(b) The state may sue for an injunction to restrain the

practice of chiropractic in violation of this chapter.

(c) The state shall be represented in suits for injunction by:

(1) the attorney general;

(2) the district attorney of the district in which the defendant resides; or

(3) the county attorney of the county in which the defendant resides.

(d) A suit for injunction under Subsection (b) may not be filed before the final conviction for a violation of this chapter of the party sought to be enjoined.

(e) The state is not required to show that a person is personally injured by the defendant's unlawful practice of chiropractic.

(f) A court may not grant a temporary or permanent injunction until a hearing of the complaint on its merits. A court may not issue an injunction or restraining order until the final trial and final judgment on the merits of the suit.

(g) If the defendant is shown to have been unlawfully practicing chiropractic or to have been about to unlawfully practice chiropractic, the court shall perpetually enjoin the defendant from practicing chiropractic in the manner that was the subject of the suit.

(h) A defendant who disobeys the injunction is subject to the penalties provided by law for the violation of an injunction. The remedy by injunction is in addition to a criminal prosecution.

(i) A suit for injunction under this section shall be advanced for trial on the docket of the trial court and advanced and tried in the appellate courts in the same manner as other suits for injunction.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.6015. CEASE AND DESIST ORDER. (a) If it appears to the board that a person is engaging in an act or practice that constitutes the practice of chiropractic without a license or registration under this chapter, the board, after notice and opportunity for a hearing, may issue a cease and desist order prohibiting the person from engaging in that activity.

(b) A violation of an order under this section constitutes grounds for imposing an administrative penalty under Subchapter L.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 33, eff. September 1, 2005.

Sec. 201.602. MONITORING LICENSE HOLDER. The board by rule shall develop a system for monitoring compliance with the requirements of this chapter of a license holder who is the subject of disciplinary action. Rules adopted under this section must include procedures to:

(1) monitor for compliance a license holder who is ordered by the board to perform certain acts; and

(2) identify and monitor each license holder who is the subject of disciplinary action and who presents a continuing threat to the public welfare through the practice of chiropractic.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.603. CIVIL PENALTY. (a) A person who violates this chapter or a rule adopted by the board under this chapter is liable to the state for a civil penalty of $1,000 for each day of violation.

(b) At the request of the board, the attorney general shall bring an action to recover a civil penalty authorized by this section.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.604. GENERAL CRIMINAL PENALTY. A person commits an offense if the person violates this chapter. An offense under this section is a misdemeanor punishable by a fine of not less than $50 or more than $500 or by confinement in the county jail for not more than 30 days.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 1020, Sec. 34, eff. September 1, 2005.

Sec. 201.605. CRIMINAL PENALTY: PRACTICE WITHOUT LICENSE. (a) A person commits an offense if the person violates Section 201.301.

(b) Except as provided by Subsection (c), an offense under this section is a Class A misdemeanor.

(c) If it is shown on the trial of the offense that the defendant has been previously convicted under Subsection (a), the offense is a felony of the third degree.

(d) Each day of violation constitutes a separate offense.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 201.606. CRIMINAL PENALTY: PROVIDING CHIROPRACTIC TREATMENT OR SERVICES WHILE INTOXICATED. (a) In this section, "intoxicated" has the meaning assigned by Section 49.01, Penal Code.

(b) A person commits an offense if the person is licensed or regulated under this chapter, provides chiropractic treatment or services to a patient while intoxicated, and, by reason of that conduct, places the patient at a substantial and unjustifiable risk of harm.

(c) An offense under this section is a state jail felony.

Added by Acts 2005, 79th Leg., Ch. 1020, Sec. 35, eff. September 1, 2005.

Exhibit B

OCCUPATIONS CODE

TITLE 3. HEALTH PROFESSIONS

SUBTITLE C. OTHER PROFESSIONS PERFORMING MEDICAL PROCEDURES

CHAPTER 205. ACUPUNCTURE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 205.001. DEFINITIONS. In this chapter:

(1) "Acudetox specialist" means a person certified under Section 205.303.

(2) "Acupuncture" means:

(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).

(3) "Acupuncture board" means the Texas State Board of Acupuncture Examiners.

(4) "Acupuncturist" means a person who:

(A) practices acupuncture; and

(B) directly or indirectly charges a fee for the performance of acupuncture services.

(5) "Chiropractor" means a person licensed to practice chiropractic by the Texas Board of Chiropractic Examiners.

(6) "Executive director" means the executive director of the Texas Medical Board.

(7) "Medical board" means the Texas Medical Board.

(8) "Physician" means a person licensed to practice medicine by the Texas Medical Board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by

Acts 2001, 77th Leg., ch. 719, Sec. 1, eff. Sept. 1, 2001.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.01, eff. September 1, 2005.

Sec. 205.003. EXEMPTION; LIMITATION. (a) This chapter does not apply to a health care professional licensed under another statute of this state and acting within the scope of the license.

(b) This chapter does not:

(1) limit the practice of medicine by a physician;

(2) permit the unauthorized practice of medicine; or

(3) permit a person to dispense, administer, or supply a controlled substance, narcotic, or dangerous drug unless the person is authorized by other law to do so.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER B. TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS

Sec. 205.051. BOARD; MEMBERSHIP. (a) The Texas State Board of Acupuncture Examiners consists of nine members appointed by the governor with the advice and consent of the senate as follows:

(1) four acupuncturist members who have at least five years of experience in the practice of acupuncture in this state and who are not physicians;

(2) two physician members experienced in the practice of acupuncture; and

(3) three members of the general public who are not licensed or trained in a health care profession.

(b) Appointments to the acupuncture board shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointee.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.02, eff. September 1, 2005.

Sec. 205.052. PUBLIC MEMBER ELIGIBILITY. A person is not

eligible for appointment as a public member of the acupuncture board if the person or the person's spouse:

(1) is registered, certified, or licensed by an occupational regulatory agency in the field of health care;

(2) is employed by or participates in the management of a business entity or other organization regulated by the medical board or receiving funds from the medical board or acupuncture board;

(3) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization regulated by the medical board or acupuncture board or receiving funds from the medical board;

(4) uses or receives a substantial amount of tangible goods, services, or funds from the medical board or acupuncture board, other than compensation or reimbursement authorized by law for acupuncture board membership, attendance, or expenses; or

(5) owns, operates, or has a financial interest in a school of acupuncture.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.056(a), eff. Sept. 1, 2001.

Sec. 205.053. MEMBERSHIP AND EMPLOYEE RESTRICTIONS. (a) In this section, "Texas trade association" means a cooperative and voluntarily joined statewide association of business or professional competitors in this state designed to assist its members and its industry or profession in dealing with mutual business or professional problems and in promoting their common interest.

(b) An officer, board member, employee, or paid consultant of a Texas trade association in the field of health care may not be a member of the acupuncture board or an employee of the medical board who is exempt from the state's position classification plan or is compensated at or above the amount prescribed by the General Appropriations Act for step 1, salary group A17, of the position classification salary schedule.

(c) A person may not be a member of the acupuncture board and may not be a medical board employee in a "bona fide executive, administrative, or professional capacity," as that phrase is used for purposes of establishing an exemption to the overtime provisions of

the federal Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 et seq.), if:

(1) the person is an officer, employee, or paid consultant of a Texas trade association in the field of health care; or

(2) the person's spouse is an officer, manager, or paid consultant of a Texas trade association in the field of health care.

(d) A person may not be a member of the acupuncture board or act as general counsel to the acupuncture board or the medical board if the person is required to register as a lobbyist under Chapter 305, Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of the medical board or acupuncture board.

(e) A person may not serve on the acupuncture board if the person owns, operates, or has a financial interest in a school of acupuncture.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.056(b), eff. Sept. 1, 2001. Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.03, eff. September 1, 2005.

Sec. 205.054. TERMS; VACANCIES. (a) Members of the acupuncture board serve staggered six-year terms. The terms of three members expire on January 31 of each odd-numbered year.

(b) A vacancy on the acupuncture board shall be filled by appointment of the governor.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.055. PRESIDING OFFICER. The governor shall designate an acupuncturist member of the acupuncture board as presiding officer. The presiding officer serves in that capacity at the will of the governor.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.04, eff. September 1, 2005.

Sec. 205.056. GROUNDS FOR REMOVAL. (a) It is a ground for removal from the acupuncture board that a member:

(1) does not have at the time of appointment the qualifications required by Sections 205.051 and 205.052;

(2) does not maintain during service on the acupuncture board the qualifications required by Sections 205.051 and 205.052;

(3) violates a prohibition established by Section 205.053;

(4) cannot, because of illness or disability, discharge the member's duties for a substantial part of the member's term; or

(5) is absent from more than half of the regularly scheduled acupuncture board meetings that the member is eligible to attend during a calendar year.

(b) The validity of an action of the acupuncture board is not affected by the fact that it is taken when a ground for removal of an acupuncture board member exists.

(c) If the executive director has knowledge that a potential ground for removal of an acupuncture board member exists, the executive director shall notify the presiding officer of the acupuncture board of the potential ground. The presiding officer shall then notify the governor and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the presiding officer, the executive director shall notify the next highest officer of the acupuncture board, who shall notify the governor and the attorney general that a potential ground for removal exists.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.057. TRAINING. (a) A person who is appointed to and qualifies for office as a member of the acupuncture board may not vote, deliberate, or be counted as a member in attendance at a meeting of the acupuncture board until the person completes a training program that complies with this section.

(b) The training program must provide the person with information regarding:

(1) this chapter;

(2) the programs operated by the acupuncture board;

(3) the role and functions of the acupuncture board;

(4) the rules of the acupuncture board;

(5) the current budget for the acupuncture board;

(6) the results of the most recent formal audit of the acupuncture board;

(7) the requirements of laws relating to open meetings, public information, administrative procedure, and conflicts of interest; and

(8) any applicable ethics policies adopted by the acupuncture board or the Texas Ethics Commission.

(c) A person appointed to the acupuncture board is entitled to reimbursement, as provided by the General Appropriations Act, for the travel expenses incurred in attending the training program regardless of whether the attendance at the program occurs before or after the person qualifies for office.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.05, eff. September 1, 2005.

Sec. 205.058. QUALIFICATIONS AND STANDARDS OF CONDUCT INFORMATION. The executive director or the executive director's designee shall provide, as often as necessary, to members of the acupuncture board information regarding their:

(1) qualifications for office under this chapter; and

(2) responsibilities under applicable laws relating to standards of conduct for state officers.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.059. COMPENSATION; PER DIEM. An acupuncture board member may not receive compensation for service on the acupuncture board but is entitled to receive a per diem as set by legislative appropriation for transportation and related expenses incurred for each day that the member engages in the acupuncture board's business.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.060. APPLICATION OF OPEN MEETINGS, OPEN RECORDS, AND ADMINISTRATIVE PROCEDURE LAWS. Except as provided by this chapter, the acupuncture board is subject to Chapters 551, 552, and 2001, Government Code.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER C. POWERS AND DUTIES OF ACUPUNCTURE BOARD AND MEDICAL BOARD

Sec. 205.101. GENERAL POWERS AND DUTIES OF ACUPUNCTURE BOARD. (a) Subject to the advice and approval of the medical board, the acupuncture board shall:

(1) establish qualifications for an acupuncturist to practice in this state;

(2) establish minimum education and training requirements necessary for the acupuncture board to recommend that the medical board issue a license to practice acupuncture;

(3) administer an examination that is validated by independent testing professionals for a license to practice acupuncture;

(4) develop requirements for licensure by endorsement of other states;

(5) prescribe the application form for a license to practice acupuncture;

(6) recommend rules to establish licensing and other fees;

(7) establish the requirements for a tutorial program for acupuncture students who have completed at least 48 semester hours of college; and

(8) recommend additional rules as are necessary to administer and enforce this chapter.

(b) The acupuncture board does not have independent rulemaking authority. A rule adopted by the acupuncture board is subject to medical board approval.

(c) The acupuncture board shall:

(1) review and approve or reject each application for the issuance or renewal of a license;

(2) issue each license; and

(3) deny, suspend, or revoke a license or otherwise discipline a license holder.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.06, eff. September 1, 2005.

Sec. 205.102. ASSISTANCE BY MEDICAL BOARD. (a) The medical board shall provide administrative and clerical employees as necessary to enable the acupuncture board to administer this chapter.

(b) Subject to the advice and approval of the medical board, the acupuncture board shall develop and implement policies that clearly separate the policy-making responsibilities of the acupuncture board and the management responsibilities of the executive director and the staff of the medical board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.103. FEES. The medical board shall set and collect fees in amounts that are reasonable and necessary to cover the costs of administering and enforcing this chapter without the use of any other funds generated by the medical board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.104. RULES RESTRICTING ADVERTISING OR COMPETITIVE BIDDING. (a) The medical board may not adopt rules under this chapter restricting advertising or competitive bidding by a license holder except to prohibit false, misleading, or deceptive practices.

(b) In its rules to prohibit false, misleading, or deceptive practices, the medical board may not include a rule that:

(1) restricts the use of any medium for advertising;

(2) restricts the use of a license holder's personal appearance or voice in an advertisement;

(3) relates to the size or duration of an advertisement by the license holder; or

(4) restricts the license holder's advertisement under a

trade name.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.1041. GUIDELINES FOR EARLY INVOLVEMENT IN RULEMAKING PROCESS. (a) The acupuncture board shall develop guidelines to establish procedures for receiving input during the rulemaking process from individuals and groups that have an interest in matters under the acupuncture board's jurisdiction. The guidelines must provide an opportunity for those individuals and groups to provide input before the acupuncture board submits the rule to the medical board for approval.

(b) A rule adopted by the acupuncture board may not be challenged on the grounds that the board did not comply with this section. If the acupuncture board was unable to solicit a significant amount of input from the public or affected persons early in the rulemaking process, the board shall state in writing the reasons why the board was unable to do so.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.07, eff. September 1, 2005.

Sec. 205.1045. RULES ON CONSEQUENCES OF CRIMINAL CONVICTION. The acupuncture board shall adopt rules and guidelines as necessary to comply with Chapter 53, except to the extent the requirements of this chapter are stricter than the requirements of Chapter 53.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.08, eff. September 1, 2005.

Sec. 205.106. USE OF TECHNOLOGY. Subject to the advice and approval of the medical board, the acupuncture board shall implement a policy requiring the acupuncture board to use appropriate technological solutions to improve the acupuncture board's ability to perform its functions. The policy must ensure that the public is able to interact with the acupuncture board on the Internet.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.09, eff. September 1, 2005.

Sec. 205.107. NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION POLICY. (a) Subject to the advice and approval of the medical board, the acupuncture board shall develop and implement a policy to encourage the use of:

(1) negotiated rulemaking procedures under Chapter 2008, Government Code, for the adoption of acupuncture board rules; and

(2) appropriate alternative dispute resolution procedures under Chapter 2009, Government Code, to assist in the resolution of internal and external disputes under the acupuncture board's jurisdiction.

(b) The acupuncture board procedures relating to alternative dispute resolution must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.

(c) The acupuncture board shall designate a trained person to:

(1) coordinate the implementation of the policy adopted under Subsection (a);

(2) serve as a resource for any training needed to implement the procedures for negotiated rulemaking or alternative dispute resolution; and

(3) collect data concerning the effectiveness of those procedures, as implemented by the acupuncture board.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.10, eff. September 1, 2005.

SUBCHAPTER D. PUBLIC ACCESS AND INFORMATION AND COMPLAINT PROCEDURES

Sec. 205.151. PUBLIC INTEREST INFORMATION. (a) The acupuncture board shall prepare information of public interest describing the functions of the acupuncture board and the procedures by which complaints are filed with and resolved by the acupuncture board.

(b) The acupuncture board shall make the information available to the public and appropriate state agencies.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.152. COMPLAINTS. (a) The acupuncture board by rule shall establish methods by which consumers and service recipients are notified of the name, mailing address, and telephone number of the acupuncture board for the purpose of directing a complaint to the acupuncture board. The acupuncture board may provide for that notification:

(1) on each registration form, application, or written contract for services of a person regulated under this chapter;

(2) on a sign prominently displayed in the place of business of each person regulated under this chapter; or

(3) in a bill for service provided by a person regulated under this chapter.

(b) The acupuncture board shall keep information about each complaint filed with the acupuncture board. The information shall include:

(1) the date the complaint is received;

(2) the name of the complainant;

(3) the subject matter of the complaint;

(4) a record of all persons contacted in relation to the complaint;

(5) a summary of the results of the review or investigation of the complaint; and

(6) for a complaint for which the acupuncture board took no action, an explanation of the reason the complaint was closed without action.

(c) The acupuncture board shall keep a file about each written complaint filed with the acupuncture board that the acupuncture board has authority to resolve. The acupuncture board shall provide to the person filing the complaint and each person who is the subject of the complaint the acupuncture board's policies and procedures pertaining to complaint investigation and resolution.

(d) The acupuncture board, at least quarterly and until final disposition of the complaint, shall notify the person filing the complaint and each person who is the subject of the complaint of the status of the complaint unless the notice would jeopardize an

investigation.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.1521. CONDUCT OF INVESTIGATION. The acupuncture board shall complete a preliminary investigation of a complaint received by the acupuncture board not later than the 30th day after the date of receiving the complaint. The acupuncture board shall first determine whether the acupuncturist constitutes a continuing threat to the public welfare. On completion of the preliminary investigation, the acupuncture board shall determine whether to officially proceed on the complaint. If the acupuncture board fails to complete the preliminary investigation in the time required by this section, the acupuncture board's official investigation of the complaint is considered to commence on that date.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.11, eff. September 1, 2005.

Sec. 205.153. PUBLIC PARTICIPATION. (a) Subject to the advice and approval of the medical board, the acupuncture board shall develop and implement policies that provide the public with a reasonable opportunity to appear before the acupuncture board and to speak on any issue under the acupuncture board's jurisdiction.

(b) The executive director shall prepare and maintain a written plan that describes how a person who does not speak English may be provided reasonable access to the acupuncture board's programs and services.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER E. LICENSE REQUIREMENTS

Sec. 205.201. LICENSE REQUIRED. Except as provided by Section 205.303, a person may not practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.12, eff. September 1, 2005.

Sec. 205.202. ISSUANCE OF LICENSE. (a) The acupuncture board shall issue a license to practice acupuncture in this state to a person who meets the requirements of this chapter and the rules adopted under this chapter.

(b) The acupuncture board may delegate authority to medical board employees to issue licenses under this chapter to applicants who clearly meet all licensing requirements. If the medical board employees determine that the applicant does not clearly meet all licensing requirements, the application shall be returned to the acupuncture board. A license issued under this subsection does not require formal acupuncture board approval.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.13, eff. September 1, 2005.

Sec. 205.203. LICENSE EXAMINATION. (a) An applicant for a license to practice acupuncture must pass an acupuncture examination and a jurisprudence examination approved by the acupuncture board as provided by this section.

(b) To be eligible for the examination, an applicant must:

(1) be at least 21 years of age;

(2) have completed at least 60 semester hours of college courses, including basic science courses as determined by the acupuncture board; and

(3) be a graduate of an acupuncture school with entrance requirements and a course of instruction that meet standards set under Section 205.206.

(c) The acupuncture examination shall be conducted on practical and theoretical acupuncture and other subjects required by the acupuncture board.

(c-1) The jurisprudence examination shall be conducted on the licensing requirements and other laws, rules, or regulations

applicable to the professional practice of acupuncture in this state.

(d) The examination may be in writing, by a practical demonstration of the applicant's skill, or both, as required by the acupuncture board.

(e) The medical board shall notify each applicant of the time and place of the examination.

(f) The acupuncture board shall adopt rules for the jurisprudence examination under Subsection (c-1) regarding:

(1) the development of the examination;

(2) applicable fees;

(3) administration of the examination;

(4) reexamination procedures;

(5) grading procedures; and

(6) notice of results.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.057(a), eff. Sept. 1, 2001. Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.14, eff. September 1, 2005.

Sec. 205.204. APPLICATION FOR EXAMINATION. An application for examination must be:

(1) in writing on a form prescribed by the acupuncture board;

(2) verified by affidavit;

(3) filed with the executive director; and

(4) accompanied by a fee in an amount set by the medical board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.2045. APPEARANCE OF APPLICANT BEFORE ACUPUNCTURE BOARD. An applicant for a license to practice acupuncture may not be required to appear before the acupuncture board or a committee of the acupuncture board unless the application raises questions concerning:

(1) a physical or mental impairment of the applicant;

(2) a criminal conviction of the applicant; or

(3) revocation of a professional license held by the applicant.

Added by Acts 2001, 77th Leg., ch. 1420, Sec. 14.057(b), eff. Sept. 1, 2001.

Sec. 205.205. EXAMINATION RESULTS. (a) Not later than the 30th day after the date a licensing examination is administered under this chapter, the acupuncture board shall notify each examinee of the results of the examination. If an examination is graded or reviewed by a national testing service, the acupuncture board shall notify examinees of the results of the examination not later than the 14th day after the date the acupuncture board receives the results from the testing service.

(b) If the notice of examination results graded or reviewed by a national testing service will be delayed for longer than 90 days after the examination date, the acupuncture board shall notify the examinee of the reason for the delay before the 90th day. The acupuncture board may require a testing service to notify examinees of the results of an examination.

(c) If requested in writing by a person who fails a licensing examination administered under this chapter, the acupuncture board shall furnish the person with an analysis of the person's performance on the examination if an analysis is available from the national testing service.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.206. ACUPUNCTURE SCHOOLS. (a) A reputable acupuncture school, in addition to meeting standards set by the acupuncture board, must:

(1) maintain a resident course of instruction equivalent to not less than six terms of four months each for a total of not less than 1,800 instructional hours;

(2) provide supervised patient treatment for at least two terms of the resident course of instruction;

(3) maintain a course of instruction in anatomy-histology, bacteriology, physiology, symptomatology, pathology, meridian and

point locations, hygiene, and public health; and

(4) have the necessary teaching force and facilities for proper instruction in required subjects.

(b) In establishing standards for the entrance requirements and course of instruction of an acupuncture school, the acupuncture board may consider the standards set by the National Accreditation Commission for Schools and Colleges of Acupuncture and Oriental Medicine.

(c) In addition to the other requirements of this section, an acupuncture school or degree program is subject to approval by the Texas Higher Education Coordinating Board unless the school or program qualifies for an exemption under Section 61.303, Education Code.

(d) In reviewing an acupuncture school or degree program as required by Subsection (c), the Texas Higher Education Coordinating Board shall seek input from the acupuncture board regarding the standards to be used for assessing whether a school or degree program adequately prepares an individual for the practice of acupuncture.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.15, eff. September 1, 2005.

Sec. 205.207. RECIPROCAL LICENSE. The medical board may waive any license requirement for an applicant after reviewing the applicant's credentials and determining that the applicant holds a license from another state that has license requirements substantially equivalent to those of this state.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.208. TEMPORARY LICENSE. (a) The acupuncture board may, through the executive director, issue a temporary license to practice acupuncture to an applicant who:

(1) submits an application on a form prescribed by the acupuncture board;

(2) has passed a national or other examination recognized by the acupuncture board relating to the practice of acupuncture;

(3) pays the appropriate fee;

(4) if licensed in another state, is in good standing as an acupuncturist; and

(5) meets all the qualifications for a license under this chapter but is waiting for the next scheduled meeting of the medical board for the license to be issued.

(b) A temporary license is valid for 100 days after the date issued and may be extended only for another 30 days after the date the initial temporary license expires.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER F. LICENSE RENEWAL

Sec. 205.251. ANNUAL RENEWAL REQUIRED. (a) The medical board by rule shall provide for the annual renewal of a license to practice acupuncture.

(b) The medical board by rule may adopt a system under which licenses expire on various dates during the year. For the year in which the license expiration date is changed, license fees shall be prorated on a monthly basis so that each license holder pays only that portion of the license fee that is allocable to the number of months during which the license is valid. On renewal of the license on the new expiration date, the total license renewal fee is payable.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.252. NOTICE OF LICENSE EXPIRATION. Not later than the 30th day before the expiration date of a person's license, the medical board shall send written notice of the impending license expiration to the person at the person's last known address according to the records of the medical board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.253. PROCEDURE FOR RENEWAL. (a) A person who is otherwise eligible to renew a license may renew an unexpired license by paying the required renewal fee to the medical board before the

expiration date of the license. A person whose license has expired may not engage in activities that require a license until the license has been renewed under this section or Section 205.254.

(b) If the person's license has been expired for 90 days or less, the person may renew the license by paying to the medical board a fee in an amount equal to one and one-half times the required renewal fee.

(c) If the person's license has been expired for longer than 90 days but less than one year, the person may renew the license by paying to the medical board a fee in an amount equal to two times the required renewal fee.

(d) If the person's license has been expired for one year or longer, the person may not renew the license. The person may obtain a new license by submitting to reexamination and complying with the requirements and procedures for obtaining an original license.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.254. RENEWAL OF EXPIRED LICENSE BY OUT-OF-STATE PRACTITIONER. (a) The medical board may renew without reexamination the license of a person who was licensed to practice acupuncture in this state, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding application.

(b) The person must pay to the medical board a fee in an amount equal to two times the required renewal fee for the license.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.255. CONTINUING EDUCATION. (a) The acupuncture board by rule may require a license holder to complete a certain number of hours of continuing education courses approved by the acupuncture board to renew a license.

(a-1) The acupuncture board shall establish written guidelines for granting continuing education credit that specify:

(1) procedural requirements;

(2) the qualifications needed to be considered a preferred provider of continuing education; and

(3) course content requirements.

(b) The acupuncture board shall consider the approval of a course conducted by:

(1) a knowledgeable health care provider; or

(2) a reputable school, state, or professional organization.

(c) After guidelines are established under Subsection (a-1), the acupuncture board shall delegate to medical board employees the authority to approve course applications for courses that clearly meet the guidelines. Medical board employees shall refer any courses that are not clearly within the guidelines to the acupuncture board for review and approval.

Added by Acts 2001, 77th Leg., ch. 1420, Sec. 14.058(a), eff. Sept. 1, 2001.

Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.16, eff. September 1, 2005.

SUBCHAPTER G. PRACTICE BY LICENSE HOLDER

Sec. 205.301. REFERRAL BY OTHER HEALTH CARE PRACTITIONER REQUIRED. (a) A license holder may perform acupuncture on a person only if the person was:

(1) evaluated by a physician or dentist, as appropriate, for the condition being treated within six months before the date acupuncture is performed; or

(2) referred by a chiropractor within 30 days before the date acupuncture is performed.

(b) A license holder acting under Subsection (a)(1) must obtain reasonable documentation that the required evaluation has taken place. If the license holder is unable to determine that an evaluation has taken place, the license holder must obtain a written statement signed by the person on a form prescribed by the acupuncture board that states the person has been evaluated by a physician or dentist within the prescribed time. The form must contain a clear statement that the person should be evaluated by a physician or dentist for the condition being treated by the license holder.

(c) A license holder acting under Subsection (a)(2) shall refer

the person to a physician after performing acupuncture 20 times or for 30 days, whichever occurs first, if substantial improvement does not occur in the person's condition for which the referral was made.

(d) The medical board, with advice from the acupuncture board, by rule may modify:

(1) the scope of the evaluation under Subsection (a)(1);

(2) the period during which treatment must begin under Subsection (a)(1) or (2); or

(3) the number of treatments or days before referral to a physician is required under Subsection (c).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.302. AUTHORIZED PRACTICE WITHOUT REFERRAL. (a) After notice and public hearing, the medical board shall determine by rule whether an acupuncturist may treat a patient for alcoholism or chronic pain without a referral from a physician, dentist, or chiropractor. The medical board shall make the determination based on clinical evidence and what the medical board determines to be in the best interest of affected patients.

(b) Notwithstanding Section 205.301, a license holder may, without a referral from a physician, dentist, or chiropractor, perform acupuncture on a person for:

(1) smoking addiction;

(2) weight loss; or

(3) substance abuse, to the extent permitted by medical board rule adopted with advice from the acupuncture board.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 719, Sec. 2, eff. Sept. 1, 2001.

Sec. 205.303. ACUDETOX SPECIALIST. (a) The medical board may certify a person as an acudetox specialist under this section if the person:

(1) provides to the medical board documentation that the person:

(A) is a licensed social worker, licensed

professional counselor, licensed psychologist, licensed chemical dependency counselor, licensed vocational nurse, or licensed registered nurse; and

(B) has successfully completed a training program in acupuncture detoxification that meets guidelines approved by the medical board; and

(2) pays a certification fee in an amount set by the medical board.

(b) An acudetox specialist may practice acupuncture only:

(1) to the extent allowed by rules adopted by the medical board for the treatment of alcoholism, substance abuse, or chemical dependency; and

(2) under the supervision of a licensed acupuncturist or physician.

(c) A program that includes the services of an acudetox specialist shall:

(1) notify each participant in the program of the qualifications of the acudetox specialist and of the procedure for registering a complaint regarding the acudetox specialist with the medical board; and

(2) keep a record of each client's name, the date the client received the acudetox specialist's services, and the name, signature, and certification number of the acudetox specialist.

(d) The medical board may annually renew the certification of an acudetox specialist under this section if the person:

(1) provides to the medical board documentation that:

(A) the certification or license required under Subsection (a)(1)(A) is in effect; and

(B) the person has successfully met continuing education requirements established by the medical board under Subsection (e); and

(2) pays a certification renewal fee in an amount set by the medical board.

(e) The medical board shall establish continuing education requirements for an acudetox specialist that, at a minimum, include six hours of education in the practice of acupuncture and a course in either clean needle technique or universal infection control precaution procedures.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.059(a), eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 892, Sec. 33, eff. Sept. 1, 2003.

Sec. 205.304. PROFESSIONAL REVIEW ACTION. Sections 160.002, 160.003, 160.006, 160.007(d), 160.013, 160.014, and 160.015 apply to professional review actions relating to the practice of acupuncture by an acupuncturist or acupuncturist student.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999. Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 14.060, eff. Sept. 1, 2001.

Sec. 205.305. LICENSE HOLDER INFORMATION. (a) Each license holder shall file with the acupuncture board:

(1) the license holder's mailing address;

(2) the address of the license holder's residence;

(3) the mailing address of each office of the license holder; and

(4) the address for the location of each office of the license holder that has an address different from the office's mailing address.

(b) A license holder shall:

(1) notify the acupuncture board of a change of the license holder's residence or business address; and

(2) provide the acupuncture board with the license holder's new address not later than the 30th day after the date the address change occurs.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

SUBCHAPTER H. DISCIPLINARY PROCEDURES

Sec. 205.351. GROUNDS FOR LICENSE DENIAL OR DISCIPLINARY ACTION. (a) A license to practice acupuncture may be denied or, after notice and hearing, a license holder may be subject to disciplinary action under Section 205.352 if the license applicant or

license holder:

(1) intemperately uses drugs or intoxicating liquors to an extent that, in the opinion of the board, could endanger the lives of patients;

(2) obtains or attempts to obtain a license by fraud or deception;

(3) has been adjudged mentally incompetent by a court;

(4) has a mental or physical condition that renders the person unable to perform safely as an acupuncturist;

(5) fails to practice acupuncture in an acceptable manner consistent with public health and welfare;

(6) violates this chapter or a rule adopted under this chapter;

(7) has been convicted of a crime involving moral turpitude or a felony or is the subject of deferred adjudication or pretrial diversion for such an offense;

(8) holds the person out as a physician or surgeon or any combination or derivative of those terms unless the person is also licensed by the medical board as a physician or surgeon;

(9) fraudulently or deceptively uses a license;

(10) engages in unprofessional or dishonorable conduct that is likely to deceive, defraud, or injure a member of the public;

(11) commits an act in violation of state law if the act is connected with the person's practice as an acupuncturist;

(12) fails to adequately supervise the activities of a person acting under the supervision of the license holder;

(13) directly or indirectly aids or abets the practice of acupuncture by any person not licensed to practice acupuncture by the acupuncture board;

(14) is unable to practice acupuncture with reasonable skill and with safety to patients because of illness, drunkenness, or excessive use of drugs, narcotics, chemicals, or any other type of material or because of any mental or physical condition;

(15) is the subject of repeated or recurring meritorious health-care liability claims that in the opinion of the acupuncture board evidence professional incompetence likely to injure the public;

(16) has had a license to practice acupuncture suspended, revoked, or restricted by another state or has been subject to other

disciplinary action by another state or by the uniformed services of the United States regarding practice as an acupuncturist; or

(17) sexually abuses or exploits another person through the license holder's practice as an acupuncturist.

(b) If the acupuncture board proposes to suspend, revoke, or refuse to renew a person's license, the person is entitled to a hearing conducted by the State Office of Administrative Hearings.

(c) A complaint, indictment, or conviction of a violation of law is not necessary for an action under Subsection (a)(11). Proof of the commission of the act while in the practice of acupuncture or under the guise of the practice of acupuncture is sufficient for action by the acupuncture board.

(d) A certified copy of the record of the state or uniformed services of the United States taking an action is conclusive evidence of the action for purposes of Subsection (a)(16).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.17, eff. September 1, 2005.

Sec. 205.352. DISCIPLINARY POWERS OF ACUPUNCTURE BOARD. (a) On finding that grounds exist to deny a license or take disciplinary action against a license holder, the acupuncture board by order may:

(1) deny the person's application for a license, license renewal, or certificate to practice acupuncture or revoke the person's license or certificate to practice acupuncture;

(2) require the person to submit to the care, counseling, or treatment of a health care practitioner designated by the acupuncture board as a condition for the issuance, continuance, or renewal of a license or certificate to practice acupuncture;

(3) require the person to participate in a program of education or counseling prescribed by the acupuncture board;

(4) suspend, limit, or restrict the person's license or certificate to practice acupuncture, including limiting the practice of the person to, or excluding from the practice, one or more specified activities of acupuncture or stipulating periodic review by the acupuncture board;

(5) require the person to practice under the direction of an acupuncturist designated by the acupuncture board for a specified period of time;

(6) assess an administrative penalty against the person as provided by Subchapter J;

(7) require the person to perform public service considered appropriate by the acupuncture board;

(8) stay enforcement of an order and place the person on probation with the acupuncture board retaining the right to vacate the probationary stay and enforce the original order for noncompliance with the terms of probation or impose any other remedial measure or sanction authorized by this section;

(9) require the person to continue or review professional education until the person attains a degree of skill satisfactory to the acupuncture board in those areas that are the basis of the probation under Subdivision (8);

(10) require the person to report regularly to the acupuncture board on matters that are the basis of the probation under Subdivision (8); or

(11) administer a public reprimand.

(b) The acupuncture board may reinstate or reissue a license or remove any disciplinary or corrective measure that the acupuncture board has imposed under this section.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:
Acts 2005, 79th Leg., Ch. 269, Sec. 3.18, eff. September 1, 2005.

Sec. 205.3522. SURRENDER OF LICENSE. (a) The acupuncture board may accept the voluntary surrender of a license.

(b) A surrendered license may not be returned to the license holder unless the acupuncture board determines, under acupuncture board rules, that the former holder of the license is competent to resume practice.

(c) The acupuncture board shall recommend rules to the medical board for determining the competency of a former license holder to return to practice.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.19, eff. September 1, 2005.

Sec. 205.3523. PHYSICAL OR MENTAL EXAMINATION. (a) The acupuncture board shall adopt guidelines, in conjunction with persons interested in or affected by this section, to enable the board to evaluate circumstances in which an acupuncturist or applicant may be required to submit to an examination for mental or physical health conditions, alcohol and substance abuse, or professional behavior problems.

(b) The acupuncture board shall refer an acupuncturist or applicant with a physical or mental health condition to the most appropriate medical specialist. The acupuncture board may not require an acupuncturist or applicant to submit to an examination by a physician having a specialty specified by the board unless medically indicated. The acupuncture board may not require an acupuncturist or applicant to submit to an examination to be conducted an unreasonable distance from the person's home or place of business unless the acupuncturist or applicant resides and works in an area in which there are a limited number of physicians able to perform an appropriate examination.

(c) The guidelines adopted under this section do not impair or remove the acupuncture board's power to make an independent licensing decision.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.20, eff. September 1, 2005.

Sec. 205.354. RULES FOR DISCIPLINARY PROCEEDINGS. Rules of practice adopted by the medical board under Section 2001.004, Government Code, applicable to the proceedings for a disciplinary action may not conflict with rules adopted by the State Office of Administrative Hearings.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.3541. INFORMAL PROCEEDINGS. (a) The acupuncture

board by rule shall adopt procedures governing:

(1) informal disposition of a contested case under Section 2001.056, Government Code; and

(2) informal proceedings held in compliance with Section 2001.054, Government Code.

(b) Rules adopted under this section must require that:

(1) an informal meeting in compliance with Section 2001.054, Government Code, be scheduled not later than the 180th day after the date the complaint is filed with the acupuncture board, unless good cause is shown by the acupuncture board for scheduling the informal meeting after that date;

(2) the acupuncture board give notice to the license holder of the time and place of the meeting not later than the 30th day before the date the meeting is held;

(3) the complainant and the license holder be provided an opportunity to be heard;

(4) at least one of the acupuncture board members participating in the informal meeting as a panelist be a member who represents the public;

(5) the acupuncture board's legal counsel or a representative of the attorney general be present to advise the acupuncture board or the medical board's staff; and

(6) an employee of the medical board be at the meeting to present to the acupuncture board's representative the facts the medical board staff reasonably believes it could prove by competent evidence or qualified witnesses at a hearing.

(c) An affected acupuncturist is entitled, orally or in writing, to:

(1) reply to the staff's presentation; and

(2) present the facts the acupuncturist reasonably believes the acupuncturist could prove by competent evidence or qualified witnesses at a hearing.

(d) After ample time is given for the presentations, the acupuncture board panel shall recommend that the investigation be closed or shall attempt to mediate the disputed matters and make a recommendation regarding the disposition of the case in the absence of a hearing under applicable law concerning contested cases.

(e) If the license holder has previously been the subject of

disciplinary action by the acupuncture board, the acupuncture board shall schedule the informal meeting as soon as practicable but not later than the deadline prescribed by Subsection (b)(1).

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.21, eff. September 1, 2005.

Sec. 205.3542. ACUPUNCTURE BOARD REPRESENTATION IN INFORMAL PROCEEDINGS. (a) In an informal proceeding under Section 205.3541, at least two panelists shall be appointed to determine whether an informal disposition is appropriate.

(b) Notwithstanding Subsection (a) and Section 205.3541(b)(4), an informal proceeding may be conducted by one panelist if the affected acupuncturist waives the requirement that at least two panelists conduct the informal proceeding. If the acupuncturist waives that requirement, the panelist may be any member of the acupuncture board.

(c) The panel requirements described by Subsection (a) apply to an informal proceeding conducted by the acupuncture board under Section 205.3541, including a proceeding to:

(1) consider a disciplinary case to determine if a violation has occurred; or

(2) request modification or termination of an order.

(d) The panel requirements described by Subsection (a) do not apply to an informal proceeding conducted by the acupuncture board under Section 205.3541 to show compliance with an order of the acupuncture board.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.22, eff. September 1, 2005.

Sec. 205.3543. ROLES AND RESPONSIBILITIES OF PARTICIPANTS IN INFORMAL PROCEEDINGS. (a) An acupuncture board member that serves as a panelist at an informal meeting under Section 205.3541 shall make recommendations for the disposition of a complaint or allegation. The member may request the assistance of a medical board employee at any time.

(b) Medical board employees shall present a summary of the

allegations against the affected acupuncturist and of the facts pertaining to the allegation that the employees reasonably believe may be proven by competent evidence at a formal hearing.

(c) An acupuncture board or medical board attorney shall act as counsel to the panel and, notwithstanding Subsection (e), shall be present during the informal meeting and the panel's deliberations to advise the panel on legal issues that arise during the proceeding. The attorney may ask questions of participants in the informal meeting to clarify any statement made by the participant. The attorney shall provide to the panel a historical perspective on comparable cases that have appeared before the acupuncture board or medical board, keep the proceedings focused on the case being discussed, and ensure that the medical board's employees and the affected acupuncturist have an opportunity to present information related to the case. During the panel's deliberation, the attorney may be present only to advise the panel on legal issues and to provide information on comparable cases that have appeared before the acupuncture board or medical board.

(d) The panel and medical board employees shall provide an opportunity for the affected acupuncturist and the acupuncturist's authorized representative to reply to the board employees' presentation and to present oral and written statements and facts that the acupuncturist and representative reasonably believe could be proven by competent evidence at a formal hearing.

(e) An employee of the medical board who participated in the presentation of the allegation or information gathered in the investigation of the complaint, the affected acupuncturist, the acupuncturist's authorized representative, the complainant, the witnesses, and members of the public may not be present during the deliberations of the panel. Only the members of the panel and the attorney serving as counsel to the panel may be present during the deliberations.

(f) The panel shall recommend the dismissal of the complaint or allegations or, if the panel determines that the affected acupuncturist has violated a statute or acupuncture board rule, the panel may recommend board action and terms for an informal settlement of the case.

(g) The panel's recommendations under Subsection (f) must be

made in a written order and presented to the affected acupuncturist and the acupuncturist's authorized representative. The acupuncturist may accept the proposed settlement within the time established by the panel at the informal meeting. If the acupuncturist rejects the proposed settlement or does not act within the required time, the acupuncture board may proceed with the filing of a formal complaint with the State Office of Administrative Hearings.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.23, eff. September 1, 2005.

Sec. 205.3544. LIMIT ON ACCESS TO INVESTIGATION FILES. The acupuncture board shall prohibit or limit access to an investigation file relating to a license holder in an informal proceeding in the manner provided by Section 164.007(c).

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.24, eff. September 1, 2005.

Sec. 205.355. REQUIRED DISCIPLINARY ACTION FOR FAILURE TO OBTAIN REFERRAL. Except as provided by Section 205.301(a)(2), a license to practice acupuncture shall be denied or, after notice and hearing, revoked if the applicant or license holder violates Section 205.301(a)(1).

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.356. REHABILITATION ORDER. (a) The acupuncture board, through an agreed order or after a contested proceeding, may impose a nondisciplinary rehabilitation order on an applicant, as a prerequisite for issuing a license, or on a license holder based on:

(1) the person's intemperate use of drugs or alcohol directly resulting from habituation or addiction caused by medical care or treatment provided by a physician;

(2) the person's intemperate use of drugs or alcohol during the five years preceding the date of the report that could adversely affect the person's ability to safely practice as an

acupuncturist, if the person:

(A) reported the use;

(B) has not previously been the subject of a substance abuse related order of the acupuncture board; and

(C) did not violate the standard of care as a result of the impairment;

(3) a judgment by a court that the person is of unsound mind; or

(4) the results of a mental or physical examination, or an admission by the person, indicating that the person suffers from a potentially dangerous limitation or an inability to practice as an acupuncturist with reasonable skill and safety by reason of illness or as a result of any physical or mental condition.

(b) The acupuncture board may not issue an order under this section if, before the individual signs the proposed order, the board receives a valid complaint with regard to the individual based on the individual's intemperate use of drugs or alcohol in a manner affecting the standard of care.

(c) The acupuncture board must determine whether an individual has committed a standard of care violation described by Subsection (a)(2) before imposing an order under this section.

(d) The acupuncture board may disclose a rehabilitation order to a local or statewide private acupuncture association only as provided by Section 205.3562.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.25, eff. September 1, 2005.

Sec. 205.3561. EXPERT IMMUNITY. An expert who assists the acupuncture board is immune from suit and judgment and may not be subjected to a suit for damages for any investigation, report, recommendation, statement, evaluation, finding, or other action taken without fraud or malice in the course of assisting the board in a disciplinary proceeding. The attorney general shall represent the expert in any suit resulting from a service provided by the expert in good faith to the acupuncture board.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.26, eff. September 1, 2005.

Sec. 205.3562. RESPONSIBILITIES OF PRIVATE ASSOCIATIONS. (a) If a rehabilitation order imposed under Section 205.356 requires a license holder to participate in activities or programs provided by a local or statewide private acupuncture association, the acupuncture board shall inform the association of the license holder's duties under the order. The information provided under this section must include specific guidance to enable the association to comply with any requirements necessary to assist in the acupuncturist's rehabilitation.

(b) The acupuncture board may provide to the association any information that the board determines to be necessary, including a copy of the rehabilitation order. Any information received by the association remains confidential, is not subject to discovery, subpoena, or other means of legal compulsion, and may be disclosed only to the acupuncture board.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.26, eff. September 1, 2005.

Sec. 205.357. EFFECT OF REHABILITATION ORDER. (a) A rehabilitation order imposed under Section 205.356 is a nondisciplinary private order. If entered by agreement, the order is an agreed disposition or settlement agreement for purposes of civil litigation and is exempt from the open records law.

(b) A rehabilitation order imposed under Section 205.356 must contain findings of fact and conclusions of law. The order may impose a revocation, cancellation, suspension, period of probation or restriction, or any other term authorized by this chapter or agreed to by the acupuncture board and the person subject to the order.

(c) A violation of a rehabilitation order may result in disciplinary action under the provisions of this chapter for contested matters or the terms of the agreed order.

(d) A violation of a rehabilitation order is grounds for disciplinary action based on:

(1) unprofessional or dishonorable conduct; or

(2) any provision of this chapter that applies to the conduct resulting in the violation.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.358. AUDIT OF REHABILITATION ORDER. (a) The acupuncture board shall keep rehabilitation orders imposed under Section 205.356 in a confidential file. The file is subject to an independent audit to ensure that only qualified license holders are subject to rehabilitation orders. The audit shall be conducted by a state auditor or private auditor with whom the acupuncture board contracts to perform the audit.

(b) An audit may be performed at any time at the direction of the acupuncture board. The acupuncture board shall ensure that an audit is performed at least once in each three-year period.

(c) The audit results are a matter of public record and shall be reported in a manner that maintains the confidentiality of each license holder who is subject to a rehabilitation order.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.359. SUBPOENA. (a) On behalf of the acupuncture board, the executive director of the medical board or the presiding officer of the acupuncture board may issue a subpoena or subpoena duces tecum:

(1) for purposes of an investigation or contested proceeding related to:

(A) alleged misconduct by an acupuncturist; or

(B) an alleged violation of this chapter or other law related to practice as an acupuncturist or to the provision of health care under the authority of this chapter; and

(2) to determine whether to:

(A) issue, suspend, restrict, revoke, or cancel a license authorized by this chapter; or

(B) deny or grant an application for a license under this chapter.

(b) Failure to timely comply with a subpoena issued under this section is a ground for:

(1) disciplinary action by the acupuncture board or any other licensing or regulatory agency with jurisdiction over the individual or entity subject to the subpoena; and

(2) denial of a license application.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.360. DELEGATION OF CERTAIN COMPLAINT DISPOSITIONS. (a) The acupuncture board may delegate to a committee of medical board employees the authority to dismiss or enter into an agreed settlement of a complaint that does not relate directly to patient care or that involves only administrative violations. The disposition determined by the committee must be approved by the acupuncture board at a public meeting.

(b) A complaint delegated under this section shall be referred for informal proceedings under Section 205.3541 if:

(1) the committee of employees determines that the complaint should not be dismissed or settled;

(2) the committee is unable to reach an agreed settlement; or

(3) the affected acupuncturist requests that the complaint be referred for informal proceedings.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.27, eff. September 1, 2005.

Sec. 205.361. TEMPORARY SUSPENSION. (a) The presiding officer of the acupuncture board, with that board's approval, shall appoint a three-member disciplinary panel consisting of acupuncture board members to determine whether a person's license to practice as an acupuncturist should be temporarily suspended.

(b) If the disciplinary panel determines from the information presented to the panel that a person licensed to practice as an acupuncturist would, by the person's continuation in practice, constitute a continuing threat to the public welfare, the disciplinary panel shall temporarily suspend the license of that person.

(c) A license may be suspended under this section without notice or hearing on the complaint if:

(1) institution of proceedings for a hearing before the acupuncture board is initiated simultaneously with the temporary suspension; and

(2) a hearing is held under Chapter 2001, Government Code, and this chapter as soon as possible.

(d) Notwithstanding Chapter 551, Government Code, the disciplinary panel may hold a meeting by telephone conference call if immediate action is required and convening of the panel at one location is inconvenient for any member of the disciplinary panel.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.28, eff. September 1, 2005.

Sec. 205.362. CEASE AND DESIST ORDER. (a) If it appears to the acupuncture board that a person who is not licensed under this chapter is violating this chapter, a rule adopted under this chapter, or another state statute or rule relating to the practice of acupuncture, the board, after notice and opportunity for a hearing, may issue a cease and desist order prohibiting the person from engaging in the activity.

(b) A violation of an order under this section constitutes grounds for imposing an administrative penalty under Section 205.352.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.29, eff. September 1, 2005.

Sec. 205.363. REFUND. (a) Subject to Subsection (b), the acupuncture board may order a license holder to pay a refund to a consumer as provided in an agreement resulting from an informal settlement conference instead of or in addition to imposing an administrative penalty under this subchapter.

(b) The amount of a refund ordered under Subsection (a) may not exceed the amount the consumer paid to the license holder for a service regulated by this chapter. The acupuncture board may not require payment of other damages or estimate harm in a refund order.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.30, eff. September 1, 2005.

Sec. 205.364. MODIFICATION OF FINDINGS OR RULINGS BY ADMINISTRATIVE LAW JUDGE. The acupuncture board may change a finding of fact or conclusion of law or vacate or modify an order of an administrative law judge only if the acupuncture board makes a determination required by Section 2001.058(e), Government Code.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.31, eff. September 1, 2005.

SUBCHAPTER I. CRIMINAL PENALTIES AND OTHER ENFORCEMENT PROVISIONS

Sec. 205.401. CRIMINAL PENALTY. (a) Except as provided by Section 205.303, a person commits an offense if the person practices acupuncture in this state without a license issued under this chapter.

(b) Each day a person practices acupuncture in violation of Subsection (a) constitutes a separate offense.

(c) An offense under Subsection (a) is a felony of the third degree.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Sec. 205.402. INJUNCTIVE RELIEF; CIVIL PENALTY. (a) The acupuncture board, the attorney general, or a district or county attorney may bring a civil action to compel compliance with this chapter or to enforce a rule adopted under this chapter.

(b) In addition to injunctive relief or any other remedy provided by law, a person who violates this chapter or a rule adopted under this chapter is liable to the state for a civil penalty in an amount not to exceed $2,000 for each violation.

(c) Each day a violation continues or occurs is a separate violation for purposes of imposing a civil penalty.

(d) The attorney general, at the request of the acupuncture board or on the attorney general's own initiative, may bring a civil action to collect a civil penalty.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.

Amended by:

Acts 2005, 79th Leg., Ch. 269, Sec. 3.32, eff. September 1, 2005.

SUBCHAPTER J. ADMINISTRATIVE PENALTIES

Sec. 205.451. IMPOSITION OF ADMINISTRATIVE PENALTY. The acupuncture board by order may impose an administrative penalty against a person licensed or regulated under this chapter who violates this chapter or a rule or order adopted under this chapter.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.452. PROCEDURE. (a) The acupuncture board by rule shall prescribe the procedure by which it may impose an administrative penalty.

(b) A proceeding under this subchapter is subject to Chapter 2001, Government Code.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.453. AMOUNT OF PENALTY. (a) The amount of an administrative penalty may not exceed $5,000 for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(b) The amount of the penalty shall be based on:

(1) the seriousness of the violation, including:

(A) the nature, circumstances, extent, and gravity of any prohibited act; and

(B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the economic harm to property or the environment caused by the violation;

(3) the history of previous violations;

(4) the amount necessary to deter a future violation;

(5) efforts to correct the violation; and

(6) any other matter that justice may require.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.454. NOTICE OF VIOLATION AND PENALTY. (a) If the acupuncture board by order determines that a violation has occurred and imposes an administrative penalty, the acupuncture board shall notify the affected person of the board's order.

(b) The notice must include a statement of the right of the person to judicial review of the order.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.455. OPTIONS FOLLOWING DECISION: PAY OR APPEAL. (a) Not later than the 30th day after the date the acupuncture board's order imposing the administrative penalty is final, the person shall:

(1) pay the penalty;

(2) pay the penalty and file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both; or

(3) without paying the penalty, file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both.

(b) Within the 30-day period, a person who acts under Subsection (a)(3) may:

(1) stay enforcement of the penalty by:

(A) paying the penalty to the court for placement in an escrow account; or

(B) giving to the court a supersedeas bond approved by the court for the amount of the penalty and that is effective until all judicial review of the acupuncture board's order is final; or

(2) request the court to stay enforcement of the penalty by:

(A) filing with the court an affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and

(B) giving a copy of the affidavit to the presiding officer of the acupuncture board by certified mail.

(c) If the presiding officer of the acupuncture board receives a copy of an affidavit under Subsection (b)(2), the presiding officer may file with the court a contest to the affidavit not later than the fifth day after the date the copy is received.

(d) The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true. The person who files an affidavit has the burden of proving that the person is financially unable to pay the penalty and to give a supersedeas bond.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.456. COLLECTION OF PENALTY. If the person does not pay the administrative penalty and the enforcement of the penalty is not stayed, the presiding officer of the acupuncture board may refer the matter to the attorney general for collection of the penalty.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.457. DETERMINATION BY COURT. (a) If on appeal the court sustains the determination that a violation occurred, the court may uphold or reduce the amount of the administrative penalty and order the person to pay the full or reduced penalty.

(b) If the court does not sustain the determination that a violation occurred, the court shall order that a penalty is not owed.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Sec. 205.458. REMITTANCE OF PENALTY AND INTEREST. (a) If after judicial review the administrative penalty is reduced or not imposed by the court, the court shall, after the judgment becomes final:

(1) order that the appropriate amount, plus accrued interest, be remitted to the person if the person paid the penalty; or

(2) order the release of the bond in full if the penalty is not imposed or order the release of the bond after the person pays the penalty imposed if the person posted a supersedeas bond.

(b) The interest paid under Subsection (a)(1) is the rate charged on loans to depository institutions by the New York Federal Reserve Bank. The interest is paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

Added by Acts 2005, 79th Leg., Ch. 269, Sec. 3.34, eff. September 1, 2005.

Exhibit C

Tex. Admin. Code tit. 22, § 75.17

Texas Administrative Code Currentness
Title 22. Examining Boards
Part 3. Texas Board of Chiropractic Examiners
Chapter 75. Rules of Practice
§ 75.17. Scope of Practice

(a) Aspects of Practice.

(1) A person practices chiropractic if they:

(A) use objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; or

(B) perform nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.

(2) The practice of chiropractic does not include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription; or

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials.

(3) 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.

(4) This section does not apply to:

(A) a health care professional licensed under another statute of this state and acting within the scope of their license; or

(B) any other activity not regulated by state or federal law.

Tex. Admin. Code tit. 22, § 75.17

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Board--the Texas Board of Chiropractic Examiners.

(2) CPT Codebook--the American Medical Association's annual Current Procedural Terminology Codebook (2004). The CPT Codebook has been adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services as Level I of the common procedure coding system.

(3) Cosmetic treatment--a treatment that is primarily intended by the licensee to address the outward appearance of a patient.

(4) Incision--a cut or a surgical wound; also, a division of the soft parts made with a knife or hot laser.

(5) Musculoskeletal system--the system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form.

(6) On-site--the presence of a licensed chiropractor in the clinic, but not necessarily in the room, while a patient is undergoing an examination or treatment procedure or service.

(7) Practice of chiropractic--the description and terms set forth under Texas Occupations Code § 201.002, relating to the practice of chiropractic.

(8) Subluxation--a lesion or dysfunction in a joint or motion segment in which alignment, movement integrity and/or physiological function are altered, although contact between joint surfaces remains intact. It is essentially a functional entity, which may influence biomechanical and neural integrity.

(9) Subluxation complex--a neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them.

(c) Examination and Evaluation.

(1) In the practice of Chiropractic, licensees of this board provide necessary examination

and evaluation services to:

(A) Determine the bio-mechanical condition of the spine and musculoskeletal system of the human body including, but not limited to, the following:

(i) the health and integrity of the structures of the system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health and integrity of the system;

(iii) the existence of the structural pathology, functional pathology or other abnormality of the system;

(iv) the nature, severity, complicating factors and effects of said structural pathology, functional pathology or other abnormality of the system;

(v) the etiology of said structural pathology, functional pathology or other abnormality of the system; and

(vi) the effect of said structural pathology, functional pathology or other abnormality of the system on the health of an individual patient or population of patients;

(B) Determine the existence of subluxation complexes of the spine and musculoskeletal system of the human body and to evaluate their condition including, but not limited to:

(i) The nature, severity, complicating factors and effects of said subluxation complexes;

(ii) the etiology of said subluxation complexes; and

(iii) The effect of said subluxation complexes on the health of an individual patient or population of patients;

(C) Determine the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(D) Determine the treatment procedures that are contra-indicated in the therapeutic

care of a patient or condition; and

(E) Differentiate a patient or condition for which chiropractic treatment is appropriate from a patient or condition that is in need of care from a medical or other class of provider.

(2) To evaluate and examine individual patients or patient populations, licensees of this board are authorized to use:

(A) physical examinations;

(B) diagnostic imaging;

(C) laboratory examination;

(D) electro-diagnostic testing, other than an incisive procedure;

(E) sonography; and

(F) other forms of testing and measurement.

(3) Examination and evaluation services which require a license holder to obtain additional training or certification, in addition to the requirements of a basic chiropractic license, include:

(A) Performance of radiologic procedures, which are authorized under the Texas Chiropractic Act, Texas Occupations Code, Chapter 201, may be delegated to an assistant who meets the training requirements set forth under § 78.1 of this title (relating to Registration of Chiropractic Radiologic Technologists).

(B) Technological Instrumented Vestibular-Ocular-Nystagmus Testing may be performed by a licensee with a diplomate in chiropractic neurology and that has successfully completed 150 hours of clinical and didactic training in the technical and professional components of the procedures as part of coursework in vestibular rehabilitation including the successful completion of a written and performance examination for vestibular specialty or certification. The professional component of these procedures may not be delegated to a technician and must be directly performed by a qualified licensee.

(4) Examination and evaluation services, and the equipment used for such services, which

are outside the scope of chiropractic practice include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or

(D) other examination and evaluation services that are inconsistent with the practice of chiropractic and with the examination and evaluation services described under this subsection.

(d) Analysis, Diagnosis, and Other Opinions.

(1) In the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions could include, but are not limited to, the following:

(A) An analysis, diagnosis or other opinion regarding the biomechanical condition of the spine or musculoskeletal system including, but not limited to, the following:

(i) the health and integrity of the structures of the system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health and integrity of the system;

(iii) the existence of structural pathology, functional pathology or other abnormality of the system;

(iv) the nature, severity, complicating factors and effects of said structural pathology, functional pathology, or other abnormality of the system;

(v) the etiology of said structural pathology, functional pathology or other abnormality of the system; and

(vi) the effect of said structural pathology, functional pathology or other abnormal-

ity of the system on the health of an individual patient or population of patients;

(B) An analysis, diagnosis or other opinion regarding a subluxation complex of the spine or musculoskeletal system including, but not limited to, the following:

(i) the nature, severity, complicating factors and effects of said subluxation complex;

(ii) the etiology of said subluxation complex; and

(iii) the effect of said subluxation complex on the health of an individual patient or population of patients;

(C) An opinion regarding the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(D) An opinion regarding the likelihood of recovery of a patient or condition under an indicated course of treatment;

(E) An opinion regarding the risks associated with the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(F) An opinion regarding the risks associated with not receiving the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(G) An opinion regarding the treatment procedures that are contraindicated in the therapeutic care of a patient or condition;

(H) An opinion that a patient or condition is in need of care from a medical or other class of provider;

(I) An opinion regarding an individual's ability to perform normal job functions and activities of daily living, and the assessment of any disability or impairment;

(J) An opinion regarding the biomechanical risks to a patient, or patient population from various occupations, job duties or functions, activities of daily living, sports or athletics, or from the ergonomics of a given environment; and

(K) Other necessary or appropriate opinions consistent with the practice of chiropractic.

(2) Analysis, diagnosis, and other opinions regarding the findings of examinations and evaluations which are outside the scope of chiropractic include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or

(D) other analysis, diagnosis, and other opinions that are inconsistent with the practice of chiropractic and with the analysis, diagnosis, and other opinions described under this subsection.

(e) Treatment Procedures and Services.

(1) In the practice of chiropractic, licensees recommend, perform or oversee the performance of the treatment procedures that are indicated in the therapeutic care of a patient or patient population in order to:

(A) Improve, correct, or optimize the biomechanical condition of the spine or musculoskeletal system of the human body including, but not limited to, the following:

(i) the health and integrity of the structures of the musculoskeletal system; and

(ii) the coordination, balance, efficiency, strength, conditioning, and functional health and integrity of the musculoskeletal system;

(B) Promote the healing of, recovery from, or prevent the development or deterioration of abnormalities of the biomechanical condition of the spine or musculoskeletal system of the human body including, but not limited to, the following:

(i) the structural pathology, functional pathology, or other abnormality of the musculoskeletal system;

(ii) the effects and complicating factors of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system;

(iii) the etiology of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system; and

(iv) the effect of any structural pathology, functional pathology, or other abnormality of the musculoskeletal system on the health of an individual patient or population of patients; and

(C) Promote the healing of, recovery from, or prevent the development or deterioration of a subluxation complex of the spine or musculoskeletal system, including, but not limited to, the following:

(i) the structural pathology, functional pathology, or other abnormality of a subluxation complex;

(ii) the effects and complicating factors of any structural pathology, functional pathology, or other abnormality of a subluxation complex;

(iii) the etiology of any structural pathology, functional pathology, or other abnormality of a subluxation complex; and

(iv) the effect of any structural pathology, functional pathology, or other abnormality of a subluxation complex on the health of an individual patient or population of patients.

(2) In order to provide therapeutic care for a patient or patient population, licensees are authorized to use the therapeutic modalities listed in this paragraph. 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.

(A) Osseous and soft tissue adjustment and manipulative techniques;

(B) Physical and rehabilitative procedures and modalities;

(C) Acupuncture and other reflex techniques;

(D) Exercise therapy;

(E) Patient education;

(F) Advice and counsel;

(G) Diet and weight control;

(H) Immobilization;

(I) Splinting;

(J) Bracing;

(K) Therapeutic lasers (non-invasive, nonincisive), with adequate training and the use of appropriate safety devices and procedures for the patient, the licensee and all other persons present during the use of the laser;

(L) Durable medical goods and devices;

(M) Homeopathic and botanical medicines, including vitamins, minerals, phytonutrients, antioxidants, enzymes, neutraceuticals, and glandular extracts;

(N) Non-prescription drugs;

(O) Referral of patients to other doctors and health care providers; and

(P) Other treatment procedures and services consistent with the practice of chiropractic.

(3) The treatment procedures and services provided by a licensee which are outside of the scope of practice include:

(A) incisive or surgical procedures;

(B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;

(C) the use of x-ray therapy or therapy that exposes the body to radioactive materials;

Tex. Admin. Code tit. 22, § 75.17

(D) cosmetic treatments; or

(E) other treatment procedures and services that are inconsistent with the practice of chiropractic and with the treatment procedures and services described under this subsection.

(f) Questions Regarding Scope of Practice. Further questions regarding whether a service or procedure is within the scope of practice and this rule may be submitted in writing to the Board and should contain the following information:

(1) a detailed description of the service or procedure that will provide the Board with sufficient background information and detail to make an informed decision;

(2) information on the use of the service or procedure by chiropractors in Texas or in other jurisdictions; and

(3) an explanation of how the service or procedure is consistent with either:

(A) using subjective or objective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; or

(B) performing nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.

Source: The provisions of this §75.17 adopted to be effective June 11, 2006, 31 TexReg 4613; amended to be effective October 12, 2006, 31 TexReg 8363; amended to be effective June 30, 2009, 34 TexReg 4332; amended to be effective December 24, 2009, 34 TexReg 9208; amended to be effective October 27, 2010, 35 TexReg 9508; amended to be effective January 7, 2013, 38 TexReg 137; amended to be effective December 12, 2013, 38 TexReg 8827.

22 TAC § 75.17, 22 TX ADC § 75.17

Current through 39 Tex.Reg. No. 8016, dated October 3, 2014, as effective on or before October 9, 2014

END OF DOCUMENT

Tex. Admin. Code tit. 22, § 75.21

Texas Administrative Code Currentness
Title 22. Examining Boards
Part 3. Texas Board of Chiropractic Examiners
Chapter 75. Rules of Practice
§ 75.21. 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.

Tex. Admin. Code tit. 22, § 75.21

(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.

Source: The provisions of this §75.21 adopted to be effective July 2, 2009, 34 TexReg 4333; amended to be effective June 18, 2013, 38 TexReg 3784.

22 TAC § 75.21, 22 TX ADC § 75.21

Current through 39 Tex.Reg. No. 8016, dated October 3, 2014, as effective on or before October 9, 2014

END OF DOCUMENT

Exhibit D

C

Tex. Atty. Gen. Op. DM-415, 1996 WL 554570 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. DM-415

September 23, 1996

Re: Whether the practice of acupuncture is within the scope of practice for a licensed Texas chiropractor and related questions (RQ-853)

Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Acupuncture Examiners
P.O. Box 149134
Austin, Texas 78714-9134

Dear Dr. Levy:

You inform us that certain health-care practitioners, who are licensed as chiropractors but not as acupuncturists, [FN1] have been advertising that they perform, and presumably do perform, acupuncture at their chiropractic clinics. You ask three questions in an attempt to determine whether this phenomenon indicates a violation of V.T.C.S. article 4495b, subchapter F, which governs the practice of acupuncture, or V.T.C.S. article 4512b, which governs the practice of chiropractic. Specifically, you seek our opinion regarding the following issues:

1. Whether the practice of acupuncture is within the scope of practice for a licensed Texas chiropractor? [FN2]

2. Whether licensure as an acupuncturist is required for a licensed Texas chiropractor to engage in the practice of acupuncture?

3. If the answer to the first question is yes and the answer to the second question is no, whether advertising the practice of acupuncture by a licensed chiropractor violates statutes prohibiting false or misleading advertising if the chiropractor fails to indicate in the advertisement that he or she is not licensed by the Texas State Board of Acupuncture Examiners?

We will begin by discussing the two statutes that are most relevant to your questions, V.T.C.S. article 4495b, subchapter F, and V.T.C.S. article 4512b.

The legislature enacted subchapter F of article 4495b to provide for the "establishment of statewide standards for the training, education, and discipline of" acupuncturists and for "an orderly system of regulating the practice of acupuncture."V.T.C.S. art. 4495b, § 6.01. See generally Attorney General Opinion DM-336 (1995) at 1-2 (summarizing V.T.C.S. art. 4495b, subch. F). Section 6.02(1) defines "acupuncture" as follows:

(A) the insertion of an acupuncture needle and the application of moxibustion [FN3] to specific areas of the human body as a primary mode of therapy to treat and mitigate a human 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) of this subdivision. [FN4] [Footnotes added.]

No individual may practice acupuncture in this state unless he or she has obtained a license to practice acupuncture from the Board of Medical Examiners, upon the recommendation of the Board of Acupuncture Examiners. [FN5]V.T.C.S. art. 4495b, § 6.06; see also id. §§ 6.05(a)(6), 6.10. A "health care professional licensed under another subchapter" of the Medical Practice Act or another statute may practice acupuncture without obtaining a license from the Board of Medical Examiners, but only if the practice of acupuncture is "within the scope of" the health care professional's license. Id. § 6.03(a). Any individual who practices acupuncture without a license to practice acupuncture or a license encompassing the practice of acupuncture commits a class A misdemeanor. Id. § 6.12(b).

***2** Section 1 of article 4512b, V.T.C.S., lists three acts constituting the practice of chiropractic. As amended by the Seventy-fourth Legislature, section 1 provides:

(a) A person shall be regarded as practicing chiropractic within the meaning of this Act 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;

(2) performs nonsurgical, nonincisive procedures, including but not limited to adjustment and manipulation, in order to improve the subluxation [FN6] complex or the biomechanics of the musculoskeletal system; or

(3) holds himself out to the public as a chiropractor of the human body or uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms in connection with his name. [FN7]

Act of May 29, 1995, 74th Leg. R.S., ch. 965, § 13, 1995 Tex. Sess. Law Serv. 4789, 4802 (footnotes added). Prior to the effective date of the 1995 amendments, article 4512b did not limit the scope of chiropractic to only nonincisive, nonsurgical procedures. [FN8] See id.

Section 13a of V.T.C.S. article 4512b, which the Seventy-fourth Legislature also amended, see id. § 18, 1995 Tex. Sess. Law Serv. 4789, 4803, explicitly excludes from the practice of chiropractic, among other things, "incisive or surgical procedures." For purposes of article 4512b, the phrase

"incisive or surgical procedure" includes but is not limited to making an incision into any tissue, cavity, or organ by any person or implement. It does not include the use of a needle for the purpose of drawing blood for diagnostic testing. [FN9]

V.T.C.S. art. 4512b, § 13a(b) (footnote added).

A violation of article 4512b results in the revocation or suspension of a license, or the probation or reprimand of a licensee. V.T.C.S. art. 4512b, § 14(a); see also id. § 14a(1). The Texas Board of Chiropractic Examiners may assess an administrative penalty in an amount not to exceed $1,000 for each day the violation occurs or continues. See id. §§ 14(a), 19a(a). In addition, a person who violates article 4512b is liable to the state for a civil penalty of $1,000 for each day the violation occurs or continues. Id. § 19a(b).

For purposes of this opinion, we assume a chiropractor practices acupuncture to improve the subluxation complex or the biomechanics of the musculoskeletal system. See id. § 1(a)(2). Central to our determination of whether the practice of acupuncture is "within the scope of" a chiropractic license, see V.T.C.S. art. 4495b, § 6.03(a), is a consideration of whether acupuncture is an "incisive or surgical procedure" for purposes of section 13a(b) of article 4512b. If acupuncture is an incisive or surgical procedure, article 4512b, section 13a(a)(1) excludes it from the practice of chiropractic, and a person who is licensed only as a chiropractor may not perform it..

The word "incisive" means "cutting; having the power of cutting."TABER'S CYCLOPEDIC MEDICAL DICTIONARY I-12 (Clayton L. Thomas, M.D., M.P.H., ed., 13th ed. 1977). It also means "cutting with a sharp edge." VII THE OXFORD ENGLISH DICTIONARY 796 (2d ed. 1989).

***3** The word "surgical" pertains to surgery, which is the "branch of medicine dealing with manual and operative procedures for correction of deformities and defects, repair of injuries, and diagnosis and cure of certain diseases."TABER'S CYCLOPEDIC MEDICAL DICTIONARY, supra, at S-130; see also id. at S-131 (defining "surgical"). For purposes of the Medical Practice Act, V.T.C.S. article 4495b, the legislature has defined the term "surgery" to include "surgical services, surgical procedures, surgical operations, and the procedures described in the surgery section of the Common Procedure Coding System as adopted by the Health Care Financing Administration of the United States Department of Health and Human Services."[FN10]V.T.C.S. art. 4495b, § 1.03(a)(15).

When interpreting a statute, a court must diligently attempt to ascertain legislative intent. Gov't Code § 312.005. Although we question whether a court ordinarily would classify acupuncture as "incisive" [FN11] or "surgical," [FN12] we believe the legislature intended that V.T.C.S. article 4512b, section 13a(b) be construed to classify acupuncture as an "incisive or surgical procedure"; we further believe a court would reach a conclusion consistent with the legislative intent. The legislature expressly excluded from the range of procedures that are incisive or surgical "the use of a needle for the purpose of drawing blood for diagnostic testing."We deduce that the legislature considered the use of a needle for the purpose of drawing blood to be an incisive or surgical procedure, and we find no distinction

between the use of a needle in a diagnostic circumstance and the use of acupuncture needles. Notably, however, the legislature did not exclude acupuncture from those incisive or surgical procedures that are outside the scope of chiropractic.

Additionally, we note that, during the Seventy-fourth Legislature, a witness described acupuncture as "a mild form of surgery" to the Senate Committee on Health and Human Services. See Hearings on S.B. 718 Before the Senate Comm. on Health and Human Services, 74th Leg., R.S. (Apr. 12, 1995) (statement of Dee Ann Newbold, Texas Acupuncture Association) (tape available from Senate Staff Services). The legislature may well have believed, therefore, that acupuncture was among those "incisive" and "surgical" procedures article 4512b, sections 1(a)(2) and 13a(b) exclude from the practice of chiropractic.

Furthermore, article 4495b, subchapter F suggests that the legislature believes acupuncturists should be trained in accordance with statewide standards, see V.T.C.S. art. 4495b, § 6.01(1), and examined by a state board, see id. § 6.05(a). The legislature has established requirements for an applicant for a license to practice acupuncture: among other things, the applicant must have completed 1,800 hours of instruction in subjects including bacteriology, physiology, symptomatology, meridian and point locations, and hygiene, and must have treated patients (with supervision) for at least two terms. See id. § 6.07(c). We believe the legislature, in the interest of the public health, safety, and welfare, see id. § 6.01(2), intended to except from the training and examination requirements only health care professionals whose licenses clearly encompass the practice of acupuncture. See id. § 6.03(a). 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.

***4** We accordingly conclude that V.T.C.S. article 4512b, section 1, which encompasses within the practice of chiropractic only nonsurgical, nonincisive procedures, does not authorize a chiropractor to practice acupuncture. In answer to your first question, therefore, the practice of acupuncture is outside the scope of practice for a licensed Texas chiropractor. Conversely, in answer to your second question, a licensed chiropractor must obtain a license to practice acupuncture if the chiropractor desires to practice acupuncture.

You premise your last question on an affirmative response to your first question and a negative response to your second question. We have reached the opposite conclusions. Consequently, we need not answer your last question.

Summary

Only a health care professional whose license clearly encompasses the practice of acupuncture is excepted from the training and examination requirements set forth for acupuncturists in V.T.C.S. article 4495b, subchapter F. The practice of chiropractic, as delineated in V.T.C.S. article 4512b, section 1, does not clearly encompass the practice of acupuncture. Accordingly, V.T.C.S. article 4512b, section 1, which authorizes a chiropractor to perform only nonsurgical, nonincisive procedures, does not authorize a chiropractor to practice acupuncture.

Thus, the practice of acupuncture is not within the scope of practice for a licensed Texas chiropractor. Conversely, a licensed chiropractor must obtain a license to practice acupuncture if the chiropractor desires to practice acupuncture.

Yours very truly,
Dan Morales
Attorney General of Texas

Jorge Vega
First Assistant Attorney General

Sarah J. Shirley
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge
Assistant Attorney General

[FN1]. An acupuncturist is a practitioner of acupuncture. See V.T.C.S. art. 4495b, § 6.02(2).

[FN2]. We assume, for purposes of our response to your first question, that the licensed chiropractor is not also licensed as an acupuncturist under subchapter F of the Medical Practice Act, V.T.C.S. article 4495b.

[FN3]. "Moxibustion" is "[c]auterization by means of a cylinder or cone of cotton wool, called a moxa, placed on the skin and fired at the top."TABER'S CYCLOPEDIC MEDICAL DICTIONARY M-66 (Clayton L. Thomas, M.D., M.P.H., ed., 13th ed. 1977); see also Andrews v. Ballard, 498 F. Supp. 1038, 1043 n.14 (S.D. Tex. 1980). Moxibustion is "[u]sed to produce counterirritation." TABER'S CYCLOPEDIC MEDICAL DICTIONARY M-66.

[FN4]. For purposes of this opinion, we will assume that the licensed chiropractors are practicing acupuncture as section 6.02(1) of the Medical Practice Act, V.T.C.S. article 4495b, defines the term "acupuncture." An advertisement you submitted with your request letter states that "[a]cupuncture is a principle, not a technique."Thus, the advertisement continues, a practitioner may use many different methods "to stimulate an [a]cupoint," not just the insertion of a needle. For example, the advertisement says, "[m]any practitioners use electronic stimulation, laser beam or pressure massage to treat an [a]cupoint."Elsewhere, the advertisement repeats that many practitioners "are employing electronic and laser stimulation to the [a]cupoint with equal effectiveness as the needle."

> Additionally, the Texas Chiropractic Association cites, in its brief to this office, a study by the National Board of Chiropractic Examiners finding that 11.8% of chiropractors in the United States use "needling" acupuncture in their practice, while 65% of chiropractors practice acupuncture without needles. Similarly, the same board found in 1994 that 62.4% of Texas chiropractors were using some form of acupuncture, but only 15.8% were using needles in the practice of acupuncture. Provided that electronic and laser stimulations and other non-needle techniques are not administered "in conjunction with" the insertion of needles, see V.T.C.S. art. 4495b, § 6.02(1)(B), the definition of "acupuncture" in section 6.02(1), V.T.C.S. article 4495b does not appear to encompass them.

[FN5]. We assume that the chiropractors about which you ark are not licensed acupuncturists.

[FN6]. “Subluxation” is “a partial dislocation, a sprain.” XVII OXFORD ENGLISH DICTIONARY 42 (2d ed. 1989).

[FN7]. The Seventy-fourth Legislature inserted the words “of the human body” between “as a chiropractor” and “or uses the term.” See Act of May 29, 1995, 74th Leg., R.S., ch. 965, § 13, 1995 Tex. Sess. Law Serv. 4789, 4802 (amending V.T.C.S. art. 4512b, § 1(a)(3)).

[FN8]. In particular, prior to amendment by the Seventy-fourth Legislature, V.T.C.S. article 4512b, section 1(a)(2) provided that an individual practices chiropractic if the individual “uses adjustment, manipulation, or other procedures in order to improve subluxation or the biomechanics of the musculoskeletal system.”See Act of May 29, 1995, 74th Leg., R.S., ch. 965, § 13, 1995 Tex. Sess. Law Serv. 4789, 4802 (amending V.T.C.S. art. 4512b, § 1(a)(2)).

[FN9]. Prior to amendment by the Seventy-fourth Legislature, V.T.C.S. article 4512b, section 13a provided only that “[a] chiropractor may not use in the chiropractor's practice surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive material.”

[FN10]. The Common Procedure Coding System does not list acupuncture as a surgical procedure. See American Medical Association, PHYSICIANS' CURRENT PROCEDURAL TERMINOLOGY ‘96 at 53-246 (1995).

[FN11]. Courts have described acupuncture as a “piercing of the skin,” see Acupuncture Soc'y of Kan. v. Kansas State Bd. of Healing Arts, 602 P.2d 1311, 1311 (Kan. 1979), or “a puncturing of bodily tissue,” see People v. Amber, 349 N.Y.S.2d 604, 610 (N.Y. Sup. Ct. 1973), as well as an “insertion” and “manipulation” of wires or needles, see Andrews v. Ballard, 498 F. Supp. 1038, 1043 (S.D. Tex. 1980); People v. Roos, 514 N.E.2d 993, 993, 994 (Ill. 1987); Acupuncture Soc'y of Kan., 602 P.2d at 1312;State v. Rich, 339 N.E.2d 630, 631 (Ohio 1975); Amber, 349 N.Y.S.2d at 611.

[FN12]. We find no Texas court that has considered whether the practice of acupuncture constitutes surgery, but we note that courts around the country have split on the issue. For example, the Supreme Court of Kansas has determined that acupuncture is not surgery for purposes of the Kansas statutes because acupuncture is not “intended to separate or sever tissue for the purpose of penetration for treatment, replacement or removal of afflicted parts.”Acupuncture Soc'y of Kan. v. Kansas State Bd. of Healing Arts, 602 P.2d 1311, 1315-16 (Kan. 1979); accord People v. Roos, 514 N.E.2d 993, 997 (Ill. 1987); see also State v. Won, 528 P.2d 594, 596 (Or. 1974) (summarizing, without reconsidering, lower court's finding that acupuncture did not constitute minor surgery).

On the other hand, the Washington Court of Appeals has determined that acupuncture constitutes surgery because it involves “the penetration of human tissue.” State v. Wilson, 528 P.2d 279, 281 (Wash. Ct. App. 1974); accord Kelley v. Raguckas, 270 N.W.2d 665, 669 (Mich. Ct. App. 1978) (citing Note, Regulating the Practice of Acupuncture: Recent Developments in California, 7 U.C. DAVIS L. REV. 385, 391-92, 396 (1974)); see also Cherry v. State Farm Mut. Auto. Ins. Co., 489 N.W.2d 788, 790 (Mich. Ct. App. 1992) (citing Raguckas, 270 N.W.2d 665);Commonwealth v. Schatzberg, 371 A.2d 544, 547 n.6 (Pa. Commw. Ct. 1977) (indicating that Attorney General of Pennsylvania concluded that acupuncture is surgery and forbidden to chiropractors).

Tex. Atty. Gen. Op. DM-415, 1996 WL 554570 (Tex.A.G.)

END OF DOCUMENT

Exhibit E

C

Tex. Atty. Gen. Op. DM-471, 1998 WL 150366 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. DM-471

March 30, 1998

Re: Whether the performance of acupuncture is within the scope of practice of a licensed Texas chiropractor (RQ-988)

Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Acupuncture Examiners
P.O. Box 2018
Austin, Texas 78768-2018

Dear Dr. Levy:

You ask whether the practice of acupuncture is within the scope of practice of a licensed doctor of chiropractic, a question that we considered in Attorney General Opinion DM-415.We conclude that the practice of acupuncture as defined in V.T.C.S. article 4495b is within the scope of the practice of chiropractic, and consequently that the conclusion reached in DM-415 with respect to the practice of acupuncture by chiropractors is superseded by statute.

The issue in DM-415 was whether the practice of acupuncture [FN1]

> was within the scope of practice of a licensed chiropractor who was not also a licensed acupuncturist.Attorney General Opinion DM-415 (1996). Central to our determination was a consideration of whether acupuncture, defined in part as "the insertion of an acupuncture needle" into the human body, is an "incisive or surgical procedure" under V.T.C.S. article 4512b. *Id.* at 4. We reasoned that because the legislature expressly excluded from the range of procedures that are incisive or surgical "the use of a needle for the purpose of drawing blood for diagnostic testing," the legislature considered the use of a needle for the purpose of drawing blood to be an incisive or surgical procedure. *Id.* at 5. Seeing no distinction between the use of a needle for drawing blood and the use of acupuncture needles, we concluded that acupuncture was not within the scope of practice of chiropractic.

As a part of the acupuncture board's sunset legislation, the Seventy-fifth Legislature amended the definition of acupuncture in V.T.C.S. article 4495b, subchapter F (the "acupuncture statute"), to define acupuncture in part as the

"nonsurgical, nonincisive insertion of an acupuncture needle."Act of May 29, 1997, 75th Leg., R.S., ch. 1170, 1997 Tex. Sess. Law Serv. 4418, 4418 (codified at V.T.C.S. art. 4495b, § 6.02(1)). Because the acupuncture statute and the chiropractic statute both regulate health care professions, we believe they may be read *in pari materia*. Acupuncture is defined in the acupuncture statute as a "nonsurgical, nonincisive" procedure. Therefore, it is not an "incisive or surgical procedure" excluded by the chiropractic statute from the scope of the practice of chiropractic. Furthermore, the legislative history of the amendment to the acupuncture statute indicates that the amendment was intended to allow chiropractors to practice acupuncture without being separately licensed to do so. *See* Hearing on S.B. 361 Before the House Public Health Comm., 75th Leg. (May 8, 1997) (testimony of Rep. Patricia Gray) (tape available in House Video/Audio Services Office). Therefore, our conclusion in DM-415 that needle acupuncture is not within the scope of the practice of chiropractic has been superseded by statute.

***2** It has been argued that the use of acupuncture needles by chiropractors not licensed to practice acupuncture contravenes the federal Food and Drug Administration's ("FDA") classification of acupuncture needles. We disagree. The FDA defines an acupuncture needle as "a device intended to pierce the skin in the practice of acupuncture."21 C.F.R. § 880.5580. Acupuncture needles are classified by the FDA as "Class II" medical devices, which are devices for which general controls are insufficient to assure the safety and effectiveness of the device, and which are therefore subject to special controls. *See*21 U.S.C. § 360c(a) (defining classes of devices); 21 C.F.R. § 860.3 (same). The FDA requires acupuncture needles to be labeled for single use only, conform to FDA requirements for prescription devices, and comply with biocompatibility and sterility requirements. 21 C.F.R. § 880.5580. FDA regulations restrict the use of prescription devices, including acupuncture needles, to practitioners licensed by state law to use or order the use of such devices. *Id.* § 801.109. The FDA does not, however, prescribe who may be licensed by a state to use the device. Any person authorized by state law to use acupuncture needles must do so in accordance with FDA regulations.

Summary

The practice of acupuncture, as defined by V.T.C.S. article 4495b, is not an "incisive or surgical procedure" excluded from the scope of the practice of chiropractic. The conclusion reached in Attorney General Opinion DM-415 with respect to the practice of acupuncture by chiropractors is superseded by statute.

Yours very truly,
Dan Morales
Attorney General of Texas

Jorge Vega
First Assistant Attorney General

Sarah J. Shirley
Chair
Opinion Committee

Prepared by Barbara Griffin
Assistant Attorney General

[FN1] When Attorney General Opinion DM-415 was issued, V.T.C.S. article 4495b, which governs the practice of acupuncture in Texas, defined acupuncture as:

> (A) the 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; 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) of this subdivision.

V.T.C.S. art. 4495b, § 6.02.

Tex. Atty. Gen. Op. DM-471, 1998 WL 150366 (Tex.A.G.)

END OF DOCUMENT

Exhibit F

C

Tex. Atty. Gen. Op. DM-472, 1998 WL 150369 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. DM-472

March 30, 1998

Re: Use of injectable substances by licensed chiropractors, and related questions (RQ-925)

The Honorable Hugo Berlanga
Chairman
Committee on Public Health
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Oliver R. Smith, Jr., D.C.
President
Texas Board of Chiropractic Examiners
333 Guadalupe, Tower III, Suite 825
Austin, Texas 78701

Dear Representative Berlanga and Dr. Smith:

Both of you ask whether the use of injectable substances by a licensed chiropractor in the treatment of biomechanical conditions of the spine and musculoskeletal system of the body is within the scope of practice of chiropractic as defined in V.T.C.S. article 4512b. By "injectable substances" we understand you to mean substances that are injected into a person with a needle. We conclude that the use of a needle to inject substances or for any purpose other than the drawing of blood for diagnostic purposes or the performance of acupuncture as defined by the Medical Practice Act, V.T.C.S. article 4495b, section 6.02(1), is not within the scope of practice of a licensed Texas chiropractor. [FN1] We also answer Dr. Smith's questions regarding the use of certain drugs in the practice of chiropractic.

A person may practice chiropractic in this state only if licensed to do so by the Texas Board of Chiropractic Examiners, and then only in compliance with the provisions of V.T.C.S. article 4512b. *See* V.T.C.S. art. 4512b, §§ 5a(a),

14a. A person is regarded as practicing chiropractic within the meaning of article 4512b 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;

(2) performs nonsurgical, nonincisive procedures, including but not limited to adjustment and manipulation, in order to improve the subluxation complex or the biomechanics of the musculoskeletal system; or

(3) holds himself out to the public as a chiropractor of the human body or uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms in connection with his name.

Id. § 1.

Article 4512b expressly excludes certain acts from the practice of chiropractic. *Id.* § 13a. In 1995, the Seventy-fourth Legislature amended article 4512b to include "incisive or surgical procedures" among the excluded acts. *Id.* § 13a(a); *see* Act of May 29, 1995, 74th Leg., R.S., ch. 965, § 18, 1995 Tex. Gen. Laws 4789, 4803. [FN2] For purposes of article 4512b, the phrase "incisive or surgical procedure" includes but is not limited to "making an incision into any tissue, cavity, or organ by any person or implement," but does *not* include "the use of a needle for the purpose of drawing blood for diagnostic testing."V.T.C.S. art. 4512b, § 13a(a), (b). Your questions require us to determine whether use of a needle other than for the purpose of drawing blood is an incisive or surgical procedure.

***2** We considered a closely related question in Attorney General Opinion DM-415.The issue there was whether the practice of acupuncture [FN3]

is within the scope of practice of a licensed chiropractor who is not also a licensed acupuncturist.Attorney General Opinion DM-415 (1996). Central to our determination was a consideration of whether acupuncture, defined in part as "the insertion of an acupuncture needle" into the human body, is an "incisive or surgical procedure" under article 4512b. *Id.* at 4. We reasoned that because the legislature expressly excluded from the range of procedures that are incisive or surgical "the use of a needle for the purpose of drawing blood for diagnostic testing," the legislature considered the use of a needle for the purpose of drawing blood to be an incisive or surgical procedure. *Id.* at 5. Seeing no distinction between the use of a needle for drawing blood and the use of acupuncture needles, we concluded that acupuncture was not within the scope of practice of chiropractic. [FN4] Likewise, seeing no distinction between the use of a needle for drawing blood and the use of a needle for injections, we conclude that the use of needles to inject substances into a person is excluded from the scope of practice of chiropractic.

We find support for our conclusion in the legislative history of V.T.C.S. article 4512b. The statute was amended in 1995 for the purpose of clarifying the "considerable confusion . . . about the scope of chiropractic."Debate on S.B. 718 on the Floor of the Senate, 74th Leg., R.S. (May 15, 1995) (statement of Senator Moncrief) (tape available from Senate Staff Services). The use of needles by chiropractors was a central issue in the debate. As first introduced, Senate Bill 718 would have excluded from the scope of chiropractic "invasive or surgical procedures," but did not define the term invasive. S.B. 718, 74th Leg., R.S. (1995) (introduced version). The Senate Committee on Health and Human Services amended the bill to exclude from the definition of invasive certain procedures, namely, the "examination of the ear, nose, and throat or drawing of blood for the purposes of diagnostic testing."[FN5]*Id.*(committee substitute). A witness testifying in support of the bill remarked that because acupuncture is an "invasive" procedure, the bill would prohibit acupuncture. Hearings on S.B. 718 Before the Senate Health and Human Serv. Comm., 74th Leg., R.S. (Apr. 12, 1995) (testimony of Dee Ann Newbald, Texas Acupuncture Association) (transcript available from Senate Staff Services).

The bill was amended on the senate floor to change “invasive” to “incisive” and to allow chiropractors to perform acupuncture and needle electromyogram (“EMG”), [FN6] but only if certified by the Board of Chiropractic Examiners to perform such procedures. S.B. 718, 74th Leg., R.S. (1995) (as reprinted in S.J. of Tex., 74th Leg., R.S. 2059 (1995)). It has been argued that the term “invasive” was changed to “incisive” so as not to include acupuncture and other uses of needles within the definition of prohibited practices. However, even after the term “incisive” was substituted in, the senate continued to except from its definition the use of needles for diagnostic testing, acupuncture, and needle electromyogram. In our view, if the senate understood the term “incisive” not to include the use of needles, it would not have excepted from that definition the use of needles for certain purposes.

***3** The provisions of Senate Bill 718 were added by Representative Uher as an amendment to Senate Bill 673 on the floor of the house, but without provisions expressly permitting acupuncture and needle EMG. Representative Janek offered an additional amendment to prohibit manipulation under anesthesia stating: “This amendment would take out any ability by the chiropractors to put needles in people.”Debate on S.B. 673 on the Floor of the House, 74th Leg., R.S. (May 22, 1995) (statement of Rep. Janek) (transcript available from Senate Staff Services).[FN7] In our view, the legislature intended the use of needles for any purpose other than the drawing of blood for diagnostic purposes to be excluded from the scope of chiropractic.

We note that in Attorney General Opinion DM-443 (1997), this office considered whether the performance of needle EMG is within the scope of the practice of licensed physicians and physical therapists. The State Board of Medical Examiners has the statutory authority to determine what constitutes the practice of medicine, which is broadly defined. *See*V.T.C.S. art. 4495b, § 1.03(a)(12). The Texas Board of Physical Therapy Examiners is charged with the enforcement of the Physical Therapy Act. *Seeid*. art. 4512e, § 2G. Both boards, the medical board by resolution and the physical therapy board by rule, determined that needle EMG is within the scope of the practice of their respective professions. We concluded in DM-443 that the boards are entitled to deference in their interpretations of the acts they are charged with administering and enforcing, and their decisions that needle EMG is within the scope of their practices were reasonable ones.

In this case, the scope of chiropractic is not so broadly defined. Both the language of V.T.C.S. article 4512b and its legislative history indicate to us that the legislature intended to exclude the use of needles from the scope of the practice of chiropractic except for certain purposes. The Board of Chiropractic Examiners could not adopt a rule inconsistent with the statute.

The chiropractic board's second question concerns the use by chiropractors of “dangerous drugs.” V.T.C.S. article 4512b, section 13a(a)(2), excludes from the scope of the practice of chiropractic “the prescribing of controlled substances or dangerous drugs or any drug that requires a prescription.”[FN8] The Health and Safety Code defines a “dangerous drug” as:

> a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups I through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend:
>
> (A) Caution: federal law prohibits dispensing without prescription; or
>
> (B) Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.

Health & Safety Code § 483.001(2); *see*Gov't Code § 311.011(b) (Code Construction Act) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). Thus Texas law considers a substance to be a "dangerous drug" when the federal Food and Drug Administration ("FDA") requires the substance to bear a prescription legend. The board tells us that in some instances, although the FDA requires a legend, some manufacturers do not include the legend in their packaging and promotion. We understand you to ask, therefore, whether a chiropractor may be found to be in violation of V.T.C.S. article 4512b if he or she prescribes a dangerous drug that does not carry the FDA-required legend. [FN9] We conclude that a chiropractor may be found to be in violation in such a case.

***4** The statute defines a dangerous drug to include a drug that bears *or is required to bear* a prescription legend. Health & Safety Code § 483.001(2). Thus a drug that is required to bear a prescription legend is a dangerous drug even if it does not actually bear the legend. We believe it is the duty of a responsible health care provider to determine whether a drug not bearing a legend is nevertheless required to bear a legend. Furthermore, the critical factor in determining whether a drug is a dangerous drug is not whether it carries an FDA-required legend, but rather whether it is "unsafe for self-medication." A drug that is "unsafe for self-medication" falls within the definition of a dangerous drug even if it does not carry or is not required to carry a prescription legend. [FN10] Thus a chiropractor may be found to be in violation of article 4512b if he or she prescribes a drug that is "unsafe for self-medication" whether or not the drug carries an FDA-required legend.

The chiropractic board's third question also relates to the use of dangerous drugs. The board tells us that some manufacturers include legends on drugs even though the FDA does not require a legend on the particular drug. The board asks if such a drug falls within the definition of a dangerous drug. We believe that it does. Again, the Health and Safety Code includes within the definition of "dangerous drug" a drug "*that bears or is required to bear*" a prescription legend. Health & Safety Code § 483.001(2) (emphasis added). The definition is not limited to drugs that are required to bear the legend.

The chiropractic board's fourth question is: "In the State of Texas who is the source or body that has the definitive authority of defining a controlled substance, dangerous drug or drug that requires a prescription?"We find no single "definitive authority" on the question of classifying drugs. Certainly, the Texas Legislature has the power to define what constitutes a controlled, dangerous, or prescription drug, and it has done so. Health and Safety Code chapter 481 lists specific drugs that are deemed to be controlled substances. Health & Safety Code § 481.002(5). The Commissioner of Health may, with the approval of the Texas Board of Health, add to, delete from, or reschedule substances on the list. *Id.* § 481.038. Health and Safety Code chapter 483 defines a dangerous drug as a drug that is "unsafe for self-medication," including drugs that bear or are required by the FDA to bear a prescription legend. Thus, to some extent, the FDA determines what is a dangerous drug under Texas law.

Finally, the chiropractic board asks whether chiropractors may use injectable substances in the scope of their practice that are not controlled substances, dangerous drugs, or substances otherwise barred by the Chiropractic Act. Again, the use of a needle for any purpose other than the drawing of blood for diagnostic purposes or the practice of acupuncture is not within the scope of practice of a licensed Texas chiropractor. We conclude that the use of any injectable substance is not within the scope of the practice of chiropractic.

Summary

***5** The use of a needle to inject substances or for any purpose other than the drawing of blood for diagnostic testing or for the practice of acupuncture is not within the scope of practice of a licensed Texas chiropractor. A chiropractor may be found to be in violation of V.T.C.S. article 4512b, prohibiting the prescription by a chiropractor of dangerous drugs, if the chiropractor prescribes a drug that does not bear, but is required to bear, a legend stating that federal law prohibits dispensing the drug without a prescription. A drug that bears a prescription legend falls within the definition of "dangerous drug" found in Health and Safety Code section 483.001(2).

Yours very truly,
Dan Morales
Attorney General of Texas

Jorge Vega
First Assistant Attorney General

Sarah J. Shirley
Chair
Opinion Committee

Prepared by Barbara Griffin
Assistant Attorney General

[FN1] We assume for purposes of this opinion that a chiropractor is not otherwise licensed as a practitioner who is authorized to use needles in the scope of his or her practice.

[FN2] Prior to amendment, section 13a provided only that chiropractors may not use "surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive material."Act of May 29, 1995, 74th Leg., R.S., ch. 965, § 18, 1995 Tex. Gen. Laws 4789, 4803.

[FN3] When Attorney General Opinion DM-415 was issued, V.T.C.S. article 4495b, which governs the practice of acupuncture in Texas, defined acupuncture as:

> (A) the 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; 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) of this subdivision.

V.T.C.S. art. 4495b, § 6.02.

[FN4] This year, the Seventy-fifth Legislature amended the definition of acupuncture in V.T.C.S. article 4495b to define acupuncture, in part, as the "nonsurgical, nonincisive insertion of an acupuncture needle."Act of May 28, 1997,

75th Leg., R.S., ch. 1170, 1997 Tex. Sess. Law Serv. 4418, 4418 (to be codified as an amendment to V.T.C.S. art. 4495b, § 6.02(1) (effective Sept. 1, 1997)). Because acupuncture is now defined in the acupuncture statute as a "nonsurgical, nonincisive" procedure, it is not an "incisive or surgical procedure" excluded by the chiropractic statute from the scope of the practice of chiropractic. Therefore, our conclusion in DM-415 that needle acupuncture is not within the scope of the practice of chiropractic has been superseded by statute. *See*Attorney General Opinion DM-471 (1998). For all other uses of needles, however, the reasoning applied in DM-415 remains valid.

[FN5] It has been argued that the phrase excluding the use of needles for diagnostic testing was inserted not to make an exception to the prohibition on the use of needles, but to illustrate by example that the use of a needle is permitted. We do not find support for this assertion in the legislative history of Senate Bill 718. To the contrary, comments during debate on the bill illustrate that the members understood that the provision would exclude the use of needles for any purpose other than those expressly allowed. *See* discussion *infra* note 7.

[FN6] An electromyogram is "a record of the intrinsic electric activity in a skeletal muscle."Mosby's Medical, Nursing, & Allied Health Dictionary 534 (4th ed. 1994). The data is obtained "by applying surface electrodes or by inserting a needle electrode into the muscle and observing electrical activity with an oscilloscope and a loud speaker."*Id.*

[FN7] During the debate, Representative Steve Ogden remarked that the use of needles is not ordinarily viewed as part of chiropractic treatment, and that Representative Janek's amendment would ensure it remained true. He said: "It would seem to me like without your amendment, there would be a significant departure from the way chiropractic has represented itself in my district, which is an alternative to the more conventional treatment that would involve needles, drugs, anesthesia."Debate on S.B. 673 on the Floor of the Senate, 74th Leg., R.S. (May 22, 1995) (statement of Rep. Ogden) (transcript available from Senate Staff Services).

[FN8] A violation of article 4512b is punishable by the revocation or suspension of a chiropractor's license, or the probation or reprimand of a licensee. V.T.C.S. art. 4512b, § 14(a). The board may impose an administrative penalty in an amount not to exceed $1,000 for each day the violation occurs or continues, and the violator is also liable to the state for a civil penalty of $1,000 per day. *Id.*§§ 14a(a), 19a(a), (b). The Health and Safety Code also provides for criminal penalties for the possession or delivery of a dangerous drug. *See*Health and Safety Code ch. 483, subch. C.

[FN9] You ask about a chiropractor's "use" of dangerous drugs in his or her practice, while the statute speaks with respect to the "prescrib[ing]" of dangerous drugs. For purposes of this opinion, we assume that prescribing and using are synonymous.

[FN10] The statute provides that dangerous drugs "include" prescription drugs. In accordance with the Code Construction Act, we construe "includes" as a term of enlargement and not of limitation or exclusive enumeration. *See*Gov't Code § 311.005(13).

Tex. Atty. Gen. Op. DM-472, 1998 WL 150369 (Tex.A.G.)

END OF DOCUMENT

Exhibit G

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

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE *Plaintiff,*	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS and YVETTE YARBROUGH, EXECUTIVE DIRECTOR, IN HER OFFICIAL CAPACITY *Defendants.*	§	**201ST JUDICIAL DISTRICT**

TEXAS BOARD OF CHIROPRACTIC EXAMINERS and YVETTE YARBROUGH'S RESPONSES TO TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE'S REQUESTS FOR ADMISSIONS, REQUESTS FOR PRODUCTION AND INTERROGATORIES

To: Texas Association of Acupuncture and Oriental Medicine by and through its attorney of record, Craig T. Enoch, Enoch Kever PLLC, 600 Congress Avenue, Suite 2800, Austin, Texas 78701.

Defendant Texas Board of Chiropractic Examiners and Yvette Yarbrough (hereinafter the "Board" or "Defendant"), by and through its counsel of record, Joe Thrash, Assistant Attorney General, hereby serves this, Responses to Texas Association of Acupuncture and Oriental Medicine's (the "Plaintiff") Requests for Admissions, Requests for Production and Interrogatories

RESPONSES TO REQUESTS FOR ADMISSIONS

(1) Admit that doctors of medicine licensed by the Texas Medical Board may use any system or method for diagnosing and treating medical conditions.

RESPONSE:

Admit.

(2) Admit that Texas Occupations Code, Chapter 205 is limited to governing the practice of acupuncture, the educational requirements for the practice of acupuncture, and the licensing of acupuncturists.

RESPONSE:

Objection to the Request because it calls for the admission of a legal conclusion. Parties may not be compelled to answer legal conclusions, *Credit Car Ctr., Inc. v. Chambers*, 969 S.W.2d 459, 464 (Tex. App.—El Paso 1998, no pet.) and such conclusions do not bind the court. *Fort Bend Cent. Appraisal Dist. v. Hines Wholesale Nurseries*, 844 S.W.2d 857, 858-59 (Tex. App.—Texarkana 1992, writ denied).

(3) Admit that Texas Occupations Code, Chapter 201 is limited to governing the practice of chiropractic, the educational requirements for the practice of chiropractic, and the licensing of chiropractors.

RESPONSE:

Objection to the Request because it calls for the admission of a legal conclusion. Parties may not be compelled to answer legal conclusions, *Credit Car Ctr., Inc. v. Chambers*, 969 S.W.2d 459, 464 (Tex. App.—El Paso 1998, no pet.) and such conclusions do not bind the court. *Fort Bend Cent. Appraisal Dist. v. Hines Wholesale Nurseries*, 844 S.W.2d 857, 858-59 (Tex. App.—Texarkana 1992, writ denied).

(4) Admit that the Texas Occupations Code, Chapter 201 prohibits chiropractors from performing incisions by any person or implement, except for the use of needles for the purpose of drawing blood for diagnostic testing.

RESPONSE:

Admit.

(5) Admit that Texas Occupations Code, Chapter 201 limits the practice of chiropractic to procedures used to analyze, examine, evaluate, or treat the spine and musculoskeletal system of the human body.

RESPONSE:

Deny.

(6) Admit that in *Tex. Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d 464 (Tex. App.—Austin 2012, pet. denied), the Austin Court of Appeals affirmed the trial court's judgment voiding subpart 75.17(a)(3) of TBCE's scope-of- practice rule.

RESPONSE:

Admit.

(7) Admit that under Texas Occupations Code, Section 201.1525, TBCE is authorized to clarify—but not define—the scope of the practice of chiropractic.

RESPONSE:

Objection to the Request because it calls for the admission of a legal conclusion. Parties may not be compelled to answer legal conclusions, *Credit Car Ctr., Inc. v. Chambers*, 969 S.W.2d 459, 464 (Tex. App.—El Paso 1998, no pet.) and such conclusions do not bind the court. *Fort Bend Cent. Appraisal Dist. v. Hines Wholesale Nurseries*, 844 S.W.2d 857, 858-59 (Tex. App.—Texarkana 1992, writ denied).

Notwithstanding the objection, deny.

(8) Admit that under 22 Texas Administrative Code § 75.21 chiropractors are only required to complete 100 hours in training in acupuncture to practice acupuncture in Texas.

RESPONSE:

The Board objects to the phrase "training in acupuncture," because it is undefined and ambiguous. Notwithstanding the objection, to the extent that training is specific to needle technique, admit that only 100 hours is required. The four-year curriculum required to become a doctor of chiropractic includes many hundreds of hours in subjects related to acupuncture and similar to the training required for certification as a licensed acupuncturist in Texas, thus deny that only 100 hours of training related to acupuncture are required.

(9) Admit that chiropractors in Texas may complete the majority of the 100 hours in training in acupuncture mandated by 22 Texas Administrative Code § 75.21 through online courses.

RESPONSE:

Admit that it is theoretically possible to complete the majority, but not all, of the 100 hour training requirement in 22 Texas Administrative Code sec. 75.21 through online courses.

(10) Admit that chiropractors in Texas may complete the entirety of the 100 hours in training in acupuncture mandated by 22 Texas Administrative Code § 75.21 without any clinical instruction or residency course in acupuncture.

RESPONSE:

Deny.

(11) Admit that 22 Texas Administrative Code § 75.21 does not contain any requirements specifying the content of the acupuncture instruction required in order for a chiropractor to practice acupuncture in Texas.

RESPONSE:

Admit.

(12) Admit that TBCE does not track or keep any record of which chiropractors have successfully completed at least 100 hours of training in the practice of acupuncture.

RESPONSE:

Admit in part and deny in part.

(13) Admit that TBCE does not track or keep records of which chiropractors in Texas have passed a 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

RESPONSE:

Admit.

(14) Admit that TBCE does not issue certificates, licenses, or endorsements or any similar authorizations indicating which chiropractors may practice acupuncture in Texas.

RESPONSE:

Admit.

(15) Admit that TBCE does not track or keep any record of which chiropractors practice acupuncture in Texas.

RESPONSE:

Admit.

(16) Admit that chiropractors who practice acupuncture in Texas are not required to complete any continuing education in acupuncture in order to continue practicing the procedure.

RESPONSE:

Admit.

ANSWERS TO INTERROGATORIES

(1) If you have denied any request for admission, what is the legal and factual basis for each denial?

ANSWER:

With respect to Request for Admission No. 5, the practice of chiropractic also includes nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.

With respect to Request for Admission No. 7, whether "clarify" is a synonym for "define" or whether to "clearly specify the procedures that chiropractors may perform" or "clearly specify any equipment and the use of that equipment" constitutes defining the scope of practice of chiropractic is a semantic distinction without a difference. Just as the court in *Texas Board of Chiropractic Examiners v. Texas Medical Association* determined that "analyze, examine, or evaluate" is a synonym for "diagnose," so too is this process of clarification a synonym for defining the scope of practice of chiropractic. *Tex. Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d 464, 495-96 (Tex. App.—Austin 2012, pet. denied),

With respect to Request for Admission No. 10, while § 75.21 does not specifically include a requirement for the inclusion of clinical instruction in acupuncture, the Board reviews and approves each such course and no course without clinical instruction has been approved by the Board. Chiropractic training does not include "residency" courses.

(2) How many chiropractors are practicing acupuncture in Texas during 2014 and how many have practiced acupuncture in each of the last four years?

ANSWER:

No information is available.

(3) On average, how much acupuncture-specific training and education has been completed by the chiropractors performing acupuncture in Texas during 2014?

ANSWER:

No information is available.

(4) Of the chiropractors performing acupuncture in Texas in 2014, how many are doing so with no more than the 100 hours of acupuncture training required by 22 Texas Administrative Code § 75.21?

ANSWER:

No information is available.

(5) How many chiropractors in Texas are performing acupuncture de-tox on their patients during 2014 and how many have done so during each of the last four years?

ANSWER:

The Board objects to the undefined term "acupuncture de-tox." Notwithstanding the objection, the Board does not have information on this question.

(6) How many chiropractors in Texas are recommending or dispensing herbal and dietary supplements to patients during 2014 and how many have done so during each of the last four years?

ANSWER:

No information is available.

(7) On average, how much training in herbal therapy has been completed by the chiropractors who are recommending or dispensing herbal and dietary supplements to

patients in 2014?

ANSWER:

The Councils on Chiropractic Education International sets standards for chiropractic colleges. Licensed chiropractors in Texas are required to graduate from an accredited institution that is accredited by a CCEI-approved body, in this case the Council on Chiropractic Education. *See* 22 Tex. Admin. Code § 71.5. Training in herbal and dietary supplements is a requirement for accreditation, but the exact nature and length of this training is left to the individual institution. Thus, all chiropractors in Texas have had training in herbal medicine and dietary supplements, but it is not possible from information retained by the Board to determine an "average amount" of such training.

(8) How many stakeholder proceedings concerning the practice of acupuncture by chiropractors has TBCE convened since September 1, 2005, under Texas Occupations Code, Section 201.1526?

ANSWER:

Seven.

(9) How many hours of instruction in Chinese herbology are chiropractors required to complete to practice acupuncture in Texas?

ANSWER:

See answer to Interrogatory No. 7. No distinction is made between Chinese herbology and other methodologies.

(10) How many hours of meridian and point location training are chiropractors required to complete to practice acupuncture in Texas?

ANSWER:

Meridian and point location training is a part of the 100 hours of additional training required for a chiropractor to practice acupuncture in Texas. The exact number of hours is determined by the institution providing the training.

(11) How many hours of supervised patient treatment in acupuncture are chiropractors required to complete to practice acupuncture in Texas?

ANSWER:

Supervised patient treatment in acupuncture is a part of the 100 hours of additional training required for a chiropractor to practice acupuncture in Texas. The exact number of hours is determined by the institution providing the training.

(12) How are chiropractors who practice acupuncture in Texas permitted to represent themselves to the public as practitioners of acupuncture?

ANSWER:

Any way they want as long as the advertising is not false, misleading, or deceptive. *See* Tex. Occ. Code § 201.155.

(13) If you deny any request for admission set forth above, state the legal and factual reason for the denial.

ANSWER:

This duplicates Interrogatory No. 1. See response above.

RESPONSES TO REQUESTS FOR PRODUCTION

(1) Produce records identifying all chiropractors who are performing acupuncture in Texas during 2014.

RESPONSE:

No such records exist.

(2) Produce records identifying all chiropractors in Texas who have completed the 100 hours of training for performing acupuncture specified in 22 Texas Administrative Code § 75.21.

RESPONSE:

Since January 1, 2011, the Board has maintained records of chiropractors' continuing education courses completed. To the extent that individuals claimed continuing education credit for the 100-hour course, these records are available and are attached as Exhibit 1. No records exist for chiropractors who completed this training prior to January 1, 2011, or those not claiming continuing education credit for the training.

(3) Produce records identifying all chiropractors in Texas who completed continuing education courses in acupuncture in 2013 or 2014.

RESPONSE:

See records at Exhibit 1. These records include all continuing education courses that were solely on acupuncture or contained a significant component concerning acupuncture. Other courses may have may have had a minor mention of acupuncture, but identification of such components would be unduly burdensome and would require the limited staff of the Board to review approximately 1500 course applications. Accordingly, the Board objects to this portion of the Request for Production.

(4) Produce all briefs, comments, or correspondence between TBCE and the Office of Attorney General concerning the opinion request (RQ-988) that resulted in Texas Attorney General Opinion No. DM-471 (1998), and the opinion request (RQ-925) that resulted in Texas Attorney General Opinion No. DM-472 (1998).

RESPONSE:

See documents at Exhibit 2.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense
Civil Litigation

DAVID A. TALBOT, JR.
Chief, Administrative Law Division

/s/ Joe H. Thrash
JOE H. THRASH
Assistant Attorney General
Administrative Law Division
P.O. Box 12548

Austin, Texas 78711-2548
Telephone: (512) 475-4300
Facsimile: (512) 320-0167
Joe.Thrash@texasattorneygeneral.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Responses to Requests for Admissions, Requests for Production and Interrogatories were sent as described below on this the 5th day of September, 2014, to the following:

Attorney for Plaintiff: Via Email: cenoch@enochkever.com
Craig T. Enoch
cenoch@enochkever.com
ENOCH KEVER PLLC
600 Congress Avenue
Suite 2800
Austin, Texas 78701
Phone: (512) 615-1200
Fax: (512) 615-1198

/s/ Joe H. Thrash
JOE H. THRASH

EXHIBIT 1

Acupuncture Webinar 3-12/13-2013 Attendees

A07-5019
march
2013
TCA

1. Allen, David DC 10783
8826 Rolling Rapids Rd.
Humble TX 77346
281-904-0189
4 HOURS

2. Carrier, Brad DC 7269
10806 Hunters Run
Greenville TX 75402
903-456-4671
4 HOURS

3. Caskey, Trent DC 5240
25275 140th Street
Spirit Lake IA 51360
915-525-3755
4 HOURS

4. Clark, Benjamin DC 9555
9117 Wichita trl
Frisco TX 75033
469-877-5804
4 HOURS

5. Clark, Karen DC 6179
3239 Belk Ln
Robstown TX 78380
361-558-8848
4 HOURS

6. Fleischmann Bonner, Catherine DC 10378
PO Box 5724
Valley Spring TX 76885
325-247-2687
4 HOURS

7. Story, Pearl DC 10257
3131 East 29th Street Bldg. A
Bryan TX 77802
979-229-3653
4 HOURS

A07-5108
March
2013

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC

Texas

Acupuncture 2013 Certificate Program

Date: **March 23-24, 2013**

#A07-5108

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
12277	Castriotta	#A07-5108	16.75	3/23/2013
8774	Franklin	#A07-5108	16.75	3/23/2013
10902	Grimmett	#A07-5108	16.75	3/23/2013
4245	Heikkinen, Paul	#A07-5108	16.75	3/23/2013
12258	Hwang	#A07-5108	16.75	3/23/2013
8969	Martin	#A07-5108	16.75	3/23/2013
12261	Moreland	#A07-5108	16.75	3/23/2013
8415	Myron	#A07-5108	16.75	3/23/2013
12120	Nguyen	#A07-5108	16.75	3/23/2013
9637	Norton	#A07-5108	16.75	3/23/2013
12290	Jung Sun Oh	#A07-5108	16.75	3/23/2013
6331	Sawyers	#A07-5108	16.75	3/23/2013
11055	Sneed	#A07-5108	16.75	3/23/2013
8383	Johnson	#A07-5108	16.75	3/23/2013
98915	Stowe	#A07-5108	16.75	3/23/2013
12023	Tengra	#A07-5108	16.75	3/23/2013
12236	Paterno	#A07-5108	16.75	3/23/2013
10106	Arnette	#A07-5108	16.75	3/23/2013

A07-5109
April 2013

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC
Texas

Acupuncture (Basic) **Module #2**

Date: **April 20-21, 2013**
A07-5109

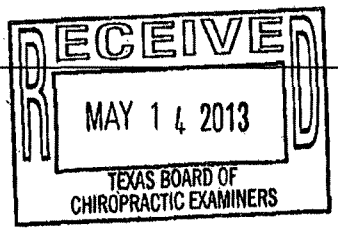
TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
10106	Arnett	A07-5109	16.75	4/21/2013
12277	Castriotta	A07-5109	16.75	4/21/2013
10902	Grimmett	A07-5109	16.75	4/21/2013
8969	Martin	A07-5109	16.75	4/21/2013
12261	Moreland	A07-5109	16.75	4/21/2013
8415	Myron	A07-5109	16.75	4/21/2013
9637	Norton	A07-5109	16.75	4/21/2013
11709	Park	A07-5109	15.75	4/21/2013
11055	Sneed	A07-5109	16.75	4/21/2013
12234	Song	A07-5109	16.75	4/21/2013
11442	Sweeney	A07-5109	16.75	4/21/2013
11025	Yancey	A07-5109	16.75	4/21/2013

A07-5110
May 2013

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC
Texas

Acupuncture 2013 Certificate Program - Module #3
Date: May 11-12, 2013
#A07-5110

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
10106	Arnett	#A07-5110	16.75	5/12/2013
12277	Castriotta	#A07-5110	16.45	5/12/2013
5442	Cobian-Silver	#A07-5110	9.5	5/12/2013
10902	Grimmett	#A07-5110	16.75	5/12/2013
10742	Letz	#A07-5110	16.75	5/12/2013
9637	Norton	#A07-5110	16.75	5/12/2013
12290	Oh	#A07-5110	16.75	5/12/2013
8415	Myron	#A07-5110	16.75	5/12/2013
11709	Park	#A07-5110	16.75	5/12/2013
11055	Sneed	#A07-5110	16.75	5/12/2013
12234	Song	#A07-5110	16.75	5/12/2013
11442	Sweeney	#A07-5110	16.75	5/12/2013
11025	Yancey	#A07-5110	16.75	5/12/2013



A07-5111
June 2013
Parker

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC
Texas

Acupuncture 2013 Certificate Program - Module #4
Date: June 15-16, 2013
A07-5111

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
12236	Paterno	A07-5111	16.75	**June 15-16, 2013**
10106	Arnette	A07-5111	16.75	**June 15-16, 2013**

A07-5136
June 2013
TCA

Clinical Acupuncture in the Chiropractic Practice
June 22-23, 2013
R07-5136/A07-5136

LicenseNum	Name	Total	Acu	TBCE
5920	Phillip Bellows, D.C.	16.5	12.5	4
9697	Ronda J. Cooksey, D.C.	16.5	12.5	4
10989	Sylvia Deilly, D.C.	16.5	12.5	4
9365	Dale Leonard, D.C.	16.5	12.5	4
11215	Vandara Mounarath, D.C.	16.5	12.5	4
5104	Jerry C. Nance, D.C.	16.5	12.5	4
10541	Kenneth Wayne Parker, D.C.	16.5	12.5	4
6324	Thomas Rawle, D.C.	16.5	12.5	4

A07-5112
July 2013
Parker

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC
Texas

Acupuncture 2013 Certificate Program - Module #5

Date: **July 20-21, 2013**

A07-5112

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
10106	Arrnett	A07-5112	16.75	7/20/2013
12277	Castriotta	A07-5112	16.75	7/20/2013
9978	Collins	A07-5112	16.75	7/20/2013
12159	Ellis	A07-5112	16.75	7/20/2013
10902	Grimmett	A07-5112	16.75	7/20/2013
8775	Hedges	A07-5112	16.75	7/20/2013
12258	Hwang	A07-5112	16.75	7/20/2013
10742	Letz	A07-5112	16.75	7/20/2013
10904	Martin	A07-5112	16.75	7/20/2013
8969	Martin	A07-5112	16.75	7/20/2013
10953	McGinnis	A07-5112	16.75	7/20/2013
8415	Myron	A07-5112	16.75	7/20/2013
12120	Nguyen	A07-5112	16.75	7/20/2013
9637	Norton	A07-5112	16.75	7/20/2013
11055	Sneed	A07-5112	16.75	7/20/2013
12234	Song	A07-5112	16.75	7/20/2013
11442	Sweeney	A07-5112	16.75	7/20/2013
7088	Wells	A07-5112	16.75	7/20/2013
11025	Yancey	A07-5112	16.75	7/20/2013

A07-5113
August 2013

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC

Texas

Acupuncture 2013 Certificate Program

Date: **August 10-11, 2013 - Module #6**

#A07-5113

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
10106	Arnett	#A07-5113	16.75	8/10/2013
12277	Castriotta	#A07-5113	16.75	8/10/2013
9978	Collins	#A07-5113	16.75	8/10/2013
12159	Ellis	#A07-5113	16.75	8/10/2013
10874	Hasegawa	#A07-5113	16.75	8/10/2013
12258	Hwang	#A07-5113	16.75	8/10/2013
10742	Letz	#A07-5113	16.75	8/10/2013
12117	Martin	#A07-5113	16.75	8/10/2013
8415	Myron	#A07-5113	16.75	8/10/2013
9637	Norton	#A07-5113	16.75	8/10/2013
11055	Sneed	#A07-5113	16.75	8/10/2013
11442	Sweeney	#A07-5113	16.75	8/10/2013
11025	Yancey	#A07-5113	16.75	8/10/2013

A07-D331
A07-D332

TCA
NACA
Sept. 13

Acupuncture webinar September 10-11-12, 2013 Attendees

Combs, Sarah DC 6652 *(combination of lunch and evening hours)* 31 /32
3814 Belgrade dr
Houston TX 77045
832-372-7513
6 HOURS

McDaniel, Nikisha DC 9181 *(combination of lunch and evening hours)* 31 /32
139 South Main
Irving TX 75060
972-897-5650
6 HOURS

sims, gina DC 7415 *(all lunch hours)* 31
po box 523
waller TX 77484
281-682-8222
6 HOURS

Wright, Monty DC 5007 *(all evening hours)* 32
302 E. Beauregard
san angelo TX 76903
325-655-1070
6 HOURS

A07-5400
Oct. 2013
TCA

Clinical Acupuncture in the Chiropractic Practice- Module I
October 5-6, 2013
R07-5400/A07-5400

LicenseNum	Name	Total	Acu	CE	MED	TBCE
11967	Merissa Ann Baker, D.C.	16.5	12.5	0	0	4
5437	Oliver L Blummer	16.5	12.5	0	0	4
8889	Michael Chong	16.5	12.5	0	0	4
7336	Scott Sims, D.C.	16.5	12.5	0	0	4

A07-5407
NOV. 2013
TCA

Clinical Acupuncture in the Chiropractic Practice
November 2-3, 2013
R07-5407/A07-5407

LicenseNum	Name	Total	ACU	TBCE
6626	Steven Luke Ahee, D.C.	16.5	12.5	4
4333	Timothy Dolan, D.C.	16.5	12.5	4
9066	Valerie R. Escalona-Estrada, D.C.	16.5	12.5	4
10305	Babush Faridi, D.C.	16.5	12.5	4
9456	Michiel Judson Kendall, D.C.	8.5	4.5	4
12105	Thuy Nguyen, D.C.	16.5	12.5	4
7336	Scott Sims, D.C.	12.5	12.5	0
5493	Kevin R. Walcher, D.C.	16.5	12.5	4

1 of 2 A07-5329
A07-5330
NOV. 2013

2013 Acupuncture Webinar November 5-6-7, 2013 Attendees

1. Alvey, Tina DC 6952 *(am)* **07-5329 all 3 days**
1609 W. Frank Ste. B
Lufkin TX 75904
936-637-2300
6 HOURS

2. Bergeron, Dustin DC 11808 *(pm and am)* **07-5330 Wed 07-5329 Thurs.**
2809 Shawn Dr.
Denison TX 75020
9038210062
4 HOURS

3. Brasseur, Glen DC 6196 *(am)* **07-5329 all 3 days**
1782 Capital Ave SW
Battle Creek MI 49015
5103331670
6 HOURS

4. Bubela, Carolyn DC 8931 *(pm am)* **07-5330 Tues 07-5329 Wed. Thurs.**
2664 county road 467
Wharton TX 77488
8326519616
6 HOURS

5. combs, sarah DC 6652 *(pm am)* **07-5330 Tues 07-5329 Wed. Thurs.**
3814 belgrade
Houston TX 77045
832-372-7513
6 HOURS

6. Czerminski, Jeanie DC 6685 *(pm am)* **07-5330 Tues 07-5329 Wed. Thurs.**
31427 Tres Lomas
Bulverde TX 78163
2106831150
6 HOURS

7. Czerminski, Drew DC 6948 *(pm)* **07-5330 all 3 days**
11465 Toepperwein Rd
Live Oak TX 78233
210-364-7614
6 HOURS

8. Fowler, Jason DC 6289 *(am)* **07-5329 all 3 days**
P.O. Box 727
Mineola TX 75773
903-245-3586
6 HOURS

9. Jaskoviak, Paul DC 4396 *(am)* **07-5329 all 3 days**
7910 South Echo Branch
Missouri City TX 77459
281-778-0388
6 HOURS

10. Jones, Paule DC 8511 *(pm am pm)* **07-5329 Wed. 07-5330 Tues. Thurs.**
1516 Misty Glen
Corinth TX 75210
214-968-1615
6 HOURS

11. STEPHENSON, SCOTT DC 2865 *(am)* **07-5329 all 3 days**
1406 N. MECHANIC
EL CAMPO TX 77437
979-546-8600
6 HOURS

12. Wolter, My-Le DC 9932 *(am)* **07-5329 all 3 days**
10001 Westheimer, Suite 2960
Houston TX 77042
(713) 587-0900
6 HOURS

13. Woodard, Greg DC 5129 *(am)* **07-5329 all 3 days**
10101 Fondren #254
Houston TX 77096
713 726-9650
6 HOURS

14. Wright, Monty DC 5007 *(pm)* **07-5330 all 3 days**
302 E. Beauregard
San Angelo TX 76903
325-655-1070
6 HOURS

15. yamasaki, jenna DC 10882 *(pm)* **07-5330 all 3 days**
4301 springbrook dr
Odessa TX 78762
432 272 0953
6 HOURS

16 Huff, Lew DC 6870 (speaker) **07-5329 all 3 days 07-5330 all 3 days**
7111 Harwin Ste 132
Houston, Tx 77036
713-498-6866
6 HOURS

ATTENDENCE ROSTER

07-5592
Jan. 2014
NACA-TCC

01/27/14

Course Name: **WEBINAR: Acupuncture of the Head, Neck & Shoulders**

Course Number: **14HUFF-TX**

Date: **01/14/14 - 01/16/14**
Time: **12 N to 2 PM**

Location: **WEBINAR**
ALL State Approval #'s
TX: 07-5592

Laurent is back-up instructor

BARBARA BROWN 7503 AVE C SANTA FE TX 77510 PHONE 409-939-4748	**License #:** **HOURS: 6.00**	**Nataly Perez** 401 E 27th HOUSTON TX 77008 PHONE 832-498-2236	**License #: Student** **HOURS: 6.00**
Bobby Baker 1615 Pimlico Lane Pasadena TX 77503 PHONE 281-772-5178	**License #: 5839** **HOURS: 6.00**	**Iesha Roberts** 1710 Dairy Ashford Ste 109 HOUSTON TX 77077 PHONE - -	**License #: 5259** **HOURS: 6.00**
Marissa Bunker 3105 Titanic Ave EL PASO TX 79904 PHONE 301-455-7832	**License #: 12430** **HOURS: 6.00**	**Jenna Yamasaki** 4301 Springbrook Dr ODESSA TX 79762 PHONE 432-488-7131	**License #: 10882** **HOURS: 6.00**
TIMOTHY CARROLL 1100 W MAIN Eastland TX 76448 PHONE 254-629-8055	**License #: 9670** **HOURS: 2.00**		
Trent Caskey 25275 140th St Spirit Lake IA 51360 PHONE 915-525-9755	**License #: 5240** **HOURS: 2.00**		
Sarah Combs 3814 BELGRADE HOUSTON TX 77045 PHONE 713-728-4661	**License #: 6652** **HOURS: 6.00**		
Chandler George PO Box 1274 Roanoke TX 76262 PHONE 817-939-8435	**License #: 5079** **HOURS: 6.00**		
Mattie Nguyen 10504 AIRLINE DR. HOUSTON TX 77037 PHONE 713-478-1685	**License #: 7875** **HOURS: 4.00**		

A07-5697
Feb. 2014
NACA -
TCC

~~Acupuncture webinar February 18-19-20, 2014~~

WEBINAR:

Acupuncture of the Low Back
Pain Syndromes Using Body, Ear, Hand and Scalp Points
TX APPROVAL: A07-5697

1. **Bubela, Carolyn DC**

2664 County Road 467
Wharton TX 77488
979-532-4476
6 HOURS
carolyn_bubela@yahoo.com

2. **Golightley ,earl DC 8292**
2604 W. Kansas Ave.
Midland TX 79701
432-262-6524
6 HOURS
dr.golightley@doctor.com

A07-5698
March
2014
NACA-TCC

Acupuncture Webinar March 4-5-6, 2014 Attendees

TX APPROVAL: A07-5698

1.Bowen, Tina DC 6968
11737 welch rd
Dallas TX 75229
2146625872
6 HOURS
drtbdc@sbcglobal.net

2.Bubela, Carolyn DC 8931
2664 county road 467
Wharton TX 77488
979-532-4476
6 HOURS
carolyn_bubela@yahoo.com

3.eshkevari, bijan DC 9309
2500 East TC Jester
Houston TX 77008
7139224479
4 HOURS
bondoc41@yahoo.com

4.Lumpkin, Christin DC 9081
5830 Beacon Falls
Kingwood TX 77345
832-428-5560
6 HOURS
wima@live.com

A07-5657
Maron
2014

CE Attendance Records - PARKER COLLEGE OF CHIROPRACTIC

Texas

Acupuncture Basic 2014
Date: March 15-16, 2014
#A07-5657

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
9139	Barringer	**#A07-5657**	16.75	3/15/2014
10652	Blavier	**#A07-5657**	16.75	3/15/2014
12029	Bullock	**#A07-5657**	16.75	3/15/2014
11010	Heikkinen	**#A07-5657**	16.75	3/15/2014
11971	Lopez	**#A07-5657**	16.75	3/15/2014
10917	Monroe	**#A07-5657**	16.75	3/15/2014
11709	Park	**#A07-5657**	16.75	3/15/2014
4280	Phipps	**#A07-5657**	16.75	3/15/2014
12016	Reinlie	**#A07-5657**	16.75	3/15/2014
10861	Schrimsher	**#A07-5657**	16.75	3/15/2014

A07-5712
March 2014
TCA.

Clinical Acupuncture in the Chiropractic Practice- Module I
March 22-23, 2014
R07-5712/A07-5712

LicenseNum	Name	Total	CE	TBCE	
9256	Sheila Carley-Harris, D.C.	16.5	12.5	4	
6531	Manh D. Chung, D.C.	16.5	12.5	4	
8351	David Groneck, D.C.	16.5	12.5	4	
10590	Yong Kyu Kim, D.C.	4	0	4	TBCE only - NO Acup.
5273	Rand H. Lewis, D.C.	16.5	12.5	4	
11564	Benjamin Nephi McKee, D.C.	4	0	4	TBCE only. NO Acup.
10861	Thomas Schrimsher, Dr.	16.5	12.5	4	
8199	Matthew D. Yocom, D.C.	4	0	4	TBCE only. NO Acup.

A07-5658
April 2014

CE Attendance Records: Parker University
Texas

Acupuncture Module #2
Date: April 12-13, 2014
#A07-5658

Lic. #	Last Name	Course ID#	of Hours Earne	ate Class Began
9139	Barringer	**#A07-5658**	16.75	4/12/2014
12029	Bullock	**#A07-5658**	16.75	4/12/2014
12016	Reinlie	**#A07-5658**	16.75	4/12/2014
10861	Schrimshu	**#A07-5658**	16.75	4/12/2014

A07-5659
May 2014

CE Attendance Records: Parker University Texas

Acupuncture - Module #3
Date: May 10-11, 2014
#A07-5659

Lic. #	Last Name	Course ID#	Hours	Date Class Began
9139	Barringer	**#A07-5659**	16.75	5/10/2014
12029	Bullock	**#A07-5659**	16.75	5/10/2014
11844	McDougal	**#A07-5659**	16.75	5/10/2014
12016	Reinlie	**#A07-5659**	16.75	5/10/2014

1 of 2 A07-5903

Texas Board of Chiropractic Examiners

333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942
(512) 305-6700
Facsimile (512) 305-6705

~~2014 Auricular Acupuncture for the Ear - May 27-28-29, 2014 Attendees~~

May 2014 NACA-TCC

TX APPROVAL: 07-5903

1.Adetola, Esther DC 10243
5424 Rufe Snoe Dr #101
NRH TX 76180
817-751-6212
yinkadetola@hotmail.com
6 HOURS

2.Darragh, Joseph DC 4655
2801 Millennium Dr Suite A
Kaufman TX 75142
214-577-4259
drjoe@kaufmanchiro.com
6 HOURS

3.Davis, Nancy DC 12602
2001 Central Circle, Ste 108
McKinney TX 75069
214-986-3386
dr.leanne.davis@gmail.com
4 HOURS

4.Freeze, Kenneth DC 5448
2920 duniven circle suite 6b
Amarillo TX 79109
806-331-9355
drkenneth@freezechiropractic.com
6 HOURS

5.Halterman, Marcy DC 4237
1605 Rock Prairie Rd. #318
College Station TX 77845
9794924938
drmarcy@collegestationchiropractic.com
6 HOURS

6.Ireland, Monna DC 5158
333 Shayla Lane
Canyon Lake TX 78133
210-887-3507
mirelanddc@yahoo.com
6 HOURS

7.Krugman, Daxton DC 8577
14602 Compass

Texas Board of Chiropractic Examiners

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(512) 305-6700
Facsimile (512) 305-6705

A07-5903

Corpus Christi TX 78418
3617652567
islandcdk@gmail.com
6 HOURS

8.Mauger, Mike DC 3033
6009 staples
Coprus Christi TX 78413
361 993 3918
mauger777@aol.com
6 HOURS

9.Soliz, Roberto DC 11994
3433 W. Dallas
Houston TX 77019
281-389-9157
rdsoliz@yahoo.com
6 HOURS

10.Warner, Robin DC 5550
1515 Farr Street
Waller TX 77484
713-370-3929
rlwarner@sbcglobal.net

4 HOURS

11.Warren, James DC 4822
1000 Highland Dr
Big Spring TX 79720
432-816-1094
drwarren777@gmail.com
6 HOURS

A07-5888
June 2014
TCA

Clinical Acupuncture in the Chiropractic Practice
June 21-22, 2014
R07-5888/A07-5888

LicenseNum	Name	Total	CE	TBCE	
10633	Sara K. Bonham, D.C.	16.5	12.5	4	
2872	Charles (Chuck) Robert Cottier, D.C.	4	0	4	TBCE only
10450	Whitney S. Fogle, D.C.	16.5	12.5	4	
6598	Tina Michelle Ingram, D.C.	16.5	12.5	4	
8581	Lam Chi Ly, D.C.	16.5	12.5	4	
5689	Justin C. Perish, D.C.	4	0	4	TBCE only
8473	Mahmood Poushesh, D.C.	16.5	12.5	4	
6755	Norman Rittenberry, D.C.	16.5	12.5	4	
10174	Alexander Hieu Tran, D.C.	4	0	4	TBCE only
6613	Andrew David Ullman, D.C.	4	0	4	TBCE only
7360	Joanne Wisdom, D.C.	16.5	12.5	4	

A07-Fall
July 2014

Parker University
Texas

Basic Acupuncture Certificate Program
Date: July 12-13, 2014
#A07-5661

TX Licensce #	Last Name	Course ID#	# of Hours Earned	Date Class Began
9139	Barringer	**#A07-5661**	16.75	7/12/2014
10652	Blavier	**#A07-5661**	16.75	7/12/2014
10917	Monroe	**#A07-5661**	16.75	7/12/2014
9833	Munoz	**#A07-5661**	9	7/12/2014
12016	Reinlie	**#A07-5661**	16.75	7/12/2014

EXHIBIT 2

Texas Board of Chiropractic Examiners

333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701
512-305-6700 FAX 512-305-6705

FILE # RQ-988-DM
I.D. # 32846

RECEIVED
OCT 21 1997
Opinion Committee

Ms. Sarah Shirley
Chief, Opinions Committee
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

RE: TSB of Acupuncture Examiners' Request for Opinion

Dear Ms. Shirley:

In an inquiry dated August 18, 1997, the Executive Director of the Texas State Board of Acupuncture Examiners formally requested an opinion questioning the legality of licensed chiropractors performing acupuncture. As chairperson of the Technical Standards Committee of the Texas State Board of Chiropractic Examiners, I respectfully submit this letter on behalf of the Board for your consideration.

In opinion No. DM-415, you determined that chiropractors were nor authorized to practice acupuncture on the grounds that it violated article 4512b, Section 1, of the Texas Chiropractic Act; which states that chiropractors may perform "...nonsurgical, nonincisive procedures..." and at the time, acupuncture was interpreted in this Opinion to be incisive.

However, as you are now aware, Senate Bill 361 amended the definition of acupuncture in article 4495b, Section 6.02, (1), (A), and specifically described it to be a technique that is both "...nonsurgical, (and) nonincisive..." Given this definition, and referring back to article 4512b, Section 1, of the Texas Chiropractic Act, it seems fairly clear that acupuncture is indeed within the scope of chiropractic practice. Arguably, it may be that it is the legislative intent of SB 361 to include chiropractic, as the very same language is used in this legislation to define acupuncture as that used in the Texas Chiropractic Act.

The Board of Chiropractic Examiners met on September 11, 1997 and as part of that agenda, determined that acupuncture was within the scope of chiropractic as defined by the Chiropractic Act and accordingly, guidelines were adopted for its licensees regarding the practice of acupuncture. I have attached a copy of those guidelines for your review.

Should you require any additional information regarding this matter, please don't hesitate to contact the board.

Sincerely,

Cynthia S. Vaughn D.C.

Cynthia S. Vaughn, D.C.
Chairperson, Technical
Standards Committee

Oliver R. Smith, Jr., D.C.

Oliver R. Smith, Jr., D.C., President
Texas Board of Chiropractic Examiners

Texas Board of Chiropractic Examiners

333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942
(512) 305-6700
Fascimile (512) 305-6705

June 09, 1998

FILE # ML-40315-98
I.D. # 40315

RECEIVED
JUN 16 1998
Opinion Committee

The Honorable Dan Morales
Attorney General/State of Texas
P.O. Box 12548
Austin, Texas 78701

RE: Attorney General Opinion DM-472

Dear General Morales:

The Texas Board of Chiropractic Examiners met on May 7, 1998, and as part of its duly posted agenda, discussed the findings of DM-471 and DM-472.

Upon the review and recommendation of the Technical Standards Committee, the Board voted unanimously that the practice of acupuncture remains under the scope of a licensed doctor of chiropractic in Texas, as concluded in DM-471.

However, in DM-472, the Board agreed with this decision only in part, specifically that the use of injectables is outside the scope of chiropractic due to the prohibition outlined in section 13a (a) (2) stating, The practice of chiropractic shall not be construed to include: the prescribing of controlled substances or dangerous drugs or any drug that requires a prescription..."Other than this specific point made in DM-472, this agency would like to state for the record that we disagree with your interpretation of the legislative intent of section 13a. (b) as it pertains to the use of needles. This agency contends, as supported by Representative Tom Uher's letter, that the original legislative intent was to include the use of needles for a much broader purpose than merely for the" drawing of blood for diagnostic purposes, especially as it applies to diagnostic purposes.

Sincerely,

Cynthia Vaughn, D.C. V6.

Cynthia Vaughn, D.C.
Chairman, Technical
Standards Committee

Oliver R. Smith, Jr., D.C. V6.

Oliver R. Smith, Jr., D.C., President
Texas Board of Chiropractic Examiners

www.tbce.state.tx.us
Web Address

tbce@tbce.state.tx.us
E-mail

TBCE OPINION:
ACUPUNCTURE, *MANIPULATION UNDER ANESTHESIA,* AND NEEDLE EMG *AS BEING WITHIN THE SCOPE OF PRACTICE*

DRAFT

The Texas Board of Chiropractic Examiners, met in a regularly called meeting, on September 11, 1997, to consider whether or not acupuncture, manipulation under anesthesia, and needle EMG are within the scope of chiropractic as defined by the Texas Chiropractic Act, Texas Revised Civil Statutes, Article 4512b, Section 1a.

It is the Board's opinion, as approved by a majority vote of its members, that acupuncture, manipulation under anesthesia, and needle EMG, is within the scope of chiropractic if a chiropractor performs such procedure (1) to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body, or (2) to improve the subluxation complex or the biomechanics of the musculoskeletal system. This opinion is not intended and should not be interpreted as Board approval for a licensed chiropractor to perform these procedures without adequate training. As with any chiropractic procedure, the Board expects licensees to exercise reasonable care for the safety of patients, including being properly trained for each procedure a licensee expects to perform in the practice of chiropractic.

It is the Board's further opinion that acupuncture, manipulation under anesthesia, and needle EMG are procedures that require additional training over and above the minimum educational requirements for a chiropractic license under the Chiropractic Act. Any chiropractor who performs these procedures without adequate training does so at his or her own risk.

ISSUED this 11th day of September, 1997.

Texas Board of Chiropractic Examiners
Technical Standards Committee

TBCE RECOMMENDED EDUCATION GUIDELINES:

ACUPUNCTURE, MANIPULATION UNDER ANESTHESIA, & NEEDLE EMG

DRAFT

The Texas Board of Chiropractic Examiners has approved the following guidelines and strongly encourages chiropractors, who intend to perform these procedures, to follow them. The guidelines are in addition to any other requirements of state or federal law, rule or regulation governing a particular procedure. Depending on the circumstances, the Board may consider the failure to follow these guidelines or other equivalent education or training to be a failure to use proper diligence in the practice of chiropractic or habitual conduct calculated to endanger the lives of patients. Such failure or conduct may subject a chiropractor to disciplinary action by the Board under Section 14a of the Chiropractic Act.

I. ACUPUNCTURE

GUIDELINE NO. I-1 Successful completion, with a grade of 75% or better, of a 100-hour course in needle acupuncture from a CCE accredited college, including eight hours of "clean needle technique" or an equivalent technique that meets current OSHA guidelines;

GUIDELINE NO. I-2 Twelve hours of continuing education in a Board-approved seminar on needle acupuncture, every two years after completion of Guideline No. 1. These hours are in addition to the Board's annual continuing education requirement under Rule 73.3(1)(A).

II. MANIPULATION UNDER ANESTHESIA (MUA)

GUIDELINE NO. II-1 Successful completion of a course in MUA from a CCE accredited college.

GUIDELINE NO. II-2 A Board-approved refresher course in MUA, every two years after completion of Guideline No. II-1. These hours are in addition to the Board's annual continuing education requirement under Rule 73.3(1)(A).

DRAFT

III. NEEDLE EMG

GUIDELINE NO. III-1 A Diplomate in Neurology, plus successful completion, with a grade of 75% or better, a 60-hour course in electro diagnostics from a CCE accredited college;

or

Successful completion of a 120-hour course, with a grade of 75% or better, in electro diagnostics from a CCE accredited college.

GUIDELINE NO. III-2 Twelve hours of continuing education in a Board-approved seminar on needle EMG, every two years after completion of Guideline No. III-1. These hours are in addition to the Board's annual continuing education requirement under Rule 73.3(1)(A).

Texas Board of Chiropractic Examiners

333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701
512-305-6700 FAX 512-305-6705

November 5, 1996

The Honorable Dan Morales
Attorney General
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

FILE # RQ-925
I.D. # 39317

re: Request for Attorney General Opinion

Dear General Morales:

An Attorney General Opinion is respectfully requested under the authority of Section 22 of Article IV of the Texas Constitution and section 402.041 through 402.045 of the Texas Government Code. An opinion is requested concerning the use of injectables by licensed Chiropractors.

Attached are several letters requesting that the Board review this matter. Research brought up the question as to whether all injectible substances are classified as dangerous drugs or controlled substances.

Also attached is the Board adopted criteria which is used to determine if procedures are within the scope of practice as defined in Art. 4512b (V.A.C.S.).

As of this writing the committee has not been able to establish a definitive answer as to the classification of injectables. Various state and federal agencies have been contacted with regard to this question and have responded without giving a clear answer to the question (copies attached).

A legal brief was presented by counsel for licensees who use injectables as a part of their daily practice. Within the brief, reference was made to a 1993 Enforcement Committee action regarding injectables. Further research of that issue proved that this was an isolated issue which was never brought before the full Board for ratification. The question and the brief filed in behalf of those who use injectables places this agency in a precarious position with regard to regulation and enforcement. Promulgation of rules and/or procedural actions by this Board which stop the use of injectables will bring suit from one of several parties involved in this matter. Based on the concerns stated and the threat of legal action, the Texas Board of Chiropractic Examiners requests an Attorney General Opinion to definitively resolve the questions:

1. Is the use of injectible vitamins by licensed Doctors of Chiropractic in the treatment of biomechanical conditions of the spine and musculoskeletal system of the body with the scope of practice as defined in Art. 4512b (V.A.C.S.)?

2. When the Federal Drug Administration requires a legend for a particular injectable substance (i.e. Caution: Federal Law prohibits dispensing without prescription.) Texas statute considers that substance to be a "dangerous drug." In some instances, although the FDA requires it, some manufacturers do not include the legend in their packaging and promotion. Therefore, how would a practitioner know if that substance was a controlled substance, dangerous drug or a drug that requires a prescription? Does the responsibility lie with the manufacturer or the practitioner?

3. In some instances the FDA does not require a legend but manufacturers continue to include it in their packaging and promotion. Is that substance still considered to be a dangerous drug according to the Texas Dangerous Drug Act?

4. In the State of Texas who is the source or body that has the definitive authority of defining a controlled substance, dangerous drug or drug that requires a prescription?

5. If these substances are not controlled substances or dangerous drugs, nor do they violate any other provision of the Chiropractic Act, is the use of these substances in the treatment of biomechanical conditions of the spine and musculoskeletal system of the body within the scope of practice as defined in Art. 4512b (V.A.C.S.).

Your expeditious handling of this matter will be greatly appreciated as the potential for public harm exists.

Sincerely,

Oliver R. Smith, Jr., D.C.

Oliver R. Smith, Jr., D.C.
President
Texas Board of Chiropractic Examiners

cc: Texas Board of Chiropractic Examiners

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

OCT 11 1996

RECEIVED

OCT 15 1996

Kevin Raef, D.C.
Texas Board of Chiropractic Examiners
Guadalupe, Tower III, Suite 825
Austin, TX 78701

Dear Dr. Raef:

This is in reply to your letter of May 23, 1996, to Mr. Jim Lahar of the Food and Drug Administration's Dallas District Office. Your letter has been referred to this division for response. In this letter, you reference several questions relating to the labeling and prescription status of drug products for injection. We apologize for the delay in our response.

Pursuant to our telephone conversation of September 10, 1996, this response has been tailored to answer your letter and reflect our conversation. As we discussed, all injectable drug products, with the exception of certain insulin products, are considered prescription drugs.

Section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (the Act) defines a prescription drug as one which:

(A) is a habit forming drug to which section 502(d) applies; or
(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or
(C) is limited by an approved application under section 505 to use under the professional supervision of a practitioner licensed by law to administer such drug.

Ordinarily, injectable drug products, because of their method of use are prescription drugs and, therefore, are not considered safe for use except under the supervision of a practitioner licensed by law to administer such drugs.

Section 503(b)(4) of the Act also requires prescription drugs in commercial distribution to be labeled with the statement "Caution: Federal law prohibits dispensing without prescription." As discussed during our telephone conversation, you have encountered situations in which an injectable drug product was not labeled with the federal caution statement. If this is so, then these products may be misbranded. However, we would need to examine these products before a determination could be made, as there are circumstances under which the immediate container may not require the prescription legend.

Title 21 Code of Federal Regulations (CFR) 201.100(b)(7) provides that in the case of containers too small or otherwise unable to accommodate a label with sufficient space to bear all required information, but when packaged within an outer container from which they are removed for dispensing or use, the statement "Caution: Federal law prohibits dispensing without prescription" may be placed on such outer container only. Therefore, although an individual vial may not be required to be labeled with the federal caution legend, it is required to be on the product's outer carton labeling.

Further, a drug product subject to section 503(b)(1), a prescription drug, is considered misbranded if at anytime prior to dispensing its label fails to bear the federal caution statement. A drug not subject to section 503(b)(1) is also considered misbranded if its label bears the federal caution legend, since it is not entitled to such legend.

Please be advised that the comments contained in this letter, relative to your inquiry, are an informal opinion and do not constitute a formal agency statement of policy.

Enclosed are copies of the applicable regulations and section of the Act which addresses the issues you have raised.

We hope we have been responsive to your concerns. Should you have any questions or need additional information, please contact me at (301) 594-0101.

Sincerely yours,

Kathleen R Anderson

Kathleen R. Anderson
Consumer Safety Officer
Compliance Evaluation Branch, HFD-336
Division of Prescription Drug Compliance and Surveillance
Office of Compliance
Center for Drug Evaluation and Research

or under section 519 respecting the device, or (3) to comply with a requirement under section 522.

EXEMPTIONS AND CONSIDERATION FOR CERTAIN DRUGS, DEVICES, AND BIOLOGICAL PRODUCTS

SEC. 503. [353] (a) The Secretary is hereby directed to promulgate regulations exempting from any labeling or packaging requirement of this Act drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such drugs and devices are not adulterated or misbranded, under the provisions of this Act upon removal from such processing, labeling, or repacking establishment.

(b)(1) A drug intended for use by man which—

(A) is a habit-forming drug to which section 502(d) applies; or

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(C) is limited by an approved application under section 505 to use under the professional supervision of a practitioner licensed by law to administer such drug;

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

(2) Any drug dispensed by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug shall be exempt from the requirements of section 502, except paragraphs (a), (i) (2) and (3), (k), and (l), and the packaging requirements of paragraphs (g), (h), and (p), if the drug bears a label containing the name and address of the dispenser, the serial number and date of the prescription or of its filling, the name of the prescriber, and, if stated in the prescription, the name of the patient, and the directions for use and cautionary statements, if any, contained in such prescription. This exemption shall not apply to any drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail, or to a drug dispensed in violation of paragraph (1) of this subsection.

(3) The Secretary may by regulation remove drugs subject to section 502(d) and section 505 from the requirements of paragraph (1) of this subsection when such requirements are not necessary for the protection of the public health.

(4) A drug which is subject to paragraph (1) of this subsection shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement "Caution: Federal law prohibits dispensing without prescription." A drug to which paragraph (1) of this subsection does not apply shall be deemed to be misbranded if at any time prior to dispensing its label bears the caution statement quoted in the preceding sentence.

(5) Nothing in this subsection shall be construed to relieve any person from any requirement prescribed by or under authority of law with respect to drugs now included or which may hereafter be included within the classifications stated in section 3220 of the Internal Revenue Code (26 U.S.C. 3220), or to marihuana as defined in section 3238(b) of the Internal Revenue Code (26 U.S.C. 3238(b)).

(c)(1) No person may sell, purchase, or trade or offer to sell, purchase, or trade any drug sample. For purposes of this paragraph and subsection (d), the term "drug sample" means a unit of a drug, subject to subsection (b), which is not intended to be sold and is intended to promote the sale of the drug. Nothing in this paragraph shall subject an officer or executive of a drug manufacturer or distributor to criminal liability solely because of a sale, purchase, trade, or offer to sell, purchase, or trade in violation of this paragraph by other employees of the manufacturer or distributor.

(2) No person may sell, purchase, or trade, offer to sell, purchase, or trade, or counterfeit any coupon. For purposes of this paragraph, the term "coupon" means a form which may be redeemed, at no cost or at a reduced cost, for a drug which is prescribed in accordance with subsection (b).

(3)(A) No person may sell, purchase, or trade, or offer to sell, purchase, or trade, any drug—

(i) which is subject to subsection (b), and

(ii)(I) which was purchased by a public or private hospital or other health care entity, or

(II) which was donated or supplied at a reduced price to a charitable organization described in section 501(c)(3) of the Internal Revenue Code of 1954.

(B) Subparagraph (A) does not apply to—

(i) the purchase or other acquisition by a hospital or other health care entity which is a member of a group purchasing organization of a drug for its own use from the group purchasing organization or from other hospitals or health care entities which are members of such organization,

(ii) the sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug by an organization described in subparagraph (A)(ii)(II) to a nonprofit affiliate of the organization to the extent otherwise permitted by law,

(iii) a sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug among hospitals or other health care entities which are under common control,

(iv) a sale, purchase, or trade of a drug or an offer to sell, purchase, or trade a drug for emergency medical reasons, or

ragraph (a) of this section, unless
ierwise stated in the NDA or in the
al OTC drug monograph.
) The following OTC drugs are ex-
pt from the provisions of paragraph
of this section:
) Drugs that are intended to benefit
fetus or nursing infant during the
iod of pregnancy or nursing.
) Drugs that are labeled exclusively
pediatric use.
) The Food and Drug Administra-
n will grant an exemption from
agraph (a) of this section where ap-
priate upon petition under the pro-
ions of §10.30 of this chapter. Deci-
is with respect to requests for ex-
ptions shall be maintained in a per-
nent file for public review by the
ckets Management Branch (HFA-
), Food and Drug Administration,
1–23, 12420 Parklawn Dr., Rockville,
20857.
) The labeling of orally or rectally
ministered OTC aspirin and aspirin-
taining drug products must bear a
rning that immediately follows the
eral warning identified in para-
ph (a) of this section. The warning
ll be as follows:

T IS ESPECIALLY IMPORTANT NOT USE" (select "ASPIRIN" or ARBASPIRIN CALCIUM," as appropriate) URING THE LAST 3 MONTHS OF PREGNCY UNLESS SPECIFICALLY DICTED TO DO SO BY A DOCTOR BEUSE IT MAY CAUSE PROBLEMS IN THE BORN CHILD OR COMPLICATIONS DUR- DELIVERY."

FR 54757, Dec. 3, 1982, as amended at 55 27784, July 5, 1990; 59 FR 14364, Mar. 28, 1]

Subpart D—Exemptions From Adequate Directions for Use

01.100 Prescription drugs for human use.

A drug subject to the requirements of ction 503(b)(1) of the act shall be expt from section 502(f)(1) if all the llowing conditions are met:
a) The drug is:
1) (i) In the possession of a person his agents or employees) regularly d lawfully engaged in the manufacre, transp on, storage, or wholele distrib on of prescription drugs;

(ii) In the possession of a retail, hospital, or clinic pharmacy, or a public health agency, regularly and lawfully engaged in dispensing prescription drugs; or

(iii) In the possession of a practitioner licensed by law to administer or prescribe such drugs; and

(2) It is to be dispensed in accordance with section 503(b)

(b) The label of the drug bears:

(1) The statement "Caution: Federal law prohibits dispensing without prescription" and

(2) The recommended or usual dosage and

(3) The route of administration, if it is not for oral use; and

(4) The quantity or proportion of each active ingredient, as well as the information required by section 502 (d) and (e); and

(5) If it is for other than oral use, the names of all inactive ingredients, except that:

(i) Flavorings and perfumes may be designated as such without naming their components.

(ii) Color additives may be designated as coloring without naming specific color components unless the naming of such components is required by a color additive regulation prescribed in Subchapter A of this chapter.

(iii) Trace amounts of harmless substances added solely for individual product identification need not be named. If it is intended for administration by parenteral injection, the quantity or proportion of all inactive ingredients, except that ingredients added to adjust the pH or to make the drug isotonic may be declared by name and a statement of their effect; and if the vehicle is water for injection it need not be named.

(6) An identifying lot or control number from which it is possible to determine the complete manufacturing history of the package of the drug.

(7) A statement directed to the pharmacist specifying the type of container to be used in dispensing the drug product to maintain its identity, strength, quality, and purity. Where there are standards and test procedures for determining that the container meets the requirements for specified types of containers as defined in an official compendium, such terms may be used. For example, "Dispense in tight, light-resistant container as defined in the National Formulary". Where standards and test procedures for determining the types of containers to be used in dispensing the drug product are not included in an official compendium, the specific container or types of containers known to be adequate to maintain the identity, strength, quality, and purity of the drug products shall be described. For example, "Dispense in containers which (statement of specifications which clearly enable the dispensing pharmacist to select an adequate container)": *Provided, however,* That in the case of containers too small or otherwise unable to accommodate a label with sufficient space to bear all such information, but which are packaged within an outer container from which they are removed for dispensing or use, the information required by paragraph (b) (2), (3), (5), and (7) of this section may be contained in other labeling on or within the package from which it is to be dispensed; the information referred to in paragraph (b)(1) of this section may be placed on such outer container only; and the information required by paragraph (b)(6) of this section may be on the crimp of the dispensing tube. The information required by this paragraph (b)(7) is not required for prescription drug products packaged in unit-dose, unit-of-use, on other packaging format in which the manufacturer's original package is designed and intended to be dispensed to patients without repackaging.

(c)(1) Labeling on or within the package from which the drug is to be dispensed bears adequate information for its use, including indications, effects, dosages, routes, methods, and frequency and duration of administration, and any relevant hazards, contraindications, side effects, and precautions under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended, including all purposes for which it is advertised or represented; and

(2) If the article is subject to section 505, 506, or 507 of the act, the labeling bearing such information is the labeling authorized by the approved new drug application or required as a condition for the certification or the exemption from certification requirements applicable to preparations of insulin or antibiotic drugs.

(d) Any labeling, as defined in section 201(m) of the act, whether or not it is on or within a package from which the drug is to be dispensed, distributed by or on behalf of the manufacturer, packer, or distributor of the drug, that furnishes or purports to furnish information for use or which prescribes, recommends, or suggests a dosage for the use of the drug (other than dose information required by paragraph (b) (2) of this section and §201.105(b) (2) contains:

(1) Adequate information for such use, including indications, effects, dosages, routes, methods, and frequency and duration of administration and any relevant warnings, hazards, contraindications, side effects, and precautions, under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended, including all conditions for which it is advertised or represented; and if the article is subject to section 505 or 507 of the act, the parts of the labeling providing such information are the same in language and emphasis as labeling approved or permitted, under the provisions of section 505 or 507, respectively, and any other parts of the labeling are consistent with and not contrary to such approved or permitted labeling; and

(2) The same information concerning the ingredients of the drug as appears on the label and labeling on or within the package from which the drug is to be dispensed.

(3) The information required, and in the format specified, by §§201.56 and 201.57.

(e) All labeling described in paragraph (d) of this section bears conspicuously the name and place of business of the manufacturer, packer, or distributor, as required for the label of the drug under §201.1.

(f) Reminder labeling which calls attention to the name of the drug product but does not include indications or dosage recommendations for use of the pro-

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March 7, 1996

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Re: Chiropractors' use of Injectables/Technical Standards Committee "Policy" regarding same.

Dear Board members:

The purpose of this letter is to express opposition to the Texas Board of Chiropractic Examiners Technical Standards Committee's recommendation that the committee and/or the Board "adopt" any "policy" regarding chiropractors' use of injectables without compliance with the procedural requirements of the Administrative Procedure Act ("APA"), TEX. GOV'T CODE ANN. §2001.005 and §§2001.021-2001.037 (Vernon Pamph. 1996) and to petition the Board for the adoption of rules pursuant to section 2001.021.

At the meeting of the Board of January 12, 1996, and by letter brief dated March 4, 1996, Dr. John P. Boren, D.C., and Dr. Ronney M. Henson, D.C., through the undersigned and submitted reasons why the Board should not adopt rules prohibiting chiropractors' use of injectables. The Technical Standards Committee this morning decided to recommend two things: (1) that the Board seek an opinion from the Attorney General of Texas regarding whether the Texas Chiropractic Act, TEX. REV. CIV. STAT. ANN. Art. 4512b (Vernon Pamph. 1996), authorizes the Board to prohibit chiropractors' use of injectables and (2) that the Board "continue" to "enforce" its "policy" that chiropractors may not use injectables.

Dr. Boren and Dr. Henson do not oppose the recommendation that the Board seek an opinion from the attorney general and, in fact, welcome the opportunity to submit comments in that forum. Dr. Boren and Dr. Henson, however, strenuously oppose any effort, however, to enforce a policy interpreting the new amendments to the Chiropractic Act without compliance with the APA's rulemaking procedures.

The committee's "policy" is invalid and unenforceable because it does not comply with the procedures for the adoption of rules and emergency rules established by APA §§2001.021 *et seq.* Under the APA, a "rule" includes " a state agency statement of general applicability that . . . implements, interprets, or prescribes law or policy." TEX. GOV'T CODE §2001.003(6)(A). No "rule," as defined in the APA, is valid unless it is adopted in compliance with the APA's procedural requirements. TEX. GOV'T CODE §2001.035. In addition, the Board lacks authority to enforce what are in effect "rules" interpreting and applying the new amendments until and unless the Board complies with section 2001.021(c) of the APA regarding this petition for rulemaking.

In addition, notice and hearing, the fundamental attributes of due process in contested cases, are undermined by the Board applying, in an adjudicative hearing, a new interpretation of a statute that controls the result of the hearing and that is ambiguous and undefined. Madden v. Texas Board of Chiropractic Examiners, 663 S.W.2d 622, 626-627 (Tex. App. --Austin 1983, writ ref's n.r.e.); *Cf.* Texas Coastal Bank v. Texas Finance Commission, 895 S.W.2d 882 (TEx. App. -- Austin, no writ). For that reason, the Board cannot apply this unpublished "policy" in specific disciplinary hearings.

Dr. Boren and Dr. Henson petition the Board for the adoption of rules interpreting section 13a of the Act and that authorize the use by chiropractors of the following substances, by injection or otherwise:

(A) a vitamin;
(B) a mineral;

(C) an herb or other botanical;
(D) an amino acid;
(E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
(F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A),(B),(C),(D), or (E);

Your patience and attention to these matter are appreciated.

Yours very truly,

JENNIFER S. RIGGS. P.C.

Jennifer S. Riggs

Enclosures

cc: Ms. Patte Kent (Hand Delivery)
Dr. John P. Boren, D.C.
Dr. Ronney M. Henson, D.C.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Vernon's Ann.Civ.St. art. 6252-13a, § 1.

Notes of Decisions

Construction and application 1

1. Construction and application
Recent codification of former Administrative Procedure and Texas Register Act to current Administrative Procedure Act did not substantively change the law. Morgan v. Employees' Retirement System of Texas (App. 3 Dist. 1994) 872 S.W.2d 819.

§ 2001.002. Short Title

This chapter may be cited as the Administrative Procedure Act.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Vernon's Ann.Civ.St. art. 6252-13a, § 2.

§ 2001.003. Definitions

In this chapter:

(1) "Contested case" means a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(2) "License" includes the whole or a part of a state agency permit, certificate, approval, registration, or similar form of permission required by law.

(3) "Licensing" includes a state agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(4) "Party" means a person or state agency named or admitted as a party.

(5) "Person" means an individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency.

(6) "Rule":

(A) means a state agency statement of general applicability that:

(i) implements, interprets, or prescribes law or policy; or

(ii) describes the procedure or practice requirements of a state agency;

(B) includes the amendment or repeal of a prior rule; and

(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

(7) "State agency" means a state officer, board, commission, or department with statewide jurisdiction that makes rules or determines contested cases. The term includes the State Office of Administrative Hearings for the purpose of determining contested cases. The term does not include:

(A) a state agency wholly financed by federal money;

(B) the legislature;

(C) the courts;

(D) the Texas Workers' Compensation Commission; or

(E) an institution of higher education.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Acts 1983, 68th Leg., p. 4341, ch. 695, § 1.
Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 15.32.
Acts 1991, 72nd Leg., ch. 591, § 5.
Vernon's Ann.Civ.St. art. 6252-13a, § 3.

Notes of Decisions

State agency 1

1. State agency
Court Reporters Certification Board is not subject to statute which establishes State Office of Administrative Hearings. Op.Atty.Gen.1992, No. DM-142.

§ 2001.004. Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions

In addition to other requirements under law, a state agency shall:

(1) adopt rules of practice stating the nature and requirements of all available formal and informal procedures;

(2) index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions; and

(3) index, cross-index to statute, and make available for public inspection all final orders, decisions, and opinions.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Acts 1991, 72nd Leg., ch. 482, § 1.
Vernon's Ann.Civ.St. art. 6252-13a, § 4(a).

Cross References

Rules of Practice, Department of Agriculture, see V.T.C.A., Agriculture Code § 12.0202.

(2) states in writing the reasons for its finding under Subdivision (1).

(b) A state agency shall set forth in an emergency rule's preamble the finding required by Subsection (a).

(c) A rule adopted under this section may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. An identical rule may be adopted under Sections 2001.023 and 2001.029.

(d) A state agency shall file an emergency rule adopted under this section and the agency's written reasons for the adoption in the office of the secretary of state for publication in the Texas Register in the manner prescribed by Chapter 2002.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Acts 1989, 71st Leg., ch. 1050, § 1.
Vernon's Ann.Civ.St. art. 6252-13a, § 5(d).

§ 2001.035. Substantial Compliance Requirement; Time Limit on Procedural Challenge

(a) A rule adopted after January 1, 1976, is not valid unless a state agency adopts it in substantial compliance with Sections 2001.023 through 2001.034.

(b) A person must initiate a proceeding to contest a rule on the ground of noncompliance with the procedural requirements of Sections 2001.023 through 2001.034 not later than the second anniversary of the effective date of the rule.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1975, 64th Leg., p. 136, ch. 61.
Vernon's Ann.Civ.St. art. 6252-13a, § 5(e).

Notes of Decisions

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1. Construction and application

Stating applicable statute and inapplicable statutes as authority for promulgating insurance rule substantially complied with statutory requirement that notice of proposed rule include concise explanation of particular statutory or other provisions under which rule is proposed. National Ass'n of Independent Insurers v. Texas Dept. of Ins. (App. 3 Dist. 1994) 888 S.W.2d 198, rehearing overruled.

"Substantial compliance" does not mean literal and exact compliance with every provision of statute; compliance with essential requirements of statute suffices under Administrative Procedure Act (APA). National Ass'n of Independent Insurers v. Texas Dept. of Ins. (App. 3 Dist. 1994) 888 S.W.2d 198, rehearing overruled.

2. Technical defects

Mere technical defects that do not result in prejudice to person's rights or privileges should not be grounds for invalidation of rule under Administrative Procedure Act (APA). National Ass'n of Independent Insurers v. Texas Dept. of Ins. (App. 3 Dist. 1994) 888 S.W.2d 198, rehearing overruled.

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March 4, 1996

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Re: Chiropractors' use of Injectables

Dear Board members:

The purpose of this letter is to provide the Texas Board of Chiropractic Examiners information in opposition to rules prohibiting chiropractors' use of injectables and in support of the adoption of reasonable rules governing chiropractors' use of injectables.

THE TEXAS CHIROPRACTIC ACT

At issue here are several sections of the Texas Chiropractic Act, TEX. REV. CIV. STAT. ANN. Art. 4512b (Vernon Pamph. 1996). In interpreting these sections, the Board's role, like that of the courts, is to ascertain and give effect to the legislature's intent. Unfortunately, legislative intent is not always easy to ascertain. The text of the amendment to the sections of the act at issue, showing additions and deletions, is attached as Exhibit "1."

Section 4 of the act provides in part that "[t]he Board may prescribe rules, regulations and bylaws in harmony with the provisions of this Act for its own proceedings and government for the examination of applicants for license to practice chiropractic" and that "the Board shall adopt rules for regulation and enforcement of this Act." The act does not authorize the Board to define the scope of practice for Chiropractors -- the Board's rulemaking authority is limited to that which is provided expressly in the act or that which must of necessity be implied from express provisions.

The 74th Texas Legislature *deleted* language from section 4 of the act that granted the Board limited authority to adopt rules relating to the meaning of the practice of chiropractic. *See* Acts 1995, 74th Tex. Leg., Ch. 965, §15, p. 4802 (amending section 4). Although the deleted language authorized the Board to adopt only rules related to the practice of chiropractic that directly related to (1) improving subluxation of the spine or of the musculoskeletal system or (2) defining an unacceptable practice of chiropractic, the deleted language nevertheless was a grant of limited authority. By deleting that language, the legislature arguably intended to remove *all* power of the Board to adopt rules related to the scope of the practice of chiropractic. Leaving that issue aside for purposes of this discussion, however, even with such authority the Board may not impose additional burdens or limits on chiropractic licenses not intended by the legislature.

Section 1 of the act defines the acts that constitute the practice of chiropractic:

> (a) A person shall be regarded as practicing chiropractic within the meaning of this Act 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;

(2) performs *nonsurgical, nonincisive* procedures, including *but not limited to* adjustment and manipulation, in order to improve the subluxation complex or the biomechanics of the musculoskeletal system; or

(3) holds himself out to the public as a chiropractor of the human body or uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms in connection with his name.

Art. 4512b, §1 (emphasis added).

Section 13a of the act specifies the activities that chiropractors may *not* perform:

Sec. 13a. (a) The practice of chiropractic shall not be construed to include:

(1) *incisive or surgical* procedures:

(2) the *prescribing of controlled substances or dangerous drugs or any drug that requires a prescription*; or

(3) the use of x-ray therapy or therapy that exposes the body to radioactive materials.

(b) In this Act, "incisive or surgical procedure" includes but is not limited to *making an incision into any tissue, cavity, or organ by any person or implement. It does not include the use of a needle for the purpose of drawing blood for diagnostic testing.*

Art. 4512b, §13a (as added by Acts 1995, 74th Tex. Leg., Ch. 965, §18, p. 4803)(emphasis added).

The 74th Texas Legislature added the above-quoted version of section 13a. The following language was deleted:

A chiropractor may not use in the chiropractors's practice surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive materials.

See Acts 1995, 74th Tex. Leg., Ch. 965, §18, p. 4803 (amending section 13a).

Despite its length, the amendment to section 13a contains basically the same limits as the previous language. The amendment merely expands upon and clarifies the general concepts already embodied in section 13a. For example, the amendment added the term "incisive," but defines it in a manner that is akin to surgery and distinguishes it from acts such as the venipuncture. For that reason, section 13a does not prohibit the use of needles *per se* because they do not fall within the plain meaning of "incisive or surgical procedure."

The amendment regarding drugs is significant. The old language prohibited the "*use* in the chiropractors's practice . . . drugs that require a prescription to be *dispensed.* The new language prohibits the "*prescribing* of controlled substances or dangerous drugs or any drug that requires a prescription." As will be shown in the following discussion, this distinction may be significant.

Board members expressed concern about whether injectables constitute drugs. That is a more difficult question. The short answer is that it depends on the injectable and the purpose for the injection.

TEXAS DEFINITIONS OF "DRUGS"

Definitions for "controlled substance," "drug," "dangerous drug," and "prescription" are provided in the Texas Health and Safety Code's food, drugs, and alcohol provisions.

Section 481.002(5) of the Health & Safety Code (Chapter 481 is the Texas Controlled Substances Act), provides that a "controlled substance" means "a substance, including a drug and an immediate precursor, listed in Schedules I through V or Penalty Groups 1 through 4." TEX. HEALTH & SAFETY CODE ANN. §481.002 (5)(Vernon 1992). At the upcoming Board meeting, we will provide a set of the current Schedules I through IV and Penalty Groups 1 through 4, in light of a Board member's request for a copy of them. They are too voluminous to attach to this letter brief.

Section 481.037 provides in pertinent part:

(a) A nonnarcotic substance is *excluded* from Schedules I through V if the substance may lawfully be sold over the counter without a prescription, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 301 et seq.).

. . .

(e) A nonnarcotic prescription substance is *exempted* from Schedules I through V and the application of this chapter to the same extent that the substance has been exempted from

the application of the Federal Controlled Substances Act, if the substance is listed as an exempt prescription product under 21 C.F.R. Section 1308.32 and its subsequent amendments.

TEX. HEALTH & SAFETY CODE ANN. §481.037(a) & (e).

Section 481.002(16) of the Health and Safety Code defines "drug" as a substance, other than a device or a component, part, or accessory of a device, that is:

(A) recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or a supplement to either pharmacopeia of the formulary;

(B) *intended* for use in the diagnosis, cure, mitigation, treatment, or prevention of *disease* in man or animals;

(C) *intended* to affect the structure or function of the body of man or animals but *is not food*; or

(D) intended for use as a component of a substance described by paragraph (A), (B), or (C).

TEX. HEALTH & SAFETY CODE ANN. §481.002(16)(Vernon 1992)(emphasis added).

The term "drug" as used in Texas law is *not* synonymous with requiring a prescription. A separate section of the Health and Safety Code defines "dangerous drugs" to be "legend drugs" -- meaning drugs bearing the legend "federal law prohibits dispensing without a prescription."

Chapter 483 of the Health & Safety Code, the Dangerous Drugs Chapter, provides the following:

(3) "Dangerous Drug" means a device or a drug that is unsafe for self-medication and that is not included in Schedules I through V or Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend:

(A) Caution: federal law prohibits dispensing without a prescription; or
(B) Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.

TEX. HEALTH & SAFETY CODE ANN. §483.001 (3).

Thus, federal law determines what constitutes a "dangerous drug" and what is excluded and/or exempted from the definition of a "controlled substance." Both Chapters 481 and 483 refer to federal law to determine what constitutes a drug that requires a prescription. As will be shown in the following section, what constitutes a drug that requires a prescription depends on how a substance is marketed -- a designation that is often left to the pharmaceutical manufacturers.

FEDERAL DEFINITIONS OF "DRUGS"

The Food and Drug Administration ("FDA") has broad authority to determine what constitutes a "new drug" and what "drug" may not be dispensed without a prescription from a qualified practitioner. The FDA has been challenged, primarily by manufacturers and/or distributors, over the scope of the FDA's authority. *See, e.g., Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609 (1973). The courts have upheld the FDA's authority, subject to certain limits, to determine what products are "new drugs" and what products are "prescription drugs." The courts have even upheld the regulation of vitamins. *See, e.g., Kordel v. United States*, 335 U.S. 345 (1948) (compounds of minerals, vitamins, and herbs).

The relevant federal provision is as follows:

> The term "drug" means (articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (B) articles *intended* for use in the diagnosis, cure, mitigation, treatment, or prevention of *disease* in man or other animals; and (C) articles *(other than food) intended* to affect the structure or any function of the body of man or other animals; and (D) articles intended for use as a component of any article specified in clauses (A), (B), or (C) of this paragraph. . . .

21 U.S.C. §321(g)(1) (West 19__).

That is the provision upon which the Texas definition of "drug" is based. *See* TEX. HEALTH & SAFETY CODE ANN. §481.002(16)(quoted above). As shown above, however, the term "drug" is not synonymous with "legend drug," one that cannot be dispensed without a prescription. Moreover, the FDA's authority was limited significantly by Congress.

Congress recently amended the FDA's enabling legislation to restrict the FDA's power to define "drugs" and to regulate "dietary supplements." The following language was added to

section 321(g)(1), set forth above:

> A food or dietary supplement for which a claim, subject to sections 343(r)(1)(B) and 343(r)(3) of this title or sections 343(r)(1)(B) and 343 (r)(5)(D) of this title, is made in accordance with the requirements of section 343(r) of this title is not a drug solely because the label or the labeling contains such a claim. A food, dietary ingredient, or dietary supplement for which a truthful and not misleading statement is made in accordance with section 343(r)(6) if this title is not a drug under clause (C) solely because the label or the labeling contains such a statement.

21 U.S.C. §321(g)(1) (West Supp. 1996). Section 343 is the section that governs food labeling.

Section 321(ff) was also amended to state that "dietary supplement"

(1) means a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

(A) a vitamin;
(B) a mineral;
(C) an herb or other botanical;
(D) an amino acid;
(E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or
(F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A),(B),(C),(D), or (E);

(2) means a product that --

(A) (i) is intended for ingestion in a form described in section 350(c)(1)(B)(i) of this title; or
(ii) complies with section 350(c)(1)(B)(ii)of this title;
(B) is not represented for use as conventional food or as sole item of a meal or the diet; and
(C) is labeled as a dietary supplement. . . .

21 U.S.C. §321(ff) (West Supp. 1996).

Finally, section 350(a) was amended to expressly limit the authority of the FDA:

(1) Except as provided in paragraph (2)--

(A) the Secretary may not establish, under section 321(n), 341, or 343 of this title, maximum limits on the potency of any synthetic vitamin or natural vitamin or mineral within a food to which this section applies;

(B) the Secretary may not classify any natural or synthetic vitamin or mineral (or combination thereof) as a drug solely because it exceeds the level of potency which the Secretary determines is nutritionally rational or useful;

(C) the Secretary may not limit, under section 321(n), 341, or 343 of this title, the combination or number of any synthetic or natural --

(i) vitamin,
(ii) mineral,or
(iii) other ingredient of food,

within a food to which this section applies.

(2) Paragraph (1) shall not apply in the case of a vitamin, mineral, other ingredient of food, or food, which is represented for use by individuals in the treatment or management of specific diseases or disorders, by children, or by pregnant or lactating women.

21 U.S.C. §350(a) (West Supp. 1996).

Because much of the above-quoted statutory language is "legalese," several documents are attached that describe Congress's policy concerns in limiting the FDA's authority. Those documents are as follows: (1) August 13, 1994 Statement of Orrin G. Hatch regarding S. 784 (Exhibit "2"), (2) January 7, 1994 letter from Senator Hutchison to a constituent regarding S. 784 (Exhibit "3"), and (3) December 16, 1993 Resolution of the Austin City Council in support of [S.] 784 and its companion bill H. 1709 (Exhibit "4"). These documents reflect a sound policy -- one with which the Board of Chiropractic Examiners would be at odds if it restricted a Chiropractors use of vitamin injectables.

Under these provisions, there simply is no authority for determining that vitamins are prescription drugs simply because they are administered in injectable form. The Board should be aware that, according to several phone conversations with FDA representatives, the FDA considers *all* injectables to be drugs. The FDA representatives, however, could not provide a citation to any authority for that position. The FDA has not passed any regulations that so state, nor does that position find support in the law.

The reason for the FDA position is likely that for a substance to be considered over-the-counter (OTC), the manufacturer must request that it be so considered, and the manufacturers of the large doses of certain injectable vitamins, particularly vitamin A, have not so requested. For the same reason, large doses of Vitamin A (over 10,000 IU), even when taken orally, require prescriptions according to the FDA -- *because* the manufacturers have not requested OTC status. The rational of manufacturers varies; most often, they wish to limit their liability by avoiding direct sales to the public of injectables, precisely because some vitamins and similar substances can have toxic levels. The problem with that position is that the statute indicates that the FDA may not regulate certain dietary supplements. If the FDA cannot regulate the substance, the FDA cannot require that a company seek OTC status.

Aside from the lack of statutory authority for the FDA position, the position taken by the FDA, if "adopted" by the Board of Chiropractic Examiners, has the effect of adding burdens or restrictions to a Chiropractors license that are determined arbitrarily by a private entity -- the pharmaceutical manufacturers. Applying the provisions of the Texas Health and Safety Code at issue, which refer to federal law, which in practice (but not in letter) refers to manufacturers' decisions, constitutes an invalid delegation. Assuming that the FDA's interpretation is correct, that "process" imposes new limits on Chiropractors' licenses -- it prohibits the use of injectables. The pharmaceutical manufacturer has the authority to determine whether a chiropractor may qualify to use injectables.

The state may not delegate its police power to regulate the practice of chiropractic to private entities. Article III, section 1, of the Texas Constitution provides that the legislative power of the state shall be vested in the Texas Legislature. It has long been stated, although not often followed, that the legislature cannot delegate its power to make law. See e.g. State v. Swisher, 17 Tex. 441 (1856), but see Spears v. City of San Antonio, 110 Tex. 618, 223 S.W. 166 (1920). The courts recognize, however, as a practical matter that administrative agencies and local governmental entities must exercise some delegated powers. The "modern" rule is that a legislative delegation of rule-making authority must establish standards in order to be valid. Southwestern Savings & Loan Ass'n of Houston v. Falkner, 160 Tex. 417, 422, 331 S.W.2d 917, 921 (1960). These Texas cases, however, address the validity of a delegation of quasi-legislative power to administrative agencies and/or to political subdivisions -- not to private entities.

There are serious policy concerns associated with delegations to private entities. In the quasi-legislative, rule-making area, those who establish policy should be politically accountable. In the quasi-judicial area, those who make decisions should be unbiased. These concerns are not met when governmental powers are delegated to private entities.

In Carter v. Carter Coal, 298 U.S. 238 (1936), the United States Supreme Court first held unconstitutional a delegation of power to private parties. In Schweiker v. McClure, 456 U.S. 188 (1982), the Court upheld a system that delegated adjudicatory authority over Medicare cases to decisionmakers who were employees of insurance companies. The Court upheld the delegation because (1) both the claim payments and the hearings officers' salaries were paid from governmental funds and (2) because there was no evidence that either the insurance carriers or the hearings officers had a reason for bias. In contrast, here, the entity that decides who may use injectables is the pharmaceutical manufacturer, an entity that could potentially benefit from restricted access as it tends to increase the price of the injectables and decrease potential liability to the public for the product.

In Office of Public Insurance Counsel v. Texas Automobile Insurance Plan, 860 S.W.2d 231 (Tex. App.--Austin 1993, writ denied), the court held that a delegation of authority to a private entity may be lawful if the legislature's purpose is discernible and if there are sufficient protections against arbitrary exercises of power. At issue was a statute that authorized insurance carriers to create an administrative agency to apportion high risk insureds among insurance companies to assure that all persons could obtain automobile insurance. The statute also gave insurance companies the express authority to enact "necessary reasonable rules" to operate the assigned risk plan.

The court upheld the statute because

> The legislative policy underlying the assigned risk plan is established by the statute . . . . The state regulatory agency, the Board, has power to approve or veto the plan rules of operation and to determine appropriate rates and policy forms. We conclude that this statutory scheme establishes reasonable standards to guide TAIP in its rulemaking and sufficient safeguards against its arbitrary exercise of power. Indeed, we conclude that the safeguards are sufficient for a delegation of power to private parties. [Citations omitted]

Texas Automobile Insurance Plan, 860 S.W.2d at 237.

There are a number of attorney general opinions that suggest that a delegation of authority to determine licensing questions is invalid. In Op. Tex. Att'y Gen. No. H-372 (1974), the attorney general stated that the State Board of Registration for Professional Engineers' authority to license engineers was exclusive and that a private institution could not certify individuals as engineers. The opinion did not address, however, whether the Board could delegate such authority to a private entity. In Op. Tex. Att'y Gen. No. H-644 (1975), however, the attorney general held that the State Board of Examiners of Psychologists could not delegate the "quasi-

judicial fact-finding" duty to determine whether applicants are qualified to take the Board's licensing examination. Similar considerations apply here.

Ironically, the pharmaceutical manufacturers do not object to providing injectables to chiropractors. That fact shows the absurdity of the circular position espoused by the FDA. Copies of relevant information regarding companies that provide injectables is included as Exhibit "5."

TEXAS DEFINITION OF "PRESCRIPTION"

It is also significant that section 13a of the Chiropractic Act contains reference to the "*prescribing* of controlled substances or dangerous drugs or any drug that requires a prescription." As indicated, the statute previously referred to the "use" of "drugs that require a prescription to be dispensed." That change is significant.

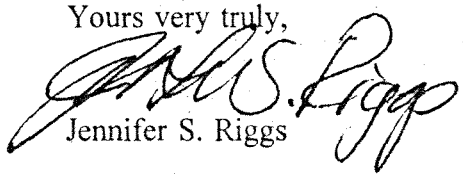
Under Texas Law, the term "prescription" has a specific meaning. TEX. HEALTH & SAFETY CODE ANN. §483.001(13). It means an order from a practitioner, as defined in the Health and Safety Code, to a pharmacist for a dangerous drug to be dispensed. Prescribe/prescription does *not* mean administer or dispense. The legislature, when it changes statutory language is presumed to have intended some change.

CONCLUSION

For these reasons, Dr. John B. Boren, D.C., and Dr. Ronney M. Henson, D.C., request that the Texas Board of Chiropractic Examiners decline to adopt rules prohibiting chiropractors' use of injectables and adopt of reasonable rules governing chiropractors' use of injectables. A copy of a proposed rule is attached as Exhibit "7." In addition, material related to an approved course will be provided at the Board meeting. Unfortunately, there is insufficient time to gather all of the relevant material in time to send to you with this letter.

Your patience and attention to this matter are appreciated.

Yours very truly,



Jennifer S. Riggs

cc: Ms. Patte Kent (Hand Delivery)
Dr. John B. Boren, D.C.
Dr. Ronney M. Henson, D.C.

(e) The department shall report to the board from time to time regarding issues identified in emergency medical services responses in which an out-of-hospital DNR order or DNR identification device is encountered. The report may contain recommendations to the board for necessary modifications to the form of the standard out-of-hospital DNR order or the designated life-sustaining procedures listed in the standard out-of-hospital DNR order, the statewide out-of-hospital DNR order protocol, or the DNR identification devices.

Sec. 674.024. RECOGNITION OF OUT-OF-HOSPITAL DNR ORDER EXECUTED OR ISSUED IN OTHER STATE. An out-of-hospital DNR order executed, issued, or authorized in another state or a territory or possession of the United States in compliance with the law of that jurisdiction is effective for purposes of this chapter.

SECTION 11. Subsection (c), Section 51.918, Education Code, is amended to read as follows:

(c) The Center for Rural Health Initiatives shall develop relief service programs for rural physicians and allied health personnel to facilitate ready access to continuing medical education *or practice coverage for purposes other than continuing medical education.*

SECTION 12. Subsection (e), Section 58.002, Education Code, is amended to read as follows:

(e) It is the intent of this chapter that [~~eventually~~] at least 50 percent of [~~the first year~~] resident physicians [~~appointed by medical schools~~] shall be in the [~~primary care~~] areas of family medicine, *general* internal medicine, *general* pediatrics, geriatrics, obstetrics/gynecology, and emergency medicine, with 25 percent of those residents in family practice.

SECTION 13. Section 1, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 1. *(a)* A person shall be regarded as practicing chiropractic within the meaning of this Act 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;

(2) *performs nonsurgical, nonincisive* [~~uses adjustment, manipulation, or other~~] procedures, *including but not limited to adjustment and manipulation,* in order to improve *the* subluxation *complex* or the biomechanics of the musculoskeletal system; or

(3) holds himself out to the public as a chiropractor *of the human body* or uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms in connection with his name.

SECTION 14. Subsection (h), Section 3, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended to read as follows:

(h) The members of the Texas Board of Chiropractic Examiners shall be divided into three (3) classes, one, two and three, and are appointed for staggered six-year terms, with three members' terms expiring on February 1 of each odd-numbered year. *No person may be appointed to serve more than two terms. The president of the Board shall be a licensed doctor of chiropractic.* Members hold office for their terms and until their successors are duly appointed and qualified. In case of death or resignation of a member of the Board, the Governor shall appoint another to take his place for the unexpired term only.

SECTION 15. Subsection (c), Section 4, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended to read as follows:

(c) The Board shall adopt *rules* [~~guidelines~~] for *regulation and enforcement of* [~~educational preparation for all aspects of the practice of chiropractic. The Board may not adopt a rule relating to the meaning of the practice of chiropractic under this Act except for:~~

[~~(1) a rule relating to an adjustment, manipulation, or other procedure directly related to improving the subluxation of the spine or of the musculoskeletal system as it directly relates to improving the subluxation of the spine; or~~

[~~(2) a rule that defines an unacceptable practice of chiropractic and provides for a penalty or sanction under~~] this Act. *The Board shall issue all opinions based on a vote of a majority of the Board at a regular or called meeting. The issuance of a disciplinary action or disciplinary order of the Board is not limited by this subsection.*

EXHIBIT 1

SECTION 16. Section 5a, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended by adding Subsection (c) to read as follows:

(c) A person who violates this section commits an offense. An offense under this section is a Class A misdemeanor. If it is shown at a trial of an offense under this section that the defendant has previously been convicted under this section, the offense is a felony of the third degree. Each day of violation constitutes a separate offense.

SECTION 17. Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended by adding Section 12b to read as follows:

Sec. 12b. (a) The advisory commission to the Texas Board of Chiropractic Examiners is created. The advisory commission shall advise the Board on scientific and technical matters regarding new and experimental diagnostic and treatment practices, procedures, or instruments that are within the definition of chiropractic as set out in Section 1 of this Act.

(b) The advisory commission shall be composed of:

(1) three persons who are licensees of the Board and who are appointed by the Board;

(2) two licensees from chiropractic colleges in this state appointed by the Board from a list submitted by the president or governing body of each college;

(3) two licensees of the Texas State Board of Medical Examiners who are designated by that board;

(4) one licensee of the Board of Nurse Examiners who is designated by that board; and

(5) one licensee of the State Board of Pharmacy who is designated by that board.

(c) Each member of the advisory commission serves at the pleasure of the authority that appointed the member to the advisory commission.

(d) The chair of the advisory commission shall be selected from among the three members of the Board who are licensed doctors of chiropractic.

(e) The members of the advisory commission shall serve without compensation but are entitled to reimbursement for actual expenses incurred in carrying out official duties, subject to the approval of the chair of the advisory commission.

SECTION 18. Section 13a, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 13a. *(a) The practice of chiropractic shall not be construed to include:*

(1) incisive or surgical procedures;

(2) the prescribing of controlled substances or dangerous drugs or any drug that requires a prescription; or

(3) the use of x-ray therapy or therapy that exposes the body to radioactive materials.

(b) In this Act, "incisive or surgical procedure" includes but is not limited to making an incision into any tissue, cavity, or organ by any person or implement. It does not include the use of a needle for the purpose of drawing blood for diagnostic testing. [~~A chiropractor may not use in the chiropractor's practice surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive material.~~]

SECTION 19. Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended by adding Section 13b to read as follows:

Sec. 13b. (a) Notwithstanding any other provision in this Act, the Board shall not adopt a process to certify chiropractors to perform manipulation under anesthesia.

SECTION 20. Section 14a, Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 14a. The Texas Board of Chiropractic Examiners may refuse to admit persons to its examinations and may cancel, revoke or suspend licenses or place licensees upon probation for such length of time as may be deemed proper by the Board for any one or more of the following causes:

1. For failure to comply with, or the violation of, any of the provisions of this Act or of a rule adopted under this Act;

Statement of Senator Orrin G. Hatch
Consideration of S. 784, Dietary Supplement Health and Education Act
August 13, 1994

Mr. President:

This is a momentous day in the United States Senate.

Today, we honor the wishes of 100 million people, consumers of dietary supplements, people who simply want the ability to lead healthy lifestyles without the constant intervention of one tiny agency which is possessed by a regulatory zeal equaling none.

It is entirely appropriate that we consider the Dietary Supplement Health and Education Act today, as the Senate completes another day of debate on the health care reform legislation. For there is no bill which can lead to improved health more than S.784.

The substitute that I offer today embodies the text Of the Dietary Supplement Health and Education Act as approved by the Labor and Human Resources Committee on May 11, with several important changes negotiated by Senator Harkin and myself in response to concerns raised by several Senators immediately prior to the markup.

Our overwhelming consideration in considering this legislation today is that the legislative session is rapidly drawing to a close. The specter of our all-consuming debate in health care reform hangs over us. That debate will surely continue for days, if not weeks.

In the interim, we have a legislative proposal which is cosponsored by 66 Senators, two-thirds of this body, and supported by many, many more. In the House, the counterpart legislation authored by our esteemed colleague, Rep. Bill Richardson, has over 250 cosponsors. Unfortunately, that bill has not been marked up yet, either in Subcommittee or full Committee.

Mr. President, Senate staff has been meeting on almost a daily basis with the staff of Chairmen Dingell and Waxman; we have made some progress, but we have not been able to bring the negotiations to a conclusion after several weeks of discussion.

I am very appreciative of the great amount of time the House staff have devoted to this effort, especially at such a busy time in our legislative agenda. There is no question they have a strong desire to work this out.

Chairman Dingell's most able counsel, Kay Holcombe, one of the best staffers on Capitol Hill in my estimation, and Chairman Waxman's counsel, Bill Schultz, a superb food and drug lawyer, have gone out of their way to make the time for these negotiating sessions. For that, I --and I believe I am speaking for Senator Harkin as well-- owe a great debt of gratitude.

Nevertheless, we have to realize that the situation is very different in the Senate with a bill which has been reported by the Labor and Human Resources Committee on a 13-4 vote. I have the greatest respect for our House colleagues, but I recognize that they do have a differing views about the regulation of products which fall under the purview of the Food and Drug Administration. The issues surrounding the regulation of dietary supplements are tremendously complicated, and there are many details we have to work out.

I want to make very, very clear, that we recognize there will be no final bill without the participation and agreement of our House colleagues. We are not intending to act unilaterally here, but rather to show the Senate's eagerness to move this issue to a conclusion.

EXHIBIT
2

After this amendment passes, as I know it will, I intend that our staffs continue negotiations with the House, in an effort to wrap this up. I will be available any time, day or night, to meet with our House colleagues, as I am sure is the case with Senator Harkin.

This dialogue with the House is one I wish to continue. I want to make that abundantly clear. As I mentioned, the language we offer today differs from the Dietary Supplement Health and Education Act in several crucial ways which I will outline.

As you know, S. 784 makes clear that dietary supplements are not food additives or drugs, and that the burden of proof shall be on the FDA to prove that a product is unsafe. That basic premise does not change.

Drafters of the legislation, though, were criticized for a definition of dietary supplement which some felt was overly broad. We have tried to tighten that up.

Some then believed that the language would allow drugs such as taxol to be marketed in the U.S. as dietary supplements. Senator Harkin and I worked for some time after the markup to resolve that issue, and the language we present today addresses that concern.

Other concerns were raised about the-safety standard in the bill, that is, the standard which FDA uses to gauge whether a product is unsafe and thus should be removed from the market.

I continue to believe that the safety standard in the law is adequate. However, in deference to concerns that FDA may not have the authority to remove potentially dangerous products from the market, we have inserted a provision giving the Secretary emergency authority to act against dietary supplements which pose an imminent and substantial public health hazard. We took this language from a similar provision in the drug law.

Some have argued that this new provision would be ineffective, because the drug language has been in the statute since 1938 and has seldom been utilized.

I look at it the other way. The reason this emergency authority has been seldom used is that the threat of this tool is so effective, it is such a powerful enforcer, that it doesn't need to be utilized to be effective.

Another issue about which much concern was expressed is health claims. Under S. 784 as introduced, dietary supplement health labeling claims would be allowed as long as they are truthful and not misleading and are based on the totality of scientific evidence. Because of FDA's bias against dietary supplements and dietary supplement claims, I was not, and am not, comfortable in allowing the FDA the power to approve claims --simply because they won't approve claims, as history has shown.

However, in deference to concerns raised by several of our colleagues, both on and off the Labor Committee, Senator Harkin and I are willing to consider a fair claims process, on two conditions:

1) that consumers will be guaranteed access to information about dietary supplements through truthful and nonmisleading third-party literature such as journals or newspaper articles;and

2) dietary supplement manufacturers will be able to make so-called "structure/function" or "nutritional support" statements, statements about how a nutrient affects the structure or function of the body.

An example of a structure/function claim is "Calcium builds strong bones." Manufacturers have the right to make such statements under current law, and our bill clarifies that they continue to have this right.

With respect to third-party literature, the Harkin-Hatch compromise states that truthful and nonmisleading information can be provided to consumers in connection with the marketing of dietary supplements, provided that information does not promote any specific product or brand, provided the information is balanced, and provided it is maintained in a location which is physically separate from the products.

It should be emphasized that these new provisions allowing the use of certain independent third-party literature in connection with the sale of dietary supplement products in no way detract from the right of a retail health food store or any other business or person to sell independently both dietary supplements and books or other literature about nutrients.

The United States Court of Appeals for the Second Circuit ruled in United States vs. Sterling Vinegar and Honey ... and an Undetermined Number of Copies of . .Books, 333 F.2d 157 (2nd cir. 1964) that a health food store could, properly, sell both a honey-vinegar product and, separately, books about the purported health- and disease-related benefits of a honey-vinegar combination, without having the books be deemed to be labeling when there was no "integrated use" of the books and the honey-vinegar product by the store. That case remains good law, and nothing in this legislation would change it.

Instead, what the legislation would do would be to permit the use of certain types of third party literature in direct connection with the sale of dietary supplement products. The literature would need to meet certain criteria that would generally establish the independence and reliability of the material, i.e. the bill would require (a)that any such item would need to be "not false or misleading," (b) that it "not promote a particular brand of dietary supplement," (c) that it be displayed or presented so as to present a "balanced view" of the available information, and (d) that if displayed in a location in an establishment, it be displayed "physically separate" from the dietary supplements.

Thus, I want to make clear that our language in no way interferes with the current ability of retailers to maintain a "library" or "literature section" in their stores which contain both reference materials and materials for sale.

A major way in which this amendment differs from the original Dietary Supplement Health and Education Act is in the treatment of health claims.

This amendment makes clear that dietary supplements will be subject to the pre-approval process and standard of the Nutritional Labeling and Education Act for the two year period that a new, independent commission determines the most appropriate process.

This is a major compromise and I was not totally comfortable in agreeing to it. However, I do believe the provision is necessary if we are to get a bill signed this year. As long as the authority is time-limited and Congress has an ability to re-examine it in the future, I believe it is reasonable to include it in our compromise.

Two other changes are important to note.

At the request of our colleague from Washington, Senator Murray, we have included a provision requiring that all dietary supplements be labeled with an expiration date. Senator Murray's suggestion is a good improvement to our bill.

After S. 784 was introduced, the food industry expressed some concern that the language put them at a competitive disadvantage, since dietary supplement claims could be made under a lower standard than those for foods. That situation is not the case under the substitute, since all dietary supplement claims during the two-year period would be subject to the same process and standard as that for foods.

I am aware that some members of this body sought additional provisions relating to foods in this bill. I sincerely regret that we could not bring together consensus on this matter in the Senate. Senator Harkin and I tried very hard and we will keep working to pursue this in the House.

Finally, at the suggestion of Chairman Dingell, the substitute supports the establishment of appropriate dietary supplement Good Manufacturing Practice regulations. Dietary supplements currently are subject to the Good Manufacturing Practices (GMP) requirements for foods.

We believe Chairman Dingell raised a valid point that dietary supplements may require different manufacturing and quality controls and a provision addressing his concern is included.

The substitute continues other provisions contained in our original bill. One of those is the authorization for an office of Dietary Supplements at the National Institutes of Health, so that we can encourage more focus on research into the health benefits of nutritional supplements.

Another is a provision allowing judicial review of FDA warning letters, if the issue giving rising to the letter is not resolved within 60 days. The bill makes clear that the provision only allows manufacturers to go to court to challenge the findings in the warning letter; it does not preclude the FDA from taking any action it finds necessary under law to resolve the situation.

Mr. President, I want to underscore here the wide range of support for this amendment.

Our efforts are supported by groups ranging from Citizens for Health, with chapters all throughout this the nation, to the Alliance for Aging Research, to the Utah Natural Products Alliance. Our substitute is supported by the National Nutritional Foods Association, the Nutritional Health Alliance, and the Council for Responsible Nutrition.

In particular, I want to cite the dedicated efforts of Citizens for Health, whose hundreds of members have worked tirelessly and unselfishly to make this an informed and successful debate. There is no question in my mind that the work of this "citizen army" makes today's victory possible.

Others have worked very closely with us and I want to recognize their special efforts, including the National Council for Improved Health, Michael Onstott and the others at the Alternative Treatment Committee of the AIDS Coalition to Unleash Power (ACT-UP San Francisco) , Dr. Julian Whitaker, a noted physician and president of the American Preventive Medical Association.

Let me also mention the valuable information that has been provided to me by several other individuals, including: the late Royden Brown, a leader in the alternative medicine community; Claire Farr, President of Claire Industries; Ken Murdock, Chairman of Nature's Way; Richard Bizzaro, President of Wieder Foods; and Jeff Henricks, President of Solaray.

Finally, I want to cite the stellar testimony at our hearing by nutritionist and author Patricia Hausman, and by Dr. Michael Janson, who is a fellow and member of the Board of Directors of the American College for Advancement in Medicine and the chairman of their Scientific Advisory Committee.

These people and organizations have all done fabulous work in helping to bring the bill forward to the Senate floor, and I will be counting on them to help Rep. Richardson, Rep. Gallegly and me move the bill through the House as well.

These organizations recognize what two-thirds of the Senate has recognized: for over 30 years, the FDA has pursued a singlehanded regulatory agenda which has stifled the ability of consumers to have access to safe dietary supplements and information about those supplements.

Despite a voluminous scientific record indicating the potential health benefits of dietary supplements, the Food and Drug Administration has pursued a heavy-handed enforcement agenda against nutritional supplements which has forced the Congress to intervene on two previous occasions, and yet again with adoption of this amendment.

In 1962, the FDA published regulations setting minimum and maximum levels for supplements. These regulations were withdrawn in the face of strong citizen protest.

Between 1966 and 1973, the agency issued proposed regulations on the labeling and content of dietary food products. FDA tried to classify vitamins as over-the-counter drugs if the product exceeded 150% of the Recommended Daily Allowance (RDA). Vitamins A and D would have been considered prescription drugs. Combinations of vitamins and minerals would have been prohibited under most circumstances. Congress negated this action in 1976 when it approved the Proxmire/Rogers amendment to the Federal Food, Drug and Cosmetic Act.

Blocked by the Proxmire amendment, later in the 1970s, FDA tried to regulate vitamins by claiming they were toxic, and therefore their potencies could be regulated. The Federal Courts rejected FDA's this attempt to end-run the Proxmire.

In 1980, the FDA issued a proposed Over-the-Counter drug monograph for vitamins and minerals. The document supposedly dealt only with potencies above the RDA, thereby implicitly placing a potency limit on vitamins and minerals. The proposal was withdrawn after strong opposition.

Beginning in the late 1970s, FDA turned from drug potency arguments to enforcement attempts utilizing the "food additive theory' to prohibit the sale of supplements which bore no claims. Essentially, the theory was that any ingredient added to a capsule or tablet rendered the resulting dietary supplement a food additive because the ingredient was added to the capsule or tablet. Under this theory, FDA could not lose, as it needed only to furnish an affidavit from one of its scientists stating that experts generally did not regard the product as safe. The actual safety of the product was never at issue.

Between 1986 and 1990, the FDA issued four "health messages" documents for food products. This reflected FDAs initial policy with respect to the ability of food manufacturers to make limited claims about how a nutrient might prevent certain chronic diseases (such as fiber and cancer) without rendering those drugs products unapproved drugs. FDA left a very narrow area for dietary supplement health messages. The level of proof required for dietary supplement claims was unrealistic in that the degree of scientific consensus and clinical data required eliminated almost all existing supplement claims.

With enactment of the Nutrition Labeling and Education Act (NLEA) of 1990, Congress directed the FDA to use the "significant scientific agreement" standard when deciding if foods could make claims about the relationship of the nutrient to a disease, so-called "health claims." The statute specifically said that the FDA could recommend a different standard and approval procedure for supplements.

In December, 1991, FDA proposed rules implementing the NLEA, but rejected all but one claim for supplements (for calcium/osteoporosis in White and Asian Women) Only one other claim has been approved since that time, the claim for folic acid and neural tube defects, and that claim was only approved after intense public pressure on the FDA.

Twice since 1991, FDA has proposed that it use the same standard and procedure for health claims for foods as on dietary supplements. In 1992, the Congress imposed a one-year moratorium barring FDA from implementing the rule changes for one year. In 1993, the Senate unanimously adopted a second moratorium, but the House did not act on that legislation.

The FDA's policies on dietary supplements have not been sustained in the courts as well. FDA has asserted to Congress that in pursuing food additive allegations against dietary supplement ingredients, it is simply applying the current law in a reasonable manner and restricting its actions to products that present serious safety concerns. Two recent federal judicial decisions, however, show that, in fact, FDA has been distorting the law in its actions to try to prevent the marketing of safe dietary supplement substances.

The FDAs efforts to ban the safe dietary supplement of black currant oil by asserting that it was an unsafe food additive were rejected last year by two unanimous decisions of two different three-judge panels in two different United States Courts of Appeals (United States v. Two Plastic Drums--Viponte Ltd. Black Currant Oil--Traco Labs, Inc., 984 F.2d 814 (7th Cir- 1993); United States v. 29 Cartons of--an Article of Food--Oakmont Investment Co., 987F.2d 33(lst Cir. 1993).

In both of these cases, FDA assered that black currant oil (BCO) was a food additive because it was added to gelatin capsules. The Seventh Circuit noted that "FDA has not shown that BCO is adulterated or unsafe in any way." The Court described the FDA's effort as an "Alice in Wonder-land" approach. Further, the decision by the First Circuit described FDAs approach as "nonsensical."

Despite these two setbacks in the court, the FDA recommended to the Department of Justice that petitions be filed to have these cases overturned in the Supreme Court. The Solicitor General did not file those petitions.

These examples show how the FDA has tried to "protect" the public against "unsafe" products for which there is no evidence that the product is unsafe. The FDA has also acted to restrict the information that the public may receive about dietary supplements. Folic acid is a clear example as was brought out at our Labor Committee hearing last October.

In September, 1992, the Public Health Service issued a recommendation that all women of child-bearing age have adequate folic acid to prevent against birth defects. The Centers for Disease Control had made a similar recommendation one year before.

Despite these two recommendations, and despite the fact that the FDA participated in the PHS proceedings leading up to the announcement, FDA did not issue a regulation proposing approval of a health claim for folic acid until October, 1993, one week before the Committee's hearing on dietary supplements.

Absent approval of a health claim by the FDA, it was illegal for manufacturers or retailers to advise the public about the benefits of folic acid, even though those benefits had been endorsed by the leading federal public health agencies!

If that isn't "significant scientific agreement," ~I don't know what is!

What is ironic about this situation, Mr. President, is that the ONE element of today's health care deliberations on which there is unanimous agreement is the need for preventive health care measures and efforts to increase health promotion and disease prevention.

Unfortunately, millions of Americans do not have healthy diets and their nutrition deficit places them at risk. Senior citizens, pregnant women, infants, children, dieters and smokers are especially vulnerable.

Debate on health care reform in the 103d Congress makes clear that improving the health status of all Americans ranks at the top of our national priorities. It is equally clear that good nutrition, which clinical research has shown to limit the incidence of chronic diseases and reduce health care expenditures, should also be an important national objective.

Today, more than 100 million Americans supplement their diets through the regular or occasional use of vitamins, minerals, herbs, amino acids, or other nutritional substances. We have all heard from these consumers, and we all know how strongly they support this legislation.

Let us remember why this legislation is necessary.

It is not one Senator versus another, nor Democrat versus Republican, nor the Senate versus the House.

It is the United States Congress versus the Food and Drug Administration. It is the majority of the United States Senate versus the continual harassment by one tiny agency which has constantly misled the American public through deliberately false and misleading statements.

It is the 250 members of the House of Representatives against mindless government bureaucracy, against continual over-regulation, against an agency whose guiding principle has always been: "ONE WAY ... THEIR WAY."

Here we are about to enter an unprecedented consideration of the Health Security Act, legislation which attempts to restructure one-seventh of the American economy in the name of good health for our citizens.

Here we are saying we want the American people to be as healthy as they can. Here we are meeting virtually round-the-clock to make this our top priority.

And at the same time, we are letting the FDA stand in the way of 100 million consumers' efforts to make themselves more healthy. It does not make any sense.

If we don't pass this bill and correct the situation, we will be parties to that charge of 'gridlock' our constituents condemn.

There is no disagreement among us that consumers must have access to safe dietary supplements and to information about those supplements.

Any concerns that were raised about this bill, Senator Harkin and I worked very hard to address, as I have outlined.

But let us not kid ourselves. We are starting debate on health care reform this week, and we will not have the opportunity for protracted discussion of the dietary supplement issue.

The Congress has moved a great deal on this issue since Senator Reid and I introduced the original bill last April. All of this progress has been made despite the lack of cooperation by the Food and Drug Administration, an agency which, in my mind, has lied to the American public and the Congress.

And let us not forget that FDA has all the authority in the world to take bad products off the market-they just don't use it.

Critics say that the industry is misleading the public by predicting that the FDA will make dietary supplements prescription drugs, even though the FDA published a proposal soliciting comments on whether certain amino acids and herbs should be drugs.

That regulation has never been withdrawn.

If you are talking about false and misleading statements, Mr. President, the FDA has a corner on the market.

I draw your attention to our Labor Committee hearing last October, when Dr. Kessler and I discussed his agency's report "Unsubstantiated Claims and Documented Health Hazards in the Dietary Supplement Marketplace." I think many of us were astounded to learn of all the inaccuracies FDA made in the name of informing the Congress.

The report was so riddled with error, so flawed, that I think it calls into question the veracity of the officials who prepared it.

--34 of the 528 products on FDA's list simply don't exist.
--142 were assigned to companies that neither manufactured nor sold the product; and
--25 products were listed more than once.

At the hearing, I asked Dr. Kessler to withdraw the report; he did not.

After the hearing, Bill Richardson, Elton Gallegly, and I wrote to Secretary Shalala and asked her to withdraw the report; she did not. She said that the FDA would respond on my specific concerns. They sent me a report signed by a junior official which addressed none of my concerns.

At the hearing, I gave Dr. Kessler every opportunity to redeem his agency's credibility. I repeatedly asked him for documentation of his statements, even though his office had provided me with all the documentation which they said existed.

So, FDA said they would provide it for the record.

Well, that was October 21, 1993, almost one year ago. The record has been printed. Every single copy of the hearing has been snatched up by eager consumers. And still we have received no documentation. And at least ten items that Dr. Kessler promised to follow up on for the record were never supplied.

Dr. Kessler brought the dog and pony show of "bad products" before the Committee. I asked them to leave them so we could examine them and see what type of claims FDA thought were a problem.

Dr. Kessler refused, but said, "Senator, we would be happy to make copies of the labels and give you those."

That was almost a year ago and we're still waiting.

Let me tell you what has happened in those ten months.

FDA has issued its final regulations, regulations so flawed that our only recourse, I believe, is to see them withdrawn.

And while the bureaucrats were over in FDA dotting all the i's and crossing all the t's on these regulations, what were they doing to discharge their authority under the law to protect consumers from false and misleading claims?

What were they doing? Nothing. Zippo. Zip.

You know how many seizures they have recommended against dietary supplement manufacturers since October? Zero.

You know how many prosecutions they have recommended? Zero.

And how many recalls? Just two.

I guess they were expecting us to take action against all those little bottles and boxes they brought up to the hearing, because the FDA sure didn't have any interest in doing so.

So, I go back to my original premise, Mr. President. I have seen the enemy, and it is not anyone in this Chamber!

We have all worked long and hard. We have had to make compromises that none of us would have liked, but we have done it in the name of good public policy.

I urge that we move this issue forward and that we continue our efforts with the House to see a dietary supplement bill enacted as soon as possible.

APR-27-95 THU 01:25 PM
KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
SMALL BUSINESS
ARMED SERVICES
COMMERCE, SCIENCE
& TRANSPORTATION

United States Senate

WASHINGTON, D.C. 20510

January 7, 1994

Mr. Lance Winters

Dear Mr. Winters:

Thank you for contacting me regarding S. 784, the Dietary Supplement Health and Education Act. As you may know, S. 784 was introduced earlier this year by Senator Orrin Hatch, and I have cosponsored it with him.

If the FDA were to classify as drugs a broad array of herbs, vitamins, amino acids, and other diet supplements, it would turn deprive consumers of choices to which they have a right. It would also force those who use such products out of medical necessity, or by choice, to bear the extra costs associated with obtaining products by prescription. None of these consequences are fair, nor can they be justified in terms of the legitimate need to protect public health.

I appreciate hearing from you and hope you will not hesitate to contact me again about any matter of concern to you.

Sincerely,

Kay Bailey Hutchison

KAY BAILEY HUTCHISON
United States Senate

KBH/nfm

EXHIBIT
3

RESOLUTION

WHEREAS, improving the health status of U.S. citizens ranks at the top of Government's priorities;

WHEREAS, the importance of nutrition and the benefits of dietary supplements to health promotion and disease prevention have been documented increasingly in scientific studies;

WHEREAS, preventive health measures, including education, good nutrition, and appropriate use of safe nutritional supplements will limit the incidence of chronic diseases, and reduce long-term health care expenditures;

WHEREAS, recent national surveys have revealed that 60 million Americans regularly consume dietary supplements as a means of improving their nutrition intake and chances of disease prevention,

WHEREAS, the United States will spend over $900,000,000 on health care in 1993 and reduction in health care expenditures is of paramount importance to the future of the country and the economic well-being of the country;

WHEREAS, approximately 12,000 health food retail stores in the U.S. serve 10.5 million customers per week, staff 116,000 employees, pay $1,800,000 in wages, sell approximately 3,400 products with total annual sales of such products of $3,000,000,000; and

WHEREAS, the H.R. 1709 and S.R. 784, the Dietary Supplement Health and Education Act, enjoy bipartisan support; NOW THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

That the Austin City Council urges passage of H.R. 1709 and S.R. 784, the Dietary Supplement Health and Education Act into law; and

BE IT FURTHER RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

That a copy of this resolution be transmitted by the City Clerk to Representative J.J. "Jake" Pickle and Senators Phil Gramm and Kay Bailey Hutchison.

ADOPTED: December 16, 1993 ATTEST: James E. Aldridge
James E. Aldridge
City Clerk

16DEC93
SH/ln
15477

EXHIBIT
4

CHEMISTRIES--EVALUATIONS--TREATMENT

SPECIALTY ITEMS

Sulfite dipstix--Meridian Valley Clinical Labs--1-800-234-6825--Ask for New doctors packet.

Colloidal Minerals--Mortor Systems--Rockland Corporation (Body Booster)--1-800-421-7310.

Ness--Plant Enzymes--(Proteolytic and Pancreatic Enzymes) 1-800-637-7893.

Lithate for Lithium--Biotech.

Progena--Oral Antigen Drops

Mercapturic Acid--Test for Lead Poisoning--Doctors Data--1-800-323-2784.

Acemanin--Treatment for Lupus--Carrington Labs--1-214-717-5009

RPUREALOE--1-800-543-2563 (Saline and aloe are used as a retention enema in patients with ulcerative colitis.)

PRECAUTIONARY INVENTORY

Order these as prescriptions for yourself and give only as a good samaritan! If a patient suffers anaphylactic shock this may save their life. Do not charge for it unless you have a DEA number.

30 cc bottle or aqueous epinephrine.
3 epinephrine pens
Benadryl tablets (25 mg)
100 cc bottle of benedryl as injectable
Tagamet

DIRECTORY OF WHERE TO ORDER INJECTABLE PRODUCTS

Key Co.-- Wanda Munson--A better resource or more knowledgable person will be hard to find. 1-800-325-9592 or 1-800-756-3062.

PRN (Carrier Solutions--IV sets--Winged infusion needles) 1-800-543-2776

Rocky Mountain Labs. Phoenix, Az.--(MIC)-- 1-800-776-5227

BHI--HEEL--ALBA--Homeopathic oral ampules in isotonic solution (may be used as injectable). 1-800-621-7644.

CHP DISTRIBUTING -ELHA PRODUCTS FROM GERMANY-1-800-8751251.

EXHIBIT
5

(iii) proper and safe storage of drugs and devices; and

(iv) maintenance of proper records for drugs and devices. In this subdivision, "device" has the meaning assigned by the Texas Pharmacy Act (Article 4542a–1, Vernon's Texas Civil Statutes).

(12) "Practitioner" means a person licensed:

(A) by the Texas State Board of Medical Examiners, State Board of Dental Examiners, Texas State Board of Podiatric Medical Examiners, Texas Optometry Board, or State Board of Veterinary Medical Examiners to prescribe and administer dangerous drugs;

(B) by another state in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs; or

(C) in Canada or Mexico in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs.

(13) "Prescription" means an order from a practitioner, or an agent of the practitioner designated in writing as authorized to communicate prescriptions, or an order made in accordance with Section 3.06(d)(5) or (6), Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), to a pharmacist for a dangerous drug to be dispensed that states:

(A) the date of the order's issue;

(B) the name and address of the patient;

(C) if the drug is prescribed for an animal, the species of the animal;

(D) the name and quantity of the drug prescribed;

(E) the directions for the use of the drug;

(F) the intended use of the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(G) the name, address, and telephone number of the practitioner at the practitioner's usual place of business, legibly printed or stamped; and

(H) the name, address, and telephone number of the registered nurse or physician assistant, legibly printed or stamped, if signed by a registered nurse or physician assistant.

(14) "Warehouseman" means a person who stores dangerous drugs for others and who has no control over the disposition of the drugs except for the purpose of storage.

(15) "Wholesaler" means a person engaged in the business of distributing dangerous drugs to a person listed in Sections 483.041(c)(1)–(6).

Amended by Acts 1993, 73rd Leg., ch. 351, § 29, eff. Sept. 1, 1993; Acts 1993, 73rd Leg., ch. 789, § 18, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 965, §§ 6, 82, eff. June 16, 1995.

Historical and Statutory Notes

1993 Legislation

Acts 1993, 73rd Leg., ch. 351 added subd. (13)(F).

Acts 1993, 73rd Leg., ch. 789 renumbered former subds. (2), (3) and (4) as (1), (2) and (3), respectively; added a new subd. (4); in subd. (10), inserted "licensed by the board pursuant to Section 29, Texas Pharmacy Act (Article 4542a–1, Vernon's Texas Civil Statutes)"; rewrote subd. (11); and, in subd. (13), added paragraphs (F) and (G).

1995 Legislation

The 1995 amendment, in subd. (4)(C), inserted "or (6)"; in subd. (12)(A), substituted "Podiatric Medical Examiners" for "Podiatry Examiners"; and in subd. (13), rewrote par. (F) and added par. (H). Prior to amendment, subd. (13)(F) read:

"the legibly printed or stamped name, address, Federal Drug Enforcement Administration registration number, and telephone number of the practitioner at the practitioner's usual place of business."

§ 483.003. Board of Health Hearings Regarding Certain Dangerous Drugs

(a) The Texas Board of Health may hold public hearings in accordance with Chapter 2001, Government Code to determine whether there is compelling evidence that a dangerous drug has been abused, either by being prescribed for nontherapeutic purposes or by the ultimate user.

[See main volume for (b)]

Amended by Acts 1995, 74th Leg., ch. 76, § 5.95(49), eff. Sept. 1, 1995.

TECHNICAL STANDARDS COMMITTEE REPORT
MARCH 31, 1994

FIRST ISSUE: I would like to ask to have the Technical Standards Committee Report approved with the recommendations to be reviewed by the Rules Committee with the following recommendations.

1. No Doctor of Chiropractic licensed and practicing in the State of Texas shall administer, prescribe or cause to be used injectable vitamins, minerals, or nutritional supplements until he/she has been certified by a Board approved course as being proficient in the administration and use of said injectables.

2. The curriculum outline is to include, but not limited to :
   - A. Homeopathic, herbal, botanical, or other vitamin products injectable by IM, subcutaneous or IV.
   - B. Trigger point therapy and pain management techniques.
   - C. Patient preparation protocols, safety and hazardous wastes, handling/disposable procedures and OSHA compliance.
   - D. Adverse Reactions Procedures--including training and usage in CPR, local anesthetic technique, emergency medical routing and standard epinephrine anaphylaxis kit.

CCE Standards

SECOND ISSUE: This committee recommends a clarification of Section 13(a). "A chiropractor may not use in the chiropractor's practice surgery, drugs that require a prescription to be dispensed, X-Ray therapy or therapy that exposes the body to radioactive material,

It is my recommendation that the clarification of the term "drug" of Section 13(a) be made to define the intent of the rule by reading: "Drugs (i.e. prescription) means any product, substance, or chemical compound that requires a DEA number and/or is regulated as a controlled substance.

Each year the Board may institute through a Board approved Association, College or curriculum, an ongoing program of proficiency and certification in the use of injectable vitamins, minerals, and nutritional supplements.

EXHIBIT
7

TEXAS STATE BOARD OF PHARMACY

February 14, 1996

RECEIVED
FEB 16 1996
TEXAS BOARD OF
CHIROPRACTIC EXAMINERS

Kevin Raef, D.C.
Chairman, Technical Standards Committee
Texas Board of Chiropractic Examiners
333 Guadalupe, Tower III, Suite 825
Austin, TX 78701

Dear Dr. Raef:

This is in response to your letter concerning how medications are classified and some of the terms associated with medications and their use. Your first three questions will be easier to answer if we combine them.

(1) What are the definitions of drug, controlled substances and dangerous drugs?
(2) How many types of classifications are there?
(3a) What are the differences between scheduled, non-scheduled, legend, and non-legend?

Several of these terms are interchangeable which adds somewhat to the confusion. The term "drug" includes all of the subclasses and will be our starting point.

Drugs

The term "drug" is defined in the Texas Pharmacy Act as:

"(A) a substance recognized as drugs in the current official United States Pharmacopoeia, official National Formulary, official Homeopathic Pharmacopoeia, or other drug compendium or any supplement to any of them;
(B) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;
(C) a substance, other than food, intended to affect the structure or any function of the body of man or other animals;
(D) a substance intended for use as a component of any articles specified in Paragraph (A), (B), or (C) of this subdivision;
(E) a dangerous drug; or
(F) a controlled substance."

So a drug can be seen as virtually anything other than food that affects the body of a man or an animal. Drugs are divided into two major subcategories, non-prescription drugs and prescription drugs.

- **Non-prescription drugs (also called Non-Legend Drugs or OTCs)**
  The term is not defined in the Texas drug laws but obviously is a drug other than a prescription drug or a legend drug. Since these drugs may be obtained over-the-counter (without a prescription) they are often called OTCs.

- **Prescription Drugs (also called Legend Drugs)**
  A prescription drug is a drug that the federal Food and Drug Administration (FDA) has determined is unsafe for self use. FDA identifies prescription drugs by requiring that the label of such a drug contain the legend "*Caution: federal law prohibits dispensing without prescription.*" As a result of this required federal legend, prescription drugs are often called "legend drugs." Prescription drugs are further divided into two subcategories, dangerous drugs and controlled substances.

  - **Dangerous Drugs (also called Non-Controlled Drugs or Non-Scheduled Drugs)**
    The term "dangerous drug" is defined in the Texas Dangerous Drug Act as:

    > "a device or a drug that is unsafe for self-medication and that is not included in Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend:
    > (A) "*Caution: federal law prohibits dispensing without prescription;*" or
    > (B) "*Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.*"

    Thus, a dangerous drug is a prescription drug other than a controlled substance. Since controlled substances are classified into schedules as we will discuss next, dangerous drugs are also called non-scheduled drugs.

  - **Controlled Substances (also called Scheduled Drugs or Controlled Drugs)**
    The term "controlled drug" is defined in the Texas Controlled Substances Act as:

    > "a substance, including a drug and an immediate precursor, listed in Schedules I through V or Penalty Groups 1 through 4."

Controlled substances are those drugs which have a potential for abuse and/or psychic or physical dependence. The federal government through the Drug Enforcement Administration (DEA) classifies a drug as a controlled substance and places each drug into one of five Schedules depending on abuse potential, hence the term scheduled drug. Although the State of Texas may do the same thing, it seldom exercises this authority and relies on the federal scheduling.

The five Schedules include:

Schedule I	No accepted medical use in the U.S. and a high abuse potential
Schedule II	An accepted medical use in the U.S. and a high abuse potential
Schedule III	An abuse potential less than in Schedule I and II
Schedule IV	An abuse potential less than in Schedule III
Schedule V	An abuse potential less than in Schedule IV

Outline Summary of Drug Classifications

Drugs

I. Non-prescription drugs (Non-Legend Drugs, OTCs)
II. Prescription Drugs (Legend Drugs)
    A. Dangerous Drugs (Non-Controlled Drugs, Non-Scheduled Drugs)
    B. Controlled Substances (Scheduled Drugs, Controlled Drugs)
        1. Schedule I
        2. Schedule II
        3. Schedule III
        4. Schedule IV
        5. Schedule V

(3b) Is there a list available of those drugs and their classifications?

The required labeling on the container immediately identifies the classification of a drug within this outline. Of course, without the container in hand we must refer to other resources. An easily obtained resource which gives prescription classifications is the *Physician's Desk Reference* (PDR). This reference indicates all dangerous drugs with an "Rx" and all controlled substances with a "C and a number indicating the schedule" (e.g., C-IV). The PDR also has a much smaller reference called the *Physician's Desk Reference for Nonprescription Drugs*. The PDR can often be found in the larger bookstores. An order form has been enclosed to order direct from Medical Economics.

(4) What is the difference between prescribe, inject and/or administer?

The term "prescribe" is not defined in the Texas Dangerous Drug Act or the Texas Pharmacy Act. It is however, generally taken to mean the act of a practitioner to authorize a drug to be administered or dispensed. Definitions for the terms "administer" and "dispense" are found in the Texas Pharmacy Act as follows.

> "*Administer* means the direct application of a prescription drug by injection, inhalation, ingestion, or any other means to the body of a patient by:
> (A) a practitioner, an authorized agent under his supervision, or other person authorized by law; or
> (b) the patient at the direction of a practitioner."
>
> "*Dispense* means preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner."

Essentially the difference between these two terms is that dispensing involves giving the patient a supply of a drug which leaves with the patient for their future self administration. The term "inject" is not defined separately in the Texas Pharmacy Act but is contained within the definition of the term "administer."

(5) Is there a "generic" use of the term prescription vs. the "legislative" use?

Although the term "prescription" may be abused by the public or even health care providers, with respect to its use with respect to medications, the Texas Dangerous Drug Act and the Texas Controlled Substances Act are very specific as to its meaning. For example, the Texas Dangerous Drug Act defines the term prescription as:

> "an order from a practitioner, or an agent of the practitioner designated in writing as authorized to communicate prescriptions, or an order made in accordance with Section 3.06(d)(5) or (6), Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), to a pharmacist for a dangerous drug to be dispensed that states:
> (A) the date of the orders issue;
> (B) the name and address of the patient;
> (C) if the drug is prescribed for an animal, the species of the animal;
> (D) the name and quantity of the drug prescribed;
> (E) the directions for the use of the drug;
> (F) the intended use of the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(G) the name, address, and telephone number of the practitioner at the practitioner's usual place of business, legibly printed or stamped; and
(H) the name, address, and telephone number of the registered nurse or physician assistant, legibly printed or stamped, if signed by a registered nurse or physician assistant."

A very similar definition appears in the Texas Controlled Substances Act.

Given proper lead time, we will be happy to offer the services of one of our staff as a resource when this information is discussed. If I may be of further assistance, please contact me.

Sincerely,

Fred S. Brinkley, Jr., R.Ph., M.B.A.
Executive Director/Secretary

Enclosure

cc: Patty Kent
Executive Director
Texas Board of Chiropractic Examiners

BOARD OF NURSE EXAMINERS
FOR THE STATE OF TEXAS

1909 86 YEARS 1995

Mailing Address:
BOX 140466
AUSTIN, TEXAS 78714

333 GUADALUPE, SUITE 3-460
AUSTIN, TEXAS 78701•512/305-7400

KATHERINE A. THOMAS, MN, RN
EXECUTIVE DIRECTOR

January 9, 1996

Patte B. Kent
Executive Director
Board of Chiropractic Examiners
333 Guadalupe, Suite 825
Austin, Texas 78701

Dear Ms. Kent:

This is in response to your question concerning whether a Certified Registered Nurse Anesthetist (CRNA) may administer any drugs and apply any devices in an emergency situation.

I presume an emergency situation is one in which the life of the client is threatened and the CRNA is the provider with the highest level of education and skill in the specific presenting situation. In this case, the CRNA would be expected to do whatever he/she was capable of doing to save a life.

I hope this information is helpful. If you have further questions, you may reach me at 305-6810.

Sincerely,

Kathy Thomas

Kathy Thomas, MN, RN
Executive Director

KT/

BOARD OF NURSE EXAMINERS
FOR THE STATE OF TEXAS

1909 86 YEARS 1995

Mailing Address:
BOX 140466
AUSTIN, TEXAS 78714

333 GUADALUPE, SUITE 3-460
AUSTIN, TEXAS 78701•512/305-7400

KATHERINE A. THOMAS, MN, RN
EXECUTIVE DIRECTOR

MEMORANDUM

TO: Patte B. Kent

FROM: Kathy Thomas KT.

DATE: January 8, 1996

I am enclosing copies of rule 221, Advanced Practice Nurses and rule 222, Advanced Practice Nurses Limited Prescriptive Authority for you to share with your board member. Please note the highlighted 222.6, page H-5.

If you or your board member have specific questions, please feel free to call me at 305-6810. (I will be attending our board meeting on January 10 and 11.)

KT:ief

Enclosures

Box 140466
Austin, Texas 78714

§221.1. Definitions. The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

"Advanced Practice Nurse (APN)" - A registered professional nurse, currently licensed in the State of Texas, who is prepared for advanced nursing practice by virtue of knowledge and skills obtained in an advanced educational program of study acceptable to the board. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services.

"Advanced educational program" - A post-basic advanced practice nurse program at the certificate or master's degree level.

"Authorization to practice" - The process of reviewing the educational, licensing, certification and other credentials of the registered nurse to determine compliance with the board's requirements for approval as an advanced practice nurse.

"Board" - The Board of Nurse Examiners for the State of Texas.

"Current certification" - Initial certification and maintenance of certification by certifying bodies recognized by the board.

"Current practice" - Maintaining competence as an advanced practice nurse by practicing as a clinician, educator, consultant or administrator.

"Protocols/policies/practice guidelines" - Written authorization to initiate medical aspects of patient care which are agreed upon and signed by the advanced practice nurse and the physician, reviewed and signed at least biennially, and maintained in the practice setting of the advanced practice nurse.

"Shall" and "must" - Mandatory requirements.

"Should" - A recommendation.

§221.2. Titles.

(a) Registered professional nurses holding themselves out to be advanced practice nurses may include, but not be limited to, the following:

(1) nurse anesthetist,

(2) nurse midwife,

(3) nurse practitioner,

(4) clinical nurse specialist,

(5) and other titles as approved by the board.

(b) Titles with specialization as stated in subsection (a) of this section must be approved by the board.

(c) "Advanced practice nurse" shall not be used as a title. Advanced practice nurses shall use titles for identification which reflect advanced educational preparation and are authorized by the board, i.e., certified nurse midwife, pediatric nurse practitioner.

§221.3. Education. The registered professional nurse practicing as an advanced practice nurse shall have completed an advanced educational program of study appropriate to the practice area which meets the following criteria.

(1) The program of study shall meet the requirements for advanced nurse practitioner programs according to §§219.1 - 219.14, Advanced Nurse Practitioner Program of this title (relating to Definitions, New Programs, Accreditation, Philosophy and Objectives, Administration and Organization, Faculty Qualification, Change of Director, Faculty Policies, Faculty Development and Evaluation, Program of Study, Curriculum, Curriculum Change, Students, and Educational Resources and Facilities).

(2) Programs of study in the State of Texas shall be accredited by the board or a national accrediting body recognized by the board.

(3) Programs of study in states other than Texas must meet the requirements of Chapter 219 of this title (relating to Advanced Nurse Practitioner Program) and shall be accredited by the appropriate licensing body in that state or be accredited by a national accrediting body recognized by the board.

(4) The program of study shall be at least one academic year in length which may include a formal preceptorship.

§221.4. Requirements for Initial Authorization to Practice.

(a) The registered professional nurse who seeks authorization to practice as an advanced practice nurse must:

(1) hold a current, valid license as a registered nurse in the State of Texas;

(2) submit to the board such evidence as required by the board to insure compliance with §221.3 of this title (relating to Education);

(3) attest, on forms provided by the board, to having the minimum of 400 hours of current practice within the preceding biennium unless the applicant has

graduated from an advanced practice program within the preceding biennium; (This section is effective January 1, 1996.)

(4) attest, on forms provided by the board, to having obtained 20 contact hours of continuing education in the advanced specialty area and role recognized by the board every two years. Continuing education in the advanced practice specialty and role must meet requirements of §217.15 of this chapter (relating to Continuing Education.) The 20 contact hours required for RN licensure may be met by the 20 hours required by this subsection; (This section is effective January 1, 1996.) and

(5) submit the required credentialing fee, which is not refundable.

(b) The registered professional nurse who seeks authorization to practice as an advanced practice nurse who graduated from an advanced practice program on January 1, 1996, and thereafter, must also submit to the board such evidence as required by the board to insure the applicant holds current certification as an advanced practice nurse in an advanced nursing specialty and role recognized by the board. Such certification must be granted by a national certification body recognized by the board. If an appropriate certification examination is not available for the specific specialty and role or a related area of specialty practice within the role, the applicant may petition the board for waiver from the certification requirement according to §221.5(2) of this title (relating to Petitions for Waiver). New graduates refer to §221.7 of this title (relating to New Graduates). (This section is effective January 1, 1996.)

(c) Registered professional nurses who wish to be approved by the board for more than one title shall complete additional education in the desired area(s) of approval in compliance with §221.3 of this title (relating to Education) or obtain certification in the additional area(s) by a national organization, whose certification examination has been recognized by the board. To apply for approval for more than one title, the registered professional nurse shall submit a separate application and fee for each desired title of approval.

(d) After review by the board, notification of acceptability of credentials and a certificate verifying approval shall be sent to the advanced practice nurse.

(e) Only those registered professional nurses whose credentials have been approved by the board may hold themselves out to be advanced practice nurses and/or use titles to imply that they are advanced practice nurses.

§221.5. Petitions for Waiver. A registered professional nurse who submits a request for waiver from requirements of these rules as set forth in this section must submit documentation as required by the board to support his or her petition and assure the board that he or she possesses the knowledge, skills and abilities appropriate for the role and specialty desired. Those petitioners who are under investigation or current board order are not eligible for waiver.

(1) Petitions for waiver from the program accreditation requirements of §221.3(2) and (3) of this title (relating to Education), may be granted by the board for

individuals who completed their educational programs during or before 1978. Petitioners must meet the length of academic program requirements of §221.3(4) of this title (relating to Education).

(2) Petitions for waiver from the current certification requirements of §221.4(b) of this title (relating to Requirements for Initial Authorization to Practice) and §221.8(a) (1) of this title (relating to Maintaining Authorization as an Advanced Practice Nurse) may be granted by the board.

(A) Under this section, only those petitioners who have no national certification examination available within their role and specialty or a related advanced specialty will be considered for waiver by the board under this section.

(B) The board may determine that available national examinations must be taken in lieu of an examination specifically related to the specialty.

§221.6. Interim Approval. Interim approval may be granted by the board pending completion of the application process for a period not to exceed 90 days.

(1) The registered professional nurse seeking interim approval must complete an affidavit provided by the board verifying that he/she meets all requirements of this chapter and has completed and mailed the application to the appropriate educational program or organization for completion of the Evidence of Completion of an Advanced Nurse Practitioner Program.

(2) A letter shall be issued by the board granting interim approval.

(3) An applicant is eligible for interim approval one time only.

§221.7. New Graduates. A registered professional nurse who has completed advanced formal education as required by §221.3 of this title (relating to Education) and registered for the first available board approved national certification examination within two years of graduation from the program may be issued a temporary authorization to practice as a Graduate Advanced Practice Nurse pending notification of the results of the certification examination.

(1) The applicant for advanced practice nurse recognition shall be given no more than three opportunities in the first two years after graduation to pass the certification examination.

(2) Failure to pass the examination after three attempts or failure to pass the exam within two years of eligibility will render the applicant ineligible to practice in the advanced practice role. In this case, the applicant must immediately return the authorization to practice document to the board's office. (This section becomes effective January 1, 1996.)

§221.8. Maintaining Authorization as an Advanced Practice Nurse.

(a) The registered professional nurse seeking to maintain authorization as an advanced practice nurse shall, in conjunction with RN license renewal:

(1) provide evidence of current national certification or certification maintenance by the appropriate certifying body recognized by the board, if graduated from an advanced practice nurse program on or after January 1, 1996. A copy of the certification or certification maintenance document shall be presented at the time of the renewal and with each subsequent renewal;

(2) attest, on forms provided by the board, to having a minimum of 400 hours of current practice within the preceding biennium (effective January 1, 1996);

(3) attest, on forms provided by the board, to having obtained 20 contact hours of continuing education in the specialty area and role every two years. Continuing education in the advanced practice specialty and role must meet requirements of §217.15 of this chapter (relating to Continuing Education). The 20 contact hours required for RN licensure may be met by the 20 hours required by this subsection (effective January 1, 1996); and

(4) submit the required recredentialing fee, which is not refundable.

(b) Failure to renew the registered nurse license or to provide the required documentation for maintaining authorization shall result in expiration of the board's approval as an advanced practice nurse.

§221.9. Inactive Status.

(a) The advanced practice nurse may choose to change advanced practice nurse status to inactive by providing a written request for such change.

(b) Inactive advanced practice status means that the registered professional nurse may not practice in the advanced practice specialty and role and may not hold himself/herself out to be an advanced practice nurse by using titles defined by §221.2 of this title (relating to Titles).

§221.10. Reinstatement or Reactivation of Advanced Practice Nurse Status.

(a) To reinstate an approval which has expired due to non-payment of renewal fees for registered nurse licensure or to reactivate advanced practice nurse authorization to practice, the advanced practice nurse shall meet the requirements as stated in §221.8 of this title (relating to Maintaining Authorization as an Advanced Practice Nurse) and pay all required fees.

(b) If more than four years have lapsed since completion of the advanced practice educational program and/or the applicant has not practiced in the advanced role during the previous four years, the applicant shall reapply and meet current

requirements for authorization to practice under §221.4 of this title (relating to Requirements for Initial Authorization to Practice) and shall:

(1) hold a current Texas registered nurse license; and

(2) successfully complete a refresher course or extensive orientation in the appropriate advanced practice specialty and role which includes a supervised clinical component. The instructor/sponsor must provide written verification of satisfactory completion of the course/orientation on forms provided by the board.

§221.11. Identification. The advanced practice nurse shall wear a name tag which identifies her or him as a registered nurse with the appropriate title approved by the board (i.e., nurse anesthetist, nurse midwife, nurse practitioner or clinical nurse specialist) as stated in §221.2 of this title (relating to Titles).

§221.12. Functions.

(a) The advanced practice area of the advanced practice nurse shall be appropriate to his/her advanced educational preparation.

(b) The advanced practice nurse acts independently and/or in collaboration with the health team in the observation, assessment, diagnosis, intervention, evaluation, rehabilitation, care and counsel, and health teachings of persons who are ill, injured or infirm or experiencing changes in normal health processes; and in the promotion and maintenance of health or prevention of illness.

(c) Advanced practice nurses must utilize mechanisms which provide medical authority when such mechanisms are indicated. These mechanisms may include but are not limited to protocols/policies/practice guidelines or other orders. This shall not be construed as requiring authority for nursing aspects of care.

(1) When protocols/policies/practice guidelines are used to provide such authorization they should be jointly developed by the advanced practice nurse and appropriate physician(s) and signed by both the nurse and the physician(s). These protocols/ policies/practice guidelines shall be reviewed at least biennially.

(2) The scope and detail of said protocols/policies/practice guidelines may vary in relation to the complexity of the situations covered and the area of practice and educational preparation of the individual advanced practice nurse.

(d) The functions of the advanced practice nurse must be authorized by the Nursing Practice Act and other applicable state laws.

§221.13. Scope of Practice. The advanced practice nurse provides a broad range of personal health services, the scope of which shall be based upon educational prepara-

tion, continued experience and the accepted scope of professional practice of the particular specialty area.

§221.14. Enforcement.

(a) The board may conduct an audit to determine compliance with §221.4 of this title (relating to Requirements for Initial Authorization to Practice) and §221.8 of this title (relating to Maintaining Authorization as an Advanced Practice Nurse).

(b) Any nurse who violates these rules shall be subject to disciplinary action and/or termination of the authorization by the board under Texas Civil Statutes, Article 4525.

These rules became effective June 7, 1995 following the repeal of §§221.1-221.10, Advanced Nurse Practitioners.

§222.1. Definitions. The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Advanced practice nurse (APN)" formerly known as "Advanced Nurse Practitioner (ANP)" - A registered professional nurse, currently licensed in the State of Texas, who is prepared for advanced nursing practice by virtue of knowledge and skills obtained through a post-basic or advanced educational program of study acceptable to the board. The advanced practice nurse is prepared to practice in an expanded role to provide health care to individuals, families, and/or groups in a variety of settings including but not limited to homes, hospitals, institutions, offices, industry, schools, community agencies, public and private clinics, and private practice. The advanced practice nurse acts independently and/or in collaboration with other health care professionals in the delivery of health care services. APNs include Nurse Practitioners, Nurse Midwives, Nurse Anesthetists and Clinical Nurse Specialists.

"Eligible sites" - Sites serving medically underserved populations; a physician's primary practice site; or facility based practices at a licensed long term care facility or hospital.

"Board" - The Board of Nurse Examiners for the State of Texas.

"Carrying out or signing a prescription drug order" - Completion of a prescription drug order presigned by the delegating physician, or the signing of a prescription by an APN after the APN has been designated with the Board of Medical Examiners by the delegating physician(s) as a person delegated to sign prescriptions.

"Dangerous drug" - A device or a drug that is unsafe for self medication and that is not included in schedules I-V or penalty groups I-IV of chapter 481 Texas Health and Safety Code (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend: "Caution: federal law prohibits dispensing without prescription."

"Facility-based practice" - An APN's practice which is based at a licensed hospital or licensed long term care facility.

"Health Professional Shortage Area (HPSA)" - An area, population group, or facility designated by the United States Department of Health and Human Services (USDHHS) as having a shortage of primary care physicians.

"Medically Underserved Area (MUA)" - An area or population group designated by the USDHHS as having a shortage of personal health services; or an area defined by rule adopted by TDH that is based on demographics specific to this State, geographic factors that affect access to health care, and environmental health factors.

"Pharmacotherapeutics" - A course that offers content in pharmacokinetics and pharmacodynamics, pharmacology of current/commonly used medications, and the application of drug therapy to the treatment of disease and/or the promotion of health.

"Physician's primary practice site" - Any one of the following:

(A) the practice location where the physician spends the majority of his/her time;

(B) a licensed hospital, a licensed long-term care facility or a licensed adult care center where both the physician and the APN are authorized to practice, or an established patient residence; or

(C) where the physician is physically present with the APN.

"Protocols/or other orders" - Written authorization to initiate medical aspects of patient care which are agreed upon and signed by the APN and the physician, reviewed and signed at least annually, and maintained in the practice setting of the APN. Protocols/or other orders shall be defined to promote the exercise of professional judgement by the APN commensurate with his/her education and experience. Such protocols/or other orders need not describe the exact steps that the APN must take with respect to each specific condition, disease, or symptom and may state types or categories of drugs which may be prescribed rather than list specific drugs.

"Rural health clinic" - A clinic designated as a rural health clinic under the Rural Health Clinic Services Act of 1977 (Public Law No. 95-210); the designation is made by the Health Care Financing Administration (HCFA) of the USDHHS.

"Shall" and "must" - Mandatory requirements.

"Should" - A recommendation.

"Sites serving medically underserved populations" - A medically underserved area, a health professional shortage area, a rural health clinic, a public health clinic or family planning clinic under contract with the Texas Department of Health (TDH) or Texas Department of Human Services (TDHS) or other site approved by the TDH.

§222.2. Application for Approval.

(a) To be approved by the board to carry out or sign prescription drug orders and issued a prescription authorization number, a Registered Nurse (RN) shall satisfactorily complete the following requirements:

(1) the RN shall be approved by the board as an APN; and

(2) the APN shall submit to the board the application for Limited Prescriptive Authority and the appropriate documentation of the necessary education, training, and

current skills, to include pharmacotherapeutics, as determined by the board to carry out or sign prescription drug orders.

(b) The APN shall renew the privilege to carry out or sign prescription drug orders in conjunction with the RN license renewal application.

§222.3. Renewal of Limited Prescriptive Authority.

(a) The APN seeking to maintain prescriptive authority shall attest, on forms provided by the board, to completing at least five contact hours of continuing education in pharmacotherapeutics within the preceding biennium.

(b) The continuing education requirement in subsection (a) of this section, shall be in addition to continuing education required under rule 217.15 of this title (relating to Continuing Education).

§222.4. Functions.

(a) The APN with a valid prescription authorization number may carry out or sign prescription drug orders under the following conditions:

(1) The APN carries out or signs prescription drug orders in an eligible site.

(2) The prescription drug order is carried out or signed in accordance with protocols, standing delegation orders, standing medical orders, practice guidelines or other physician orders for medical aspects of patient care including prescription drug orders.

(3) The APN carries out or signs prescription drug orders under physician supervision which consists of the following and the additional supervision requirements set out in Board of Medical Examiners (BME) Rule §193.8 (relating to Delegation of the Carrying Out or Signing of Prescription Drug Orders to Physician Assistants and Advanced Practice Nurses):

(A) at a site serving medically underserved populations, the physician visits the site at least once a week; the physician receives daily reports from the APN regarding complications encountered; and the physician is available for consultation by direct telecommunications;

(B) at a physician's primary practice site, the physician is limited to delegation to three full time equivalent APNs; the physician may delegate the carrying out or signing of a prescription drug order for patients with whom the physician has established or will establish a physician-patient relationship but no time period to establish this relationship is required;

(C) at a facility-based practice, where the delegating physician is the medical director, chief of staff, credentialing committee chair, department chair or physician who consents to a request by the medical director or chief of staff; protocols

or other orders must be developed in accordance with policies approved by the medical staff; the APN writing prescriptions for patients of physicians, other than the delegating physician, must have the approval of the patient's physician; delegation in long term care facilities is limited to three full time equivalent APNs; and the physician must have the approval of the BME to delegate at more than one licensed hospital or more than two long term care facilities.

(4) The APN maintains appropriate documentation of physician supervision, patient records, and protocols which should comply with rules adopted by the BME.

(b) The APN with a valid prescription authorization number may carry out or sign prescription drug orders by providing the following information on the prescription:

(1) the patient's name and address;

(2) the drug to be dispensed;

(3) directions to the patient in regard to the taking and the dosage;

(4) the intended use of the drug, if appropriate;

(5) the name, address, and telephone number of the physician;

(6) the name, address, telephone, and identification number of the APN completing or signing the prescription drug order;

(7) the date; and

(8) the number of refills permitted.

(c) The format and essential elements of the prescription shall comply with the requirements of the rules of the Board of Pharmacy.

(d) The medications which can be carried out or signed by the APN through prescription drug orders shall be those drugs classified as dangerous drugs and shall be limited to those categories of drugs identified in protocol or other order.

(e) The APN with a valid prescription authorization number may request, receive, possess and distribute prescription drug samples provided:

(1) protocols or other physician orders authorize the APN to sign the prescription drug orders;

(2) all requirements for the APN to sign prescription drug orders are met;

(3) the samples are dangerous drugs only; and

(4) a record of the sample is maintained and samples are labeled as specified in the Dangerous Drug Act (Health and Safety Code, Chapter 483).

§222.5. Nurse Midwives Administering or Providing Controlled Substances. A nurse midwife recognized by the board may administer or provide one or more unit doses of a controlled substance during intra-partum or immediate post-partum care subject to the following conditions:

(1) physician delegation must be made through protocols or other physician orders;

(2) delegation is limited to three full-time equivalent nurse midwives at the designated facility where the nurse midwife practices; and

(3) providing is limited to the immediate needs of the patient not to exceed 48 hours.

§222.6. Nurse Anesthetist Authorization to Select, Obtain, Order, Administer and/or Utilize Drugs, Devices and Anesthesia Techniques in the Provision of Anesthesia and Anesthesia-Related Services.

(a) In a licensed hospital or ambulatory surgical center, consistent with facility policy or medical staff bylaws, a nurse anesthetist may select, obtain and administer drugs, including determination of appropriate dosages, techniques and medical devices for their administration and in maintaining the patient in sound physiologic status pursuant to a physician's order for anesthesia or an anesthesia-related service. This order need not be drug-specific, dosage specific, or administration-technique specific.

(b) Pursuant to a physician's order for anesthesia or an anesthesia-related service, the nurse anesthetist may order anesthesia-related medications during perianesthesia periods in the preparation for or recovery from anesthesia. Another RN may carry out these orders.

(c) In providing anesthesia or anesthesia-related service, the nurse anesthetist shall select, order, obtain and administer drugs which fall within categories of drugs generally utilized for anesthesia or anesthesia-related services and provide the concomitant care required to maintain the patient in sound physiologic status during those experiences.

§222.7. Enforcement.

(a) Any nurse who violates these rules shall be subject to removal of the authority to prescribe under this rule and disciplinary action by the board under Article 4525, Texas Civil Statutes.

(b) The practice of the APN approved by the board to carry out or sign prescription drug orders is subject to monitoring by the board on a periodic basis.

Repeal and New Rules Adopted 12/95.

TEXAS STATE BOARD OF PHARMACY

December 29, 1995

Patte Kent
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe Street, Suite 3-825
Austin, Tx 78701

Dear Ms. Kent:

This is in reply to your question concerning the prescription status of injectable drugs. Of specific concern were injectable dosage forms of vitamins (e.g., vitamin B-12), sterile water for injection, and sterile saline for injection.

The proper method to identify a product as a prescription drug is to examine the product's labeling rather than consider the dosage form of the drug. Section 483.001(2) of the Texas Dangerous Drug Act (Health and Safety Code, Chapter 483), a copy of which is enclosed, defines the term "*dangerous drug*" as:

> a device or a drug that is unsafe for self-medication and that is not included in Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear:
>
> (A) "*Caution: federal law prohibits dispensing without prescription.*" or
>
> (B) "*Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.*" (emphasis added)

The federal Food, Drug, and Cosmetic Act requires all prescription drugs for human use, including injectable drugs, to bear the statement, "*Caution: federal law prohibits dispensing without prescription.*" Therefore, as defined in the Texas Dangerous Drug Act, all prescription drugs for human use except controlled substances, are dangerous drugs in Texas.

Additionally, Section 483.041 of the Texas Dangerous Drug Act specifies who may legally possess dangerous drugs in Texas. Unfortunately, chiropractors are not included, nor are they included in the definition of the term "*practitioner*" as defined in Section 483.001(12) of the Act. In addition, Section 483.042 of the Texas Dangerous Drug Act indicates who may legally

William P. Hobby Building, Ste. 3-600 • 333 Guadalupe Street, Box 21 • Austin, Texas 78701-3942 • 512-305-8000 (voice) • 512-305-8075 (fax)

deliver a dangerous drug to a patient. Again, chiropractors are not included. Please note that an offense under Section 483.041 or 483.042 is a felony of the third degree.

We have talked to representatives of the Federal Food and Drug Administration and the Texas Department of Health, Division of Food and Drug Safety. Both indicate that virtually all products intended for injection into humans are prescription drugs and bear the federal caution statement. This includes the products specifically mentioned (injectable dosage forms of vitamins (e.g. vitamin B-12), sterile water for injection, and sterile saline for injection). The only over-the-counter, injectable product for human use that can be readily identified by either agency is insulin, a drug used for the management of diabetes.

Although we are able to say that most, but not all, injectable drugs for human use are prescription products, the proof is on the label. If I may be of further assistance, please contact me.

Sincerely,

Steve Morse, R.Ph.
Assistant Director of Compliance

Enclosure

c: Fred S. Brinkley, Jr., R.Ph., M.B.A.
Executive Director/Secretary

Gay Dodson, R.Ph.
Director of Compliance

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DANGEROUS DRUGS

SUBCHAPTER A.
GENERAL PROVISIONS.

SUBCHAPTER B.
DUTIES OF PHARMACISTS, PRACTITIONERS, AND OTHER PERSONS.

SUBCHAPTER C.
CRIMINAL PENALTIES.

Note: A *"change bar"* in the left margin indicates rules or laws that have been amended or adopted since publication of the previous (2/29/92) edition of *Texas Pharmacy Laws and Regulations*.

SUBCHAPTER D.
CRIMINAL AND CIVIL PROCEDURE.

Note: A *"change bar"* in the left margin indicates rules or laws that have been amended or adopted since publication of the previous (2/29/92) edition of *Texas Pharmacy Laws and Regulations.*

DANGEROUS DRUGS.

SUBCHAPTER A.
GENERAL PROVISIONS.

Sec. 483.0001. Short Title.

This Act may be cited as the Texas Dangerous Drug Act.

Acts 1993, 73rd Leg., ch. 789, §18, eff. Sept. 1, 1993.

Sec. 483.001. Definitions.

In this chapter:

(1) *"Board"* means the Texas State Board of Pharmacy.

(2) *"Dangerous drug"* means a device or a drug that is unsafe for self-medication and that is not included in Penalty Groups 1 through 4 of Chapter 481 (Texas Controlled Substances Act). The term includes a device or a drug that bears or is required to bear the legend:

(A) *"Caution: federal law prohibits dispensing without prescription;"* or

(B) *"Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."*

(3) *"Deliver"* means to sell, dispense, give away, or supply in any other manner.

(4) *"Designated agent"* means:

(A) a licensed nurse, physician assistant, pharmacist, or other individual designated by a practitioner to communicate prescription drug orders to a pharmacist;

(B) a licensed nurse, physician assistant, or pharmacist employed in a health care facility to whom the practitioner communicates a prescription drug order; or

(C) a registered nurse or physician assistant authorized by a practitioner to carry out a prescription drug order for dangerous drugs under Section 3.06(d)(5), Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes).

(5) *"Dispense"* means to prepare, package, compound, or label a dangerous drug in the course of professional practice for delivery under the lawful order of a practitioner to an ultimate user or the user's agent.

(6) *"Manufacturer"* means a person, other than a pharmacist, who manufactures dangerous drugs. The term includes a person who prepares dangerous drugs in dosage form by mixing, compounding, encapsulating, entableting, or any other process.

(7) *"Patient"* means:

(A) an individual for whom a dangerous drug is prescribed or to whom a dangerous drug is administered; or

(B) an owner or the agent of an owner of an animal for which a dangerous drug is prescribed or to which a dangerous drug is administered.

(8) *"Person"* includes an individual, corporation, partnership, and association.

(9) *"Pharmacist"* means a person licensed by the Texas State Board of Pharmacy to practice pharmacy.

(10) *"Pharmacy"* means a facility licensed by the board pursuant to Section 29, Texas Pharmacy Act (Article 4542a-1, Vernon's Texas Civil Statutes).

(11) *"Practice of pharmacy"* means:

(A) provision of those acts or services necessary to provide pharmaceutical care;

(B) interpretation and evaluation of prescription drug orders or medication orders;

(C) participation in drug and device selection as authorized by law, drug administration, drug regimen review, or drug or drug-related research;

(D) provision of patient counseling; and

(E) responsibility for:

(i) dispensing of prescription drug orders or distribution of medication orders in the patient's best interest;

(ii) compounding and labeling of drugs and devices, except labeling by a manufacturer, repackager, or distributor of nonprescription drugs and commercially packaged prescription drugs and devices;

(iii) proper and safe storage of drugs and devices; and

(iv) maintenance of proper records for drugs and devices. In this subdivision, *"device"* has the meaning assigned by the Texas Pharmacy Act (Article 4542a-1, Vernon's Texas Civil Statutes).

(12) *"Practitioner"* means a person licensed:

(A) by the Texas State Board of Medical Examiners, State Board of Dental Examiners, Texas State Board of Podiatry Examiners, Texas Optometry Board, or State Board of Veterinary Medical Examiners to prescribe and administer dangerous drugs;

(B) by another state in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs; or

(C) in Canada or Mexico in a health field in which, under the laws of this state, a licensee may legally prescribe dangerous drugs.

(13) *"Prescription"* means an order from a practitioner, or an agent of the practitioner designated in writing as authorized to communicate prescriptions, or an order made in accordance with Section 3.06(d)(5), Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), to a pharmacist for a dangerous drug to be dispensed that states:

(A) the date of the order's issue;

(B) the name and address of the patient;

(C) if the drug is prescribed for an animal, the species of the animal;

(D) the name and quantity of the drug prescribed;

(E) the directions for the use of the drug;

Text of paragraph (F) as added by Acts 1993, 73rd Leg., ch. 351, §29.

(F) the legibly printed or stamped name, address, and telephone number of the practitioner at the practitioner's usual place of business.

Text of paragraph (F) as added by Acts 1993, 73rd Leg., ch. 789, §18.

(F) the intended use of the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient; and

(G) the name, address, and telephone number of the practitioner at the practitioner's usual place of business, legibly printed or stamped.

(14) *"Warehouseman"* means a person who stores dangerous drugs for others and who has no control over the disposition of the drugs except for the purpose of storage.

(15) *"Wholesaler"* means a person engaged in the business of distributing dangerous drugs to a person listed in Sections 483.041(c)(1)-(6).

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1989, 71st Leg., p. 4522, ch. 1100, §§5.03(h), 5.04(b), eff., Sept. 1, 1989; amended by Acts 1991, 72nd Leg., p. 185, ch. 14, §200, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., p. 928, ch. 237, §10, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., p. 2117, ch. 588, §26, eff. Sept. 1, 1991; amended by Acts 1993, 73rd Leg., ch. 351, §29, eff. Sept. 1, 1993, amended by Acts 1993, 73rd Leg., ch. 789, §18, eff. Sept. 1, 1993.

Sec. 483.002. Rules.

The board may adopt rules for the proper administration and enforcement of this chapter.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.003. Board of Health Hearings Regarding Certain Dangerous Drugs.

(a) The Texas Board of Health may hold public hearings in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes) to determine whether there is compelling evidence that a dangerous drug has been abused, either by being prescribed for nontherapeutic purposes or by the ultimate user.

(b) On making that finding, the board may limit the availability of the abused drug by permitting its dispensing only on the prescription of a practitioner described by Section 483.001(12)(A) or (B).

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.004. Commissioner of Health Emergency Authority Relating to Dangerous Drugs.

If the commissioner of health has compelling evidence that an immediate danger to the public health exists as a result of the prescription of a dangerous drug by practitioners described by Section 483.001(12)(C), the commissioner may use the commissioner's existing emergency authority to limit the availability of the drug by permitting its prescription only by practitioners described by Section 483.001(12)(A) or (B).

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.005. through 483.020. [Reserved.]

SUBCHAPTER B.
DUTIES OF PHARMACISTS, PRACTITIONERS, AND OTHER PERSONS.

Sec. 483.021. Determination by Pharmacist on Request to Dispense Drug.

(a) A pharmacist who is requested to dispense a dangerous drug under a prescription issued by a practitioner described by Section 483.001(12)(C) shall determine, in the exercise of the pharmacist's professional judgment, that:
  (1) the prescription is authentic;
  (2) the prescription was issued under a valid patient-physician relationship; and
  (3) the prescribed drug is considered necessary for the treatment of illness.

(b) A pharmacist who is requested to dispense a dangerous drug under a prescription issued by a therapeutic optometrist shall determine, in the exercise of the pharmacist's professional judgment, whether the prescription is for a dangerous drug that a therapeutic optometrist is authorized to prescribe under Section 1.03, Texas Optometry Act (Article 4552-1.01 *et seq.*, Vernon's Texas Civil Statutes).

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1991, 72nd Leg., p. 2117, ch. 588, §27, eff. Sept. 1, 1991.

Sec. 483.022. Practitioner's Designation of Agent; Practitioner's Responsibilities.

(a) A practitioner shall provide in writing the name of each designated agent as defined by Section 483.001(4)(A) and (C), and the name of each healthcare facility which employs persons defined by Section 483.001(4)(B).

(b) The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents or healthcare facilities as defined by Section 483.001(4).

(c) The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a designated agent as defined by Section 483.001(4) on the pharmacist's request.

(d) This section does not relieve a practitioner or the practitioner's designated agent from the requirements of Section 40, Texas Pharmacy Act (Article 4542a-1, Vernon's Texas Civil Statutes).

(e) A practitioner remains personally responsible for the actions of a designated agent who communicates a prescription to a pharmacist.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1. 1989; amended by Acts 1991, 72nd Leg., p. 185, ch. 14, §201, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., p. 929, ch. 237, §11, eff. Sept. 1, 1991; amended by Acts 1993, 73rd Leg., ch. 789, §19, eff. Sept. 1, 1993.

Sec. 483.023. Retention of Prescriptions.

A pharmacy shall retain a prescription for a dangerous drug dispensed by the pharmacy for two years after the date of the initial dispensing or the last refilling of the prescription, whichever date is later.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.024. Records of Acquisition or Disposal.

The following persons shall maintain a record of each acquisition and each disposal of a dangerous drug for two years after the date of the acquisition or disposal:
  (1) a pharmacy;
  (2) a practitioner;
  (3) a person who obtains a dangerous drug for lawful research, teaching, or testing purposes, but not for resale;
  (4) a hospital that obtains a dangerous drug for lawful administration by a practitioner; and
  (5) a manufacturer or wholesaler registered with the commissioner of health under Chapter 431 (Texas Food, Drug, and Cosmetic Act).

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.025. Inspections; Inventories.

A person required to keep records relating to dangerous drugs shall:
  (1) make the records available for inspection and copying at all reasonable hours by any public official or employee engaged in enforcing this chapter; and
  (2) allow the official or employee to inventory all stocks of dangerous drugs on hand.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.026. Repealed by Acts 1989, 71st Leg., p. 4522, ch. 1100, §503(h), eff. Sept. 1, 1989.

Sec. 483.027. through 483.040. [Reserved.]

SUBCHAPTER C.
CRIMINAL PENALTIES.

Sec. 483.041. Possession of Dangerous Drug.

(a) A person commits an offense if the person possesses a dangerous drug unless the person obtains the drug from a pharmacist acting in the manner described by Section 483.042(a)(1) or a practitioner acting in the manner described by Section 483.042(a)(2).

(b) Except as permitted by this chapter, a person commits an offense if the person possesses a dangerous drug for the purpose of selling the drug.

(c) Subsection (a) does not apply to the possession of a dangerous drug in the usual course of business or practice or in the performance of official duties by the following persons or an agent or employee of the person:
- (1) a pharmacy licensed by the board;
- (2) a practitioner;
- (3) a person who obtains a dangerous drug for lawful research, teaching, or testing, but not for resale;
- (4) a hospital that obtains a dangerous drug for lawful administration by a practitioner;
- (5) an officer or employee of the federal, state, or local government;
- (6) a manufacturer or wholesaler registered with the commissioner of health under Chapter 431 (Texas Food, Drug, and Cosmetic Act);
- (7) a carrier or warehouseman; or
- (8) a home health agency licensed under Chapter 142, which may possess sterile water for injection and irrigation, sterile saline for injection and irrigation, and heparin flush kits of interavenous fluses, as authorized by Section 142.0061.

(b) An offense under this section is a felony of the third degree.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1989, 71st Leg., p. 4522, ch. 1100, §503(f), eff. September 1, 1989; amended by Acts 1993, 73rd Leg., ch. 16, §2, eff. April 2, 1993; amended by Acts 1993, 73rd Leg., ch. 789, §20, eff. Sept. 1, 1993; amended by Acts 1993, 73rd Leg., ch. 900, §2.04, eff. Sept. 1, 1994.

Sec. 483.042. Delivery or Offer of Delivery of Dangerous Drug.

(a) A person commits an offense if the person delivers or offers to deliver a dangerous drug:
- (1) unless:
  - (A) the dangerous drug is delivered or offered for delivery by a pharmacist under:
    - (i) a prescription issued by a practitioner described by Section 483.001(12)(A) or (B); or
    - (ii) an original written prescription issued by a practitioner described by Section 483.001(12)(C); and
  - (B) a label is attached to the immediate container in which the drug is delivered or offered to be delivered and the label contains the following information:
    - (i) the name and address of the pharmacy from which the drug is delivered or offered for delivery;
    - (ii) the date the prescription for the drug is dispensed;
    - (iii) the number of the prescription as filed in the prescription files of the pharmacy from which the prescription is dispensed;
    - (iv) the name of the practitioner who prescribed the drug;
    - (v) the name of the patient and, if the drug is prescribed for an animal, a statement of the species of the animal; and
    - (vi) directions for the use of the drug as contained in the prescription; or
- (2) unless:
  - (A) the dangerous drug is delivered or offered for delivery by a practitioner in the course of practice; and
  - (B) a label is attached to the immediate container in which the drug is delivered or offered to be delivered and the label contains the following information:
    - (i) the name and address of the practitioner;
    - (ii) the date the drug is delivered;
    - (iii) the name of the patient and, if the drug is prescribed for an animal, a statement of the species of the animal; and
    - (iv) the name of the drug, the strength of the drug, and directions for the use of the drug.

(b) Subsection (a) does not apply to the delivery or offer for delivery of a dangerous drug to a person listed in Section 483.041(c) for use in the usual course of business or practice or in the performance of official duties by the person.

(c) The labeling provisions of Subsection (a) do not apply when the dangerous drug is prescribed for administration to an ultimate user who is institutionalized. The board shall adopt rules for the labeling of such drugs.

(d) Proof of an offer to sell a dangerous drug must be corroborated by a person other than the offeree or by evidence other than a statement by the offeree.

Text of Subsection (e) as added by ch. Acts 1993, 73rd Legis., ch. 237, §34

(e) The labeling provisions of Subsection (a) do not apply to a dangerous drug prescribed or dispensed for administration to food production animals in an agricultural operation under a written medical directive or treatment guideline from a veterinarian licensed under the Veterinary Licensing Act (Article 8890, Revised Statutes) and its subsequent amendments.

Text of Subsection (e) as redesignated from subsec. (d) by Acts 1993, 73rd Leg., ch. 789, §21

(e) An offense under this section is a felony of the third degree.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1989, 71st Leg., p. 4522, ch. 1100, §5.03(g), eff. Sept. 1, 1989; amended by Acts 1993, 73rd Leg., ch. 287, §34. eff. Sept. 1, 1993, amended by Acts 1993, 73rd Leg., 789, §21, eff. Sept 1, 1993.

Sec. 483.043. Manufacture of Dangerous Drug.

(a) A person commits an offense if the person manufactures a dangerous drug and the person is not authorized by law to manufacture the drug.

(b) An offense under this section is a felony of the third degree.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989, amended by Acts 1993, 73rd Leg., SB 1067, §2.05, eff. Sept 1, 1993.

Sec. 483.044. Repealed by Acts 1989, 71st Leg., p. 4522, ch. 1100, §5.03(h), eff. Sept. 1, 1989.

Sec. 483.045. Forging or Altering Prescription.

(a) A person commits an offense if the person:
- (1) forges a prescription or increases the prescribed quantity of a dangerous drug in a prescription;
- (2) issues a prescription bearing a forged or fictitious signature;
- (3) obtains or attempts to obtain a dangerous drug by using a forged, fictitious, or altered prescription;
- (4) obtains or attempts to obtain a dangerous drug by means of a fictitious or fraudulent telephone call; or
- (5) possesses a dangerous drug obtained by a forged, fictitious, or altered prescription or by means of a fictitious or fraudulent telephone call.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.046. Failure to Retain Prescription.

(a) A pharmacist commits an offense if the pharmacist:
- (1) delivers a dangerous drug under a prescription; and
- (2) fails to retain the prescription as required by Section 483.023.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.047. Refilling Prescription Without Authorization.

(a) Except as authorized by Subsection (b), a pharmacist commits an offense if the pharmacist refills a prescription unless:
- (1) the prescription contains an authorization by the practitioner for the refilling of the prescription, and the pharmacist refills the prescription in the manner provided by the authorization; or
- (2) at the time of refilling the prescription, the pharmacist is authorized to do so by the practitioner who issued the prescription.

(b) A pharmacist may exercise his professional judgment in refilling a prescription for a dangerous drug without the authorization of the prescribing practitioner provided:
- (1) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;
- (2) either:
  - (A) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or
  - (B) the pharmacist is unable to contact the practitioner after reasonable effort;
- (3) the quantity of drug dispensed does not exceed a 72-hour supply;
- (4) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills; and
- (5) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time.

offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1993, 73rd Leg. ch. 789, §22, eff. Sept. 1, 1993.

Sec. 483.048. Unauthorized Communication of Prescription.

(a) An agent of a practitioner commits an offense if the agent communicates by telephone a prescription unless the agent is designated in writing under Section 483.022 as authorized by the practitioner to communicate prescriptions by telephone.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.049. Failure to Maintain Records.

(a) A person commits an offense if the person is required to maintain a record under Section 483.023 or 483.024 and the person fails to maintain the record in the manner required by those sections.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.050. Refusal to Permit Inspection.

(a) A person commits an offense if the person is required to permit an inspection authorized by Section 483.025 and fails to permit the inspection in the manner required by that section.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.051. Using or Revealing Trade Secret.

(a) A person commits an offense if the person uses for the person's advantage or reveals to another person, other than to an officer or employee of the board or to a court in a judicial proceeding relevant to this chapter, information relating to dangerous drugs required to be kept under this chapter, if that information concerns a method or process subject to protection as a trade secret.

(b) An offense under this section is a Class B misdemeanor unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.052. Violation of Other Provision.

(a) A person commits an offense if the person violates a provision of this chapter other than a provision for which a specific offense is otherwise described by this chapter.

(b) An offense under this section is a Class B misdemeanor, unless it is shown on the trial of the defendant that the defendant has previously been convicted of an offense under this chapter, in which event the offense is a Class A misdemeanor.

Sec. 483.053. through 483.070. [Reserved.]

SUBCHAPTER D.
CRIMINAL AND CIVIL PROCEDURE.

Sec. 483.071. Exceptions; Burden of Proof.

(a) In a complaint, information, indictment, or other action or proceeding brought for the enforcement of this chapter, the state is not required to negate an exception, excuse, proviso, or exemption contained in this chapter.

(b) The defendant has the burden of proving the exception, excuse, proviso, or exemption.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.072. Uncorroborated Testimony.

A conviction under this chapter may be obtained on the uncorroborated testimony of a party to the offense.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.073. Search Warrant.

A peace officer may apply for a search warrant to search for dangerous drugs possessed in violation of this chapter. The peace officer must apply for and execute the search warrant in the manner prescribed by the Code of Criminal Procedure.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.074. Seizure and Destruction.

(a) A dangerous drug that is manufactured, sold, or possessed in violation of this chapter is contraband and may be seized by an employee of the board or by a peace officer authorized to enforce this chapter and charged with that duty.

(b) If a dangerous drug is seized under Subsection (a), the board may direct an employee of the board or an authorized peace officer to destroy the drug. The employee or authorized peace officer directed to destroy the drug must act in the presence of another employee of the board or authorized peace officer and shall destroy the drug in any manner designated as appropriate by the board.

(c) Before the dangerous drug is destroyed, an inventory of the drug must be prepared. The inventory must be accompanied by a statement that the dangerous drug is being destroyed at the direction of the board, by an employee of the board or an authorized peace officer, and in the presence of another employee of the board or authorized peace officer. The statement must also contain the names of the persons in attendance at the time of destruction, state the capacity in which each of those persons acts, be signed by those persons, and be sworn to by those persons that the statement is correct. The statement shall be filed with the board.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989; amended by Acts 1991, 72nd Leg., ch. 237, §12, eff. Sept. 1, 1991.

Sec. 483.075. Injunction.

The board may institute an action in its own name to enjoin a violation of this chapter.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Sec. 483.076. Legal Representation of Board.

(a) If the board institutes a legal proceeding under this chapter, the board may be represented only by a county attorney, a district attorney, or the attorney general.

(b) The board may not employ private counsel in any legal proceeding instituted by or against the board under this chapter.

Acts 1989, 71st Leg., p. 2230, ch. 678, §1, eff. Sept. 1, 1989.

Texas Board of Chiropractic Examiners

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June 09, 1998

FILE # ML-40315-98
I.D. # 40315

RECEIVED
JUN 16 1998
Opinion Committee

The Honorable Dan Morales
Attorney General/State of Texas
P.O. Box 12548
Austin, Texas 78701

RE: Attorney General Opinion DM-472

Dear General Morales:

The Texas Board of Chiropractic Examiners met on May 7, 1998, and as part of its duly posted agenda, discussed the findings of DM-471 and DM-472.

Upon the review and recommendation of the Technical Standards Committee, the Board voted unanimously that the practice of acupuncture remains under the scope of a licensed doctor of chiropractic in Texas, as concluded in DM-471.

However, in DM-472, the Board agreed with this decision only in part, specifically that the use of injectables is outside the scope of chiropractic due to the prohibition outlined in section 13a (a) (2) stating, The practice of chiropractic shall not be construed to include: the prescribing of controlled substances or dangerous drugs or any drug that requires a prescription..."Other than this specific point made in DM-472, this agency would like to state for the record that we disagree with your interpretation of the legislative intent of section 13a. (b) as it pertains to the use of needles. This agency contends, as supported by Representative Tom Uher's letter, that the original legislative intent was to include the use of needles for a much broader purpose than merely for the" drawing of blood for diagnostic purposes, especially as it applies to diagnostic purposes.

Sincerely,

Cynthia Vaughn, D.C. 16.

Cynthia Vaughn, D.C.
Chairman, Technical
Standards Committee

Oliver R. Smith, Jr., D.C. 16.

Oliver R. Smith, Jr., D.C., President
Texas Board of Chiropractic Examiners

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Exhibit H

375 S.W.3d 464
(Cite as: 375 S.W.3d 464)

H

Court of Appeals of Texas,
Austin.
TEXAS BOARD OF CHIROPRACTIC EXAMINERS, Glenn Parker, Executive Director, and Texas Chiropractic Association, Appellants
v.
TEXAS MEDICAL ASSOCIATION, Texas Medical Board, and the State of Texas, Appellees.

No. 03–10–00673–CV.
July 6, 2012.

Background: Medical association brought action against Texas Board of Chiropractic Examiners (TBCE) seeking declarations that various provisions of the scope-of-practice rule that permitted needle electromyography (EMG) and manipulation under anesthesia (MUA) were invalid because they exceeded the statutory scope of chiropractic and constituted the unlawful practice of medicine. The District Court, Travis County, Stephen Yelenosky, J., invalidated rules. TBCE appealed.

Holdings: The Court of Appeals, Bob Pemberton, J., held that:
(1) TBCE exceeded its authority in promulgating rules allowing chiropractors to perform needle EMG;
(2) MUA was a surgical procedure excluded from the statutory scope of chiropractic;
(3) rule allowing chiropractors to make certain diagnosis regarding the biomechanical condition of the spine or musculoskeletal system fell within the statutory scope of chiropractic; and
(4) rule allowing chiropractors to diagnose a subluxation complex of the spine or musculoskeletal system fell within the statutory scope of chiropractic.

Affirmed in part, reversed in part, and remanded; rehearing denied.

West Headnotes

[1] Health 198H 176

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice
198Hk176 k. Chiropractors. Most Cited Cases

Health 198H 192

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk192 k. In general. Most Cited Cases

Texas Board of Chiropractic Examiners (TBCE) exceeded its authority in promulgating rules allowing chiropractors to perform needle electromyography (EMG); some types of EMG needles had beveled, blade-like edges, which were designed to slice or cut through tissue, and thus, the use of the needles constituted an “incisive” procedure that was excluded by statute from the scope of chiropractic. V.T.C.A., Occupations Code § 201.002(b–c); 22 TAC § 75.17(a)(3).

[2] Health 198H 176

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice
198Hk176 k. Chiropractors. Most Cited

375 S.W.3d 464
(Cite as: 375 S.W.3d 464)

Cases

Health 198H 192

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk192 k. In general. Most Cited Cases

Manipulation under anesthesia (MUA) was a "surgical procedure" excluded from the statutory scope of chiropractic, and thus, rules promulgated by the Texas Board of Chiropractic Examiners (TBCE) allowing chiropractors to perform MUA were invalid, where the American Medical Association's annual Current Procedural Terminology (CPT) Codebook listed MUA as a medical procedure in the surgery section of the Codebook. V.T.C.A., Occupations Code §§ 201.002(a)(4), 201.154; 22 TAC § 75.17(e)(2)(O).

[3] Constitutional Law 92 2442

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)4 Delegation of Powers
92k2442 k. To non-governmental entities. Most Cited Cases

Health 198H 105

198H Health
198HI Regulation in General
198HI(A) In General
198Hk102 Constitutional and Statutory Provisions
198Hk105 k. Validity. Most Cited Cases

Statute regarding scope of chiropractic practice incorporated the 2004 version of American Medical Association's (AMA) Current Procedural Terminology (CPT) Codebook in defining "surgical procedure," rather than the CPT Codebook in whatever manner the AMA might revise or amend it in the future, and thus, the Legislature did not improperly delegate its authority in a way that violated the separation-of-powers clause of the Texas Constitution. Vernon's Ann.Texas Const. Art. 3, § 1; V.T.C.A., Occupations Code § 201.002(a)(4).

[4] Health 198H 176

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice
198Hk176 k. Chiropractors. Most Cited Cases

Health 198H 192

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk192 k. In general. Most Cited Cases

In the absence of a separate notice of appeal filed by medical association, appellate court lacked jurisdiction to consider medical association's claim that the statutory scope of chiropractic did not include "diagnosing" a condition, as opposed to analyzing, examining, or evaluating it, where claim sought relief beyond that which association was afforded in the district court's judgment, which granted motions for partial summary judgment and rendered a take-nothing judgment as to association's claims for a declaration that the use of "diagnosis" in itself rendered applicable rule invalid. Rules App.Proc., Rule 25.1(c); 22 TAC § 75.17(d).

[5] Health 198H 176

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice
198Hk176 k. Chiropractors. Most Cited Cases

Health 198H 192

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk192 k. In general. Most Cited Cases

Rule promulgated by the Texas Board of Chiropractic Examiners (TBCE) allowing chiropractors to make certain diagnosis restricted any such diagnosis to the biomechanical condition of the spine or musculoskeletal system, and thus, the rule fell within the statutory scope of chiropractic. V.T.C.A., Occupations Code § 201.002(b)(1); 22 TAC § 75.17(d)(1)(A).

[6] Health 198H 176

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk162 Unauthorized Practice
198Hk176 k. Chiropractors. Most Cited Cases

Health 198H 192

198H Health
198HI Regulation in General
198HI(B) Professionals
198Hk191 Regulation of Professional Conduct; Boards and Officers
198Hk192 k. In general. Most Cited Cases

Although the definition of subluxation complex as used in rule promulgated by the Texas Board of Chiropractic Examiners (TBCE) allowing chiropractors to make certain diagnosis indicated that its existence might have functional or pathological consequences or that it might affect essentially every part of the body, the rule itself only allowed chiropractors to render an analysis, diagnosis, or other opinion regarding a subluxation complex of the spine or musculoskeletal system, and thus, the rule fell within the statutory scope of chiropractic. V.T.C.A., Occupations Code § 201.002(b); 22 TAC § 75.17(d)(1)(B).

West Codenotes
Held Invalid22 TAC § 75.17(a)(3), (e)(2)(O). ***465** Jason D. Ray, Jennifer S. Riggs, Riggs, Aleshire & Ray, P.C., Joe H. Thrash, Assistant Attorney General, Environmental Protection & Administrative Law Division, Matt C. Wood, Baker Botts, L.L.P., Austin, TX, for appellant.

David F. Bragg, Law Offices of David F. Bragg, P.C., Bastrop, TX, Nancy K. Juren, Angela V. Colmenero, Assistant Attorney General, General Litigation Division, Donald P. Wilcox, Andrea Schwab, C.J. Francisco, Office of General Counsel, Texas Medical Association, Austin, TX, for appellee.

***466** Before Chief Justice JONES, Justices PEMBERTON and HENSON.

OPINION

BOB PEMBERTON, Justice.

We withdraw our opinion and judgment dated April 5, 2012, and substitute the following in its place. The motion for rehearing filed by appellee Texas Medical Association is denied.

The Texas Board of Chiropractic Examiners (TBCE), its executive director, and the Texas Chiropractic Association appeal a final district court judgment invalidating portions of TBCE's recently adopted administrative rule

defining the scope of practice of chiropractic. *See* 22 Tex. Admin. Code § 75.17 (2011) (Tex. Bd. of Chiropractic Exam'rs, Scope of Practice). The rule provisions at issue purport to authorize TBCE's licensees to perform procedures known as manipulation under anesthesia and needle electromyography, and to "diagnose" certain conditions. *See id.* § 75.17(a)(3), (c)(2)(D), (c)(3)(A), (d)(1)(A)–(B), (e)(2)(O). We will affirm the judgment in part and reverse and remand in part.

BACKGROUND

Article XVI, section 31 of the Texas Constitution authorizes the Legislature to "pass laws prescribing the qualifications of practitioners of medicine in this State," with the caveat that "no preference shall ever be given by law to any schools of medicine." Tex. Const. art. XVI, § 31. In turn, the Legislature has enacted the Medical Practice Act, in which it has delegated broad authority to the Texas Medical Board (TMB) to regulate the "practice of medicine" in this state, mandated that a person cannot lawfully "practice medicine" without a TMB-issued license, and imposed rigorous education and training requirements as a prerequisite to licensing eligibility. *See* Tex. Occ.Code Ann. §§ 151.001–.056 (West 2004 & Supp. 2011) (Medical Practice Act); *id.* §§ 151.003(2) (providing that TMB "should remain the primary means of licensing, regulating, and disciplining physicians."), 152.001(a) (West Supp. 2011) (designating TMB as agency with power to regulate the practice of medicine), 153.001(3) (West 2004) (granting TMB the authority to adopt rules to regulate the practice of medicine), 155.001 (West 2004) (requiring license to practice medicine), 155.003 (West Supp. 2011) (setting forth requirements for license to practice medicine). The Legislature has defined "practicing medicine" under the Medical Practice Act as "the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions" by a person who either "directly or indirectly charges money or other compensation for those services" or publicly professes to be a physician or surgeon. *See id.* § 151.002(a)(13).

However, the Legislature has carved out of this broad definition of "practicing medicine"—and, thus, exempted from the Medical Practice Act's education, training, and licensing standards and the TMB's regulatory authority—a variety of other health-related fields on which it has imposed different legal requirements and regulations. *See id.* § 151.052. Such exemptions, our Texas high courts have reasoned, do not amount to an unconstitutional "preference ... to any school[ ] of medicine" to the extent the exempted treatment or method does not extend to the "whole body." *See Schlichting v. Texas State Bd. of Med. Exam'rs,* 158 Tex. 279, 310 S.W.2d 557, 564 (1958); *Ex parte Halsted,* 147 Tex.Crim. 453, 182 S.W.2d 479, 486 (1944). Among the exemptions, the Legislature ***467** has included "a licensed chiropractor engaged strictly in the practice of chiropractic as defined by law." *See* Tex. Occ.Code Ann. § 151.052(a)(3). Chiropractors are currently regulated under chapter 201 of the occupations code, which defines the permissible scope of chiropractic practice, imposes its own set of educational and licensing requirements, and delegates authority to TBCE to administer the regime. *See id.* §§ 201.001–.606 (West 2004 & Supp. 2011).

The net effect of the statutory interplay is that a person licensed by TBCE as a chiropractor but not by the TMB to "practice medicine" (i.e., as a physician [FN1]) can lawfully do things that would otherwise constitute "practicing medicine" as long as he remains within the statutory scope of chiropractic under chapter 201. However, to the extent he exceeds the statutory scope of chiropractic, he would subject himself to the Medical Practice Act—and practice medicine unlawfully. *See id.* §§ 151.002(a)(13), 201.002; [FN2] *see also Teem v. State,* 79 Tex.Crim. 285, 183 S.W. 1144 (1916) (involving prosecution of chiropractor for unlawfully practicing medicine prior to Texas's legislative recognition and legalization of chiropractic). Another consequence of this statutory interplay is a long history of professional, scientific, or economic antagonism between chiropractors and the medical community, and resultant disputes, spanning all three branches of government, regarding where any legal line between chiropractic and the practice of medicine is or should be. Key participants in these disputes have included the two professional associa-

tions that are parties to this appeal, the Texas Chiropractic Association (TCA) and the Texas Medical Association (TMA), which advocate on behalf of the respective interests of chiropractors and physicians and their sometimes-competing views of patient welfare.

FN1. *See* Tex. Occ.Code Ann. § 151.002(a)(12) (West Supp. 2011) ("physician" refers to a licensee under the Medical Practice Act).

FN2. Conversely, physicians do not subject themselves to chapter 201 if their conduct comes within the statutory scope of chiropractic. *See id.* § 201.003(b) (West 2004) (Chapter 201 "does not limit or affect the rights and powers of a physician licensed in this state to practice medicine.").

Chiropractic was historically rooted in a theory that a wide range of human health problems stem from spinal misalignment—or a broader category of spinal disorders termed "subluxations"—and can be cured through manipulation of vertebrae.[FN3] At its 1949 inception, Texas's statutory regime defining and regulating chiropractic reflected***468** this traditional focus on ascertaining spinal problems and manipulating vertebrae as an intended means of cure.[FN4] However, over the ensuing decades, Texas chiropractors evidently came to engage in identifying and treating a wider range of musculoskeletal problems with a wider range of procedures or methods. In 1989, the Legislature saw fit to take account of these developments through amendments to the statutory definition of chiropractic practice that expanded the focus of chiropractic beyond the spine to the more general "biomechanics" of the "musculoskeletal system," and added somewhat broader language regarding the treatments or methods chiropractors could perform. *See* Act of May 12, 1989, 71st Leg., R.S., ch. 227, §§ 1–3, 1989 Tex. Gen. Laws 1005, 1005–06. [FN5] Although procedures entailing "surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive material" were expressly excluded from the practice, chiropractors were now permitted to use (1) "objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body" and (2) "adjustment, manipulation, or other ***469** procedures in order to improve subluxation or the biomechanics of the musculoskeletal system." *See id.* §§ 1, 3, 1989 Tex. Gen. Laws at 1005–06.

FN3. While different cultures throughout history have employed manipulation of human bones and tissue as an intended means of improving health, David D. Palmer is typically credited with originating the modern theory of chiropractic in 1895, when he reportedly restored a man's hearing by using spinal manipulation. *See* Walter I. Wardwell, *Chiropractic: History & Evolution of a New Profession* 2 (1992); Erland Pettman, *A History of Manipulative Therapy*, 15 The Journal of Manual & Manipulative Therapy 165, 165–66 (2007); Judith Turner, *Gale Encyclopedia of Medicine: Chiropractic* (2006). Palmer concluded that misalignment or "subluxations" in the spine created pressure on or irritation of nerves that, in turn, could lead to various health problems, disease, or disability. Wardwell at 2; Pettman at 168. Based on this theoretical premise, Palmer sought to develop a procedure for adjusting misaligned vertebrae as a means of improving health and, eventually, founded this country's first chiropractic school, the Palmer School of Cure in Davenport, Iowa, currently known as the Palmer College of Chiropractic. *See* Palmer College of Chiropractic, http:// www. palmer. edu/ History (last visited Mar. 13, 2011). While today's chiropractors typically recognize the importance of other factors in disease causation, they still manipulate spines to correct musculoskeletal problems. *See* Wardwell at 2.

FN4. The 1949 enactment defined the practice of chiropractic as follows:

> Any person shall be regarded as practicing chiropractic within the meaning of this Act who

> shall employ objective or subjective means without the use of drugs, surgery, X-ray therapy or radium therapy, for the purpose of ascertaining the alignment of the vertebrae of the human spine, and the practice of adjusting the vertebrae to correct any subluxation or misalignment thereof, and charge therefor, directly or indirectly, money or other compensation; or who shall hold himself out to the public as a chiropractor or shall use either the term "chiropractor," "chiropractic," "doctor of chiropractic," or any derivative of any of the above in connection with his name.

See Act of Apr. 21, 1949, 51st Leg., R.S., ch. 94, § 1, 1949 Tex. Gen. Laws 160, 160–61. The Texas Legislature first enacted a statute recognizing chiropractic and exempting it from the laws governing the practice of medicine in 1943. *See* Act of May 5, 1943, 48th Leg., R.S., ch. 359, §§ 1–17, 1943 Tex. Gen. Laws 627. The 1943 statute authorized chiropractors to treat the "spinal column, and its connecting tissues." *Id.* § 3, 1943 Tex. Gen. Laws at 628–29. The Court of Criminal Appeals later invalidated this law as an unconstitutional "preference" to chiropractic, reasoning that "the spinal column *and its connecting tissues* embraces the entire body and all organs thereof." *See Ex parte Halsted,* 147 Tex.Crim. 453, 182 S.W.2d 479, 486 (1944) (emphasis added). The current statutory regime defining and regulating chiropractic traces back to the 1949 enactment.

FN5. The amended definition provided:

> A person shall be regarded as practicing chiropractic within the meaning of this Act 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;
>
> (2) uses adjustment, manipulation, or other procedures in order to improve subluxation or the biomechanics of the musculoskeletal system; or
>
> (3) holds himself out to the public as a chiropractor or uses the term "chiropractor," "chiropractic," "doctor of chiropractic," "D.C.," or any derivative of those terms in connection with his name.
>
> Act of May 12, 1989, 71st Leg., R.S., ch. 227, § 1, 1989 Tex. Gen. Laws 1005. Excluded from the scope of chiropractic practice, however, were the provision of "surgery, drugs that require a prescription to be dispensed, x-ray therapy, or therapy that exposes the body to radioactive material." *See id.* § 3, 1989 Tex. Gen. Laws at 1006. Amendment proponents evidently touted the changes as necessary to modernize the "outdated" statutory definition to "reflect the education, training, and clinical expertise of chiropractors today" and to account for a study showing that "86.8% of the conditions treated by chiropractors can be classified as musculoskeletal problems" rather than spinal misalignment. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. S.B. 169, 71st Leg., R.S. (1989).

In the aftermath of the 1989 amendments, a number of controversies arose concerning whether particular examination or treatment procedures exceeded the statutory scope of chiropractic and, relatedly, the extent to which TBCE, by permitting chiropractors to perform them, was abetting unlawful encroachments upon the practice of medicine. Areas of dispute included the extent to which chiropractors could perform procedures entailing the in-

sertion of needles into the human body, such as acupuncture and a procedure known as needle electromyography, or "needle EMG." Simply described, needle EMG entails the insertion of needle electrodes into a patient's muscle and transmitting a small electric current as a means of evaluating nerve conductivity. Another subject of controversy was a treatment method known as manipulation under anesthesia, or "MUA." As the term suggests, MUA entails a chiropractor's manipulation of the musculoskeletal system while the patient is under general anesthesia so as to facilitate a greater range of motion than if the patient was feeling pain or resisting.[FN6]

> FN6. The anesthesia itself is evidently administered by a qualified health-care professional other than a chiropractor, including an anesthesiologist, a physician.

Against this backdrop, in 1995 the Legislature made several important amendments to the statutory scope of chiropractic. These included specifying that the treatment methods that defined the scope of chiropractic were "nonsurgical, nonincisive procedures, including but not limited to adjustment and manipulation, in order to improve the subluxation complex or the biomechanics of the musculoskeletal system," and likewise excluding "incisive or surgical procedures" from the scope of chiropractic practice. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 965, §§ 13, 18, 1995 Tex. Gen. Laws 4789, 4802–03 (current version at Tex. Occ.Code Ann. § 201.002(b)–(c)). The Legislature defined or described "incisive or surgical procedures" as follows:

> In this act, "incisive or surgical procedure" includes but is not limited to making an incision into any tissue, cavity or organ by any person or implement. It does not include the use of a needle for the purpose of drawing blood for diagnostic testing.

See id. § 18, 1995 Tex. Gen. Laws at 4803. Additionally, the Legislature prohibited TBCE from "adopt[ing] a process to certify chiropractors to perform manipulation under anesthesia." *See id.* § 19, 1995 Tex. Gen. Laws at 4803. These provisions were later codified in sections 201.002 and 201.154 of the occupations code. *See* Tex. Occ.Code Ann. §§ 201.002(a)(3) (" '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."), .002(c) ("The practice of chiropractic does not include ... incisive or surgical procedures."), .154 ("Notwithstanding any other provision of this chapter, the [TBCE] may not adopt a process to certify chiropractors to perform manipulation under anesthesia.").[FN7]

> FN7. TMA and TMB, in particular, place great emphasis on the legislative history of these amendments. Although versions of the changes had appeared in earlier bills considered by the Seventy–Fourth Legislature, the amendments' immediate origins were a House floor amendment that Representative Tom Uher proposed to add to a bill that had theretofore focused chiefly on rural health-care issues. Although containing the same limitation of treatment methods to "nonsurgical, nonincisive procedures" and exclusion of "incisive or surgical procedures" that ultimately appeared in the final, enacted version, Uher's amendment defined "incisive procedure" to "include[ ] entry into any tissue, cavity, or organ by any person or implement," subject to some broad exceptions:
>
> > ["incisive procedure"] does not include examination of the ear, nose, and throat, drawing blood for the purposes of diagnostic testing, or acupuncture or needle EMG if the chiropractor is certified to perform acupuncture or needle EMG under ... this Act.
>
> Floor Amendment No. 9 to Tex. S.B. 673, at 2, 74th Leg., R.S. (May 22, 1995). Additionally, as the exceptions contemplated, other provisions of Uher's proposed amendment would

have required TBCE to adopt procedures and standards for "certifying" chiropractors to perform needle EMG and acupuncture. *See id.* at 6. The amendment imposed a similar mandate requiring TBCE to adopt procedures to certify chiropractors to perform MUA. *See id.* at 5.

In response to Uher's proposed amendment, then-Representative (later Senator) Kyle Janek, a physician, proposed to amend Uher's amendment to, in relevant part, (1) delete the exceptions for needle EMG and acupuncture in Uher's definition or description of "incisive" procedures; (2) delete the mandate that TBCE adopt processes for certifying chiropractors to perform needle EMG and acupuncture; and (3) invert the mandate that TBCE "shall adopt" processes for certifying chiropractors to perform MUA into an explicit prohibition that TBCE "shall not" adopt processes to "certify" chiropractors to perform MUA. *See* Floor Amendment No. 12 to Tex. S.B. 673, 74th Leg., R.S. (May 22, 1995). During the debate on these amendments, Representative Janek expressed his opinion that "[t]his amendment would take out any ability by the chiropractors to put needles in people." Debate on S.B. 673 on the Floor of the House, 74th Leg., R.S. (May 22, 1995) (statement of Rep. Janek) (transcript available from Senate Staff Services). The House of Representatives ultimately adopted Uher's amendment with Janek's modifications and a few additional, less sweeping changes and refinements. *See* Floor Amendment Nos. 9–14 to Tex. S.B. 673 (May 22–24, 1995). These changes, in turn, were ultimately enacted into law, as described above.

***470** In the aftermath of these changes to the statutory scope of chiropractic, TBCE issued what it styled as informal "statements" or "memoranda" advising its licensees of its view that the 1995 amendments had not rendered needle EMG, acupuncture, or MUA beyond the scope of chiropractic practice.[FN8] Meanwhile, the Attorney General issued opinions reasoning that, to the contrary, any procedure involving the insertion of a needle into the body (other than the excepted blood draw for diagnostic use) was "incisive" and thus excluded it from the scope of chiropractic.[FN9] Applying this reasoning, for example, the Attorney General opined that acupuncture was an "incisive" procedure and thus excluded from the scope of chiropractic. [FN10] Thereafter, the Legislature amended the statutory definition of acupuncture, which had previously been stated in terms of "the insertion of an acupuncture needle," *see* Act of May 30, 1993, 73d Leg., R.S., ch. 862, § 37, 1993 Tex. Gen. Laws 3374, 3400, to refer instead to "the *nonsurgical, nonincisive* insertion of an acupuncture needle." *See* Act of May 28, 1997, 75th Leg., R.S., ch. 1170, § 1, 1997 Tex. Gen. Laws 4418 (emphasis added) (current version at Tex. Occ.Code Ann. § 205.001(2)(A) (West Supp. 2011)); *see also* Tex. Att'y Gen. Op. No. DM–471 (1998) (concluding that the ***471** 1997 amendment served to ensure that the practice of acupuncture would be within the practice of chiropractic, thereby superseding the prior opinion). But the broader underlying disagreement concerning the use of needles in chiropractic remained,[FN11] as did the controversy regarding whether chiropractors could perform MUA. However, due in part to the advisory nature of the administrative pronouncements and related jurisdictional and procedural limitations, the controversies eluded judicial resolution for several years.[FN12]

FN8. *See* Tex. Bd. of Chiropractic Exam'rs, *Acupuncture, MUA, and Needle EMG* (ratified September 11, 1997, amended May 7, 1998, and May 1999); Tex. Bd. Chiropractic Exam'rs, *RE: Scope of Practice Clarification regarding Nerve Conduction Studies* (Jan. 25, 2002) (memo. to all Texas chiropractic licensees).

FN9. *See, e.g.*, Tex. Att'y Gen. Op. No. DM–472, at 3 (1998).

FN10. *See* Tex. Att'y Gen. Op. No. DM–415, at

4–6 (1996).

FN11. *See* Tex. Att'y Gen. Op. No. DM–472, at 6 (concluding that "the use of a needle ... for any purpose other than the drawing of blood for diagnostic purposes or the practice of acupuncture is not within the scope of practice of a licensed Texas chiropractor.").

FN12. *See O'Neal v. Texas Bd. of Chiropractic Exam'rs,* No. 03–03–00270–CV, 2004 WL 2027787, at *3, 2004 Tex.App. LEXIS 8254, at *9 (Tex.App.-Austin Sept. 10, 2004, no pet.) (mem. op.) (holding that suit by chiropractor against TBCE seeking declaration that needle EMG was within the scope of chiropractic practice did not present a justiciable controversy "where the ... Board indisputably agrees with the legal interpretation ... that [the chiropractor] seeks" and there was no more than speculation that it would change that view; also observing that Attorney General opinions did not in themselves present a justiciable controversy); *Continental Cas. Co. v. Texas Bd. of Chiropractic Exam'rs,* No. 03–00–00513–CV, 2001 WL 359632, at *1, 2001 Tex.App. LEXIS 2336, at *2 (Tex.App.-Austin Apr. 12, 2001, no pet.) (mem. op., not designated for publication) (holding court lacked jurisdiction to hear insurance company's claim that TBCE improperly authorized chiropractors to perform MUA and needle EMG because there was no justiciable controversy where company was not a licensee or otherwise subject to TBCE); *see also Texas Mut. Ins. Co. v. Stelzer,* No. 03–06–00675–CV, 2010 WL 142501, at *1–3, 2010 Tex.App. LEXIS 236, *2–10 (Tex.App.-Austin 2010, no pet.) (mem. op.) (rejecting carrier's challenge to workers' compensation division order requiring reimbursement of chiropractor for needle-EMG procedure; holding that division properly deferred to TBCE interpretation of statutory scope of practice and that underlying scope-of-practice dispute was not properly before the court).

The Legislature returned to chiropractic scope-of-practice issues in 2005 when TBCE came up for sunset review. Although it did not address either needle EMG or MUA through statutory amendments expressly mentioning either procedure, the Legislature did add a new description of the "surgical procedures" that were excluded from chiropractic:

> "Surgical procedure" includes a procedure described in the surgery section of the common procedure coding system as adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services.

See Act of May 27, 2005, 79th Leg., R.S., ch. 1020, § 1, 2005 Tex. Gen. Laws 3464, 3465 (codified at Tex. Occ.Code Ann. § 201.002(a)(4)). The Legislature also mandated that TBCE "adopt rules clarifying what activities are included within the scope of the practice of chiropractic and what activities are outside of that scope," including "clearly specify[ing] the procedures that chiropractors may perform" and "any equipment and the use of that equipment that is prohibited." *See id.* § 8, 2005 Tex. Gen. Laws at 3466 (codified at Tex. Occ.Code Ann. §§ 201.1525–.1526). Among other implications, this rule-making mandate ensured that TBCE would issue scope-of-practice directives to its licensees in a form that opponents could test in court to determine whether they exceeded the underlying statutory scope of chiropractic. *See* Tex. Gov't Code Ann. § 2001.038 (West 2008) (creating cause of action for declaratory relief regarding "the validity or applicability of a rule" where "it is alleged that the rule or its threatened ***472** application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff"); *see also Texas Orthopaedic Ass'n v. Texas State Bd. of Podiatric Med. Exam'rs,* 254 S.W.3d 714, 718 n. 1 (Tex.App.-Austin 2008, pet. denied) (recognizing physician's standing to challenge validity of podiatric board rule that included ankle within the definition of "foot" and ultimately holding that rule exceeded board's rule-making authority).[FN13]

FN13. In fact, one of the Sunset recommendations preceding the 2005 amendments had criticized TBCE's "practice of issuing Board opinions" to define the scope of chiropractic and recommended that the agency be required to promulgate administrative rules instead. *See* Sunset Advisory Comm'n, Sunset Comm'n Decisions: Tex. Bd. of Chiropractic Exam'rs (May 2004) at 3; Sunset Advisory Comm'n: Tex. Bd. of Chiropractic Exam'rs, Staff Report, at 5 (Feb. 2004).

In response to this rule-making mandate, TBCE promulgated a "Scope of Practice" rule authorizing chiropractors to perform both needle EMG and MUA. *See* 22 Tex. Admin. Code § 75.17.[FN14] Invoking section 2001.038 of the Administrative Procedures Act, TMA sued TBCE [FN15] seeking declarations that various provisions of the scope-of-practice rule that permitted needle EMG and MUA were invalid because they exceeded the statutory scope of chiropractic and, therefore, constituted the unlawful practice of medicine.[FN16] TMA also asserted similar claims concerning a provision of the rule permitting chiropractors to "diagnose" certain conditions. In the alternative, if any of the challenged rule provisions proved to be within TBCE's statutory authority, TMA sought declarations that the underlying statutes granted chiropractors a "preference" over physicians in practicing "medicine" in violation of article XVI, section 31 of the Texas Constitution. TMA further sought injunctive relief barring enforcement of the challenged rules or, alternatively, statutes.

FN14. When it initially promulgated the scope-of-practice rule in 2006, TBCE purported to leave MUA unaddressed pending further rule-making while also emphasizing in the rule's preamble that MUA "ha[d] been part of the practice of chiropractic in Texas for more than 25 years" and that the agency was leaving this "status quo" undisturbed. *See* 31 Tex. Reg. 4613 (2006) (proposed Dec. 16, 2005), *amended in part by* 34 Tex. Reg. 4331 (2009) (proposed Jan. 2, 2009) (former 22 Tex. Admin. Code § 75.17). This former version of the rule was the subject of the interlocutory jurisdictional appeal we addressed in *Texas Board of Chiropractic Examiners v. Texas Medical Association,* 270 S.W.3d 777, 780–83 (Tex.App.-Austin 2008, no pet.). During the pendency of the litigation, TBCE amended the text of the rule to include an explicit authorization for chiropractors to perform MUA, discussed above. *See* 34 Tex. Reg. 4331 (2009) (codified at 22 Tex. Admin. Code § 75.17) (proposed Jan. 2, 2009).

FN15. TMA also named TBCE's executive director as a defendant, and he appears in his official capacity as a party to this appeal. Because any distinction between the two parties is not material to this appeal, for convenience we will use "TBCE" hereinafter to refer both to the agency itself and the agency and executive director collectively.

FN16. TMA also sought a declaration that TBCE had failed to provide an adequate "reasoned justification" for the challenged rules, as required by the Administrative Procedure Act. These claims are not at issue on appeal.

On petition of TMA, the TMB was joined in the suit as a plaintiff. After TBCE was unsuccessful in challenging TMA's standing, TCA intervened as a defendant and also asserted its own affirmative claims for declarations that each of the challenged rules were within the statutory scope of chiropractic. In the alternative, TCA sought a declaration that a statutory definition of "surgical" added by the Legislature in the 2005 Sunset legislation was unconstitutional on grounds that included ***473** improper delegation of legislative authority to a private entity. *See Texas Boll Weevil Eradication Found., Inc. v. Lewellen,* 952 S.W.2d 454, 465–75 (Tex.1997).

TMA, joined by TMB (hereafter, the "Physician Parties"), sought traditional partial summary judgment on

their claims seeking to invalidate, as beyond the statutory scope of chiropractic, TBCE's rules authorizing chiropractors to perform needle EMG and MUA. The district court granted the motion as to these claims.

In the same motion, the Physician Parties similarly sought summary judgment invalidating TBCE's rule permitting chiropractors to make "diagnoses" as beyond the statutory scope of chiropractic. TBCE and TCA (hereafter the "Chiropractor Parties") countered with a cross-motion for partial summary judgment dismissing the Physician Parties' claims challenging whether TBCE's rules permitting "diagnoses" were within the statutory scope of chiropractic.[FN17] The district court denied the Physician Parties' motion and granted the Chiropractor Parties' motion in part "as to the Chiropractic Board's use of the word 'diagnosis' in its rule." "However," the court emphasized, it "reserve[d] judgment regarding 'diagnosis' as it related to *scope of practice.*" (Emphasis in original.) Following a second round of summary-judgment filings, however, the district court granted summary judgment for the Physician Parties as to a narrower portion of the "diagnosis" rule than they had challenged previously.

> FN17. The district court's final judgment also references cross-motions purportedly filed by the Chiropractor Parties concerning the needle-EMG and MUA issues. However, no such motions appear in the appellate record, nor does the docket sheet reflect that any such motions were ever filed.

In the meantime, the Attorney General had intervened on behalf of the State of Texas to defend against each side's alternative constitutional claims, *see* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b) (West 2008), and the Attorney General and various other parties had filed pleadings attacking those claims. After the district court indicated its intended disposition of the second round of partial summary-judgment motions, but before it signed an order, TCA non-suited its affirmative claims for relief.

In light of TCA's non-suit, and concluding that the Physician Parties' "constitutional challenges" had been rendered "moot" by its summary-judgment rulings, the district court rendered a final judgment incorporating its summary-judgment rulings and declaring the aforementioned rule provisions concerning needle EMG, MUA, and "diagnoses" "invalid and void." Both of the Chiropractor Parties filed notices of appeal.

ANALYSIS

In five issues on appeal, TCA challenges the district court's judgment invalidating TBCE rules regarding needle EMG, MUA, and "diagnoses." TBCE brings three issues challenging only the portions of the judgment invalidating the needle-EMG and MUA rules.

Standard of review

The challenged portions of the district court's judgment are predicated on its rulings granting or denying motions for partial summary judgment. We review the district court's summary judgments de novo. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex.2005); *Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex.2003). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter ***474** of law. Tex.R. Civ. P. 166a(c). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating Co.,* 164 S.W.3d at 661; *Knott,* 128 S.W.3d at 215. When parties file cross-motions for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we review the summary-judgment evidence supporting both motions and determine all questions presented and preserved. *See FM Props. Operating Co. v. City of Austin,* 22 S.W.3d 868, 872 (Tex.2000). We "should render the judgment that the trial court should have rendered." *Id.*

In this case, the parties' respective entitlements to summary judgment turn principally on whether the rules in question were within TBCE's statutory authority to adopt.

To resolve such questions, we consider whether each rule: (1) contravened specific statutory language; (2) ran counter to the general objectives of the underlying statute, chapter 201 of the occupations code; or (3) imposed additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. *See City of Garland v. Public Util. Comm'n,* 165 S.W.3d 814, 819 (Tex.App.-Austin 2005, pet. denied).

Statutory construction presents a question of law that we review de novo. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex.2006). Our primary objective in statutory construction is to give effect to the Legislature's intent. *See id.* We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn,* 209 S.W.3d 83, 85 (Tex.2006). "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex.2009) (op. on reh'g) (citing *Shumake,* 199 S.W.3d at 284; *Alex Sheshunoff Mgmt. Servs. v. Johnson,* 209 S.W.3d 644, 651–52 (Tex.2006)). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired; otherwise we construe the words according to their plain and common meaning unless a contrary intent is apparent from the context. *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625–26 (Tex.2008). We also presume that the Legislature was aware of the background law and acted with reference to it. *See Acker v. Texas Water Comm'n,* 790 S.W.2d 299, 301 (Tex.1990). We further presume that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully. *See Texas Lottery Comm'n v. First State Bank of DeQueen,* 325 S.W.3d 628, 635 (Tex.2010); *Shook v. Walden,* 304 S.W.3d 910, 917 (Tex.App.-Austin 2010, no pet.). Our analysis of the statutory text may also be informed by the presumptions that "the entire statute is intended to be effective" and that "a just and reasonable result is intended," *see* Tex. Gov't Code Ann. § 311.021(2), (3) (West 2005), and consideration of such matters as "the object sought to be attained," "circumstances under which the statute was enacted," legislative history, "common law or former statutory provisions, including laws on the same or similar subjects," "consequences of a particular construction," and the enactment's "title," *id.* § 311.023(1)-(5), (7) (West 2005). However, only when the statutory text is ambiguous—i.e., susceptible to more than one reasonable interpretation—"do we 'resort to rules of construction or extrinsic aids.' " *See Entergy Gulf States, Inc.,* 282 S.W.3d at 437 (quoting *In re Estate of Nash,* 220 S.W.3d 914, 917 (Tex.2007)).

As the Chiropractor Parties emphasize, in certain circumstances courts may be required to defer to an administrative agency's construction of its own statutory authority. *See* ***475***Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water,* 336 S.W.3d 619, 624–25 (Tex.2011). But these principles apply only where the statute in question is ambiguous and only to the extent that the agency's interpretation is one of those reasonable interpretations. *See id.* "Consequently, to determine whether this rule of deference applies, a reviewing court must first make a threshold determination that the statute is ambiguous and the agency's construction is reasonable—questions that turn on statutory construction and are reviewed de novo." *City of Waco v. Texas Comm'n on Envtl. Quality,* 346 S.W.3d 781, 800 (Tex.App.-Austin 2011, pet. filed) (citing *Texas Citizens,* 336 S.W.3d at 625). Additionally, this Court has recognized that these principles of deference may be subject to further qualifications where the subject matter is not within any specialized expertise of the agency, *see id.* (citing *Texas Citizens,* 336 S.W.3d at 630), and where "a nontechnical question of law" is involved, *see Rogers v. Texas Bd. of Architectural Exam'rs,* ——S.W.3d ——, ——, 2011 WL 3371543 (Tex.App.-Austin 2011, no pet. h.) (citing *Rylander v. Fisher Controls Int'l, Inc.,* 45 S.W.3d 291, 302 (Tex.App.-Austin 2001, no pet.)).

To the extent our analysis turns on administrative construction of the rules themselves, we defer to an agency's interpretation of its own rules unless that interpretation is plainly erroneous or inconsistent with the text of the rule or underlying statute. *See Public Util. Comm'n v. Gulf States Utils. Co.,* 809 S.W.2d 201, 207 (Tex.1991); *Tennessee Gas Pipeline Co. v. Rylander,* 80 S.W.3d 200, 203 (Tex.App.-Austin 2002, pet. denied). We construe administrative rules in the same manner as statutes because

they have the force and effect of statutes. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex.1999).

Needle EMG

TCA's second issue and TBCE's first two issues challenge the district court's summary judgment invalidating rules relating to needle EMG.

As previously noted, the statutory scope of chiropractic practice includes "using objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body," *see* Tex. Occ.Code Ann. § 201.002(b)(1); *see also* 22 Tex. Admin. Code § 75.17(a)(1)(A) (tracking the same language in TBCE's scope-of-practice rule), but excludes any "incisive or surgical procedure," *see* Tex. Occ.Code Ann. § 201.002(c)(1); *see also* 22 Tex. Admin. Code § 75.17(a)(2)(A), (c)(4), (d)(2), (e)(3) (tracking same exclusion in scope-of-practice rule), a term that:

> includes making an incision into any tissue, cavity, or organ by any person or implement....
>
> [but] does not include the use of a needle for the purpose of drawing blood for diagnostic testing.

Tex. Occ.Code Ann. § 201.002(a)(3) (formatting altered for emphasis).

In its scope-of-practice rule, TBCE construed and defined the term "incision"—i.e., that which characterizes an "incisive procedure"—as "[a] cut or a surgical wound; also, a division of the soft parts made with a knife or hot laser." 22 Tex. Admin. Code § 75.17(b)(3). TBCE further determined that the insertion of a needle into the human body might or might not "cut" the body or be "incisive" in the sense of the exclusion, or be "surgical," and promulgated a standard, found in subparagraph (a)(3) of the rule, for distinguishing "incisive" or "surgical" needle insertions from non-incisive and non-surgical ones:

> (3) Needles may be used in the practice of chiropractic under standards set ***476** forth by the [TBCE] but may not be used for procedures that are incisive or surgical.
>
> (A) The use of a needle for a procedure is incisive if the procedure results in the removal of tissue other than for the purpose of drawing blood.
>
> (B) The use of a needle for a procedure is surgical if the procedure is listed in the surgical section of the CPT Codebook.

Id. § 75.17(a)(3). The "CPT Codebook" is defined elsewhere in the rule as "the American Medical Association's annual Current Procedural Terminology Codebook (2004) .... adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services as Level I of the common procedure coding system." *See id.* § 75.17(b)(2).

Applying this standard, TBCE concluded that needle EMG was neither an "incisive" nor "surgical" procedure and, thus, was not excluded from the scope of chiropractic practice. Premised on that conclusion, TBCE promulgated two additional rule provisions addressing needle EMG specifically. The first, paragraph (c)(2)(D), listed "electro-diagnostic testing" among several examples of testing and measurement procedures that chiropractic licensees were permitted to use in evaluating or examining patients. *See id.* § 75.17(c)(2)(D). In the second provision, paragraph (c)(3)(A), TBCE imposed certification and supervision requirements on any licensees who administered "electro-neuro diagnostic testing" that varied according to whether the testing was "surface (non-needle)" or involved the use of needles. *See id.* § 75.17(c)(3)(A). The import or effect of paragraphs (c)(2)(D) and (c)(3)(A), as the parties agree, was that chiropractors with specified training and certification could utilize needle EMG in evaluating or examining patients.

In their live petition and summary-judgment motions, the Physician Parties challenged the validity of the two rule provisions specifically addressing needle

EMG—75.17(c)(2)(D) and (c)(3)(A)—plus the general standard regarding use of needles—75.17(a)(3)—based on the assertions that each rule permitted chiropractors to perform needle EMG, and needle EMG was an "incisive" procedure excluded from the statutory scope of chiropractic. The district court granted the motions and rendered judgment declaring that "22 Tex. Admin. Code §§ 75.17(a)(3), 75.17(c)(2)(D) and 75.17(c)(3)(A), concerning needle electromyography, are ... invalid and void." The Physician Parties did not challenge, and the district court did not invalidate, TBCE's definition of "incision" as a "cut," "surgical wound," or "division of the soft parts." *See id.* § 75.17(b)(3).

In holding that the three rules improperly permitted chiropractors to perform an "incisive" procedure, the district court, the Chiropractor Parties assert, misconstrued unambiguous statutory language or at least erred in failing to give required deference to TBCE's reasonable construction of ambiguous language. They concede that the last sentence of occupations code section 201.002(a)(3)—"[an incisive or surgical procedure] does not include the use of a needle for the purpose of drawing blood for diagnostic testing"—negatively implies that the use of a needle to draw blood for diagnostic testing would otherwise have been considered an "incisive" procedure in the view of the Legislature, as otherwise the exception created in that sentence would have amounted to a redundant nullity. *See DeQueen*, 325 S.W.3d at 638 ("Courts 'do not lightly presume that the Legislature may have done a useless act.' " (quoting ***477***Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 485 (Tex.1998)); *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex.2005) ("We must avoid, when possible, treating statutory language as surplusage."). But the fact that this procedure involving use of a needle would be considered "incisive," the Chiropractor Parties insist, does not imply that *every* procedure involving the insertion of a needle into the human body necessarily is. They urge that any such construction or inference ignores the Legislature's 1997 amendments to the statutory definition of acupuncture. In those amendments, as previously explained, the Legislature, with evident reference to its prior exclusion of "incisive" and "surgical" procedures from the practice of chiropractic, changed the definition of acupuncture to refer to "the nonsurgical, nonincisive insertion of an acupuncture needle ... to specific areas of the human body." *See* Act of May 28, 1997, § 1, 1997 Tex. Gen. Laws at 4418 (codified at Tex. Occ.Code Ann. § 205.001(2)(A)); Tex. Att'y Gen. Op. No. DM–471 (1998) (observing that 1997 amendment responded to prior opinion concluding that acupuncture was an "incisive" procedure outside the scope of chiropractic). By expressly contemplating, in a related statute, that the insertion of a needle into the human body may be "nonincisive" (not to mention "nonsurgical"), the Legislature, in the Chiropractor Parties' view, confirmed that needle insertions may either be "incisive" or "nonincisive" within the meaning of the statutory exclusion from chiropractic. And it follows, they add, that the mere fact a needle insertion creates some degree of hole or separation of tissue along the length of the inserted instrument, as all needle insertions will, cannot in itself be the criterion that distinguishes an "incisive" needle insertion from a "nonincisive" one within the Legislature's contemplation.

The Chiropractor Parties add that TBCE's standard for distinguishing "incisive" from "nonincisive" needle use, which focuses on whether the procedure results in the removal of tissue, *see* 22 Tex. Admin. Code § 75.17(a)(3), is consistent with this statutory framework. They reason that (1) if using needles for blood draws for diagnostic use is an "incisive" procedure (again, the negative implication of the Legislature's exception of blood draws from "incisive or surgical" procedures, *see* Tex. Occ.Code Ann. § 201.002(a)(3)), (2) but needle insertion in itself cannot be what makes the procedure "incisive" (as implied by the statutory definition of acupuncture as entailing "nonincisive" needle insertion into the body, *see* Tex. Occ.Code Ann. § 205.001(2)(A)), (3) then the "incisive" character of a needle blood draw must relate to the fact that it results in the separation and removal of the blood itself or, more generally, tissue, as blood is considered to be a form of connective tissue. That distinguishing feature, the Chiropractor Parties assert, is properly reflected in TBCE's standard for determining "incisive" needle use. In striking down that standard, they argue, the district court over-

looked the unambiguous text of the relevant statutes, or at least failed to give required deference to TBCE's reasonable construction of ambiguous text. And the same error, they add, led the district court to improperly strike down the two rules permitting needle EMG, as it is undisputed that the procedure does not entail the removal of tissue.

The Physician Parties' core contention in response, as it was in their summary-judgment motions, is that occupations code section 201.002(a)(3)'s express exception for needle blood draws for diagnostic purposes from the "incisive or surgical" procedures excluded from chiropractic reflects the Legislature's intent that all other procedures involving needle usage, including ***478** needle EMG, be excluded from the scope of chiropractic practice. Such a construction, they reason, is necessary both to give effect to the exclusion, *see Liberty Mut. Ins. Co. v. American Emp'rs Ins. Co.*, 556 S.W.2d 242, 245 (Tex.1977) (in context of construing a contract, observing "the purpose of an exclusion is to take something out ... that would otherwise have been included in it"), and by the canon of statutory construction known as *expressio unius est exclusio alterius*—literally "the specific mention of one is the exclusion of the other"—under which we would presume that the Legislature's explicit mention or inclusion of one thing signals its intention to exclude the other or the alternative thing. *See Johnson v. Second Injury Fund*, 688 S.W.2d 107, 108–09 (Tex.1985) (citing *Bryan v. Sundberg*, 5 Tex. 418, 422–23 (Tex.1849)). They similarly rely on the more general principle that courts must assume that the Legislature chose its words carefully and deliberately, and included or excluded particular words purposefully. *See, e.g.*, *DeQueen*, 325 S.W.3d at 635; *USA Waste Servs. of Houston, Inc. v. Strayhorn*, 150 S.W.3d 491, 494 (Tex.App.-Austin 2004, pet. denied).

In further support, the Physician Parties emphasize the legislative history of the 1995 amendments that added the exclusion and description of "incisive or surgical procedures." In their view, this history confirms the Legislature's intent to forbid chiropractors from performing needle EMG and any other procedure entailing the insertion of needles into the human body. In reply, the Chiropractor Parties remind us that statutory construction turns not on the statements of individual legislators but on the text of the statutes the Legislature collectively enacts. *See Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 435 (Tex.2011) (noting that courts should apply "text-centric model" when construing statutes, using extrinsic aids such as legislative history only when text is not clear). And that statutory text, they urge, stops well short of evidencing intent to outlaw needle EMG by chiropractors, especially considering that the procedure has been performed by Texas chiropractors since the early 1990s and been a frequent concern of the medical community for much of that time. If the Legislature had truly meant to prohibit chiropractors from performing needle EMG, they suggest, it presumably would have said so more clearly and directly instead of condemning "incisive" procedures and delegating power to TBCE to promulgate scope-of-practice rules.

As for the implications of the acupuncture statute's reference to "nonsurgical, nonincisive" needle insertions, the Physician Parties first suggest that this language is simply irrelevant because chiropractors acting within the scope of their license are exempted from the acupuncture statutes. [FN18] They similarly question the premise of the Chiropractor Parties (and the Attorney General) [FN19] that the definition of acupuncture as "nonsurgical" and "nonincisive" under the statutes regulating its practice necessarily resolves whether or not it is "incisive" under the meaning of the chiropractic statutes. However, the Physician Parties have also relied on the narrower point (so to speak) that the types of needles used in needle EMG have physical***479** features that materially distinguish them from those used in acupuncture.

FN18. *See* Tex. Occ.Code Ann. § 205.003 (West 2004) (government code chapter 205, the chapter regulating acupuncture, "does not apply to a health care professional licensed under another statute and acting within the scope of the license").

FN19. *See* Tex. Att'y Gen. Op. No. DM–471 (1998); Tex. Att'y Gen. Op. No. DM–472 (1998).

In support of their summary-judgment motion, TMA presented the affidavit of Dr. Sara G. Austin, a physician, who compared the characteristics of acupuncture needles versus those used in needle EMG. Attached to her affidavit were photographs comparing what she averred were "a standard needle used in performing acupuncture" alongside "two of the types of needles I use in performing EMG." The photographs reflected that the two needle-EMG needles were longer and somewhat thicker than the acupuncture needle, with one of the needle-EMG needles appearing to extend four or five times the length of the acupuncture needle.[FN20] Austin further testified that the tips of the types of needles used in needle EMG "typically are beveled"—i.e., have an angled side or end, characteristic of a blade or cutting edge [FN21]—and, consequently, "incise tissue" (in the sense of cutting it like a blade) when they are inserted during the EMG examination.[FN22] She did not, however, speak directly to the types of tips found on acupuncture needles.

FN20. The photographic depictions show the acupuncture needle as approximately three-quarters to one inch long, one of the needle-EMG needles appears to be roughly one-and-a-half inches long, and the remaining needle-EMG needle is approximately four or five inches long. However, Austin indicated that while the photographs accurately depicted the needles' comparative sizes, shapes, and configurations, the "photocopying process" had created some differences from their actual sizes.

FN21. Austin also referenced an attached magnified image of a needle tip showing such an edge.

FN22. Austin did not purport to opine as to whether the needle would be "incisive" in the sense that term is used in the statutory exclusion. To the extent her testimony might be so construed, we note that the testimony would amount to an incompetent legal conclusion. *See LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 689 (Tex.2006) (holding that bare legal conclusion is not competent summary-judgment evidence); *see also City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex.2009) (observing that unsupported legal conclusions are not competent evidence and may not support a judgment even in the absence of an objection).

The Physician Parties portray this summary-judgment evidence as establishing conclusively that needle-EMG needles characteristically have a beveled or cutting edge. Consequently, they reason, the insertion of such a needle into the human body effects a "cut" or "incision" and, thus, is an "incisive procedure" within the meaning of the statutory exclusion. In reply, the Chiropractor Parties emphasize Dr. Austin's deposition testimony, which they presented with their summary-judgment response. During her deposition, Austin acknowledged that while she used needle-EMG needles that have a beveled, blade-like edge, some other practitioners performing the procedure instead used needles having a tapered or blunt edge.

[1] Our analysis of the parties' competing contentions begins, in the first instance, with a threshold question of whether the Legislature intended the term "incisive" procedure as used in the statutory exclusion to be afforded its ordinary meaning or a somewhat narrower technical meaning. *See City of Rockwall*, 246 S.W.3d at 625–26. Especially in the context of health care, "incisive" is used to refer to the act of cutting, usually tissue. *See Stedman's Medical Dictionary* 700 (5th Unabridged Lawyers' ed. 1982) (defining "incisive" as "cutting; having the power to cut"); *Dorland's Illustrated Medical Dictionary* 940 (31st ed. 2007) (defining "incisive" as "having the power or quality of cutting," and listing under its heading for "incision" various types of ***480** medical tissue incisions). By contrast, the ordinary meaning of "incisive" embraces not only the concept of cutting, but also "piercing" ("run[ning] into or through as a pointed instrument ... does, stab [bing] ...[,] mak[ing] a hole in or through") and "penetrating" ("pass[ing] into or through").[FN23] A needle insertion into the human body would quite obviously satisfy the ordinary

meaning of "incisive," as such a procedure would plainly "penetrate" tissue, if not also "pierce" it. But it is a closer question whether a needle insertion likewise "cuts" tissue and meets the narrower, technical definition.

> FN23. *See Webster's Third New Int'l Dictionary* 1142 (defining "incisive" as "having a cutting edge or a piercing point"), 1670 (defining "penetrate"), 1712 (defining "pierce") (2002); *American Heritage College Dictionary* 687 (defining "incisive" as penetrating), 1010 (defining "penetrate" as "to enter or force a way into; pierce"), 1035 (defining "pierce" as "to cut or pass through with or as if with a sharp instrument; stab or penetrate") (2000).

In this case, our choice between the ordinary and technical meaning of "incisive" has been narrowed somewhat by TBCE's rule provision, unchallenged by the Physician Parties and undisturbed by the district court's judgment, construing the related term "incision." *See* Tex. Occ.Code Ann. § 201.002(c) (providing that " '[i]ncisive or surgical procedure' includes making an *incision* into any tissue, cavity, or organ by any person or implement ...) (emphasis added). Consistent with the technical meaning of "incisive," TBCE has defined "incision" to mean, in relevant part, "a cut or surgical wound." *See* 22 Tex. Admin. Code § 75.17(b)(3). Consequently, whether the use of a needle is "incisive" so as to be excluded from chiropractic turns on whether such use "cuts" or makes a "surgical wound" "into any tissue, cavity, or organ." And, in light of this rule definition, our analytical focus must shift to determining whether the three invalidated rules permitting needle EMG are premised on a construction and application of "cut" that is clearly erroneous or inconsistent with the rule's text and underlying statutes. *See TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex.2011) ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, ... we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule."); *Rodriguez*, 997 S.W.2d at 254 ("While we defer to the Commission's interpretation of its own regulation, we cannot defer to an administrative interpretation that is 'plainly erroneous or inconsistent with the regulation.' " (quoting *Gulf State Utils. Co.*, 809 S.W.2d at 207)).

Here the summary-judgment evidence becomes relevant to our analysis. Although the summary-judgment evidence falls short of establishing conclusively that *all* needle-EMG needles have a beveled, blade-like edge, Dr. Austin's testimony remains undisputed that at least *some* of the types of needles used by practitioners in performing that procedure do have that feature. And the very purpose of having such an edge on a needle, as Austin further explained, is to make the needle cut or slice through tissue, like a blade or knife. This evidence conclusively establishes that at least some types of needles used in needle EMG "cut" into tissue under any conceivable definition of that term. In its ordinary usage, "cut" with reference to something being inserted into or applied to tissue means "to penetrate with or as if an edged instrument" or to separate into parts with a sharp instrument. *See Webster's Third New Int'l Dictionary* 560 (2002) (defining "cut" as "to penetrate with or as if with an edged instrument .... ***481** make an incision in .... to separate into parts"); *American Heritage College Dictionary* 341 (2000) (defining "cut" as "to penetrate with a sharp edge; .... [t]o separate into parts with or as if with a sharp-edged instrument; sever"); *Random House Dictionary of the English Language* 494 (2d ed. 1987) (defining "cut" as "to penetrate with or as if with a sharp-edged instrument or object ... to divide with or as if with a sharp-edged instrument or object"). We also observe that in the context of health care, needles with beveled edges are said to "cut" or have a "cutting edge," as contrasted with differently edged needles that do not "cut." *Compare Dorland's* at 1255 (defining "cope needle" as "blunt-ended hook like needle with a concealed cutting edge and snare" *and* "Hagedorn's needles" as "surgical needles that are flat from side to side with a straight, cutting edge near the point") *with id.* (defining "spatula needle" as "minute needle with a flat or slightly curved concave surface that does not cut or pierce"). Further, while the question of whether acupuncture is within the chiropractic scope of practice is not be-

fore us, nor does the summary-judgment evidence address whether or not acupuncture needles have a beveled edge, this distinction between beveled, "cutting" needles and other kinds that do not "cut" would perhaps explain how, in the Legislature's view, acupuncture needles would be capable of being inserted into the body in a "nonincisive" and "nonsurgical" manner. *See* Tex. Occ.Code Ann. § 205.001(2)(A).

In contending that needle EMG is not a "cutting" or "incisive" procedure, the Chiropractor Parties ultimately rely upon an asserted distinction predicated on the size of a needle's cutting edge as compared to that of scalpels, knives, or other larger cutting instruments. As they explain their position on appeal, "[a] 'cut' or 'wound' involves an appreciable separation of tissue in at least two directions, as when a knife cuts into and along the body at the same time," (citing dictionary definition of "cut" as "an opening made with an edged instrument"), "[b]ut a needle entry typically creates an appreciable separation of tissue in only one direction—along the length of the needle—because the width of most needles is small." Consequently, in their view, "[t]he resulting hole is not obviously a 'cut,' " creating "a conceptually difficult question of interpretation: when does a needle entry qualify as a 'cut' or 'wound' (and hence become 'incisive')," answered in turn by TBCE's "rational" conclusion focused on tissue removal. But these musings about needle points ultimately miss the point—regardless of the relative size of the instrument, or whether its effects on tissue are "obvious," it remains 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 that term. It would, therefore, be an "incisive" use of a needle. Consequently, the Chiropractor Parties' construction is contrary to the text of its own definition of "incision" as well as the underlying statutes. *See Gulf State Utils. Co.,* 809 S.W.2d at 207; *City of Garland,* 165 S.W.3d at 819.

It follows that the three challenged rule provisions purport to authorize chiropractors to perform "incisive" procedures that are beyond chiropractic's statutory scope—75.17(c)(2)(D) and 75.17(c)(3)(A) authorize chiropractors to perform needle EMG, and 75.17(a)(3) states that a procedure involving a needle is "incisive" only if it results in removal of tissue. In so doing, these rules exceed the statutory limits of chiropractic by, at a minimum, authorizing chiropractors to perform needle EMG with beveled-edged needles that are made to cut or incise tissue. They were, accordingly, beyond TBCE's statutory authority and void. *See* ***482***Gulf States Utils. Co.,* 809 S.W.2d at 207. The district court did not err in granting summary judgment to that effect. We overrule the Chiropractor Parties' issues concerning needle EMG.

MUA

[2] TCA's first and TBCE's third issue challenge the district court's summary judgment invalidating a provision of the scope-of-practice rule, subsection 75.17(e)(2)(O), that included MUA among the treatment procedures or services that chiropractors are expressly authorized to perform. *See* 22 Tex. Admin. Code § 75.17(e)(2)(O). As previously noted, chiropractors are generally authorized to "perform[ ] nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system." *See* Tex. Occ.Code Ann. § 201.002(b)(2); *see also* 22 Tex. Admin. Code § 75.17(a)(1)(B) (tracking the same language in TBCE's scope-of-practice rule). In their summary-judgment motions, the Physician Parties sought to invalidate the rule's authorization of MUA on two basic grounds. First, they asserted that the authorization was contrary to the prohibition in occupations code section 201.154 barring TBCE from "adopt[ing] a process to certify chiropractors to perform manipulation under anesthesia." *See* Tex. Occ.Code Ann. § 201.154. Second, the Physician Parties urged that MUA was a "surgical" procedure excluded from the scope of chiropractic. *See id.* § 201.002(b)(2), (c)(1). In this regard, they relied on the definition or description of "surgical procedure" added by the Legislature in 2005: " '[s]urgical procedure' includes a procedure described in the surgery section of the common procedure coding system as adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services." *Id.* § 201.002(a)(4). The district court did not specify in its

summary-judgment order and judgment the ground or grounds on which it relied.[FN24] The Chiropractor Parties challenge both grounds on appeal, which they perceive to be related to one another.

> FN24. Although both sides reference explanatory letters from the district court that preceded its summary-judgment order and judgment, they acknowledge that the letters do not impact the standard or scope of our appellate review. *See Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex.1990) (holding that trial court's letter to parties was not competent evidence of the trial court's basis for judgment); *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20, 25 (Tex.App.-Houston [1st Dist.] 1995, writ denied) (refusing to consider trial court's letter to parties explaining reasons why judge would grant summary judgment).

Regarding section 201.154's ban on TBCE "adopt[ing] a process to certify chiropractors to perform [MUA]," the Chiropractor Parties insist that a ban on "certifying" chiropractors to perform MUA means only that TBCE cannot create some sort of advanced training or "certification" process beyond licensing minimums as a prerequisite to being allowed to perform MUA, but does not prohibit chiropractors from performing the procedure itself. They add that such a ban further implies that MUA itself could not be banned anywhere in chapter 201, as otherwise section 201.154's "certification" ban would be redundant surplusage. *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex.2008) (citing general rule that courts should avoid statutory constructions that create surplusage or fail to give effect to provisions).

As for the implications of occupations code 201.002(a)(4)'s definition or description of "surgical procedure" (i.e., the language added in 2005), TBCE in its scope-of-practice rule elaborated that "the common***483** procedure coding system as adopted by the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services," referenced in the statute, referred to "the American Medical Association's annual Current Procedural Terminology Codebook (2004)," which "has been adopted by the Centers for Medicare and Medicaid Services ... as Level 1 of the common procedure coding system." *See* 22 Tex. Admin. Code § 75.17(b)(2) (defining "CPT Codebook"). Simply described, the CPT Codebook identifies several thousand medical procedures and services and provides a five-digit code and brief description for each. The American Medical Association began the development of the CPT coding system in 1966 to—

> encourage the use of standard terms and descriptors to document procedures in the medical record; help[ ] communicate accurate information on procedures and services to agencies concerned with insurance claims; provide[ ] the basis for a computer oriented system to evaluate operative procedures; and contribute [ ] basic information for actuarial and statistical purposes.

American Medical Association, *CPT Coding Billing & Insurance, CPT Application Process FAQ*, http:// www. ama- assn. org/ ama/ pub/ physician- resources/ solutions- managing- your- practice/ coding- billing- insurance/ cpt/ cpt- process- faq/ code- becomes- cpt. page (last visited Mar. 13, 2012). Currently, the CPT is used "to report medical procedures and services under public and private health insurance programs ... [and] is also used for administrative management purposes such as claims processing and developing guidelines for medical care review." *Id.* The AMA updates the CPT each year, effective January 1, to reflect new developments in medical procedures and services. *See id.; Practice Mgmt. Info. Corp. v. American Med. Ass'n*, 121 F.3d 516, 517 (9th Cir.1997). The summary-judgment record contains excerpts from what appears to be a CPT Codebook for 2007,[FN25] one of the versions in effect during the course of this litigation.

> FN25. *See* American Medical Association, *Current Procedural Terminology (CPT®) 2007* (4th ed. 2006).

The five-digit codes in the CPT are divided into three categories: Category I covers medical services and procedures; Category II includes codes related to performance measurement; and Category III lists the temporary codes for new and emerging technology. Category I is further divided into six sections—"evaluation," "anesthesia," "radiology," "pathology," "medicine," and, of relevance here, "surgery." *See* American Medical Association *Current Procedural Terminology (CPT®) 2007* xiv (4th ed. 2006). Within each section, procedures are arranged to enable the user to locate the code number readily. In the "surgical" section, the procedures are grouped according to the body system on which surgery is performed.

On appeal, TBCE concedes that "MUA is listed in the surgery section of the CPT Codebook and [is] thus a surgical procedure under the Chiropractic Act." *See also* 31 Tex. Reg. 4615 (2006) (Texas Bd. of Chiropractic Exam'rs) (stating the same thing). Nonetheless, TBCE insists that we must "harmonize" occupations code 201.002(a)(4), which would otherwise serve to exclude MUA from the scope of chiropractic, *see* Tex. Occ.Code Ann. § 201.002(c)(1), with the general statutory authorization of chiropractors to perform "adjustment and manipulation," *see id.* § 201.002(b)(2), and what it perceives to be ***484** an implicit authorization or recognition in occupations code 201.154 that chiropractors can perform MUA because, as previously explained, TBCE maintains that the section's ban on "certification" of chiropractors to perform MUA would otherwise be redundant surplusage. Relatedly, TBCE also invokes the principle that when statutory provisions irreconcilably conflict, the "more specific" provision—what they view as the implicit authorization of MUA present in section 201.154—should control over the "general" statutory exclusion of surgical procedures from chiropractic. *See* Tex. Gov't Code Ann. § 311.026(b) (West 2005) (providing that specific provision prevails over general); *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 670 n. 56 (Tex.2009) (citing to government code section 311.026(b) for same proposition).

In contrast to TBCE, TCA vigorously disputes that MUA is "described in the surgery section" of the CPT Codebook in any sense relevant to chiropractors. While not disputing that the "surgery" section of the book has contained a description of MUA at all times relevant to our inquiry here,[FN26] TCA insists that the reference "does not encompass chiropractic procedures." It emphasizes a cross-reference that appears in the 2007 CPT Codebook's description of MUA:

> FN26. In fact, the 1970 edition of the CPT Codebook lists "22505 MANIPULATION SPINE ANY REGION, REQUIRING ANESTHESIA" in the surgery section using the same five-digit code used in the most current version of the CPT. *See* American Medical Association, *Current Procedural Terminology* 135 (2d ed. 1970); American Medical Association, *Current Procedural Terminology CPT® 2012* 75 (4th ed. 2011) ("**22505** Manipulation of spine requiring anesthesia, any region").

Manipulation

(For spinal manipulation without anesthesia, use 97140)

22505 Manipulation of spine requiring anesthesia, any region

American Medical Association, *2007 Current Procedural Terminology (CPT®) 2007* 85 (4th ed. 2006). TCA represents that the referenced code "97140" does not apply to chiropractors because there are different codes—98940 through 98943—that cover "chiropractic manipulative treatment." And because manipulation by chiropractors is not covered by the cross-referenced code 91740, it reasons, the "manipulation of spine requiring anesthesia" code from which the reference is made must likewise not apply to chiropractors. *See id.* at xiv, 85 (describing the "Surgery" section of the CPT codebook as including code numbers 10021 through

69990). The portions of the CPT Codebook concerning chiropractic manipulation do not appear in our record. Regardless, assuming that TCA's description of those codes is accurate, and even assuming it is correct in concluding that code 22505 ("manipulation of the spine requiring anesthesia," i.e., MUA) would not actually be the code applied by a chiropractor who was billing for the treatment, it remains undisputed that this code and accompanying description have appeared in the CPT Codebook's "surgery" section at all relevant times. This is all that the Legislature has required in order for MUA to be deemed a "surgical" procedure excluded from the scope of chiropractic: " '[s]urgical procedure' includes a procedure described in the surgery section of the [CPT Codebook]." *See* Tex. Occ.Code Ann. § 201.002(a)(4); 22 Tex. Admin. Code § 75.17(b)(2). The Legislature did not condition this requirement on the identity or type of health-care provider who performs the procedure. And in the face of this unambiguous statutory language, it is simply irrelevant whether, as TCA insists, a chiropractor ***485** would actually bill under code 22505. To the contrary, such a fact would, if anything, further confirm that the Legislature intended procedures "described" in the Codebook's "surgical" section be off-limits to chiropractors.

Nor should we construe section 201.002(a)(4) any differently to "harmonize" or avoid "conflict" with section 201.154, the provision barring TBCE from "adopt[ing] a process to certify chiropractors to perform [MUA]." As an initial observation, the gravamen of the Chiropractor Parties' position concerning section 201.154 is that the Legislature, despite its *specific* prohibition barring chiropractors from performing procedures listed under the CPT surgery codes, intended to *impliedly* allow chiropractors to perform one of the listed procedures. Their position further suggests that the Legislature intended (without explicitly saying so) that chiropractors be allowed to perform MUA, yet went out of its way to bar TBCE from requiring any additional training or qualifications beyond licensing minimums to ensure that chiropractors perform that procedure safely. Such a construction yields what approaches "absurd results" that we presume the Legislature could not possibly have intended. *See Molinet v. Kimbrell,* 356 S.W.3d 407, 411 (Tex.2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." (citing *City of Rockwall,* 246 S.W.3d at 625–26)). It is also unsupported by the text of section 201.154 itself.

The Chiropractor Parties' construction of section 201.154 assumes that the word "certify" expresses an intent to grant some special or additional type of authority to perform MUA beyond that conveyed through licensing. But "certify" simply means "to designate as having met the requirements for pursuing a certain kind of study or work." *See Webster's* 367 (defining "certify" and comparing to "license"); *see also Black's Law Dictionary* 258 (9th ed. 2009) (describing "certify" as "attest as being true or as meeting certain criteria"). It does not necessarily require some underlying, preexisting authority that would be enhanced, as it were, by the certification. In fact, the plain language of section 201.154—i.e., "the board may not adopt a process to certify chiropractors *to perform* [MUA]"—suggests that without certification, chiropractors lack the authority *to perform* MUA. *See* Tex. Occ.Code Ann. § 201.154 (emphasis added).

If the Legislature had intended "certify" to have the meaning that the Chiropractor Parties suggest here—i.e., that "certification" contemplates some special designation and presumes a status quo in which chiropractors can perform the procedure—a clearer statement of that intent would have been a prohibition against TBCE adopting a process to certify chiropractors, for example, "as an MUA specialist" or "in the field of MUA." *See, e.g.,* Tex. Occ.Code Ann. § 205.303(a) (West 2004) ("The medical board may certify a person *as an* acudetox *specialist*....") (emphasis added); *id.* § 1701.404(b) (West Supp. 2011) ("The commission may certify a sheriff, sheriff's deputy, constable, other peace officer, county jailer, or justice of the peace *as a special* officer for offenders with mental impairments....") (emphasis added). But the plain language of section 201.154 does not do this. Rather, it merely forbids TBCE from designating chiropractors as having met

the requirements *to perform* MUA. Therefore, it does not necessarily follow that chiropractors already have the authority to perform MUA.

For similar reasons, we also reject the TBCE's related contention that the "more specific" language of section 201.154 ***486** should control over the statute's general ban on surgical procedures. But even if we were to apply this canon of construction, section 201.154 cannot be said to be "more specific" than the ban on surgical procedures with regard to whether chiropractors may perform MUA. At best, section 201.154 implies that chiropractors may perform MUA, but section 201.002(a)(4) specifically provides that chiropractors may not perform MUA. Thus, 201.002(a)(4) is the specific provision that should control.

Although our construction here could appear, at first glance, to render section 201.154 superfluous given the Act's ban on MUA as a surgical procedure, it also can be viewed as reinforcing the Legislature's intent that chiropractors not perform MUA. *See Nash,* 220 S.W.3d at 917–18 (noting that "there are times when redundancies are precisely what the Legislature intended"); *In re City of Georgetown,* 53 S.W.3d 328, 335–36 (Tex.2001) (construing duplicative provisions of the Open Records Act and concluding that "the Legislature repeated itself out of an abundance of caution, for emphasis or both"). In any event, occupations code section 201.002(a)(4) means what it says, and we cannot ignore this clear expression of legislative intent in the cause of avoiding any redundancy with section 201.154. *See City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 29 (Tex.2003) (" 'It is an elementary rule of construction that, *when possible to do so,* effect must be given to every sentence, clause, and word of a statute so that no part thereof be rendered superfluous.' ") (quoting *Spence v. Fenchler,* 107 Tex. 443, 180 S.W. 597, 601 (1915)).

Based on the unambiguous text of occupations code section 201.002(a)(4), we conclude that MUA is a "surgical procedure" excluded from the statutory scope of chiropractic and that occupations code section 201.154 is not to the contrary. Although the Physician Parties also emphasize the anecdotal legislative history of section 201.154, the statutory text is dispositive here. *See DeQueen,* 325 S.W.3d at 635 (noting that courts should look first to the plain meaning of statutory text as expressing legislative intent); *Alex Sheshunoff,* 209 S.W.3d at 652 n. 4 (noting that reliance on secondary materials such as legislative history should be avoided when text is unambiguous). We must, however, consider one final argument asserted by TCA.

[3] TCA urges that if we construe section 201.002(a)(4) to deem MUA performed by chiropractors a "surgical procedure," we must invalidate the provision as an improper delegation of legislative authority that violates the separation-of-powers clause of the Texas Constitution.[FN27] *See* Tex. Const. art. III, § 1 (vesting the legislative power in the Senate and House of Representatives).[FN28] Specifically, the Chiropractor Parties assert that by effectively incorporating a coding system developed by the AMA—a private association (not to mention a longtime professional rival to chiropractors and chiropractic)—to supply a definition or description of "surgical procedure," the Legislature has delegated its ***487** authority to the AMA in a manner that fails the eight-factor balancing test articulated by the supreme court in *Texas Boll Weevil Eradication Foundation, Inc.,* 952 S.W.2d at 472, for delegations of authority to private entities.[FN29] Although we agree that a delegation of unbridled discretion to the AMA to define "surgical procedures" would potentially raise constitutional concerns, *see id.* at 471–75, we disagree that the Legislature has delegated its authority in this situation.

FN27. As was the case with TCA's assertion that MUA performed by chiropractors is not described in the surgical section of the CPT Codebook, TBCE does not join in this argument.

FN28. Both the Physician Parties and the State of Texas assert that TCA waived this argument by non-suiting its affirmative claims for relief. To the contrary, TCA also raised this contention defensively, as a ground for denying the Physician

Parties' summary-judgment motion, thereby preserving it for appeal. *See* Tex.R. Civ. P. 166a(c). Furthermore, in its notice of non-suit, TCA explicitly disclaimed any intent to waive its right to assert any defensive arguments.

FN29. Although the text of section 201.002(a)(4) itself refers to an agency of the federal government rather than the AMA ("the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services"), there is no dispute that at all relevant times CMS has fully incorporated the AMA's CPT coding system, as TBCE has acknowledged in its rules. *See* Department of Health & Human Services Medical Data Code Sets Rule, 45 C.F.R. § 162(b)(1) (2012) (adopting AMA's CPT codebook for the period from October 16, 2003 through September 30, 2013); 22 Tex. Admin. Code § 75.17(a)(4) (2011) (Tex. Bd. of Chiropractic Exam'rs, Scope of Practice); *see also* HCPCS–General Information, Centers for Medicare & Medicaid Servs., https:// www. cms. gov/ Med HCPCSGen Info (last visited Mar. 13, 2012) ("Level I of the HCPCS is comprised of CPT (Current Procedural Terminology), a numeric coding system maintained by the American Medical Association (AMA)."). Consequently, the statutory reference to the "common procedure coding system adopted" by CMS was, at least at the time of the statute's 2005 enactment, tantamount to incorporating the AMA's CPT Codebook.

Whether the Legislature has, in fact, delegated its authority to define "surgical procedures" to the AMA depends initially on whether section 201.002(a)(4) incorporates (1) some fixed version of the CPT Codebook or (2) the CPT Codebook in whatever manner the AMA may revise or amend it in the future. If the former, the Legislature has not delegated its authority to define "surgical procedure," but has instead defined that term itself, albeit by reference to another source. *See Ex parte Elliott,* 973 S.W.2d 737, 741 (Tex.App.-Austin 1998, pet. ref'd). This sort of cross-reference to fixed external fact, source, or standard is no more a delegation of legislative authority than a statutory reference to a measure of time or volume.

Although no party has emphasized it, we observe that TBCE's scope-of-practice rule defines the "CPT Codebook" as the version published by the AMA in 2004. *See* 22 Tex. Admin. Code § 75.17(b)(2) (identifying "the American Medical Association's annual Current Procedural Terminology CodeBook (2004)"). That is, in fact, the version of the CPT Codebook that was in effect when the Legislature adopted section 201.002(a)(4) in May 2005.[FN30] Thus, TBCE has interpreted section 201.002(a)(4) to incorporate a fixed version of the CPT Codebook. *See Ex parte Elliott,* 973 S.W.2d at 741. Moreover, we would reach the same conclusion even in the absence of this rule. In *Ex parte Elliott,* we considered, in the context of a habeas proceeding, whether the Legislature's incorporation of the Environmental Protection Agency's definition of "hazardous waste" was an unconstitutional delegation of legislative authority. *See id.* at 741. We held that the Legislature intended to adopt the EPA's definition of hazardous waste that existed on the date the relevant legislation was enacted. *See id.* In reaching our holding, we relied on supreme court precedent that (1) a statute that ***488** adopts another statute by reference adopts the referenced statute as it exists at the time of adoption, but not as it may be amended in the future, *see id.* (citing *Trimmier v. Carlton,* 116 Tex. 572, 296 S.W. 1070, 1074 (1927)), and that (2) we must construe a statute subject to varying interpretations in a manner that assumes the Legislature's intent to enact a constitutional statute. *See id.* at 742 (citing *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 715 (Tex.1990)); *see also* Tex. Gov't Code Ann. § 311.021(1) (West 2005) (establishing presumption that the Legislature intended for statutes to be constitutional); *but see id.* § 311.027 (West 2005) (providing that statutory references to a statute or rule applies to revisions or amendments to the statute or rule). In this case, we would similarly construe section 201.002(a)(4) so as to avoid the potential constitutional infirmities and hold that it references the version of the

CPT Codebook in effect on the date of its enactment, May 27, 2005. Under that construction, no delegation of the Legislature's authority to define "surgical procedure," much less an unlawful one, has occurred. *See Ex parte Elliott*, 973 S.W.2d at 742.

> FN30. According to the evidence in the record, the AMA publishes the CPT Codebook annually in the late summer or early fall, to be effective January 1. Thus, the CPT Codebook in effect for the calendar year 2005—i.e., *CPT 2005*—would have had a publication date of 2004. *See, e.g.*, American Medical Association *Current Procedural Terminology CPT 2012* (4th ed. 2011) (designated as "CPT 2012," but published in 2011).

TCA counters that construing section 201.002(a)(4) to adopt a fixed version of the CPT Codebook poses due-process concerns because the AMA updates the CPT Codebook annually and prior versions of the CPT Codebook are "inaccessible." We simply note that, in addition to the fact that there is no summary-judgment evidence in the record that the 2004 edition of the CPT Codebook was inaccessible to any party, our own independent research on the delegation question has confirmed that this specific publication is available through public sources, including interlibrary loan from the Texas State Law Library. Thus, although not as readily accessible as the current version of the CPT Codebook, the 2004 CPT Codebook is not inaccessible.

As previously noted, there is no dispute that MUA was described in the "surgical" section of the CPT Codebook throughout the period at issue, including in its 2004 version. As there is no constitutional barrier to section 201.002(a)(4)'s enforcement, we must give it effect and hold that MUA is a "surgical procedure" excluded from the statutory scope of chiropractic practice. *See* Tex. Occ.Code Ann. § 201.002(b)(2), (c)(1). Consequently, subsection 75.17(e)(2)(O), which purports to authorize chiropractors to perform MUA, is beyond TBCE's statutory authority and void. *See Gulf States Utils. Co.*, 809 S.W.2d at 207. The district court did not err in granting summary judgment to that effect. We overrule the Chiropractor Parties' issues concerning MUA.

"**Diagnosis**"

In its remaining issues, TCA (but not TBCE) challenges the district court's judgment invalidating rules authorizing chiropractors to make certain "diagnoses." In addition to responding to TCA's issues, the Physician Parties assert what they term a "cross-point" urging affirmance based on the grounds they raised in their first motion for partial summary judgment, and also what is substantively a motion to dismiss one of TCA's issues for lack of subject-matter jurisdiction. Before turning to the parties' competing contentions, it is necessary to clarify, at some length, the specific rules at issue, the scope of the district court's ruling, and the procedural posture of the remaining issues on appeal.

The statutory scope of chiropractic, again, includes "us[ing] objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body" and "perform[ing] nonsurgical, nonincisive procedures ... to improve ***489** the subluxation complex or the biomechanics of the musculoskeletal system." *See* Tex. Occ.Code Ann. § 201.002(b)(1), (2). In subpart (d)(1) of its scope-of-practice rule, TBCE construed these provisions to permit chiropractors to render certain "analyses," "diagnoses," and "other opinions":

> (d) Analysis, Diagnosis, and Other Opinions
>
> (1) In the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions could include, but are not limited to, the following:
>
> (A) An analysis, diagnosis or other opinion regarding the biomechanical condition of the spine or musculoskeletal system including, but not limited

to, the following:

(i) the health and integrity of the structures of the system;

(ii) the coordination, balance, efficiency, strength, conditioning and functional health and integrity of the system;

(iii) the existence of structural pathology, functional pathology or other abnormality of the system;

(iv) the nature, severity, complicating factors and effects of said structural pathology, functional pathology, or other abnormality of the system;

(v) the etiology of said structural pathology, functional pathology or other abnormality of the system; and

(vi) the effect of said structural pathology, functional pathology or other abnormality of the system on the health of an individual patient or population of patients;

(B) An analysis, diagnosis or other opinion regarding a subluxation complex of the spine or musculoskeletal system including, but not limited to, the following:

(i) the nature, severity, complicating factors and effects of said subluxation complex;

(ii) the etiology of said subluxation complex; and

(iii) the effect of said subluxation complex on the health of an individual patient or population of patients;

(C) An opinion regarding the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(D) An opinion regarding the likelihood of recovery of a patient or condition under an indicated course of treatment;

(E) An opinion regarding the risks associated with the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(F) An opinion regarding the risks associated with not receiving the treatment procedures that are indicated in the therapeutic care of a patient or condition;

(G) An opinion regarding the treatment procedures that are contraindicated in the therapeutic care of a patient or condition;

(H) An opinion that a patient or condition is in need of care from a medical or other class of provider;

(I) An opinion regarding an individual's ability to perform normal job functions and activities of daily living, and the assessment of any disability or impairment;

(J) An opinion regarding the biomechanical risks to a patient, ***490** or patient population from various occupations, job duties or functions, activities of daily living, sports or athletics, or from the ergonomics of a given environment; and

(K) Other necessary or appropriate opinions consistent with the practice of chiropractic.

22 Tex. Admin. Code § 75.17(d)(1). In a subpart (d)(2) to the rule, however, TBCE described several examples of "analyses," "diagnoses," or "other opinions" that would be, in its view, outside the permissible scope of chiropractic practice:

> (2) Analysis, diagnosis, and other opinions regarding the findings of examinations and evaluations which are outside the scope of chiropractic include:
>
> (A) incisive or surgical procedures;
>
> (B) the prescription of controlled substances, dangerous drugs, or any other drug that requires a prescription;
>
> (C) the use of x-ray therapy or therapy that exposes the body to radioactive materials; or
>
> (D) other analysis, diagnosis, and other opinions that are inconsistent with the practice of chiropractic and with the analysis, diagnosis, and other opinions described under this subsection.

Id. § 75.17(d)(2).

In their live pleadings, the Physician Parties sought two declarations that 75.17(d) was invalid for exceeding the scope of chiropractic practice and permitting chiropractors to practice medicine without a medical license, in turn violating the Medical Practice Act and, alternatively, article XVI, section 31 of the Texas Constitution. First, they sought a declaration that 75.17(d)'s use of "diagnosis" in itself rendered this rule and various related rules invalid, reasoning that the statutory scope of chiropractic permits licensees to "analyze, examine, or evaluate" certain conditions, but not to "diagnose" them, and that "diagnose" is instead reserved to the practice of medicine and certain other health care professions. *Compare* Tex. Occ.Code Ann. § 201.002(b)(1) (providing that one practices chiropractic if he or she "uses objective or subjective means to analyze, examine, or evaluate ...") *with id.* § 151.002(a)(3) (" '[p]racticing medicine' means the diagnosis, treatment, or offer to treat ..."). Second, they sought a narrower declaration that 75.17(d) exceeded the statutory scope of chiropractic by permitting licensees to "diagnose" conditions beyond the biomechanical condition of the spine and musculoskeletal system. Additionally, in the event 75.17(d) (or any of the challenged rules) were held to be within the statutory scope of chiropractic, TMA asserted an alternative constitutional challenge to the underlying statutes themselves under article XVI, section 31 of the Texas Constitution.

In their first motion for partial summary judgment, the Physician Parties sought judgment on their broader declaratory claim challenging 75.17(d). The Chiropractor Parties countered with their own motion for partial summary judgment seeking dismissal of the Physician Parties' claims that the use of the term "diagnosis" in its scope-of-practice rule exceeded chiropractic's statutory scope. They asserted that "diagnosis" in its ordinary meaning broadly denoted a process of analysis and evaluation and was, therefore, included or implicit in the express statutory authorizations of chiropractors to "analyze," "examine," and "evaluate," if not also the authorizations to treat certain conditions. The district court denied the Physician Parties' motion and granted the Chiropractors' motions "in part as to the Chiropractic ***491** Board's use of the word 'diagnosis' in its rule." "However," the court emphasized in its order, it "reserve[d] judgment regarding 'diagnosis' as it relates to *scope of practice*." (Emphasis in original.)

Subsequently, the Physician Parties filed a second motion for partial summary judgment seeking relief only as to two portions of 75.17(d)—(d)(1)(A), which authorized "analysis, diagnosis or other opinion" concerning a list of six specific subjects "regarding the biomechanical condition of the spine or musculoskeletal system"; and (d)(1)(B), which authorized "analysis, diagnosis or other opinion" concerning a list of three specific subjects "regarding a subluxation complex of the spine or musculoskeletal system." *See* 22 Tex. Admin. Code § 75.17(d)(1)(A), (B). In this motion, they relied on their narrower claim that these provisions exceeded chiropractic's statutory scope of practice and also violated article XVI, section 31 of the Texas Constitution by permitting chiropractors to "diagnose" conditions, such as diseases, that were beyond the "biomechanical condition[s] of the spine and musculoskeletal system of the human body" that

chiropractors were statutorily permitted to "analyze, examine, or evaluate." *See* Tex. Occ.Code Ann. § 201.002(b)(1). The Chiropractor Parties countered with a joint "supplemental" motion for partial summary judgment and request for judicial notice urging that "diagnose" (which, again, they viewed as synonymous or implicit in "analyze," "examine," and "evaluate") encompassed diagnosis of diseases and any other matter listed in 75.17(d)(1) and (2).[FN31] Without stating the specific grounds on which it relied, the district court granted the Physician Parties' second motion for partial summary judgment and, as before, denied the Chiropractor Parties' motions except to the extent of granting them "as to the use of the word 'diagnosis' in the rule." Both summary-judgment rulings were merged into and expressly memorialized in the final judgment, which further declared "22 Tex. Admin. Code §§ 75.17(d)(A) and (B), concerning diagnosis, ... invalid and void" and ordered that the parties take nothing on any claims for relief not awarded therein.

> FN31. Additionally, in the meantime, TBCE filed a motion for partial summary judgment seeking dismissal of the Physician Parties' constitutional claims challenging 75.17(d) and, alternatively, its underlying statutes. However, we cannot discern from the record that TBCE ever obtained a ruling on this motion.

In its third issue, TCA urges that the district court erred in concluding that (d)(1)(A) (concerning "analysis, diagnosis or other opinion" regarding what were termed aspects of "the biomechanical condition of the spine or musculoskeletal system") exceeded chiropractic's statutory scope of practice. In its fourth issue, it advances a similar contention as to the district court's invalidation of (d)(1)(B) (concerning "analysis, diagnosis or other opinion regarding a subluxation complex of the spine or musculoskeletal system"). In its fifth and final issue, TCA challenges the Physician Parties' alternative summary-judgment ground that (d)(1)(A) and (B) violated article XVI, section 31 of the Texas Constitution.

[4] In addition to joining issue on the merits of TCA's third and fourth issues, the Physician Parties assert what they style as a "cross-point" urging that we affirm the summary judgment as to (d)(1)(A) and (B) on the ground, originally presented in their first motion for partial summary judgment, that the statutory scope of chiropractic does not include "diagnosing" a condition, as opposed to "analyzing, examining, or evaluating" it. TCA ***492** replies, and we agree, that the Physician Parties' "cross-point" seeks relief beyond that which they were afforded in the district court's judgment, which explicitly granted the Chiropractor Parties' motion for partial summary judgment and rendered a take-nothing judgment as to the Physician Parties' claims for a declaration that the use of "diagnosis" in itself rendered 75.17(d) invalid. Consequently, to raise this contention on appeal, the Physician Parties were required to file their own notice of appeal. *See* Tex.R.App. P. 25.1(c) ("A party who seeks to alter the trial court's judgment ... must file a notice of appeal."); *Lubbock County, Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex.2002); *Quimby v. Texas Dep't of Transp.*, 10 S.W.3d 778, 781 (Tex.App.-Austin 2000, pet. denied). They did not do so. We thus lack jurisdiction to consider the Physician Parties' "cross-point" and dismiss it.[FN32] *See Tarrant Restoration v. TX Arlington Oaks Apartments, Ltd.*, 225 S.W.3d 721, 733–34 (Tex.App.-Dallas 2007, pet. dism'd w.o.j.).

> FN32. We emphasize that we express no opinions regarding the merits of the cross-point that the Physician Parties attempt to assert.

Conversely, the Physician Parties suggest that we lack subject-matter jurisdiction to consider TCA's fifth issue challenging the potential summary-judgment ground that 75.17(d)(1)(A) and (B) violate article XVI, section 31 of the Texas Constitution. Citing the portion of the district court's judgment stating that its summary-judgment rulings had rendered "moot" "TMA's and TMB's constitutional challenges," the Physician Parties accuse TCA of seeking an "advisory opinion" regarding a claim or issue that the district court never reached. We observe that while TMA's alternative constitutional challenges to the underlying statutes were never adjudicated below and would indeed

have been mooted by the district court's summary-judgment rulings, it is unclear whether the district court's reference to "moot" "constitutional challenges" was intended also to refer to the constitutional challenge to rule 75.17(d)(1)(A) and (B), as opposed to the statutes, that the Physician Parties had presented as a ground for partial summary judgment. Regardless, we ultimately agree with the Physician Parties that TCA's fifth issue is moot, if for no other reason than that the Physician Parties, by taking the position that the district court never reached their summary-judgment ground concerning the constitutionality of 75.17(d)(1)(A) and (B), have conceded that we cannot affirm the summary judgment invalidating those provisions on that basis.

Having thus clarified and narrowed the matters in dispute, the sole dispositive questions remaining before us in regard to 75.17(d)(1)(A) and (B) are whether those rule provisions exceed the statutory scope of chiropractic—assuming, as we must do in the present procedural posture, that TBCE's use of the term "diagnosis" does not in itself cause the provision to exceed the statutory or permissible constitutional scope of chiropractic practice.

"***Diagnoses" and "opinions" regarding the "biomechanical condition of the spine or musculoskeletal system***"

[5] Subpart (d)(1)(A) of TBCE's scope-of-practice rule allows a chiropractor, again, to render "an analysis, diagnosis or other opinion regarding the biomechanical condition of the spine or musculoskeletal system" and provides a non-exclusive list of examples of such analyses, diagnoses, and opinions that TBCE has determined fit within this provision. *See* 22 Tex. Admin. Code § 75.17(d)(1)(A). Although the ***493** district court did not specify the grounds on which it relied to find this provision invalid, the Physician Parties argued in support of their motion for summary judgment, and also in their briefs to this Court, that this provision improperly allows chiropractors to diagnose diseases that cannot be considered biomechanical conditions of the spine or musculoskeletal system. On appeal, TCA responds that when read in the context of the rule as a whole, subpart (d)(1)(A) does not exceed the statutory scope of chiropractic because it limits chiropractors to making diagnoses only regarding the biomechanical condition of the spine or musculoskeletal system, consistent with the statutory scope of chiropractic. *See* Tex. Occ.Code Ann. § 201.002(b)(1); 22 Tex. Admin. Code § 75.17(d)(1)(A). We agree.

The effect of our procedurally required assumption that TBCE's use of the term "diagnosis" does not in itself cause the scope-of-practice rule to exceed the statutory scope of chiropractic is that the word "diagnose" is synonymous with the phrase "analyze, examine, or evaluate" in the statutory scope of chiropractic. *See* Tex. Occ.Code Ann. § 201.002(b)(1). As such, subpart (d)(1)(A) effectively tracks the Legislature's scope of chiropractic:

Tex. Occ.Code Ann. § 201.002(b)(1)	22 Tex. Admin. Code § 75.17(d)(1)(A)
(b) A person practices chiropractic under [the Chiropractic Act] if the person:	(1) In the practice of chiropractic, licensees may render and analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions could include, but are not limited to, the following:
(1) uses objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body[.]	(A) An analysis, diagnosis or other opinion regarding the biomechanical condition of the spine or musculoskeletal system including, but not limited to, the following [list of examples].

Id.; 22 Tex. Admin. Code § 75.17(d)(1)(A). Thus, the

plain language of (d)(1)(A) limits chiropractors to diagnosing—i.e., "analyzing, examining, or evaluating"—biomechanical conditions of the spine or musculoskeletal system. Further, because the list of non-exclusive examples of such "diagnoses" are grammatically dependent on or otherwise stem from the paragraph's initial statement that the diagnosis *regard* the biomechanical condition of the spine or musculoskeletal system, the listed examples are likewise limited to the biomechanical condition of the spine or musculoskeletal system of the human body. In other words, the non-exclusive list of example opinions or diagnoses cannot be read in isolation; rather, they must be read as being dependent upon or bounded by the restriction that they also regard the biomechanical condition of the spine or musculoskeletal system. To that extent, this complies with the statutory scope of chiropractic.

The Physician Parties counter that this provision does not restrict chiropractors to the biomechanical condition of the spine or musculoskeletal system because it allows them to diagnose diseases without limitation. In support of this contention, they point to the rule's "expansive definitions" of "musculoskeletal system" [FN33] and "subluxation***494** complex," [FN34] the rule's "broad catch-all phrases "including but not limited to," "structural pathology," "functional pathology," and "etiology," and finally to their assertion that the common, ordinary meaning of the word "diagnose" incorporates identification of diseases, *see Webster's* at 622 (defining "diagnose" as "to identify (as a disease or condition) by symptoms or distinguishing characteristics"); *American Heritage College Dictionary* at 383 (defining "diagnosis" as "act or process of determining the nature and cause of a disease or injury through examination of a patient"). Specifically, they assert that because "biomechanical" refers only to the application of mechanical principles—i.e., the action of forces on matter or material, *see Webster's* at 1401 (defining "mechanics" and "mechanical")—to living bodies and does not involve diseases of any kind, chiropractors may not render a diagnosis, which by definition involves the identification of a disease. Relatedly, they point to the rule's use of "pathology" and "etiology," which also involve the study of disease, *see Dorland's* at 690 (defining "etiology" as "the study or theory of the factors that cause disease"), 1416 (defining "pathology" as "the branch of medicine that deals with the essential nature of disease"), to argue that this provision of the scope-of-practice rule allows chiropractors to diagnose a wide range of diseases and conditions, including various cancers, arthritis, osteoporosis, gout, ALS, and bone fractures.

> FN33. "The system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form." 22 Tex. Admin. Code § 75.17(b)(4).
>
> FN34. "[A] neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them." *Id.* § 75.17(b)(7).

But apart from the fact that the common, ordinary meaning of "diagnosis" also includes the identification of a "condition" or an "injury," *see Webster's* at 622; *American Heritage College Dictionary* at 383, the Physician Parties' argument presumes that "disease" would extend beyond the biomechanical condition of the spine or musculoskeletal system of the human body. This construction, as previously suggested, ignores the plain language of the rule restricting any such diagnosis to the biomechanical condition of the spine or musculoskeletal system. The text and format of this provision plainly shows that "the system" discussed in each of the examples is "the biomechanical condition of the spine and musculoskeletal system" referred to at the beginning of the provision. Stated another way, each of the listed examples is limited to the Legislature's standard of "biomechanical condition of the spine and musculoskeletal system." Thus, regardless of whether diagnosis, pathology, or etiology invoke concepts of dis-

ease as the Physician Parties suggest, the bottom line is that paragraph (d)(1)(A) limits chiropractors to diagnoses regarding "the biomechanical condition of the spine and musculoskeletal system" as required by the statutory scope of chiropractic. Accordingly, the provision does not exceed the statutory scope of chiropractic.

In a related argument, the Physician Parties challenge TBCE's use of the phrase "could include, but are not limited to" in subpart (d)(1) of the scope-of-practice rule, suggesting that it, in combination with the issues discussed above, eviscerates any purported limitation on chiropractors' authority to diagnose by allowing chiropractors to "diagnose any diseases (pathology) that relate to the biomechanical condition of the spine and musculoskeletal system (redefined to include nerves and other tissues), determine their origins ***495** (etiology) and provide a prognosis on the disease's effect." But this argument requires reading 75.17(d)(1) in an unnecessarily strained manner.

As set forth above, paragraph (d)(1) states that chiropractors "may render an analysis, diagnosis, or other opinion *regarding* the findings of examinations and evaluations. *Such opinions* could include, but are not limited to, the following[.]" *See* 22 Tex. Admin. Code § 75.17(d)(1) (emphases added). "But are not limited to" as it is used here merely means that the list of examples that follows is not a comprehensive list of every type of authorized opinion—i.e., there could be other types of opinions that fit within the parameters of the provision that are not mentioned in the list. Also, use of this phrase does not alter the limitation in the rule that the "diagnosis" referred to must regard the findings of "examinations and evaluations," a phrase that itself is described earlier in the scope-of-practice rule in terms of the statutory scope of chiropractic:

> (c) Examination and Evaluation
>
> (1) In the practice of Chiropractic, licensees of this board provide necessary examination and evaluation services to:
>
> (A) Determine the bio-mechanical condition of the spine and musculoskeletal system of the human body including, but not limited to, the following....
>
> ....
>
> (B) Determine the existence of subluxation complexes of the spine and musculoskeletal system of the human body and to evaluate their condition including, but not limited to....

Id. § 75.17(c)(1)(A), (B). Thus, the plain language of 75.17(d)(1) provides that chiropractors may render diagnoses regarding findings and examinations within the statutory scope of chiropractic, and offers a non-exclusive list of examples of *such* opinions. It does not, by its plain language, allow them to render diagnoses that do not involve the statutory scope of chiropractic. As such, it does not exceed the statutory scope of chiropractic.

We sustain TCA's third issue.

"Diagnoses" and "opinions" regarding "a subluxation complex of the spine or musculoskeletal system"

[6] Relatedly, the Physician Parties argued successfully to the district court that the following paragraph of TBCE's scope-of-practice rule, (d)(1)(B), also exceeds the statutory scope of chiropractic:

> (1) In the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations. Such opinions could include, but are not limited to, the following:
>
> ...
>
> (B) An analysis, diagnosis or other opinion regarding a subluxation complex of the spine or muscu-

> loskeletal system including, but not limited to, the following: [list of examples].

22 Tex. Admin. Code § 75.17(d)(1)(B). Initially, the Physician Parties argue that this paragraph of the scope-of-practice rule is invalid because it allows chiropractors to *diagnose* a subluxation complex despite the fact that the statutory scope of chiropractic only allows chiropractors to *treat* the subluxation complex. *Compare* Tex. Occ.Code Ann. § 201.002(b)(1) (allowing chiropractors "*to analyze, examine, or evaluate* the biomechanical condition of the spine or musculoskeletal system") (emphasis added) *with id.* § 201.002(b)(2) (allowing chiropractors "*to ... perform procedures****496*** to improve the subluxation complex or the biomechanics of the musculoskeletal system) (emphasis added). Stated another way, the Physician Parties argue that while chiropractors—again assuming our procedural limitations as to "diagnosis"—may diagnose the biomechanical condition of the spine or musculoskeletal system, they can only treat, but not diagnose, the subluxation complex. We find this argument unpersuasive.

This argument suggests that the Legislature intended to allow chiropractors to treat a condition that is undisputedly unique to the practice of chiropractic, while also deliberately depriving them of the ability to analyze, examine, evaluate, or (given our procedural posture) "diagnose" that condition. We cannot see how a chiropractor would know *to treat* a subluxation complex if he had not first determined from an analysis, examination, or evaluation/ "diagnosis" that there was a problem with the subluxation complex that needed chiropractic treatment. A more logical interpretation, and one supported by the text of both the occupations code and TBCE's scope-of-practice rule and by the summary-judgment evidence, is that a subluxation complex is part of the biomechanical condition of the spine or musculoskeletal system of the human body and, thus, may be analyzed, evaluated, examined, and diagnosed by chiropractors.

TBCE's unchallenged definition of "subluxation complex" establishes that it is a—

> neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them.

22 Tex. Admin. Code § 75.17(b)(7). The rule also defines "musculoskeletal system" as the "system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form." *See id.* § 75.17(b)(4). "Neuro-" is a prefix meaning "nerve," *see Dorland's* at 1284, and "articular" refers to joints, *see id.* at 160. To a certain extent, then, use of the prefix "neuro-" with the adjective "articular" in connection with "musculoskeletal" is redundant in that TBCE's definition of "musculoskeletal system" already includes both nerves and joints. Nevertheless, the bottom line here is that 75.17(d)(1)(B) allows chiropractors to diagnose a condition that under unchallenged rules is part of the musculoskeletal system of the human body. To that extent, it comports with the statutory scope of chiropractic.

The Physician Parties also contend that the language of paragraph (d)(1)(B) allows chiropractors, in violation of the statutory scope of chiropractic, to diagnose neurological conditions, pathological and neuro-physiological consequences that effect the spine and musculoskeletal system, and "other body systems" that are affected by subluxation. We disagree that this provision sweeps so broadly. Although the definition of "subluxation complex" indicates that its existence may have functional or pathological consequences or that it may affect essentially every part of the body, the rule itself only allows chiropractors to render an analysis, diagnosis, or other opinion regarding a subluxation complex of the spine or musculoskeletal system. Accordingly, it does not exceed the statutory scope of chiropractic.

We sustain TCA's fourth issue.

CONCLUSION

Having determined that, in the procedural posture of this appeal, the district ***497** court erred in its judgment invalidating subparts 75.17(d)(1)(A) and (B) of TBCE's scope-of-practice rule, we reverse that portion of the judgment. In light of our reversal of the district court's summary judgment invalidating subparts 75.17(d)(1)(A) and (B) of the scope-of-practice rule, we remand the case for further proceedings regarding the Physician Parties' alternative constitutional challenges. Having otherwise overruled each of the Chiropractor Parties' issues on appeal, we affirm the remainder of the district court's judgment that subparts 75.17(a)(3), (c)(2)(D), (c)(3)(A), and (e)(2)(O) of TBCE's scope-of-practice rule are void.

Tex.App.–Austin,2012.
Texas Bd. of Chiropractic Examiners v. Texas Medical Ass'n
375 S.W.3d 464

END OF DOCUMENT

Exhibit I

Texas Acupuncture Association

301 West 21st Street, Box 85
Austin, TX 78705-5697
Telephone: 512.472.3084 • Fax: 512.472.9343

January 17, 1998

Sarah J. Shirley; Chief, Opinion Committee
Office of the Attorney General
300 West 15th Street
Austin, Texas 78701

RE: Attorney General Opinion Request RQ-988.

My name is Dee Ann Newbold, President of the Texas Acupuncture Association [TAA]. TAA is the largest state wide professional association for Acupuncture and Oriental Medicine. Enclosed is our position statement regarding Attorney General Opinion Request RQ-988, prepared by our attorney Timothy E. Weitz. A courtesy copy has been given to Tony Cobos, Texas State Board of Medical Examiners Attorney assigned to the Texas State Board of Acupuncture Examiners.

Please note that we have chosen **not** to directly address the issue of "surgical" versus "nonsurgical". In our view, Attorney General Opinion DM-415 addresses this topic very adequately.

Our Association also has concern about the training for the practice of acupuncture. Enclosed is a Parker College of Chiropractic catalog that reviews all courses of training for a general Chiropractic degree. In reviewing the catalog you will find no courses about acupuncture, or oriental medical theory. There is no course that is even a preliminary class to acupuncture school, except those of anatomy, physiology, and the western sciences. Chiropractors just by being licensed to practice chiropractic does not give them training in the field of acupuncture. Without formal training public safety is a dire concern. Keeping this in mind, I think you will clearly understand this brief component of our position needs no further explanation. If you have any questions about the attached position statement, please call me at your convenience. Thank your for your time and prompt decision regarding this matter.

Sincerely,

Dee Ann Newbold, President
Texas Acupuncture Association
TX License #AC00116
Work Telephone: 512 371-1121 Fax 512 371-1181

RQ-988

CONSIDERATION OF OPINION REQUEST
TO THE OPINION COMMITTEE OF THE
OFFICE OF THE ATTORNEY GENERAL
FOR THE STATE OF TEXAS

POSITION STATEMENT OF THE TEXAS ACUPUNCTURE ASSOCIATION RELATING TO CONSIDERATION OF THE OPINION REQUEST OF BRUCE A. LEVY, M.D., J.D., EXECUTIVE DIRECTOR OF THE TEXAS STATE BOARD OF MEDICAL EXAMINERS/TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS REGARDING THE MEDICAL PRACTICE ACT, SUBCHAPTER F., ART. 4495b, TEX. REV. CIV. STAT. ANN.

SUBMITTED BY
THE TEXAS ACUPUNCTURE ASSOCIATION
301 West 21st Street, Box 85
Austin, Texas 78705-5697
(512) 472-3084
(512) 472-9343 (FAX)

January 1998

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Table of Authorities

1. Attorney General Opinion Request (RQ-988) of Bruce A. Levy, M.D., J.D., Exective Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners (August 22, 1997).

2. Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., § 6.02 (Vernon 1997).

3. Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., §§ 6.08, 6.10 (Vernon 1997).

4. Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., § 6.05 (Vernon 1997).

5. Texas Sunset Advisory Commission Staff Report on the Texas State Board of Acupuncture Examiners (1996).

6. Attorney General Opinion Request (RQ-853) of Bruce A. Levy, M.D., J.D., Exective Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners (September 15, 1995).

7. Op. Tex. Att'y Gen. No. DM-415.

8. Tex. S.B. 361, 75th Leg. (1997).

9. Tex. H.B. 1897, 75th Leg. (1997).

10. Sunset Advisory Commission, Decisions on the: Texas State Board of Acupuncture Examiners (January 1997).

11. Tex. Rev. Civ. Stat. Ann., Art. 4512b (Vernon 1997).

12. Conference Committee Report, Tex. S.B. 361, 75th Leg. (May 24, 1997).

13. Letter from Bruce A. Levy, M.D., J.D., Executive Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners to the Texas State Board of Chiropractic Examiners dated September 3, 1997.

14. U.S. CONST. art. VI, cl. 2.

15. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18 (1963).

16. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941).

17. *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275 (1990).

18. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S.Ct. 2031 (1992).

19. *CSX Transp., Inc. v. Eastwood*, 507 U.S. 658, 664, 112 S.Ct. 1732, 1737 (1993).

20. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 105 S.Ct. 1598, 1603 (1985).

21. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722 (1983).

22. *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982).

23. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 67 S.Ct. 1146, 1152 (1947)).

24. Felix Mann,M.B., Acupuncture the Ancient Chinese Art of Healing and How it Works Scientifically, (Vintage Books, 1973).

25. Ted J. Kaptchuk, OMD, The Web That Has No Weaver: Understanding Chinese Medicine, 79-80, (Congdon & Weed, Inc., 1983).

26. The American Heritage Dictionary, Second College Edition at 77, 939, 650 and 845 (1982).

27. 21 CFR §880.5580.

28. Taber's Cyclopedic Medical Dictionary, I-12 (Clayton L. Thomas, M.D., M.P.H., ed., 13th ed. 1977).

29. Barbara B. Mitchell, J.D., L.Ac., Acupuncture and Oriental Medicine Laws, 88-94 (1997).

30. *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376 (1985).

31. Tex. Rev. Civ. Stat. Ann., art. 4512b, §13a(b).

32. Tex. Rev. Civ. Stat. Ann., art. 4495b, §§6.02, 6.118 (Vernon 1997).

I.
Questions Presented

Whether an amendment to the statutory definition of acupuncture is sufficient to authorize the practice of acupuncture by a licensed Texas chiropractor without the chiropractor first obtaining an acupuncture license, and more specifically, does the addition of the words "nonsurgical, nonincisive" into the definition as set forth below authorize such practice by licensed chiropractors:

> "Acupuncture means ...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..."[1]

II.
Position Summary

The Texas Acupuncture Association ("TAA") takes the following positions related to the pending opinion request:

1. Federal preemption prohibits the contorted definition of acupuncture which the Texas Legislature has recently attempted to adopt. As a consequence, the recent amendment to the definition of acupuncture cannot confer acupuncture practice authority upon licensed chiropractors. Therefore, in the absence of specific statutory provisions granting chiropractors the authority to practice acupuncture without requiring them to first obtain an acupuncture license, Attorney General Opinion DM-415 continues to apply. A Texas acupuncture license is still required for chiropractors to practice acupuncture.

2. Even assuming that the new definition of acupuncture is consistent with Federal law, the Texas Legislature's decision to withhold specific statutory authority for the practice of acupuncture with only a chiropractice license indicates that the definition change does not confer such authority upon chiropractic practitioners.

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[1]Attorney General Opinion Request (RQ-988) of Bruce A. Levy, M.D., J.D., Exective Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners (August 22, 1997); *See also* Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., § 6.02 (Vernon 1997).

III.
General Background

In 1993, with the legislative enactment of Subchapter F. of the Medical Practice Act, Tex. Rev. Civ. Stat. Ann., art. 4495b, the Texas State Board of Acupuncture Examiners ("Acupuncture Board") was created to function with the assistance and under the supervision of the Texas State Board of Medical Examiners ("Medical Board"). The newly created Subchapter F., designed to specifically governing acupuncture practice in Texas, replaced a registration system previously handled solely by the Medical Board with a licensing process utilizing a coordinated effort between the fledgling 9 member Acupuncture Board and the long standing 18 member Medical Board. Under this new system, the Medical Board is required to provide administrative support to the Acupuncture Board, and has been given ultimate control over the issuance of acupuncture licenses.[2] The Medical Board has also retained authority to give final approval to rules proposed by the Acupuncture Board.[3] While the Acupuncture Board is statutorily tasked with protecting public health and safety related to acupuncture care, it must do so with oversight by the Medical Board. Although the Acupuncture Board has the responsibility of evaluating acupuncture license applications and a wide-range of practice issues, any action on such matters requires Medical Board approval. Since its inception, the Acupuncture Board has studied and made recommendations to the Medical Board on licensing, disciplinary matters, and rulemaking. The Medical Board is required to approve recommended actions. Consequently, the role of the Acupuncture Board has been characterized as advisory in nature with final regulatory authority vested in the Medical Board.[4]

On September 15, 1995, Bruce A. Levy, M.D., J.D., the Executive Director of the Medical and Acupuncture Boards, requested an Attorney General opinion in response to concerns brought to the attention of these boards regarding the practice of acupuncture by licensed Texas chiropractors who do not also possess acupuncture licenses.[5] The opinion request sought an answer to three questions:

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[2] Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., §§ 6.08, 6.10 (Vernon 1997).
[3] Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., § 6.05 (Vernon 1997).
[4] Texas Sunset Advisory Commission Staff Report on the Texas State Board of Acupuncture Examiners (1996) at 1.
[5] Attorney General Opinion Request (RQ-853) of Bruce A. Levy, M.D., J.D., Exective

1. Whether the practice of acupuncture is within the scope of practice for a licensed Texas chiropractor?

2. Whether licensure as an acupuncturist is required for a licensed Texas chiropractor to engage in the practice of acupuncture?

3. If the answer to the first question is yes and the answer to the second question is no, whether advertising the practice of acupuncture by a licensed chiropractor violates statutes prohibiting false or misleading adverstising if the chiropractor fails to indicate in the advertisement that he or she is not licensed by the Texas State Board of Acupuncture Examiners?[6]

In the responsive opinion, DM-415, the Texas Attorney General concluded that "Only a health care professional whose license clearly encompasses the practice of acupuncture is excepted from the training and examination requirements set forth for acupuncturists in V.T.C.S. article 4495b, subchapter F.[7]" The Attorney General further concluded: "The practice of chiropractic as delineated in V.T.C.S., article 4512b, section 1, does not clearly encompass the practice of acupuncture. Accordingly, V.T.C.S. article 4512b, section 1, which authorizes a chiropractor to perform only nonsurgical, nonincisive procedures, does not authorize a chiropractor to practice acupuncture." [8] The Attorney General specifically found that "a licensed chiropractor must obtain a license to practice acupuncture if the chiropractor desires to practice acupuncture."[9] The responses to the first two inquiries led the Attorney General to further conclude that a response to the third question was unnecessary.[10] See Attachment A.

Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners (September 15, 1995).
[6] Id.
[7] Op. Tex. Att'y Gen. No. DM-415 (1996).
[8] Id. at 7.
[9] Id.
[10] Id. at 6.

IV.

Sunset Review

Subsequently, in December 1996 and January 1997, the Texas Sunset Advisory Commission ("Sunset Commission") concluded its ongoing review of the initial performance of the Acupuncture Board and the existing system of acupuncture regulation. After consideration of a report by the Sunset Commission staff as well as both oral and written submissions from the public, the Sunset Commission concluded that considerable progress had been made in the licensing and regulation of Texas acupuncturists and that the current regulatory scheme should be continued with various recommended improvements. As a consequence of this review, during the 75th Legislative Session, companion bills were filed in the Senate and in the House to implement the Sunset Commission's recommendations. The Chair of the Sunset Commission, Representative Patricia Gray, filed H.B. 1897 and commission member, Senator Frank Madla, filed S.B. 361. Initially, the bills were virtually identical and reflected the favorable Sunset recommendations including continuation of the Texas State Board of Acupuncture Examiners until the year 2005 with standard regulatory provisions more closely resembling those applied to physicians and physician assistants including provisions governing investigations and disciplinary actions.[11]

At time of initial filing, both bills closely followed the recommendations of the Sunset Advisory Commission.[12] The Commission recommendations were in turn consistent with written submissions received, related hearing testimony, and the Sunset Staff Report.[13] Any purported grounds related to the need for a change to the definition of "acupuncture" to describe the practice as "nonsurgical, nonincisive" or to create authority for chiropractors to practice acupuncture were apparently not raised or not seen by the Sunset Advisory Commission as issues meriting attention.[14] The Sunset Advisory Commission did not recommend a change to the definition of acupuncture or even suggest

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[11] *Compare* Tex. S.B. 361, 75th Leg. (1997) and Tex. H.B. 1897, 75th Leg. (1997) *with* Texas Sunset Advisory Commission Staff Report on the Texas State Board of Acupuncture Examiners (1996) *and* Sunset Advisory Commission, Decisions on the: Texas State Board of Acupuncture Examiners (January 1997).

[12] Id.

[13] Id.

[14] Id.

authorizing chiropractors to practice acupuncture without first obtaining an acupuncture license.[15] See Attachment B.

V.
Legislative Action

During the course of the 75th Legislative Session, S.B.361 was initally channelled through the Senate Health and Human Services Committee while H.B. 1897 was sent to the House Public Health Committee. S.B. 361 was considered by the Senate Health and Human Services Committee before its companion was taken up by the committee's counterpart in the House. During the course of the Senate committee's consideration of S.B. 361, the bill's sponsor, Senator Madla, at the request of the chiropractic lobby, proposed an amendment to change the definition of acupuncture to describe the practice as "nonsurgical, nonincisive." Despite testimony in opposition, the Senate Health and Human Services Committee approved the proposed amendment. The Public Health Committee chose to defer action on H.B. 1897 until S.B 361 was routed from the Senate for the House committee's consideration. Testimony was taken by the Public Health Committee in opposition to the amendment. Testimony was also presented specifically opposed to any amendent resulting in the practice of acupuncture by chiropractors who have not met acupuncture licensing requirements. The definition change was the subject of considerable debate among the committee members and the House bill sponsor. Presumably due to the lateness in the session and the need to move Sunset legislation through the committee level, a compromise was reached. As a result of the compromise, two related House committee amendments were made to S.B. 361, and thereafter, this version was passed through committee in lieu of H.B. 1897. The first of these two amendment deleted the words "nonsurgical, nonincisive" and returned the definition of acupuncture back to its original language. The second amendment sought to add a change to the Chiropractic Act to allow for specific authority for licensed Texas chiropractors to practice acupuncture. Such authority has not previously existed and does not currently exist.[16]

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[15] Sunset Advisory Commission, Decisions on the: Texas State Board of Acupuncture Examiners (January 1997).

[16] *Compare* Tex. Rev. Civ. Stat. Ann., Art. 4512b, *with* Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., (Vernon 1997).

When presented to the full House of Representative, S.B. 361 was passed with the amendment to return the definition to its original version; however, the proposed amendment to change the Chiropractic Act failed due to procedural error. Public debate over the substantive subject matter did not occur on the House floor. When S.B. 361, as amended, was referred back to the Senate for concurrence and final passage, the Senate sponsor declined to do so and requested a conference committee for the sole purpose of addressing the definition change. During the last few days of the session, the conference committee reinserted the words "nonsurgical, nonincisive" and, with this change, S.B. 361 was passed into law with an effective date of September 1, 1997.[17]

VI.
Agency Action

On July 28, 1997 the Acupuncture Board met and expressed grave concerns about the change to the definition of acupuncture and the possible impact of this change. Keeping in mind that the Acupuncture Board is comprised of two physicians, four acupuncturists, and three public members[18], it is noteworthy that the consensus of the Acupuncture Board members in attendance was that the definition change is factually inconsistent with the actual practice of acupuncture, and as changed, is incomprehensible. Concerns were also voiced that the change may be inconsistent with federal law. After considering a proposed draft of a request for an Attorney General opinion, the Acupuncture Board inquired of staff as to whether the request could be revised to reflect the Board members dissatisfaction and disagreement with the definition change. As reflected in the language used in the resulting opinion request, a significantly more neutral and restrained approach was taken by agency staff.[19]

During the meeting of the Texas State Board of Medical Examiners of August 7-9, 1997, the Medical Board echoed the sentiments of the Acupuncture Board. In a decision which appears to be virtually unprecedented in recent years, the Medical Board directed its staff to file an amicus curiae brief to supplement the Attorney General opinion request and support the position taken by the Acupuncture Board. On August 22, 1997, the

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[17] Conference Committee Report, Tex. S.B. 361, 75th Leg. (May 24, 1997).
[18] Tex. Rev. Civ. Stat. Ann., Art. 4495b, Subchapter F., § 6.04 (Vernon 1997).
[19] Attorney General Opinion Request (RQ-988) of Bruce A. Levy, M.D., J.D., Exective Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners (August 22, 1997).

pending opinion request to the Attorney General of Texas was submitted by Bruce A. Levy, M.D., J.D., the executive director of the Medical and Acupuncture Boards.[20]

In the meantime, the Texas State Board of Chiropractic Examiners initiated rulemaking discussions prompting Dr. Levy to correspond with the Chiropractic Board to inform its members of the pending opinion request and to express the hope that no action on rulemaking would be taken regarding the practice of acupuncture by chiropractors (Attachment C).[21]

VII.
Federal Preemption

Federal preemption prohibits the contorted definition of acupuncture which the Texas Legislature has recently attempted to adopt. As a consequence, the recent amendment to the definition of acupuncture cannot confer acupuncture practice authority upon licensed chiropractors. In the absence of specific statutory provisions granting chiropractors the authority to practice acupuncture without an acupuncture license, Attorney General Opinion DM-415 continues to apply. A Texas acupuncture license is still required for chiropractors to practice acupuncture.

The doctrine of federal preemption is based on the United States Constitution, specifically the Supremacy Clause, which gives the United States Congress authority to preempt state law. The Supremacy Clause provides that federal law shall be "the supreme Law of the Land" and that "the Judges in every State shall be bound thereby."[22] The doctrine of federal preemption has evolved by judicial construction to not only require that state laws must be subordinated to federal laws when the laws of the state are contrary to the laws passed by the United State Congress, but also when state laws interfere with or impair the application of federal laws.[23]

Three distinct categories of federal preemption have emerged from decisions of the U.S. Supreme Court. These three categories are known as express preemption, field

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[20] Id.

[21] Letter from Bruce A. Levy, M.D., J.D., Executive Director, Texas State Board of Medical Examiners/Texas State Board of Acupuncture Examiners to the Texas State Board of Chiropractic Examiners dated September 3, 1997.

[22] U.S. CONST. art. VI, cl. 2.

[23] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941).

preemption, and conflict preemption.[24] The first of these preemptions is perhaps the easiest to recognize and most straightforward to apply because it is based on explicit supremacy of federal law as set out within the four corners of the federal statute. Field preemption and conflict preemption may require not only this plain reading of statute, but also an understanding of statutory intent and the practical ramifications of state and federal legislation.

Express preemption occurs when the U.S. Congress explicitly defines the degree to which a federal law will preempt state law. The plain wording of a federal statute preempting state law is considered to be the best evidence of legislative intent; however, difficulties in applying this type of preemption may arise when there is a difference of opinion as to the meaning of the plain wording.[25] There does not appear to be an express federal preemption of the new Texas definition of "acupuncture," nor does there appear to be any express federal preemption to prevent states from allowing chiropractors to practice acupuncture under a state-determined regulatory scheme.

Similarly, field preemption does not appear to apply. Field preemption occurs when the U.S. Congress has so regulated a field of activity that there is no room for state governments to expand on applicable laws. In other words, field preemption results from a system of federal regulation which is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[26] Similarly, field preemption may apply when federal law addresses a field in which the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[27] The Texas Acupuncture Association concedes that as with express preemption, field preemption does not appear to resolve the pending opinion request; however, the Texas Acupuncture Association maintains that conflict preemption does address the current circumstances.

Conflict preemption, while similar to field preemption, is somewhat less encompassing and more situation specific. This form of preemption exists when state and

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[24] *English v. General Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275 (1990).
[25] *Compare Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 112 S.Ct. 2031 (1992) *with CSX Transp., Inc. v. Eastwood,* 507 U.S. 658, 664, 112 S.Ct. 1732, 1737 (1993) *and Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 105 S.Ct. 1598, 1603 (1985).
[26] *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 204, 103 S.Ct. 1713, 1722 (1983) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 67 S.Ct. 1146, 1152 (1947)).
[27] Id.

federal law are in conflict.[28] Simply put, conflict preemption occurs when state and federal law cannot coexist due to inconsistencies between the two laws, and consequently, the state law is preempted to the extent that it conflicts with federal law.[29]

In the situation under scrutiny, the Texas Legislature has attempted to change the definition of acupuncture to characterize the practice as "nonsurgical, nonincisive." This change not only conflicts with longstanding and accepted definitions of acupuncture,[30] but also conflicts with the definition of "acupuncture needle" as adopted by the federal government for the purpose of regulating medical devices.[31] As part of the federal role of classifying acupuncture needles as Class II medical devices, requiring special controls, the federal government has identified and defined an acupuncture needle as "a device intended to ***pierce the skin*** in the practice of acupuncture (Emphasis added)."[32] The word "pierce" is commonly defined as "To ***cut*** or pass through with or as if with a sharp instrument; stab; penetrate (Emphasis added)."[33] Similarly, to "incise" is defined as a "cutting" in the context of both common usage and usage in the medical field.[34] In short, the acts of piercing, incising, and cutting are sufficiently synonomous with one another to pose a definitional conflict due to the Texas Legislature's recent attempt to characterize acupuncture as "nonincisive." To state the obvious, the prefix "non" equates to "not,"[35] and thereby negates any notion that incising, piercing or cutting is involved in the practice of acupuncture. Such a result is inconsistent with the actual practice of acupuncture and basic common sense, and conflicts with federal law to such an extent that federal conflict preemption overrides the application of the new Texas definition.

Texas is not and should not be precluded from establishing its own regulatory standards for the delivery of health care. Sister states have chosen to regulate

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[28] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18 (1963).
[29] *English v. General Elec. Co.*, 496 U.S. at 79, 110 S.Ct. at 2275.
[30] *See* Felix Mann,M.B., Acupuncture the Ancient Chinese Art of Healing and How it Works Scientifically, (Vintage Books, 1973); Ted J. Kaptchuk, OMD, The Web That Has No Weaver: Understanding Chinese Medicine, 79-80, (Congdon & Weed, Inc., 1983); The American Heritage Dictionary, Second College Edition at 77 (1982).
[31] 21 CFR §880.5580.
[32] 21 CFR §880.5580(a).
[33] The American Heritage Dictionary, Second College Edition, 939 (1982).
[34] *Compare* The American Heritage Dictionary, Second College Edition, 650 *with* Taber's Cyclopedic Medical Dictionary, I-12 (Clayton L. Thomas, M.D., M.P.H., ed., 13th ed. 1977).
[35] The American Heritage Dictionary at 845.

acupuncture and chiropractics through a range of varying mechanisms.[36] Even so, the Texas Acupuncture Association is unaware of any instance in which another state has defined or attempted to define acupuncture as "nonincisive" so as to create a conflict with prevailing common usage and federal law.[37] Those states choosing to specifically regulate acupuncture appear to have consistently defined the practice as an insertion of needles to pierce, puncture, or otherwise penetrate through the skin.[38] Consistent with the historical deference given to State legislatures in the areas of health and safety,[39] the determination as to the need for a separate license or registration for the practice of acupuncture by chiropractors in Texas is a matter which is and should be reserved to the Texas legislature; however, only so long as the Texas law does not conflict with a federal regulatory scheme. Consequently, the Texas legislature has spoken by its addition of Subchapter F. to the Medical Practice Act to specifically govern the practice of acupuncture. By its silence it has also made a determination not to carve out an exception for chiropractors.

VIII.
Lack of Specific Authority

Even assuming that the new definition of acupuncture is consistent with Federal law, the Texas Legislature's decision to withhold specific statutory authority, or provide an exception for the practice of acupuncture with only a chiropractic license, indicates that the definition change does not confer such authority upon chiropractic practitioners. The Chiropractic Act does not allow chiropractors to perform "incisive or surgical procedures" and provides only one specific exception to allow for the use of needles by chiropractors.[40] This exception is limited to the use of needles to draw blood for diagnostic purposes.[41] The specificity of this exception suggests a legislative intent to not otherwise allow the insertion of needles by chiropractors. Such a conclusion is consistent with the Attorney General's analyisis in Attorney General Opinion DM-415 which states, "Notably, however, the legislature did not exclude acupuncture from those incisive or

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[36] Barbara B. Mitchell, J.D., L.Ac., Acupuncture and Oriental Medicine Laws, 88-94 (1997).
[37] Id.
[38] Id.
[39] *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715, 105 S.Ct. 2371, 2376 (1985).
[40] Tex. Rev. Civ. Stat. Ann., art. 4512b, §13a(b).
[41] Id.

surgical procedures which are outside the scope of chiropractic."[42] The decision of the 75th Legislature not to establish an additional exception for chiropractors supports an intent for regulation of acupuncture solely under the provisions of the Medical Practice Act. Of particular interest in this regard is the fact that the 75th Legislature did create a new exception for the practice of acupuncture through an amendment of the Medical Practice Act. This exception is for the limited practice of acupuncture using only five points in the ear for purposes of treating alcoholism, substance abuse, and chemical dependency.[43] Various health care practitioners are eligible to qualify and register to provide such treatment; however, chiropractors are not included among the listed practitioners.[44]

No provision of the Chiropractic Act conveys acupuncture practice authority upon licensed chiropractors. Neither the provisions of Subchapter F. nor any other provision of the Medical Practice Act convey such authority upon them. The Sunset Advisory Commission and its staff saw no need for amendments to give special accomodation to chiropractors wishing to practice acupuncture. The eleventh hour addition of two words into the Medical Practice Act definition of acupuncture should not be deemed to have the unintended consequence of expanding the scope of chiropractics to allow chiropractors to practice acupuncture without meeting testing and other licensing requirements for an acupuncture license.

IX.
Conclusion

The Texas Acupuncture Association maintains that the addition of the words "nonsurgical, nonincisive" into the definition of acupuncture is not only inconsistent with common and accepted medical usage, but also federal law. Consequently, this language change is preempted, and cannot work to authorize chiropractors to perform acupuncture without first meeting acupuncture licensing requirements. In addition, the Texas Acupuncture Association maintains that even if federal preemption is inapplicable in this instance, the Texas Legislature's decision not to grant a specific exception despite having the opportunity to do so, indicates that it was the legislative intent to require chiropractors to meet the same licensing requirements for others wishing to practice acupuncture.

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[42] Op. Tex. Att'y Gen. No. DM-415 at 4.
[43] Tex. Rev. Civ. Stat. Ann., art. 4495b, §§6.02, 6.118 (Vernon 1997).
[44] Id.

Exhibit J

TEXAS STATE BOARD OF ACUPUNCTURE EXAMINERS
333 GUADALUPE, TOWER 3, SUITE 610
AUSTIN TX 78701
PHONE: (512) 305-7174

May 23, 2013

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 sublaxation 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 sublaxation 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 exclusion 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