



Texas Association of Acupuncture and Oriental Medicine
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March 17, 2017

Ms. Patricia Gilbert
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe Street
Austin, Texas 78701-3942

RE: Texas Association of Acupuncture and Oriental Medicine v. Texas Board of Chiropractic Examiners and Patricia Gilbert, Executive Director in her Official Capacity, *On Appeal from 201st District Court, Travis County, Texas, Cause No. NO. 03-15-00262-CV*

Dear Ms. Gilbert:

The Texas Association of Acupuncture and Oriental Medicine (TAAOM) offers this letter as a formal request and commitment to the Texas Board of Chiropractic Examiners (TBCE) to engage in settlement discussions to develop a negotiated resolution to ongoing litigation between TAAOM and TBCE. The litigation initiated by TAAOM challenges the statutory authority by which TBCE has adopted rules authorizing the practice of acupuncture by licensed chiropractors with as little as 100 hours of training.

TAAOM appreciates the informal discussions the parties have had to date regarding the need for enhanced standards and regulatory clarification to ensure chiropractors are appropriately constrained and directed in TBCE rules to limit the practice of chiropractic to the scope allowed in statute.

It is TAAOM's understanding that both parties are committed to participating in discussions intended to generate a negotiated settlement that would lead to the establishment of new enhanced standards and oversight for a licensed chiropractor wishing to use an acupuncture needle within existing statutory scope of practice for chiropractic.

By negotiating appropriate standards for training, oversight and coordination around enforcement, the taxpayers of Texas can avoid the cost associated with litigating these outstanding questions surrounding the statutory authority of the Chiropractic Board.

The need to address issues raised in this litigation through some type of negotiated policy reform, which could possibly require clarification through legislative changes, is highlighted by the following statement included in the Third Court of Appeal's decision in this case:

"Cases construing the scope of chiropractic vis-à-vis other healthcare field have been a recurring theme of litigation and decisions in this Court. What this history underscores is that the scope of chiropractic vis-à-vis other healthcare fields is a puzzle best solved by the Legislature in a clear and precise manner, rather than leaving these policy-laden issues to the Judiciary for a determination of legislative intent from statutory language that is, to say the least, not the model of clarity. We respectfully request the Legislature solve this problem."

While the Third Court of Appeals has remanded this case to District Court for additional evidentiary hearings to determine if acupuncture needles are “incisive” and therefore statutorily precluded from use by chiropractors, the Court also rendered a finding that attorney general opinion DM-471 was not a valid, legal grant of rulemaking authority to the Chiropractic Board.

The Opinion issued by the Third Court of Appeals on August 18, 2016 effectively precludes the Chiropractic Board from utilizing language in the Acupuncture Chapter to adopt or inform rules issued by the Chiropractic Board, authority which the Board has historically asserted authority it has when adopting rules allowing licensed chiropractors to practice acupuncture without meeting the standards set by the Legislature in Chapter 205 of the Occupations Code for the safe, legal and effective practice of acupuncture.

TAAOM acknowledges the common goal expressed by both TAAOM and TBCE of reaching a negotiated settlement to avoid additional expenditures on costly litigation required to resolve the outstanding questions regarding TBCE’s statutory authority to adopt rules allowing licensed chiropractors to use a needle beyond the use of a needle for blood draws.

TAAOM agrees to undertake negotiations to develop a process to resolve this litigation, and understands that terms and requirements resulting from these negotiations are to be memorialized and executed through a Memorandum of Understanding (MOU) between the litigating parties.

The anticipated MOU to be generated through settlement discussions would serve as a framework for specific types of rule revisions to be undertaken and executed by the parties through a negotiated rulemaking proceeding under Chapter 208 Government Code. The negotiated rulemaking would include, at a minimum, TBCE, TBAE, and TAAOM as affected stakeholders. The resolution of these issues would result in the parties filing a joint motion to dismiss the pending litigation.

We believe the taxpayers of Texas and the consuming public will benefit from the establishment of appropriate minimum standards and regulatory oversight, and we look forward to working with TBCE to develop and implement a regulatory structure that will address both the current court challenge to TBCE rules and the exposure related to other potential legal challenges that relate to economic liberty and inequitable and anti-competitive state standards for practice.

TAAOM is pleased to have this opportunity to address the important policy issues raised through the litigation currently pending in the Third Court of Appeals. We believe the opportunity to establish new minimum standards and enhanced regulatory oversight and enforcement is essential to ensuring the practice integrity associated with the requirements set out in Chapter 205 of the Acupuncture Act to ensure the public’s access to safe, legal and effective acupuncture treatments.

Sincerely,



Wally Doggett, L.Ac.
TAAOM President