

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

TEXAS ASSOCIATION OF
ACUPUNCTURE
AND ORIENTAL MEDICINE,
Plaintiff,

v.

TEXAS BOARD OF CHIROPRACTIC
EXAMINERS and YVETTE
YARBROUGH, EXECUTIVE DIRECTOR,
IN HER OFFICIAL CAPACITY
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT

DEFENDANTS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Defendants, the Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director, in the above styled and numbered cause, by and through their attorney Greg Abbott, Attorney General of Texas, and the undersigned Assistant Attorney General, and file this Traditional Motion for Summary Judgment, and ask the Court to sign a summary judgment pursuant to Texas Rule of Civil Procedure 166a declaring Defendants' administrative rules, 22 Texas Administrative Code §§ 75.17(a)(3), (b)(4), (e)(2)(C), and 75.21 valid. *See* Appendix Tab 1.

I. INTRODUCTION

1.1 Plaintiff, Texas Association of Acupuncture and Oriental Medicine, ("TAAOM") sued defendants, Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director (collectively, "the Board"), under Texas Government Code § 2001.038 to invalidate the Board's rules allowing chiropractors in Texas to perform acupuncture. The alleged grounds for the invalidity of the rules are that the Board has exceeded its authority and permitted

chiropractors to perform an incisive procedure, i.e., acupuncture, in violation of Texas Occupations Code section 201.002(b)(2). This section limits chiropractors to performing noninvasive, nonsurgical procedures. In addition, TAAOM seeks a declaration that, if the amendment to Texas Occupations Code § 205.001(2) adding “nonsurgical, nonincisive” to the definition of acupuncture is properly interpreted as allowing chiropractors to practice acupuncture, it violates Art. III, section 35 Texas Constitution, by having two subjects in one bill. Finally, TAAOM seeks a declaration that, if the statutes allow chiropractors to practice acupuncture with less education and training than licensed acupuncturists, the statutes are unconstitutional under Art. XVI, section 31 of the Texas Constitution.¹

1.2. The Board answered asserting the validity of its rules. This assertion is based on an amendment to the Acupuncture Act defining acupuncture as “noninvasive, nonsurgical, as well as its inherent authority to define the scope of practice of acupuncture. Tex. Occ. Code § 205.001(2)(A). In addition, the Board pled affirmative defenses of laches and limitations. The Board denies that Texas Constitution Art. III, § 35 or Art. XVI, § 31 are applicable to its authority to determine that chiropractors may practice acupuncture.

1.3. This case primarily involves statutory construction. The Chiropractic Act allows (in fact, requires) the Board to define the scope of practice of chiropractors by rule. Tex. Occ. Code § 201.101. The Board will show in this Motion that it has the authority to define the scope of practice of chiropractors in Texas to include the practice of acupuncture and has appropriately done so in the challenged rules.

¹ For convenience, Texas Occupations Code ch. 201 will be referred to as the “Chiropractic Act” and Texas Occupations Code ch. 205 will be referred to as the “Acupuncture Act.”

II. BACKGROUND

2.1. The practice of acupuncture involves methods of diagnosing and treating a patient by, among other things, short needle insertion for the purpose of obtaining a biopositive reflex response by nerve stimulation, i.e., placing short, thin needles into defined points on the human body for the relief of pain. 22 Tex. Admin. Code § 75.21(a). Chiropractors in Texas did engage in the practice of acupuncture after the practice became widely known in the United States in the time following President Nixon's visit to China in 1972. Board Minutes, Meeting of September 23, 1972, Appendix Tab 2. On consideration of whether the practice was within the scope of chiropractic practice, the Board outlawed the practice of acupuncture by chiropractors in the Board's rules in 1973. Board Minutes, Meeting of January 17-20, 1973, Appendix Tab 3. The Board took action to stop a licensee from advertising or performing acupuncture in 1974. Board Minutes, Meeting of July 17-20, 1974, Appendix Tab 4. The Texas State Board of Medical Examiners considered acupuncture to be the practice of medicine and sought to require that only a licensed physician be allowed to practice acupuncture. *See Thompson v. Tex. St. Bd. of Med. Exam'ers*, 570 S.W.2d 123 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). The Board of Medical Examiners' attempts to limit the practice of acupuncture were curtailed somewhat with the issuance of Attorney General's Opinion No. JM-125 (1984), which opined that four sections of rules limiting the practice of acupuncture were unconstitutional. Appendix Tab 5. The State of Texas recognized acupuncture as a separately-licensed area of the practice of medicine with the creation of the Texas State Board of Acupuncture Examiners ("TSBAE") in 1993. Act of May 31, 1993, 73d Leg., R.S., ch. 862, §§ 6.01-14, § 37, 1993 Tex. Gen. Laws 3400, *repealed by* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6(a), 1999 Tex. Gen. Laws 1431, 2439-40.

2.2 After the adoption of the Administrative Procedure Act by the Legislature in 1975, Board Rule 10 was codified as 22 Tex. Admin. Code § 75.1. The section prohibiting the practice of acupuncture by chiropractors became 22 Tex. Admin. Code § 75.1(7). At its meeting on June 9, 1988, the Board voted to repeal this part of the rule and the next part prohibiting the use of needles by chiropractors. 13 Tex. Reg. 4972 (1988); Board Minutes, Meeting of June 9, 1988, Appendix Tab 6. Neither the Board minutes nor the preamble to the rule action explain the reason for the change.

2.3 Seven years later, the Executive Director of the TSBAE, Dr. Bruce A. Levy, requested an Attorney General's Opinion on the matter in a letter dated September 15, 1995. *See* RQ-853, Appendix Tab 7. That request resulted in Opinion No. DM-415, in which the Attorney General opined that acupuncture was not within the legal scope of practice of chiropractic. Tex. Att'y Gen. Op. No. DM-415 (1996), Appendix Tab 8.

2.3 Following the issuance of that Attorney General's Opinion, the Board did not take action to amend its rules regarding acupuncture. Rather, it appears that the members of the Board, along with the Texas Chiropractic Association, worked with the Legislature to change the law to allow chiropractors to practice acupuncture. *See* Board Minutes, Meetings July 11, 1997 and September 11, 1997, Appendix Tab 9.

2.4 In the 1997 regular legislative session, the Legislature took action to reverse the effect of Opinion DM-415. At that time, the TSBAE was undergoing Sunset review. Certain members of the legislature sought to allow chiropractors to continue to practice acupuncture. The vehicle for their actions was Senate Bill 361, the bill that was to continue the TSBAE in existence. On April 24, 1997, the bill came before the Senate on second reading. Senator Madla offered three amendments to the bill. *See* S.J. of Tex., 75th Leg., R.S. 1325 (1997),

Appendix Tab 10. The first amendment inserted the words “nonsurgical, nonincisive” into the definition of acupuncture in the Acupuncture Act. *Id.* This amendment was adopted by the Senate.² The inclusion of this language in the Acupuncture Act is one issue in this lawsuit. The other two amendments, also adopted, are not at issue in this lawsuit. *Id.* The bill was then passed by the Senate and sent to the House. *See* Actions, Tex. Leg. Online, S.B. 361, 75th Leg., R.S., Appendix Tab 12.

2.5 After being received in the House of Representatives, S.B. 361 was the subject of a bill analysis by the House Research Organization issued on May 19, 1997. The bill analysis included a specific discussion of the impact on the practice of chiropractic: “The bill would also change the definition of ‘incisive or surgical procedure’ in the law governing chiropractors to include acupuncture.” H. Res. Org., Bill Analysis, S.B. 361, 75th R.S., May 19, 1997 at 4. Appendix Tab 13. The bill was heard in the House Committee on Public Health on May 8, 1997. At that hearing, the House Sponsor, Representative Patricia Gray, spoke specifically to the purpose of the bill. A certified transcription of her testimony is included at Appendix Tab 14. In summary, she specifically states that the purpose of the amendments to the bill is to allow chiropractors to practice acupuncture. She also states, “There was a provision added in the Senate version which authorized chiropractors to engage in the practice of acupuncture. In the, ... we have some committee amendments that we have been working on that we think will clarify that language and put that perhaps in a better place in the code.” *Id.* at 2. The bill analysis for the House Committee Report also provides an explanation of the amendments added in the committee. Tex. H. Comm. on Public Health, Comm. Rpt., S.B. 361, 75th Leg., R.S., May 8,

² The Senate Committee Report reflects that these same amendments were also added in the Senate Health and Human Services Committee when this bill was heard. Tex. S. Comm. on Health & Human Svcs., Comm. Rpt., S.B. 361, 75th Leg., R.S. (April 11, 1997). *See* Appendix Tab 11.

1997; Appendix Tab 15. The first committee amendment deleted the addition of “nonsurgical, nonincisive” from the definition of acupuncture. The bill analysis states the purpose of this change: “The purpose of the amended definition with nonsurgical, nonincisive was to allow chiropractors to practice acupuncture; however, this authority has been set forth in committee amendments 3 and 4.” *Id.* Committee amendments 3 and 4 would have amended the Chiropractic Act, then Article 4512b, Vernon’s Annotated Texas Statutes, to allow chiropractors to practice acupuncture. *Id.*; Act of April 21, 1949, 51st Leg., R.S., ch. 94, 1949 Tex. Gen. Laws 160, *repealed by* Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 6(a), 1999 Tex. Gen. Laws 1431. Because these amendments attempted to amend the Chiropractic Act rather than the Acupuncture Act, when they were offered on the floor of the House, they were subject to points of order as not germane to the original bill.³ The points of order were sustained and the amendments were not added to the bill. H. J. of Tex., 75th Leg., R.S. 2743-44 (1997), Appendix Tab 16. This left the House version of the bill without any amendment to the language concerning the definition of acupuncture. The Senate bill had passed with the addition of “nonsurgical, nonincisive” to the definition of acupuncture. When the House version was presented to the Senate, the Senate voted not to concur and requested a conference committee. S.J. of Tex., 75th Leg., R.S. 2321-22 (1997), Appendix Tab 17. The House agreed to a conference committee and appointed conferees on May 21, 1997. H.J. of Tex., 75th Leg., R.S. 2982 (1997), Appendix Tab 18. The conference committee agreed on a version of the bill and the agreed version was adopted in each house shortly thereafter. S.J. of Tex., 75th Leg., R.S. 3173 (1997), Appendix Tab 19; H.J. of Tex., 75th Leg., R.S. 4024 (1997), Appendix Tab 20.

³ The Rules of the House of Representatives required that committee amendments to a bill be offered again when the bill is considered on the floor, unless the amendments are consolidated into a committee substitute. Rules of the Texas House, 75th Session, 1997, Rule 11, §7(3)(B).

This version was signed by the Governor and then became the law at issue here. The enacted law contained the addition of “nonsurgical, nonincisive” to the definition of acupuncture. Act of May 28, 1997, 75th Leg., R.S., ch. 1170, 1997 Tex. Gen. Laws 4418, *repealed by* Act of May 13, 1999, 76th Leg., R.S., ch. 388, 1999 Tex. Gen. Laws 1431, Appendix Tab 21.

2.6 Based on the change to the definition of acupuncture in the Acupuncture Act, a new request was made to the Attorney General for an opinion on whether it was legal for Texas chiropractors to practice acupuncture. *See* RQ 988, Letter from Bruce A. Levy, M.D., J.D., to Dan Morales, August 18, 1997, Appendix Tab 22. This request led to the issuance of Opinion No. DM-471. Tex. Att’y Gen. Op. No. DM-471 (1998), Appendix Tab 23. In this opinion, the Attorney General concluded that the Legislature had intended in the amendment, and had in fact, changed the law to allow chiropractors to practice acupuncture in Texas. *Id.* The opinion concluded that the Acupuncture Act and the Chiropractic Act could be read *in pari materia*, and the amendment to the definition in the Acupuncture Act effectively applied to the Chiropractic Act, both statutes regulating a health care profession. *Id.* The opinion also concluded that the legislative history of the bill supported the idea that the intent of the amendment was to ensure that chiropractors could legally practice acupuncture. *Id.* The opinion specifically relied on the testimony of Representative Gray. For the subsequent seventeen years, the Board has taken the position of that chiropractors may legally practice acupuncture.

2.7 The TBCE was subject to sunset review during the 2005 legislative session, and one of the foci of that review was the TBCE's determination of scope of practice issues. SUNSET STAFF REPORT, TEXAS BOARD OF CHIROPRACTIC EXAMINERS, (Feb. 2004) (“Sunset Report”) excerpts, Appendix Tab 24. As noted in the Sunset Report, this review was built upon nearly a decade of discussion that had included several Attorney General Opinions. *Id.* Much of the

discussion centered on the language of the Chiropractic Act, as it then read, particularly concerning its prohibition against incise or surgical procedures. *See, e.g.*, Tex. Att’y Gen. Op. DM-472, (1998) at 2, Appendix Tab 25. As a result of the Sunset review, the Legislature amended the Chiropractic Act and made several changes regarding scope of practice, including adding a new definition for “surgical procedure” (codified at Tex. Occ. Code § 201.002(a)(4)) and mandating that the Board adopt rules clarifying activities within the scope of practice through an inclusive rulemaking process (codified at § 201.1525 and § 201.1526). Act of May 27, 2005, 79th Leg., R.S., ch. 1020; 2005 Tex. Gen. Laws 3464. After nearly a year of rulemaking, the Board adopted its scope of practice rule in 2006. 31 Tex. Reg. 4613 (June 2, 2006), codified at 22 Tex. Admin. Code § 75.17. Appendix Tab 1. That rule included some of the provisions challenged in this lawsuit. The other rule challenged in this lawsuit, the one specifically dealing with the scope of chiropractic practice in acupuncture, was adopted effective July 2, 2009. 22 Tex. Admin. Code § 75.21; 34 Tex. Reg. 4333 (2009) Appendix Tab 1.

III. SUMMARY-JUDGMENT EVIDENCE

3.1 To support the facts in this motion, the Board includes the summary-judgment evidence on which it relies in an appendix filed with this motion and incorporates the evidence into this motion by reference.

IV. SUMMARY JUDGMENT STANDARD

4.1 This motion addresses a question of statutory construction, presenting a question of law for the Court to decide. *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581, 583 (Tex. App.—Austin 2000, pet. denied). Under Texas Rule of Civil Procedure 166a(c), the party moving for summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Providence Life & Acc. Ins. Co. v.*

Knott, 128 S.W.3d 211, 215-216 (Tex. 2003). All evidence favorable to the nonmovant is taken as true and the court indulges every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*; *McCollough v. McCollough*, 212 S.W.3d 638, 641 (Tex. App.—Austin 2006, no pet.). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. *McCollough*, 212 S.W.3d at 642, citing Tex. R. Civ. P. 166a(c) and *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004).

4.2 An agency may only adopt rules as authorized by statute and consistent with the agency's statutory authority. *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref'd n.r.e.). "Rules are presumed valid and the burden of demonstrating their invalidity is on the challenging party." *Vista Healthcare, Inc. v. Texas Mut. Ins. Co.*, 324 S.W.3d 264, 273 (Tex. App.—Austin 2010, pet. denied). "In determining whether an agency has exceeded its rulemaking authority, the critical factor to be considered is whether the rule harmonizes with the general objectives of the statute." *Id.* The text of a rule is construed under the principles of statutory construction. *ASAP Paging, Inc. v. Public Util. Comm'n*, 213 S.W.3d 380, 394 (Tex. App.—Austin 2006, pet. denied). In construing a statute, the objective "is to determine and give effect to the Legislature's intent," looking "first to the plain and common meaning of the statute's words," considering the entire statute, and construing each provision in the context of the statute as a whole. *Continental Cas. Ins. Co. v. Functional Restoration Assoc.*, 19 S.W.3d 393, 398 (Tex. 2000). In order to prove the facial invalidity of a rule, a challenger must show the rule does one of three things: "(1) contravenes specific statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *State v. Public Util. Comm'n*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied).

4.3 A court may consider an agency's construction of a statute if the construction is reasonable and consistent with the statute. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 282 (Tex. 1999). When considering the validity of a rule, 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. St. Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 719 (Tex. App.—Austin 2008, pet. denied) (citations omitted). A rule without supporting statutory authority is void. *Id.* A court should "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." *Vista Healthcare*, 324 S.W.3d at 272.

**V. TRADITIONAL SUMMARY JUDGMENT:
PLAINTIFF'S CAUSE OF ACTION FOR DECLARATORY JUDGMENT
ON THE VALIDITY OF THE BOARD'S RULES ON ACUPUNCTURE**

A. Defendants Are Entitled to Judgment Under Government Code § 2001.038.

5.1 TAAOM's primary claim in this lawsuit is that the Board does not have authority to authorize chiropractors in Texas to practice acupuncture. The Board has authorized this practice by chiropractors through (1) the adoption of subsections within its general scope of practice rule and (2) adoption of a rule specifically dealing with the practice of acupuncture. 22 Tex. Admin. Code §§ 75.17(a)(3), (b)(4), (e)(2)(C), and 75.21. The Board has general authority to determine the scope of practice of Texas chiropractors under Texas Occupations Code § 201.1525:

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.

Accordingly, since the Board has this broad authority under this statute to determine what is within and outside scope of practice, TAAOM's claim fails because this rule is consistent with the Board's authority to determine that acupuncture is within scope of practice and is consistent with the Legislature's definition of acupuncture.

5.2 TAAOM's claim is that "the Chiropractic Board has defined incision in a way that allows chiropractors to use needles in procedures besides diagnostic blood draws, in direct contravention of the Chiropractic Chapter." TAAOM 2nd Amd. Pet. at 5, ¶ 15. TAAOM goes on to complain that the Board's rules "specifically authorize chiropractors to practice acupuncture" and "authorize a practice that is well beyond the statutory scope of chiropractic...." *Id.* ¶¶ 16-17. While there is some implication that acupuncture may not be a matter "affecting the spine and musculoskeletal system," the crux of TAAOM's argument is centered around the authority of the Board to adopt administrative rules that allow the use of acupuncture needles by chiropractors. *Id.* The Board will demonstrate to the Court that the Board has authority to allow chiropractors to use acupuncture needles, thus TAAOM's argument fails and the Board is entitled to judgment as a matter of law on TAAOM's section 2001.038 claim.

1. The Intent of Senate Bill 361 Was To Allow Chiropractors to Perform Acupuncture.

5.3 The legislative history of S.B. 361, 75th Legislature, is discussed in detail in the Background section of this Motion. There is no doubt what the author and sponsor of the bill were trying to accomplish. Representative Patricia Gray explicitly stated that the purpose of the amendment to the definition of acupuncture was to allow chiropractors to practice acupuncture. *See* Appendix Tab 13. This language was removed from the bill on the House floor with the intent that an amendment to the Chiropractic Act, a more direct way of accomplishing the same thing, could be added to the bill. These later amendments were ruled to be out of order because

they were not germane to the Acupuncture Act. This left the House version of the bill without any language amending the definition of acupuncture. Because of this difference in the versions passing the House and Senate, a conference committee was needed to resolve the differences. The conference committee restored the language changing the definition of acupuncture to include “nonincisive, nonsurgical” and that report was adopted as the final act. Each document discussing this bill, including both the House Bill Analysis and the House Committee Report, as well as the House sponsor’s testimony on the bill in the committee considering it, indicates that the Legislature’s intent was to allow chiropractors to practice acupuncture. This type of evidence of legislative intent has been accepted by the court in another challenge to the Board’s authority. *Tex. Bd. of Chiropractic Exam’rs v. Tex. Med. Ass’n*, 375 S.W.3d 464, 469 (Tex. App.—Austin 2012, pet. denied). Thus, the intent of the Legislature is that chiropractors be allowed to practice acupuncture without licensure under the Acupuncture Act. The Austin Court of Appeals has recognized the connection between this amendment and the Chiropractic Act:

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).

Id., 375 S.W.3d at 477. Accordingly, there is no doubt concerning the purpose of this act of the Legislature: Texas chiropractors should be allowed to practice acupuncture.

5.4 Further, the addition of this language serves no purpose other than to authorize chiropractors to practice acupuncture without licensure under the Acupuncture Act. Licensed acupuncturists could already use needles to perform acupuncture. The limitation “nonsurgical, nonincisive” appears in only two places in all of the Texas Codes: Texas Occupations Code

§ 201.002(b)(2) (the Chiropractic Act) and § 205.001(2)(A) (the Acupuncture Act). If this amendment is not effective to authorize chiropractors to practice acupuncture, then it is meaningless and surplusage. A court must give effect to all of a statutes' words and not treat any statutory language as mere surplusage. *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000).

2. Senate Bill 361 Was Effective to Authorize Chiropractors to Practice Acupuncture.

5.5 TAAOM argues that, even if the Legislature intended to allow chiropractors to practice acupuncture, the change in the Acupuncture Act may not be interpreted to allow chiropractors to perform acupuncture, because that authority must be found in the Chiropractic Act. TAAOM 2nd Amd. Pet. at 10, ¶¶32-33. Disputing the analysis of the Attorney General in Opinion DM-471, TAAOM argues that the two statutes, the Chiropractic Act and the Acupuncture Act, are not *in pari materia*, and may not be read together.

5.6 As the Austin Court of Appeals stated, in an *in pari materia* analysis, the “most important factor ... is similarity of object or purpose” between two statutes that do not specifically reference each other. *In re J.M.R.*, 149 S.W.3d 289, 291 (Tex. App.—Austin 2004, no pet.). Specifically, “[s]tatutes are *in pari materia* if they touch upon the same subject, have the same general purpose, and relate to the same conduct.” *Id.* at 292; *see also Tex. St. Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 348–49 (Tex. App.—Austin 2013, no pet.). Statutes may be considered *in pari materia* even though they contain no reference to one another and were passed at different times and in different sessions of the Legislature. *Azeez v. State*, 248 S.W.3d 182, 191 (Tex. Crim. App. 2008). A comparison of the cases cited by TAAOM with the facts at issue here is appropriate.

5.7 *In re J.M.R.* was a case involving whether a prosecution should have been brought under trespass on school property, a class C misdemeanor, or criminal trespass, a class B misdemeanor. *J.M.R.*, 149 S.W.3d at 291; Tex. Educ. Code § 37.107; Tex. Pen. Code § 30.05. After comparing the two criminal statutes, the court determined whether the “two statutes (1) are contained in the same legislative act; (2) require the same elements of proof; (3) involve different penalties; and (4) were clearly written to achieve the same objective.” *J.M.R.*, 149 S.W.3d at 292. The court held that none of the elements at issue were satisfied. *Id.* The statutes were adopted for different purposes, one to protect those present at schools, the other to protect property; each required different elements of proof; each involved different penalties; each was adopted at different times in different acts of the Legislature. *Id.*

5.8 The *Texas State Board of Chiropractic Examiners v. Abbott* case involved a question of the application of confidentiality provisions of the Chiropractic Act when information was requested under the Public Information Act. *Abbott*, 391 S.W.3d at 348-49. The Board contended that the information was confidential under Texas Occupations Code § 201.206, which makes the Board’s investigation files confidential. The Attorney General’s Open Records Division contended that different sections of the law, Texas Occupations Code §§ 201.404-.405, provide patients a special right of access to their own records. The court held that the statutes were not *in pari materia*. Section 201.206 was enacted to ensure the confidentiality of the Board’s investigative process; sections 201.404-.405 were adopted to ensure patient confidentiality. It is noteworthy that the court considered the legislative history of the law to determine if the sections were *in pari materia*, as the Court should do here. *Abbott*, 391 S.W.3d at 349-50. The statutes were not adopted for a similar purpose and were not required to be

considered together. The patient confidentiality section did not prevail over the Board's investigative privilege. *Id.*

5.9 Finally, TAAOM cites *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407 (Tex. App.—Dallas 2010, pet. denied). This case involved the use of the term “licensed architect” in Texas Civil Practice and Remedies Code § 150.002. This is a tort reform law that prescribed the kind of experts that could testify in certain professional malpractice cases. The defendant contended that the court must apply the definition of “architect” in the licensing statute, which defines “architect” as an architect registered to practice in Texas. Tex. Occ. Code § 1051.001(1). The court held that the statutes were adopted for different purposes, at different times, and were not required to be construed together. *DLB Architects, P.C.*, 305 S.W.3d at 410.

5.10 The case at issue here presents a rather different situation than the cases cited by TAAOM. Here, as demonstrated above, the sole purpose of the amendment to the Acupuncture Act was to clarify an exception to that act: to allow chiropractors to practice acupuncture without being subject to licensure under that act. *See* Tex. Occ. Code § 205.003 (Gov't Code ch. 205, the Acupuncture Act, “does not apply to a health care professional licensed under another statute and acting within the scope of the license”). The law that is to be construed with this act, Texas Occupations Code § 201.002(b)(2), is the definition of the practice of chiropractic. The purpose of the two laws is exactly the same: to define the scope of practice of chiropractic. This demonstrates the important concept of “similarity of object or purpose.” *In re J.M.R.*, 149 S.W.3d at 291. Attorney General's Opinion No. DM-471 determined that the two laws were *in pari materia* based on the fact that both statutes regulated health care professions. Yet, the connection between these two laws is much closer than that. This section is intended to and does create an exception to the Acupuncture Act: chiropractors are exempt from it. This construction

is consistent with the idea that the statutes should be construed together in harmony. Further, the court states “[S]tatutes are *in pari materia* if they touch upon the same subject, have the same general purpose, and relate to the same conduct.” *In re J.M.R.*, 149 S.W.3d at 292. Each of these criteria is met in this case. The subject is the identity of those who are allowed to practice acupuncture. The purpose is to define the practice of acupuncture. The conduct is the practice of acupuncture, either by chiropractors or licensed acupuncturists.

5.11 To the extent that the two statutes may conflict, the doctrine of *in pari materia* requires that the more specific statute control over the more general. Tex. Gov’t Code § 311.026. The amendment to the Acupuncture Act was also the later-adopted provision, and should be given effect under the rule of construction that requires the last act of the Legislature to prevail. Tex. Gov’t Code § 311.025.

5.12 TAAOM would use the doctrine of *in pari materia* to thwart the intent of the Legislature. This is contrary to precedent and the law. “The purpose of the rule of “*in pari materia*” is to aid the courts in carrying out the full intent of the legislature by giving effect to all laws and provisions bearing upon the same subject.” *Lenhard v. Butler*, 745 S.W.2d 101, 105 (Tex. App.—Fort Worth 1988, writ denied). The clear intent of this law is to allow chiropractors to perform acupuncture. This Court should affirm that intent.

3. The Board Has Inherent Authority to Authorize the Practice of Acupuncture by Chiropractors.

5.13 An alternative view of this issue does not require that Texas Occupations Code § 205.001(b)(2) be applicable to the Chiropractic Act at all. The term “nonincisive, nonsurgical procedures” is sufficiently ambiguous to be open to interpretation in the rules of the Board. While the Chiropractic Act does define “incisive or surgical procedure,” that did not end the discussion of the meaning of either phrase. Tex. Occ. Code § 201.002(a)(3). This is illustrated

by Justice Pemberton’s discussion of the meaning of the terms in *Texas Board of Chiropractic Examiners v. Texas Medical Association*, 375 S.W.3d 464, 479-82 (Tex. App.—Austin 2012, pet. denied). In a lengthy discussion of the evidence in that case, the court compares different types of needles, including those used for needle electromyograms as well as those used for acupuncture. *Id.* The court notes the difference between the ordinary and technical definitions of “incisive” and that a technical definition of the term would not necessarily include “piercing” such as would occur with an acupuncture needle. *Id.* The court notes that this distinction is the likely explanation of the legislative determination that an acupuncture needle “would be capable of being inserted into the body in a ‘nonincisive’ and ‘nonsurgical’ manner.” *Id.*, 375 S.W.3d at 481. This discussion shows that these supposedly clear terms and definitions are capable of multiple interpretations, and are therefore ambiguous. Because of this ambiguity, it is within the authority of the Board to interpret the statute in its rules. Where a statute is ambiguous, courts may be required to defer to an administrative agency’s construction of its own statutory authority. *Id.*, 375 S.W.3d at 474-75, citing *Railroad Comm’n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624–25 (Tex. 2011). Of course, the construction by the agency must be a reasonable one. *Id.*

5.14 The Legislature’s conclusion that acupuncture is not an incisive or surgical procedure provides not only statutory authority, but also a logical rationale for the Board’s determination that the insertion of an acupuncture needle is not an incisive procedure. If it is within the authority of the Legislature to determine that the insertion of an acupuncture needle is not an incisive or surgical procedure in the Acupuncture Act, through what logic would the Board be prohibited from making exactly the same determination in its own rules?

5.15 One of the items considered by the Attorney General in drafting the opinion that became DM-471 was a letter dated February 3, 1997, from Representative D.R. “Tom” Uher concerning the legislative intent in adding the phrase “incisive or surgical procedures” in the Acupuncture Act. Appendix Tab 26. Representative Uher was the House sponsor of the 1995 amendment to the Chiropractic Act that added the language that is now Texas Occupations Code § 201.002(a)(3). *See* Act of May 28, 1995, 74th Leg., R.S., ch. 965, §§ 13, 18, 1995 Tex. Gen. Laws 4789. He explains that the word “incisive” was chosen carefully, because it was broader than “invasive,” which had been suggested by others. He also indicates that the use of a needle to draw blood was intended by way of example and was not intended to be the only use of a needle permitted. This contradicts TAAOM’s assertion that the use of needles to draw blood was the only use of needles permitted by the Chiropractic Act.

5.16 The original language in the 1995 amendment to what is now section 201.002(a)(3) read as follows: “performs nonsurgical, nonincisive procedures, including but not limited to adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.” Act of May 28, 1995, *supra*. The phrase “but not limited to” was deleted when the statute was recodified into the Occupations Code. Act of May 13, 1999, 76th Leg., R.S., ch. 388, 1999 Tex. Gen. Laws 1431. Under the Code Construction Act, the elimination of “but not limited to” does not create an implication of restriction, but “including” should be construed as a term of enlargement. Tex. Gov’t Code § 311.005(13). Thus, chiropractors are not limited to adjustment and manipulation; they may use any procedure not prohibited by law. Acupuncture is one such procedure.

B. Defendants Are Entitled to Judgment Under Texas Constitution Art. III, § 35.

5.17 TAAOM claims that, if S.B. 361 “was intended to additionally expand the scope of the practice of chiropractic, it violated the one subject rule” contained in Texas Constitution, Art. III, § 35(a). TAAOM 2nd Amd. Pet. at 13. That section of the Texas Constitution states the following:

(a) No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject.

5.18 This provision has been interpreted infrequently, but there are significant cases that provide guidance for the Court. A bill is presumed to be constitutional and the burden of proof is on the person challenging it. *LeCroy v. Hanlon*, 713 S.W.2d 335, 337 (Tex. 1986). The Court should liberally construe both the constitutional provision and the statute in question to support constitutionality. *Id.* For a bill to be considered as having a single subject, the provisions must relate, directly or indirectly, to the same general subject and have a mutual connection. *Id.* Texas courts focus on the logical relationship between the provisions and the general subject. *See, e.g., Ex parte Jimenez*, 159 Tex. 183, 188, 317 S.W.2d 189, 194 (1958) (bill will be upheld on single-subject rule “if [a provision] has any logical relationship to the general subject”); *Dellinger v. State*, 115 Tex. Crim. 480, 483, 28 S.W.2d 537, 539 (1930) (“[W]here the provisions are germane in any degree, the law will be upheld.”). The subject matter of the bill, not the caption, is the relevant measure of whether the bill contains two subjects. *Ex parte Jones*, ___ S.W.3d ___, No. 1158-13, 2014 WL 2478134 (Tex. Crim. App. June 04, 2014).

5.19 TAAOM seems to argue that this provision is some general enlargement of the scope of practice of chiropractic. Yet, the effect of this provision is narrowly defined and is directly related to the bill in general. Senate Bill 361 was the sunset bill for the State Board of

Acupuncture Examiners. It was 25 pages long and dealt with numerous aspects of the practice of acupuncture and the business of the Acupuncture Board. The provision at issue here amends only the Acupuncture Act and defines the exception to the Acupuncture Act that allows chiropractors to practice acupuncture without being licensed under that act. Section 205.003 of the Acupuncture Act declares that the Act “does not apply to a health care professional licensed under another statute of this state and acting within the scope of the license.” Tex. Occ. Code § 205.003(a). The amendment to add “nonincisive, nonsurgical procedure” clarifies that a chiropractor acting within the scope of his or her practice is exempt from the Acupuncture Act, and thus directly impacts the Acupuncture Act. It is as germane to define who is *not* subject to the Acupuncture Act as it is to define who is subject to it and how they are regulated. Thus, this bill directly relates to the Acupuncture Act. There is a logical relationship between the regulation of the practice of acupuncture and the determination of who should be exempt from regulation by the State Board of Acupuncture Examiners. For another example, consider Texas Occupations Code § 151.052. This provision creates exemptions from the Medical Practice Act for other licensed professions, such as dentists, nurses, optometrists, chiropractors and others. The inclusion of this provision in the law is not only germane, but essential to allow for the orderly licensing and regulation of the various medical professions. The amendment to the Acupuncture Act to define the exemption for chiropractors from the Acupuncture Act serves exactly the same purpose. Thus, Senate Bill 361 does not violate Article III, § 35 of the Texas Constitution.

C. Defendants Are Entitled to Judgment Under Texas Constitution, Art. XVI, § 31.

5.20 TAAOM next complains that a statutory scheme that allows chiropractors to practice acupuncture with fewer hours of training than licensed acupuncturists is an improper

preference to one school of medicine over others that is prohibited by Texas Constitution Art. XVI,

§ 31. The provision in question provides as follows:

Sec. 31. 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.

Tex. Const. Art. XVI, § 31.⁴ This claim fails because chiropractic has been held not to be a school of medicine. Since it is not a school of medicine, neither the Chiropractic Act nor the amendment that is the subject of this lawsuit create a preference. *Schlichting v. Tex. St. Bd. of Med. Examiners*, 158 Tex. 279, 289-90, 310 S.W.2d 557, 564 (1957).

5.21 In an action seeking to enjoin a naturopath from practicing medicine without a license, the court drew a distinction between naturopathy, which was defined as diagnosing and treating “human ills of all kinds,” and healing arts treating limited portions of the human anatomy, such as dentistry, chiropody, and chiropractic. *Schlichting*, 158 Tex. at 289, 310 S.W.2d at 564. TAAOM erroneously asserts that chiropractic and acupuncture are “schools of medicine” within the meaning of Art. XVI, § 31. Thus, in the very authority TAAOM cites, the court held that the practice of chiropractic is not a school of medicine under Art. XVI, § 31, precisely because their practitioners are limited to a specific part of the body. If, in fact, acupuncture constitutes a “school of medicine,” its practitioners, according to *Schlichting*, are required to pass the same examination and obtain the same license as allopathic physicians licensed by the Texas Medical Board. *Id.* The Board takes no position on whether acupuncture as defined in the Acupuncture Act constitutes a school of medicine, because it is unnecessary for the determination of the issues in this case. It is sufficient that chiropractic has been determined not to be a school of medicine. The Board is entitled to judgment on this issue.

⁴ A comprehensive history of the origin and enforcement of this provision can be found in George D. Braden *et al.*, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* (1977). Appendix Tab 27.

VI. TRADITIONAL SUMMARY JUDGMENT DEFENDANTS' AFFIRMATIVE DEFENSE OF LIMITATIONS

6.1 If the Board conclusively proves each element of its affirmative defense, it prevails as a matter of law. A matter is conclusively established if reasonable people could not differ on the conclusion to be drawn from the evidence. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the Board establishes its right to summary judgment on an affirmative defense as a matter of law, the burden shifts to the Plaintiff to present evidence that raises a genuine issue of material fact. *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 743 (Tex. App.—Dallas 2003, pet. denied).

6.2 All of the challenged rule provisions have been in effect for more than four years and the statute of limitations applicable to this rule challenge, the residual limitations period of four years under Tex. Civ. Prac. & Rem. Code § 16.051, has expired. The Board adopted its scope of practice rule, 22 Tex. Admin. Code § 75.17, to be effective on June 11, 2006. 31 Tex. Reg. 4613 (2006). Only the sections of this rule dealing with acupuncture and incise procedures are challenged by the plaintiff. *See* 22 Tex. Admin. Code §§ 75.17(a)(3), 75.17(b)(4), and 75.17(e)(2)(c). Two of the sections challenged by the plaintiff are unchanged from the 2006 rule. *See* 22 Tex. Admin. Code §§ 75.17(a)(3) and 75.17(e)(2)(c). The third, 22 Tex. Admin. Code § 75.17(b)(4), was added effective October 12, 2006, 31 Tex. Reg. 8363 (2006), and subsequently renumbered without substantive change. The Board also issued a rule specifically on the subject of acupuncture, 22 Tex. Admin. Code § 75.21, effective on July 2, 2009, and also challenged by the plaintiff. 34 Tex. Reg. 4333 (2009). This most recent action of the Board relevant to this lawsuit became four years old on July 2, 2013, over six months before the filing of this lawsuit.

6.3 Limitations in this case is governed by Texas Civil Practice & Remedies Code § 16.051, which provides as follows:

Sec. 16.051. Residual Limitations Period. Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

The rulemaking provisions of the Administrative Procedure Act do not contain a statute of limitations for substantive actions challenging rules. *See* Tex. Gov't Code ch. 2001. The only mention of limitations in this chapter is a two-year limitation on procedural challenges to rules. Tex. Gov't Code § 2001.035(b). This evidences an understanding by the Legislature that some limitations provisions do apply to agency rulemaking actions. In the absence of another provision, the residual limitations provision under § 16.051 applies and the period of limitations is four years. The Board is unable to find a Texas case addressing whether the limitations period applies to the adoption of administrative rules, and this issue presents a case of first impression to the Court. In the absence of contrary authority, the residual limitations period should apply.

6.4 “Statutes of limitations preclude claimants from sleeping on their rights.” *Little v. Smith*, 943 S.W.2d 414, 418 (Tex. 1997). In this case, the TAAOM has known that chiropractors are performing acupuncture for many years. As TAAOM points out in its Petition, the Board has allowed chiropractors to engage in the practice of acupuncture “[s]ince the early 1990s.” Plaintiff’s 2nd Amd. Pet. at 3 (hereinafter, “Petition”). No provision tolls the running of limitations in this action. Plaintiff has slept on its rights. Accordingly, this lawsuit is barred by limitations.

VII. ATTORNEYS’ FEES

7.1 As stated in Defendants’ First Amended Answer, Defendants are entitled under the authority of Texas Civil Practice and Remedies Code § 37.009 to reasonable and necessary

attorney's fees that were incurred in the defense of this suit with respect to the Plaintiff's constitutional claims under the UDJA, and such attorney's fees as may be necessary in case of an appeal of this suit.

VIII. ALTERNATIVE RELIEF

8.1. In the alternative, if the Court denies any part of Defendants' motion for summary judgment, Defendants ask the Court to sign an order specifying the facts that are established as a matter of law and directing any further proceedings as are just. Tex. R. Civ. P. 166a(e).

IX. CONCLUSION

9.1 The Legislature intended to allow chiropractors to practice acupuncture when it passed S.B. 361 in 1997. Every indicator of legislative intent, whether testimony from the sponsor or documentation from the legislative research organizations, indicates that this was the intent of this section of the bill. This amendment was germane to the Acupuncture Act because it clarified an exemption from that act. It is as important to define who is exempt from the application of the act as it is to define who is subject to it. The Board has statutory authority to define the scope of practice of chiropractors. It is within that authority to define "nonsurgical, noninvasive procedures" for chiropractors in the exact terms that the Legislature used to define acupuncture in the Acupuncture Act.

9.2 TAAOM's constitutional claims are without merit. Chiropractic has been conclusively determined by the Texas Supreme Court not to constitute a "school of medicine" so there is not a violation of Texas Constitution Art. XVI, § 31. The provision at issue here does not violate the two-subject rule of Art. III, § 35 because it is germane to the Acupuncture Act to define those professions and individuals who are exempt from the Act. The Board's motion for summary judgment should be granted.

X. PRAYER

WHEREFORE, for these reasons, the Board and Ms. Yarbrough respectfully request that the court enter judgment that Plaintiff takes nothing; assess costs and attorneys' fees against Plaintiff; and award the Board and Ms. Yarbrough all other and further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Motion for Summary Judgment was sent as described below on this the 31st day of October, 2014, to the following:

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TEXAS ASSOCIATION OF
ACUPUNCTURE
AND ORIENTAL MEDICINE,
Plaintiff,

v.

TEXAS BOARD OF CHIROPRACTIC
EXAMINERS and YVETTE
YARBROUGH, EXECUTIVE DIRECTOR,
IN HER OFFICIAL CAPACITY
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT

DEFENDANTS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT APPENDIX

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TITLE 22

PART 3

CHAPTER 75

RULE §75.17

EXAMINING BOARDS

TEXAS BOARD OF CHIROPRACTIC EXAMINERS

RULES OF PRACTICE

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.

(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 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, 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;

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TITLE 22**EXAMINING BOARDS****PART 3****TEXAS BOARD OF CHIROPRACTIC EXAMINERS****CHAPTER 75****RULES OF PRACTICE****RULE §75.17****Scope of Practice**

(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, nutraceuticals, 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;

(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 Note: 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

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TITLE 22**EXAMINING BOARDS****PART 3****TEXAS BOARD OF CHIROPRACTIC EXAMINERS****CHAPTER 75****RULES OF PRACTICE****RULE §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.

(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 Note: 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

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APPENDIX 10

enforcement of a prisoner's pending release or transfer to a halfway house.
(29-0) (29-0)

CSSB 156 (Nixon) Relating to directional signs on public highways for major agricultural interests, major shopping areas, and specific information.
(29-0) (29-0)

SB 361 (Madla) Relating to the continuation and functions of the Texas State Board of Acupuncture Examiners; providing penalties.
(29-0) (29-0)

Senator Madla offered the following committee amendment to the bill:

Committee Amendment No. 1

Amend **SB 361** as follows:

(1) Inserting the following as SECTION 1, and renumbering the remaining Sections accordingly:

SECTION 1. Section 6.02, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes) is amended to read as follows:

Sec. 6.02. In this subchapter:

(1) "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; 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.

(2) "Acupuncturist" means a person who practices acupuncture.

(3) "Acupuncture board" means the Texas State Board of Acupuncture Examiners.

(4) "Chiropractor" means a licensee of the Texas Board of Chiropractic Examiners.

(5) "Executive director" means the executive director of the Texas State Board of Medical Examiners.

(6) "Medical board" means the Texas State Board of Medical Examiners.

(7) "Physician" means a licensee of the Texas State Board of Medical Examiners.

The committee amendment was read and was adopted by a viva voce vote.

Senator Madla offered the following committee amendment to the bill:

Committee Amendment No. 2

Amend **SB 361** as follows:

Amend Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), by adding section 6.118 to read as follows:

Rehabilitation Order

Sec. 6.118 (a) The board, through an agreed order or after a contested proceeding, may impose a nondisciplinary rehabilitation order on any

licensee or, as a prerequisite for issuing a license, on any licensure applicant based on one or more of the following:

(1) intemperate use of drugs or alcohol directly resulting from habituation or addiction caused by medical care or treatment provided by a physician;

(2) self-reported intemperate use of drugs or alcohol during the last five years immediately preceding the report which could adversely affect the reporter's ability to safely practice as an acupuncturist, but only if the reporting individual has not previously been the subject of a substance abuse related order of the board;

(3) judgment by a court of competent jurisdiction that the individual is of unsound mind; or

(4) results from a mental or physical examination, or admissions by the individual, indicating that the licensee or applicant suffers from a potentially dangerous limitation or an inability to safely practice as an acupuncturist with reasonable skill and safety by reason of illness or as a result of any physical or mental condition.

(b) A rehabilitation order entered pursuant to this section shall be a nondisciplinary private order and shall contain findings of fact and conclusions of law. A rehabilitation order, if entered by agreement, shall be an agreed disposition or settlement agreement for purposes of civil litigation and shall be exempt from the open records law, Chapter 552, Government Code.

(c) A rehabilitation order entered pursuant to this section may impose a revocation, cancellation, suspension, period of probation or restriction, or any other terms and conditions authorized under this Act or as otherwise agreed to by the board and the individual subject to the order.

(d) Violation of a rehabilitation order entered pursuant to this section may result in disciplinary action under the provisions of this Act for contested matters or pursuant to the terms of the agreed order. A violation of a rehabilitation order may be grounds for disciplinary action based on unprofessional or dishonorable conduct or on any of the provisions of this Act which may apply to the misconduct which resulted in violation of the rehabilitation order.

(e) The rehabilitation orders entered pursuant to this section shall be kept in a confidential file which shall be subject to an independent audit by state auditors or private auditors contracted with by the board to perform such an audit. Audits may be performed at any time at the direction of the board but shall be performed at least once every three years. The audit results shall be reported in a manner that maintains the confidentiality of all licensees who are subject to rehabilitation orders and shall be a public record. The audit shall be for the purposes of ensuring that only qualified licensees are subject to rehabilitation orders.

The committee amendment was read and was adopted by a viva voce vote.

Senator Madla offered the following committee amendment to the bill:

Committee Amendment No. 3

Amend **SB 361** as follows:

In Section 6.075 (filed version, page 10, line 8 through 24) strike the section in its entirety and insert the following:

Sec. 6.075. TEMPORARY LICENSE. (a) The acupuncture board may, through the executive director of the medical board, issue a temporary license 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) pay the appropriate fee prescribed by the medical board;

(4) if licensed in another state, the District of Columbia, or a territory of the United States, is in good standing as an acupuncturist; and

(5) meets all the qualifications for a license under this Act 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 from the date issued and may be extended only for another 30 days after the date the initial temporary license expires.

The committee amendment was read and was adopted by a viva voce vote.

CSSB 372 (Armbrister) Relating to certain regulatory functions of the Department of Agriculture. (29-0) (29-0)

SB 502 (Zaffirini) Relating to autopsies performed on a body if the deceased was a child younger than six years of age. (29-0) (29-0)

Senator Zaffirini offered the following committee amendment to the bill:

Committee Amendment No. 1

Amend **SB 502** as follows:

On page 1, line 17, insert the following as SECTION 2 of the bill and renumber each subsequent SECTION appropriately:

SECTION 2. Section 264.514(a), Family Code, is amended to read as follows:

(a) A medical examiner or justice of the peace notified of a death of a child under Section 264.513 shall hold an inquest under Chapter 49, Code of Criminal Procedure, to determine whether the death is unexpected. An inquest is not required under this subchapter if the child's death is expected and is due to a congenital or neoplastic disease. A death caused by an infectious disease may be considered an expected death if:

(1) the disease was not acquired as a result of trauma or poisoning;

(2) the infectious organism is identified using standard medical procedures; and

APPENDIX 11

SRC-JFA S.B. 361 75(R)BILL ANALYSIS

Senate Research Center S.B. 361
By: Madla
Health & Human Services
4-11-97
Committee Report (Amended)

DIGEST

The Texas State Board of Acupuncture Examiners (acupuncture board) was created as an administratively attached board to the Board of Medical Examiners (medical board) in 1993 by the 73rd Legislature. The acupuncture board is responsible for providing an orderly system of regulating the practice of acupuncture, subject to the advice and approval of the medical board. The acupuncture board carries out its programs and functions through a nine-member board appointed by the governor and through the use of the staff of the medical board. To carry out these programs, the acupuncture board has a budget of \$59,614 and 2.18 medical board employees for fiscal year 1996.

The acupuncture board is subject to the Sunset Act and will be abolished September 1, 1997, unless continued by the legislature. As a result of its review of the acupuncture board, the Sunset Advisory Commission recommended continuation and several statutory modifications that are contained in this legislation.

PURPOSE

As proposed, S.B. 361 continues the Texas State Board of Acupuncture Examiners for an eight-year period and makes statutory modifications recommended by the Sunset Advisory Commission.

RULEMAKING AUTHORITY

Rulemaking authority is granted to the Board of Acupuncture Examiners in SECTION 5 (Sections 6.051(b) and 6.075(a)(1), Article 4495b, V.T.C.S.) and to the Board of Medical Examiners in SECTIONS 5 and 7 (Sections 6.085(a) and 6.10(j), Article 4495b, V.T.C.S.) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 6.02, Article 4495b, V.T.C.S. (Medical Practice Act), to redefine "acupuncture" to mean 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; and 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.

SECTION 2. Amends Section 6.04, Article 4495b, V.T.C.S., by amending Subsections (b), (d), (g), and (h), and by adding Subsections (i)-(l), to update the standard language developed by the Sunset Commission prohibiting lobbyists from serving as a member on the Board of Acupuncture Examiners (acupuncture board). Deletes provision relating to persons employed by certain statewide or national organizations. Updates standard language developed by the Sunset Commission regarding the presiding

officer of the acupuncture board. Adds standard language developed by the Sunset Commission regarding the eligibility of a person for an appointment to the acupuncture board. Adds standard language developed by the Sunset Commission regarding an officer, employee, or paid consultant of a Texas trade association in the field of health care, or that person's spouse. Defines "Texas trade association." Deletes provision regarding the open meetings law, open records law, and the Administrative Procedure Act. Adds standard language developed by the Sunset Commission regarding appointments to the acupuncture board. Provides that unless continued in existence as provided by this chapter, the acupuncture board is abolished and this subchapter expires September 1, 2005, rather than September 1, 1997. Makes a conforming change.

SECTION 3. Amends Subchapter F, Article 4495b, V.T.C.S., by adding Sections 6.041 and 6.042, as follows:

Sec. 6.041. GROUNDS FOR REMOVAL FROM ACUPUNCTURE BOARD. Adds standard language developed by the Sunset Commission regarding grounds for removal from the acupuncture board and requiring the executive director of the Board of Medical Examiners (medical board) or the executive director's designee to provide to members of the acupuncture board certain information regarding their qualifications for office and their legal responsibilities.

Sec. 6.042. BOARD MEMBER TRAINING. Adds standard language developed by the Sunset Commission regarding board member training prior to joining the acupuncture board and prior to senate confirmation.

SECTION 4. Amends Section 6.05, Article 4495b, V.T.C.S., to update standard language developed by the Sunset Commission regarding the powers and duties of the acupuncture board. Deletes a clause requiring the acupuncture board to establish a procedure for reporting and processing complaints relating to the practice of acupuncture under this article. Makes conforming changes.

SECTION 5. Amends Subchapter F, Article 4495b, V.T.C.S., by adding Sections 6.051, 6.071, 6.075, and 6.085, as follows:

Sec. 6.051. PUBLIC INTEREST INFORMATION; COMPLAINTS. Adds standard language developed by the Sunset Commission regarding public interest information, consumer complaints, and a complaint file.

Sec. 6.071. EXAMINATION RESULTS. Adds standard language developed by the Sunset Commission regarding notification of examination.

Sec. 6.075. TEMPORARY LICENSE. Authorizes the acupuncture board, through the executive director of the medical board, to issue a temporary license to an applicant who submits an application on a form prescribed by the acupuncture board; has passed a national or other examination recognized by the acupuncture board relating to practice of acupuncturist; pay the appropriate fee prescribed by the medical board; if licensed in another state, the District of Columbia, or a territory of the United States, is in good standing as an acupuncture; and meets all the qualifications for a license under this Act but is waiting for the next scheduled meeting of the medical board for the license to be issued. Provides that a temporary license is valid for 100 days from the date issued and may be extended only for another 30 days after the date the initial temporary license expires.

Sec. 6.085. ADVERTISING. Adds standard language developed by the Sunset

Commission regarding restrictions by the medical board of advertising to prohibit false, misleading, or deceptive practices.

SECTION 6. Amends Section 6.09, Article 4495b, V.T.C.S., by adding Subsections (c) and (d), to add standard language developed by the Sunset Commission regarding the acupuncture board's funds and the acupuncture board's annual financial report.

SECTION 7. Amends Section 6.10, Article 4495b, V.T.C.S., as follows:

Sec. 6.10. New heading: ISSUANCE AND RENEWAL OF LICENSE. Adds standard language developed by the Sunset Commission regarding licensing of out-of-state applicants and renewal of licenses. Makes a conforming change.

SECTION 8. Amends Subchapter F, Article 4495b, V.T.C.S., by adding 6.101, as follows:

Sec. 6.101. LICENSE HOLDER INFORMATION. Sets forth the information each license holder is required to file with the acupuncture board. Requires a license holder to notify the acupuncture board of a change of address by a certain date.

SECTION 9. Amends Section 6.11, Article 4495b, V.T.C.S., and redesignates Sections 6.11(b)-(g) as Section 6.115, as follows:

Sec. 6.11. DENIAL OF LICENSE; DISCIPLINE OF LICENSE HOLDER. Authorizes a license to practice acupuncture to be denied, suspended, probated, or revoked if the applicant for a license or the holder of a license, among other items, has been, rather than is, adjudged mentally incompetent by a court of competent jurisdiction or has a mental or physical condition that renders the person unable to perform safely as an acupuncturist; has practiced, rather than practices, acupuncture in a manner detrimental to the public health and welfare; fraudulently or deceptively uses a license; has acted in an unprofessional or dishonorable manner that is likely to deceive, defraud, or injure a member of the public; has committed an act in violation of state law if the act is connected with the person's practice as an acupuncturist; or has had the person's license suspended, revoked, or restricted, has had other disciplinary action taken by another state regarding the person's practice as an acupuncturist, or has had disciplinary action taken against the person by the uniformed services of the U.S. based on acts by the license holder similar to acts described in this section. Provides that a complaint, indictment, or conviction of a law violation is not necessary for the enforcement of a denial, suspension, probation, or revocation of an applicant for a license or the holder of a license who has committed an act in violation of certain state laws. Provides that proof of the commission of an act while in practice as an acupuncturist or under the guise of practice as an acupuncturist is sufficient for action by the medical board. Provides that a certified copy of the record of the state or uniformed services of the U.S. taking an action is conclusive evidence that a person's license has been suspended, revoked, or restricted, or the person has had other disciplinary action taken against the person by another state or the U.S. Makes conforming and nonsubstantive changes.

Sec. 6.115. SCOPE OF PRACTICE. Redesignated from Sections 6.11(b)-(g), Article 4495b, V.T.C.S. Makes conforming changes.

SECTION 10. Amends Subchapter F, Article 4495b, by adding Sections 6.116, 6.117 and 6.118, as follows:

Sec. 6.116. ADDITIONAL DISCIPLINARY AUTHORITY. Adds standard language developed by the Sunset Commission regarding additional disciplinary authority and punishment by the acupuncture board upon a finding that an acupuncturist has committed an offense described in Section 6.11 of this Act.

Sec. 6.117. SUSPENSION, REVOCATION, OR NONRENEWAL OF LICENSE. Adds standard language developed by the Sunset Commission regarding disciplinary hearings conducted by the State Office of Administrative Hearings.

Sec. 6.118. REHABILITATION ORDER. (a) Authorizes the acupuncture board, through an agreed order or after a contested proceeding, to impose a nondisciplinary rehabilitation order on any licensee or as a prerequisite for issuing a license, on any licensure applicant based on intemperate use of drugs or alcohol directly resulting from habituation or addiction caused by medical care or treatment provided by a physician; self-reported intemperate use of drugs or alcohol during the last five years immediately preceding the report which could adversely affect the reporter's ability to safely practice as an acupuncturist, but only if the reporting individual has not previously been the subject of a substance abuse related order of the board; judgment by a court of competent jurisdiction that the individual is of unsound mind; or results from a mental or physical examination, or admissions by the individual, indicating that the licensee or applicant suffers from a potentially dangerous limitation or an inability to safely practice as an acupuncturist with reasonable skill and safety by reason of illness or as a result of any physical or mental condition.

(b) Requires a rehabilitation order entered pursuant to this section to be a nondisciplinary private order and to contain findings of fact and conclusions of law. Requires a rehabilitation order, if entered by agreement, to be an agreed disposition or settlement agreement for purposes of civil litigation and to be exempt from the open records law, Chapter 552, Government Code.

(c) Authorizes a rehabilitation orders entered pursuant to this section to impose a revocation, cancellation, suspension, period of probation or restriction, or any other terms and conditions authorized under this Act or as otherwise agreed to by the acupuncture board and the individual subject to the order.

(d) Provides that a violation of a rehabilitation order entered pursuant to this section may result in disciplinary action under the provisions of this Act for contested matters or pursuant to the terms of the agreed order. Authorizes a violation of a rehabilitation order to be grounds for disciplinary action based on unprofessional or dishonorable conduct or on any of the provisions of this Act which may apply to the misconduct which resulted in violation of the rehabilitation order.

(e) Requires the rehabilitation order entered pursuant to this section to be kept in a confidential file which shall be subject to an independent audit by state auditors or private auditors contracted with by the acupuncture board to perform such an audit. Authorizes audits to be performed at any time at the direction of the acupuncture board but shall be performed at least once every three years. Requires the audit results to be reported in a manner that maintains the confidentiality of all licensees who are subject to rehabilitation orders and to be a public record. Requires the audit to be for the purpose of ensuring that only

qualified licensees are subject to rehabilitation orders.

SECTION 11. Amends Section 6.12(b), Article 4495b, V.T.C.S., to provide that a person commits a third degree felony, rather than a Class A misdemeanor, if the person violates Section 6.06, Article 4495b, V.T.C.S., requiring a person to practice acupuncture with a license issued by the medical board.

SECTION 12. Amends Subchapter F, Article 4495b, V.T.C.S., by adding Section 6.125, as follows:

Sec. 6.125. SUBPOENAS. Authorizes the executive director of the medical board or the presiding officer of the acupuncture board to issue a subpoena or subpoena duces tecum for certain purposes. Provides that failure to timely comply with a subpoena issued under this section is a ground for 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 denial of a license application.

SECTION 13. Makes application of this Act prospective.

SECTION 14. Makes application of changes in law made by this Act, relating to members of the acupuncture board, prospective. Provides that this Act does not prohibit a person who is a member of the acupuncture board on September 1, 1997, from being reappointed to the acupuncture board if the person has the qualifications required for a member under Subchapter F, Article 4495b, V.T.C.S., as amended by this Act.

SECTION 15. Effective date: September 1, 1997.

Makes application of this Act prospective.

SECTION 16. Emergency clause.

SUMMARY OF COMMITTEE CHANGES

Amendment 1

Page 1, line 5, adds SECTION 1, Section 6.02, Article 4495b, V.T.C.S., to redefine "acupuncture." SECTIONS 1-15 are subsequently renumbered as SECTIONS 2-16.

Amendment 2

Page 18, line 27, adds Section 6.118, Article 4495b, V.T.C.S., regarding a rehabilitation order.

Amendment 3

Page 10, line 8, strike Section 6.075, Article 4495b, V.T.C.S., regarding a temporary license, in its entirety and replace with revised version of Section 6.075, Article 4495b, V.T.C.S.

APPENDIX 12

Texas Legislature Online Actions

Bill: SB 361**Legislative Session:** 75(R)**Author:** Madla**Actions:** (descending date order)

Description	Comment	Date▼	Time	Journal Page
E Effective on 9/1/97		06/20/1997		
E Signed by the Governor		06/20/1997		4926
E Sent to the Governor		06/03/1997		4924
H Signed in the House		06/01/1997		4799
S Signed in the Senate		06/01/1997		4846
S Reported enrolled		05/31/1997		
S House adopts conf. comm. report-reported		05/29/1997		3700
H Nonrecord vote recorded in Journal		05/28/1997		4024
H House adopts conference committee report		05/28/1997		4024
H Senate adopts conf. comm. report-reported		05/27/1997		3921
S Senate adopts conference committee report		05/27/1997		3173
H Conf. Comm. Report printed and distributed		05/24/1997	05:34 PM	
S Conference committee report filed		05/24/1997		2842
S House appoints conferees-reported		05/21/1997		2446
S House grants request for conf comm-reported		05/21/1997		2446
H House appoints conferees		05/21/1997		2982
H House grants request for conference committee		05/21/1997		2982
H Senate appoints conferees-reported		05/20/1997		2954
H Senate requests conference committee-reported		05/20/1997		2954
H Senate refuses to concur-reported		05/20/1997		2954
S Senate appoints conferees		05/20/1997		2322
S Senate requests conference committee		05/20/1997		2322
S Senate refuses to concur		05/20/1997		2322
S Read		05/20/1997		2322
S House amendment(s) laid before the Senate		05/20/1997		2321
S Printing rule suspended		05/20/1997		2321
S House passage as amended reported		05/20/1997		2321
H Passed		05/20/1997		2894
H Read 3rd time		05/20/1997		2894
H Passed to 3rd reading as amended		05/19/1997		2744
H Amended	5-Madden	05/19/1997		2744
H Point of order sustained (amendment)		05/19/1997		2744
H Amendment(s) offered	4-Berlanga	05/19/1997		2744
H Point of order sustained (amendment)		05/19/1997		2744
H Amendment(s) offered	3-Berlanga	05/19/1997		2743
H Amended	2-Berlanga	05/19/1997		2742

H Amended	1-Berlanga	05/19/1997	2742
H Read 2nd time		05/19/1997	2742
H Placed on Major State Calendar		05/19/1997	
H Considered in Calendars		05/16/1997	
H Committee report sent to Calendars		05/15/1997	
H Committee report printed and distributed		05/14/1997 11:03 AM	
H Committee report filed with Chief Clerk		05/13/1997	2547
H Reported favorably as amended		05/08/1997	
H Amendment(s) considered in committee		05/08/1997	
H Testimony taken in committee		05/08/1997	
H Considered in public hearing		05/08/1997	
H Referred to Public Health		04/29/1997	1676
H Read first time		04/29/1997	1676
H Received from the Senate		04/25/1997	1471
S Reported engrossed		04/24/1997	
S Record vote		04/24/1997	1325
S Passed		04/24/1997	1325
S Read 3rd time		04/24/1997	1325
S Record vote		04/24/1997	1325
S Rules suspended		04/24/1997	1325
S Passed to engrossment as amended		04/24/1997	1325
S Amended	Madla	04/24/1997	1327
S Amended	Madla	04/24/1997	1325
S Amended	Madla	04/24/1997	1325
S Read 2nd time		04/24/1997	1325
S Laid before the Senate		04/24/1997	1325
S Placed on local & uncontested calendar		04/24/1997	
S Withdrawn from intent calendar		04/17/1997	
S Placed on intent calendar		04/16/1997	
S Committee report printed and distributed		04/14/1997 10:20 PM	
S Reported favorably as amended		04/14/1997	1067
S Recommended for local & uncontested calendar		04/09/1997	
S Testimony taken in committee		04/09/1997	
S Considered in public hearing		04/09/1997	
S Scheduled for public hearing on		04/09/1997	
S Left pending in committee		04/02/1997	
S Testimony taken in committee		04/02/1997	
S Considered in public hearing		04/02/1997	
S Scheduled for public hearing on		04/02/1997	
S Referred to Health & Human Services		03/05/1997	452
S Read first time		03/05/1997	452
S Filed		02/28/1997	
S Received by the Secretary of the Senate		02/28/1997	

APPENDIX 13

SUBJECT: Continuing the State Board of Acupuncture Examiners

COMMITTEE: Public Health — favorable, with amendments

VOTE: 5 ayes — Berlanga, Hirschi, Davila, Glaze, Maxey

1 nay — Janek

2 absent — Coleman, Delisi

SENATE VOTE: On final passage, April 24 — 29-0

WITNESSES: For — Tim Weitz, Texas Acupuncture Association; J.P. Word, Texas Chiropractic Association; John Martin; Jeffrey L. Brown

Against — None

On — Anita Anderson, Texas Department of Human Services

BACKGROUND In 1993, the Legislature created the State Board of Acupuncture Examiners as an advisory board to the Texas State Board of Medical Examiners. The acupuncture board is charged with regulating the practice of acupuncture in Texas and has adopted standards for training, education and licensing of acupuncturists in the state.

The acupuncture board nine members appointed by the governor. At least four members are not physicians and have at least five years of acupuncture experience in Texas; two are physicians licensed in Texas with experience in acupuncture; and three are public members not licensed or trained in a health care profession. The board has no staff of its own but uses medical examiner staff for support services.

The board is funded by a mix of general revenue funds and licensure and registration fees. During fiscal year 1996, the board collected \$68,875 in fees and received \$59,614 in appropriations.

The State Board of Acupuncture Examiners is subject to the Sunset Act and underwent Sunset Advisory Commission review during the past interim.

The board will be abolished September 1, 1997, unless continued by the Legislature.

DIGEST:

SB 361, as amended, would continue the State Board of Acupuncture Examiners until September 1, 2005. It would give the board additional disciplinary authority and authorize it to issue temporary licenses and suspend, revoke or deny applications for licensing.

Licensing. The board could issue temporary licenses to applicants who had passed a national or other recognized examination, paid the appropriate fees, were in good standing as an acupuncturist if licensed in another state and met all other qualifications for licensing. A temporary license would be valid for 100 days and could be extended only for 30 days.

SB 361 would authorize the board to revoke, deny or suspend licenses when licensees:

- had a mental or physical condition that rendered them unable to safely perform as an acupuncturist;
- fraudulently or deceptively used a license;
- acted in an unprofessional manner; or
- violated state law or had other disciplinary action taken by another state that was connected to their practice as an acupuncturist.

A complaint, indictment or conviction would not be necessary to enforce a violation of state law. Proof of the violation or a certified copy of the record of violation from another state would suffice as grounds for board action.

Disciplinary action. If the board found that an acupuncturist had violated any rules or regulations, it could:

- require the offender to submit to care or counseling;
- place the offender on probation, retaining the right to revoke probation and enforce the original order for noncompliance;
- restore or reissue a license;
- remove disciplinary or corrective measures that may have been imposed on the offender;
- order the offender to perform public service;

- limit the offender's practice to certain areas; or
- require the offender to report regularly to the board or continue professional education.

The board also could impose a nondisciplinary and private rehabilitation order on a licensee or as a prerequisite for issuing a license. The order would have to contain findings of fact and conclusions of law. An agreed order would constitute an agreed disposition or settlement agreement for the purposes of civil litigation and would be exempt from the open records law. Violations of the order would be grounds for disciplinary action. Rehabilitation orders would have to be kept in a confidential file, subject only to an independent audit by state auditors or private auditors contracted by the board.

Rehabilitation orders would have to be based upon:

- excessive use of drugs or alcohol resulting from addiction caused by medical care or treatment provided by a physician;
- self-reported excessive use of drugs or alcohol during the last five years preceding the report that could adversely affect the individual's ability to safely practice as an acupuncturist if the individual had not previously been the subject of a substance abuse-related order of the board;
- judgment by a court that the individual was of unsound mind; or
- results from a mental or physical examination or admission that the individual suffered from a potentially dangerous limitation or inability to safely practice as an acupuncturist.

SB 361 would require rehabilitation orders to be audited at least once every three years in order to ensure that they applied to only qualified licensees. Audit results would have to be reported in a such way to maintain the confidentiality of affected licensees.

Subpoena authority. SB 361 would authorize the executive director of the Texas State Board of Medical Examiners or the presiding officer of the acupuncture board to issue a subpoena for purposes of investigating contested proceedings relating to alleged misconduct or other laws relating to practice as an acupuncturist. Subpoenas also could be issued for purposes

of determining actions to take with regard to licenses and applications for licenses. Failure to comply with a subpoena would be grounds for disciplinary action or denial of a license application.

Other provisions. SB 361 would amend Texas law to allow chiropractors to practice acupuncture after completion of a training program at an accredited school. The bill would also change the definition of “incisive or surgical procedure” in the law governing chiropractors to include acupuncture.

The bill would require licensees to file current home, business, and satellite business office addresses with the board. Licensees would be required to notify the board of changes in address within 30 days.

SB 361 would raise the penalty for practicing acupuncture without a license from a Class A misdemeanor, punishable by a maximum penalty of one year in jail and a \$4,000 fine, to a third degree felony, punishable by two to 10 years in prison and an optional fine of up to \$10,000.

Across-the-board recommendations. SB 361 would also add to the board's enabling statute standard sunset provisions addressing:

- public membership on state agency policymaking bodies;
- conflicts of interest of board members;
- board member appointment, training, and removal;
- designation of the board's presiding officer by the governor;
- separation of policy making and management responsibilities;
- public testimony at board meetings;
- notification of the public concerning agency activities;
- compliance with state open meetings and administrative procedures law;
- compliance with state and federal program and facility accessibility laws;
- placement of agency funds in the state treasury;
- collection and maintenance of information about complaints made against the board;

- licensing procedures, including staggered renewal of licenses, transfer of out-of-state licenses, posting of examination results and renewal of delinquent licenses;
- disciplinary action and hearing requirements; and
- advertising and competitive bidding practices.

SB 361 would take effect September 1, 1997.

**SUPPORTERS
SAY:**

SB 361 would protect the state's interest in acupuncture treatment by continuing the State Board of Acupuncture Examiners. Acupuncture is increasing in popularity as a method of treatment for a variety of conditions. State oversight protects the health and welfare of Texans seeking acupuncture treatment by guaranteeing the quality of licensees.

SB 361 would provide the State Board of Acupuncture Examiners with the regulatory tools and authority it needs to effectively regulate the practice of acupuncture in Texas. New enforcement authority granted to the board would allow it to achieve compliance by reforming or removing licensees from practice and would ensure the approximately 300 individuals licensed to practice acupuncture in Texas met established standards and educational requirements.

The bill also would authorize the board to use the necessary enforcement mechanisms to support its regulatory functions. The board's authority to deny license applications and discipline current licensees currently is limited compared to the authority of other boards, such as the medical examiners and the physician assistant examiners. The board's powers would be broadened to make them consistent with the regulatory authority of other health care licensing agencies. In the past, the board has had to rely on the board of medical examiners to issue subpoenas compelling witnesses to appear at administrative proceedings. SB 361 would authorize the board to issue these subpoenas itself.

SB 361 would standardize the board's regulatory tools to match those of other health licensing agencies. Health care licensing agencies screen applicants for licensure, administer examinations, issue temporary licenses and renewals, monitor licensees and take disciplinary action against

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individuals who violate licensing rules. SB 361 would expand the board's standard licensing authority to improve the regulation of acupuncturists.

SB 361 would give chiropractors a very limited and narrow authority to practice acupuncture and would ensure these practitioners received at least one year of training at an accredited school prior to practicing acupuncture.

OPPONENTS
SAY:

SB 361 would unnecessarily broaden a chiropractor's scope of practice to include acupuncture. Chiropractors do not undergo the same length and quality of training that acupuncturists undertake to become licensed to perform acupuncture and should not be able to practice this type of treatment.

NOTES:

Committee amendme
acupuncture; change
conform to across-the
perform acupuncture



the definition of
d member training to
allow chiropractors to

Legislative Session: 75(R)

SENATE BILL 361	SENATE AUTHOR: Madla
EFFECTIVE: 9-1-97	HOUSE SPONSOR: Gray

Senate Bill 361 amends the Medical Practice Act to continue the Texas State Board of Acupuncture Examiners until September 1, 2005. The act expands the list of offenses for which a license to practice acupuncture may be denied or revoked and authorizes the acupuncture board to take certain additional disciplinary actions for the offenses. The acupuncture board is also authorized to impose a nondisciplinary rehabilitation order on a licensee or applicant for substance abuse or for a mental or physical condition that limits the person's ability to safely practice acupuncture. Senate Bill 361 increases to a third degree felony the offense for practicing acupuncture without a license and authorizes the acupuncture board to issue subpoenas.

In addition, Senate Bill 361 requires a person licensed to practice acupuncture to file current address information with the Texas State Board of Medical Examiners and authorizes the acupuncture board to issue a temporary license to an applicant who meets certain qualifications. It also updates sections relating to sunset recommendations that are applied to all agencies.

APPENDIX 14

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AUDIO TRANSCRIPTION

1 CHAIRMAN BERLANGA: Chair recognizes
2 Ms. Gray.

3 REPRESENTATIVE GRAY: Mr. Chairman and
4 members, I have been here previously to talk about the
5 House bill. Now, the major provisions in the House
6 bill and the Senate bill are similar. However, there
7 are -- there was a provision added in the Senate
8 version which authorized chiropractors to engage in
9 the practice of acupuncture. In the -- we have some
10 committee amendments that we have been working on that
11 we think will clarify that language and put that
12 perhaps in a better place in the code.

13 In the House bill, the -- we made
14 grounds for denial of an acupuncture license and for
15 disciplinary action against an acupuncture license --
16 licensee consistent with similar grounds that apply to
17 physicians and physicians' assistants licensed under
18 the Medical Practices Act. We raised the criminal
19 penalty for the unlicensed practice of acupuncture
20 from a Class A misdemeanor to a third-degree felony,
21 and we continued the State Board of Acupuncture for
22 eight years.

23 We also are allowing the State Board of
24 Acupuncture Examiners to issue subpoenas so that they
25 can get the information that they need to carry out

1 the investigations. These are common in other
2 regulatory agencies so we're not giving them anything
3 that is not available to other agencies. We also
4 require that the licensees maintain a current address
5 on file with the Acupuncture Board, something that
6 seems to be a very common sense sort of thing but was
7 not in there, their statute. And we were -- we also
8 allowed the Acupuncture Board to issue temporary
9 licenses, which (inaudible) there are about 20
10 healthcare licensing agencies and all of them have a
11 provision for authorizing temporary licenses under
12 certain circumstances.

13 One of the issues that was of concern in
14 the Senate was whether or not chiropractors, whose
15 training includes acupuncture training, were
16 authorized to practice acupuncture and under what
17 circumstances that would apply. The Senate bill
18 included language that put that under the Acupuncture
19 Board. That is of some concern to the chiropractors
20 because that also is under the medical -- Board of
21 Medical Examiners.

22 It's also not clear to us that that's
23 the appropriate provision in the statute, or the
24 appropriate place for that to be addressed, and so we
25 have a couple of amendments that would lay out, that

1 still make clear, that the practice of -- is it
2 chiropracty, Dr. Glaze? Of -- you know, that the
3 chiropractors' practice does not include surgical or
4 incisive procedures, but we are adding acupuncture to
5 the list of procedures that are not considered to be
6 incisive or surgical. So it is -- we are saying that
7 acupuncture is a non-surgical, non-incisive procedure
8 so that we are making clear that we are only talking
9 about this particular area as their -- as an addition
10 to their area of practice.

11 This helps clarify a provision, an
12 Attorney General's opinion which said, well, you know,
13 if you meant -- if the legislature meant for the --
14 for the insertion of an acupuncture needle to be a
15 non-incisive, non-surgical procedure, then they should
16 have said so. We said that insertion of a needle to
17 draw blood or to conduct a diagnostic test is a
18 non-incisive, non-surgical procedure. But the
19 Attorney General's opinion said since the practice of
20 acupuncture was not included in that, that that wasn't
21 clear, so we are making clear that the insertion of a
22 needle for purposes of acupuncture is not an incisive
23 surgical procedure. It is a non-incisive,
24 non-surgical procedure.

25 In the Senate bill, all of this is put

1 under the Acupuncture Board. What the amendments
2 would do is put this under the Chiropractors' Board
3 but with certain guidelines, and so the amendments
4 would first delete that section that was added in the
5 Senate bill, then they would set out that in the
6 chiropractors' act, practice act, that they are
7 authorized to practice acupuncture provided they have
8 completed a training program that is in a school that
9 is accredited under their accrediting standards and
10 they maintain continuing education requirements in
11 acupuncture practice as set out by their board. So it
12 puts the supervision under their board but also
13 ensures some public safety by ensuring that these are
14 schools -- that the training is done in schools that
15 are accredited.

16 As you will see in the acupuncture
17 statute itself, the training programs for
18 acupuncturists, for people who are non-medical
19 personnel, are schools that are just acupuncture
20 schools, and so what we are trying to do is keep the
21 practice acts so that each group is supervising their
22 own while ensuring that certain standards are
23 maintained.

24 And then the last amendment clarifies or
25 just makes clear that the insertion of a needle for

1 purposes of acupuncture is treated the same as the
2 insertion of a needle for drawing blood or a
3 diagnostic test and includes it in that definition of
4 procedures that are not considered incisive or
5 surgical so that we are not running afoul of the AG's
6 opinion but we are clarifying the AG's opinion, and
7 we're also not changing anything else in the
8 Chiropractors' Practice Act.

9 The only other amendment that you have
10 that I would ask you to adopt cleans up some errors in
11 the board member training section of the bill, and
12 that's what we call across-the-board language or
13 standard language in all of the sunset bills, and I
14 would ask you to adopt those. I have numbered them
15 for the committee clerk in the sequence in which they
16 need to go into the bill, so one, three and four deal
17 with acupuncture and chiropractors; two deals with
18 board member training because those are the -- that's
19 the sequence of the sections in the bill.

20 The other thing that was added in the
21 Senate bill was what's called a rehabilitation order,
22 which simply says that, you know, we all know that
23 there are those in the healthcare profession who
24 sometimes have drug or alcohol or substance abuse
25 problems, and we want to encourage them to self-report

1 and to get appropriate treatment and help, and so we
2 included a rehabilitation order in there that's also
3 similar to other health profession provisions, health
4 practice act provisions so that those people will be
5 encouraged to get help before they may be subject to
6 disciplinary action. It allows them to get that help
7 and maintain some security in their license. If they
8 don't, then they can proceed to lose their license as
9 other healthcare professions do.

10 And with that, I would be happy to try
11 to answer any questions.

12 CHAIRMAN BERLANGA: Any questions of
13 Representative Gray? Chairman (inaudible).

14 UNIDENTIFIED SPEAKER: Clearly all this
15 language that's stricken by Amendment 1, maybe
16 (inaudible) I just didn't understand it.

17 REPRESENTATIVE GRAY: Okay.

18 UNIDENTIFIED SPEAKER: Where did all
19 that --

20 REPRESENTATIVE GRAY: Well --

21 UNIDENTIFIED SPEAKER: Did we pick it up
22 someplace else?

23 REPRESENTATIVE GRAY: What is picked up
24 in there are definitions from the Medical Practices
25 Act, and what we're trying to do with these three

1 amendments that deal with acupuncture and
2 chiropractors is to get -- we're going to say that
3 it's okay for chiropractors to practice acupuncture.
4 It needs to be in the practice act as it relates to
5 chiropractors and not in the acupuncture, under the
6 Board of Acupuncture Examiners, so in striking this
7 section we are taking out the Medical Practice Act
8 provisions and we are picking them up --

9 (Break in audiotape.)

10 CHAIRMAN BERLANGA: From Anita Anderson,
11 Texas Department of Human Services, if anybody has any
12 questions.

13 Anyone else wanting to testify on or
14 against Senate Bill 361?

15 MR. WEITZ: Mr. Chairman and members of
16 the committee, I'm Tim Weitz, I'm the attorney for the
17 Texas Acupuncture Association.

18 First and foremost, let me emphasize
19 that Texas Acupuncture Association does support the
20 common elements of both the House bill and the Senate
21 bill that came from the Sunset Advisory Commission.
22 We applaud the efforts of the Sunset Advisory
23 Commission. We think the sweeping changes that were
24 made are very appropriate and are certainly necessary
25 to improve the acupuncture regulation in this state.

1 With respect to the proposed amendments,
2 we have to give only qualified approval with respect
3 to those particular amendments. The Texas Acupuncture
4 Association is not in favor of allowing the
5 chiropractic scope to be expanded in this way, and we
6 do see it as an expansion of the scope. We can
7 certainly understand the environment that we're in and
8 the overlap between the various practices of medicine,
9 whether it be Oriental medicine or chiropractic
10 medicine or osteopathic medicine. We understand the
11 overlapping scope between professions and we have to
12 certainly defer to your wisdom in this area, but I am
13 not authorized to support that particular aspect of
14 the proposals that have been made today in the
15 amendments.

16 We do support the rehabilitation order,
17 as well as the temporary licensing mechanisms, and we
18 have supported some language that has been brought to
19 the attention of some of the members of the committee,
20 and I'm not sure whether amendment has been proposed
21 in that regard, the medicine language that would put
22 the chiropractic community back on even keel as far as
23 referrals go to acupuncturists, and it specifically
24 addresses Section 6.115 of this particular bill, and
25 what it would do is it would put chiropractors,

1 physicians and dentists on the same even keel as far
2 as referring to acupuncturists. It would also modify
3 some of the language to allow there to be more patient
4 choice and not be such a cumbersome mechanism as far
5 as the evaluations that are required, and there is
6 a -- kind of a staggered system that I can go into in
7 some detail if you like.

8 But once again, Mr. Chairman, members of
9 the committee, we do support the bills and the common
10 elements, particularly those amendments that we've
11 addressed, but we'd like to -- we cannot voice support
12 in favor of the chiropractic amendments specifically.

13 CHAIRMAN BERLANGA: Any questions of
14 Mr. Weitz?

15 REPRESENTATIVE JANEK: Yes.

16 CHAIRMAN BERLANGA: Dr. Janek,
17 Mr. Weitz.

18 REPRESENTATIVE JANEK: Can you give
19 me -- this may be more appropriate for the author of
20 the bill. I'll get back with her on that.

21 Have there been -- have there been times
22 when it's been cumbersome having State Board of
23 Acupuncture Medical Examiners regulate acupuncture
24 through the physicians and physician assistants versus
25 that of acupuncturists only? And can we anticipate

1 further problems by bringing it to yet another board?

2 MR. WEITZ: First of all, let me make a
3 point of clarification. Under the current law, under
4 the Physician Assistant Licensing Act, physician
5 assistants are regulated by the Medical Board almost
6 as a sister board, very much like acupuncturists
7 falling under the umbrella. But physician assistants,
8 per se, are not allowed to practice acupuncture. As
9 it stands currently under the law, medical doctors and
10 doctors of osteopathic medicine explicitly are allowed
11 to practice acupuncture. Chiropractors under the AG's
12 opinion are not, because of the way that's been
13 defined, and arguably this is what this discussion is
14 about is trying to clear that up.

15 With respect to the cumbersome nature of
16 the umbrella system, the way it works is the Medical
17 Board has veto authority over the rulemaking power of
18 the Acupuncture Board. They've only come to an
19 impasse in a significant way in one instance, and I
20 believe that this committee addressed it by approving
21 Senate Bill 1765 regarding acudetox specialists, which
22 we had to register opposition on because of certain
23 aspects of that. It came up in another instance but I
24 believe that they were able to work back and forth
25 between the Acupuncture Board and the Medical Board to

1 resolve it with some compromises. The grandfathering
2 provisions on licensure was an area that was somewhat
3 controversial but they did manage to hammer it out.

4 I guess the short answer to your
5 question, Representative Janek, is that it is
6 cumbersome and it is somewhat difficult, but everyone
7 recognizes that the acupuncture community is in a
8 growing stage, it's in its infancy in this country.
9 Although it's got well over five thousand years of
10 acceptance in other countries, it's still growing
11 here, and the supervision by the Medical Board is also
12 developing. It's getting better but there are some
13 problems both from philosophical differences as well
14 as just the mechanics of how it has to be done, and I
15 don't know if you need specifics on that but I can
16 cite examples.

17 REPRESENTATIVE JANEK: Well, I was more
18 getting to whether we end up with rules that may
19 conflict one to the other, and good acupuncture care
20 should be good acupuncture care no matter which
21 board's prescribing the rules or administering the
22 penalties.

23 MR. WEITZ: I agree, and that
24 potentiality does exist, and that's one of the
25 concerns that we do have with respect to some of the

1 amendments proposing to carve it out to allow the
2 Chiropractic Board to regulate certain aspects of
3 acupuncture.

4 It's becoming more in vogue to have
5 parallel rulemaking between agencies, and as long as
6 those agencies are in a cooperative environment, they
7 can fix those things, but it very well may be that in
8 two years or four years or six years, this body will
9 once again be looking at some of the conflicts that
10 have developed through the rulemaking processes.
11 Hopefully the communities themselves can come to grips
12 with some of these areas, but it does pose a potential
13 problem. How big that problem is is anybody's guess
14 at this point.

15 REPRESENTATIVE JANEK: I have yet to
16 have heard a philosophical discussion about whether
17 the practice of acupuncture as applied in a
18 chiropractic practice is any different from the
19 practice of acupuncture as applied in a medical
20 practice, where they're truly philosophical
21 differences between how they're used, when they're
22 used, the indications, the contraindications and all
23 that. Can you -- has this subject come up?

24 MR. WEITZ: It does come up, and a lot
25 of times what you find is to even the acupuncture

1 community itself, there are differences as far as
2 whether or not you were trained in a Japanese
3 environment or with Korean acupuncturists or
4 traditional Chinese medicine, and there are
5 distinctions and there are different emphasis.

6 I can't say that it's any more
7 conceptually difficult than some of the differences
8 between MDs and DOs. As we get more and more into the
9 '90s, these distinctions begin to disappear, but there
10 are some philosophical differences. I'm not an
11 acupuncturist, I'm an attorney, and unfortunately I'm
12 at a loss to explain all the differences.

13 Sometimes it's lost in translation
14 because much of the acupuncture training, there's
15 eighteen hundred hours of training for fully licensed
16 acupuncturists. Eighteen hundred hours includes a
17 tremendous amount of traditional Oriental medicine;
18 much of it's lost in translation. It's hard to
19 translate some of the Chinese concepts and some of the
20 philosophical aspects of it into what you would
21 consider traditional mainstream Western medicine.
22 It's like trying to explain gene science to somebody
23 that's not familiar with genetics. It's very
24 difficult and even as an attorney, I consider myself
25 an educated person, but I've also struggled with it.

1 REPRESENTATIVE JANEK: The requirements
2 for those who are solely acupuncturists, the
3 requirements for training in acupuncture would be more
4 hours, I suspect, than it would for those who are
5 physicians practicing acupuncture or chiropractors
6 practicing acupuncture by virtue of the fact that
7 they've got training in other areas that meld into
8 that, anatomy, biomechanics and all that?

9 MR. WEITZ: Very much so.

10 REPRESENTATIVE JANEK: That's the reason
11 there's more requirements for an acupuncturist?

12 MR. WEITZ: Very much so, and what
13 you'll see is that the eighteen hundred hours that's
14 required, 450 hours are in some kind of herbal
15 medicine format and the 1,350 focus on the very things
16 that you've mentioned: Anatomy, physiology. A lot of
17 the mainstream things or what you would characterize
18 as mainstream medicine is being addressed laying that
19 foundation for their understanding as they begin to
20 incorporate traditional acupuncture principles. But
21 1,350 hours are geared specifically toward the
22 needling process and the complexities and the issues
23 that arise in that context. You know, hopefully that
24 answers your question.

25 REPRESENTATIVE JANEK: It helps. I've

1 got a couple more for the author so I'll just get to
2 those.

3 CHAIRMAN BERLANGA: Any other questions
4 of Mr. Weitz?

5 Anyone else wanting to testify for or
6 against Senate Bill 361? If not, Chair recognizes
7 Ms. Gray to close. The Chair recognizes Dr. Janek.

8 REPRESENTATIVE JANEK: Madam Chair, tell
9 me again, now that I've got the bill in front of me,
10 tell me why we deleted Section 1 of Senate Bill 361,
11 definition of "acupuncture."

12 REPRESENTATIVE GRAY: And we are
13 reinstating that definition in a new Section 13, I
14 believe is where we reinstated it. It's either 13
15 or -- I'm sorry, in new Section 14.

16 REPRESENTATIVE JANEK: Ah. Okay.

17 REPRESENTATIVE GRAY: And what that --
18 we're amending, instead of amending the Acupuncture
19 Board act we are amending the Texas Board of
20 Chiropractic Examiners act. And that particular
21 section says, the particular section says, "In this
22 act, 'incisive or surgical procedure' includes but is
23 not limited to making an incision into any tissue,
24 cavity or organ by any person or implement." That is
25 an activity which chiropractors under their licensing

1 act are prohibited from performing.

2 It goes on to say, "It does not include
3 the use of a needle for the purpose of drawing blood
4 for diagnostic testing." And that's what the Attorney
5 General hinged his opinion on, for saying that
6 chiropractors could not practice acupuncture, because
7 we didn't specifically say that the insertion of a
8 needle for purposes of acupuncture was also -- was
9 listed in there along with insertion of a needle for
10 purposes of drawing blood for diagnostic testing.

11 REPRESENTATIVE JANEK: So by that logic,
12 a chiropractor could also insert needles for EMG
13 testing? Electromyography, they put needles in the
14 nerves to take transmission types.

15 REPRESENTATIVE GRAY: Well, if we are
16 adopting the Attorney General's opinion that --

17 REPRESENTATIVE JANEK: A needle is a
18 needle?

19 REPRESENTATIVE GRAY: And that the
20 purpose for which it's used, you know, that they need
21 to be adequately trained, then -- you know, somewhere
22 in here I thought that they were allowed to do that.
23 Did they do EMG testing, Dr. Glaze?

24 REPRESENTATIVE GLAZE: It's not spelled
25 out in here.

1 REPRESENTATIVE JANEK: This wasn't one
2 of the --

3 REPRESENTATIVE GRAY: No, it's not in
4 this --

5 REPRESENTATIVE JANEK: -- big parts of
6 the battle?

7 REPRESENTATIVE GRAY: Was that a big
8 part of the battle? Well --

9 REPRESENTATIVE JANEK: Because it
10 becomes a needle is a needle. If you let -- if you
11 can do it for withdrawing blood, then why not let them
12 do it for acupuncture and why not let them do it for
13 needle thoracentesis and everything else. I'm just --
14 I think the law needs to be very clear in this regard
15 and --

16 REPRESENTATIVE GRAY: Well, and that's
17 why you have the other part of the amendment, which
18 says that they have completed training under -- you
19 know, in a school that's properly accredited, and they
20 maintain continuing education, also, because the
21 curriculum in the chiropractic colleges in Texas today
22 does include training in acupuncture. That's
23 something I've learned in this process.

24 REPRESENTATIVE JANEK: Sure. And I --

25 REPRESENTATIVE GRAY: And when you

1 actually -- I mean, based on the information I've been
2 furnished from the colleges, the -- when you actually
3 look at the number of hours as they relate to the
4 actual insertion of the needle, they're equivalent to
5 what's being offered in the colleges that we accredit
6 or authorize under the acupuncture act.

7 Now, the rest of it, you know, their
8 focus is on musculoskeletal issues, and the Oriental
9 colleges that train for acupuncturists, it's on -- you
10 know, they focus on different things, and the medical
11 schools, they focus on other things, and so, you know,
12 I agree there is some philosophical debate to be had
13 here.

14 And I am, frankly, you know, as one who
15 had to participate in that scope of practice fight,
16 including, you know, sunset, or having that board
17 extended from the sunset provision, sunset fight in I
18 think '93, it didn't get resolved until '95, I have
19 some concerns about that. But if we are going to do
20 this, and clearly it's going to get done on the Senate
21 side, let's do it in the right act. You know, let's
22 do it where I think we need to do it, so --

23 REPRESENTATIVE JANEK: And then -- this
24 is my last comment -- by bringing it back over, I'm
25 not sure we're doing the right thing by having the

1 practice of acupuncture in the state of Texas
2 regulated in three different manners. And again, I
3 need to -- I need to check and find out if there have
4 been times when the rules from the State Board of
5 Medical Examiners may have bumped up against a rule
6 from the Board of Acupuncturists, and we don't want to
7 have different standards of care.

8 REPRESENTATIVE GRAY: Well, and I will
9 tell you quite frankly, Dr. Janek, I was prepared to
10 fight a lot harder on this, but when we said social
11 workers could be acudetox counselors, and even though
12 I realize we're limiting the number of parts of the
13 body that they can do this in, it's real hard for me
14 to turn around and argue with a straight face that
15 someone who goes through a three- or four-year
16 training program that includes nearly 200 hours, or as
17 much as 200 hours, of direct training in acupuncture,
18 that they shouldn't be allowed to do that.

19 REPRESENTATIVE JANEK: The issue becomes
20 not as much the prac- -- the insertion of a needle.
21 If that were the issue, then we wouldn't let body
22 piercing or ear piercing or anything else takes place.
23 The issue, in fact, is what part of the body and with
24 what purpose and what intent and how that is held out
25 to the public and what patients can reasonably expect

1 can be treated in that fashion. So --

2 REPRESENTATIVE GRAY: And I quite
3 agree --

4 REPRESENTATIVE JANEK: It may seem like
5 an earlobe is the same as the finger, but it ain't
6 necessarily so.

7 REPRESENTATIVE GRAY: No, I don't think
8 it is the same, but, you know, there isn't anything
9 that I've seen, any curriculum anywhere, that -- you
10 know, and I think somebody can be just as damaged by
11 the inappropriate insertion of needles in any part of
12 their body.

13 At least as we have crafted this, I
14 think that we can represent to the public that there
15 is some level of supervision, there is some
16 accreditation, there is somebody looking at those
17 training programs and whether they do what they say
18 they're going to do and whether we're sending people
19 out who have been adequately trained.

20 Now, I -- I have my own philosophical
21 differences with some aspects, with some in the -- who
22 practice in the field of chiropractic medicine who --
23 who I think do want to go much further or do expand
24 much further than I feel comfortable with, but I don't
25 like to take things that I feel uncomfortable standing

1 in the front mic, you know, arguing about, and I am
2 satisfied that this is a better way to approach this,
3 and if we're going to do this, then this is the manner
4 in which we ought to do it.

5 REPRESENTATIVE JANEK: Thank you,
6 Ms. Chair.

7 CHAIRMAN BERLANGA: Any other questions?
8 (Inaudible.)

9 CHAIRMAN BERLANGA: Senate Bill 361 is
10 amended to be reported back to the House (inaudible).
11 (Inaudible.)

12 CHAIRMAN BERLANGA: The clerk, call the
13 roll.

14 THE CLERK: Chairman Berlanga.

15 CHAIRMAN BERLANGA: Aye.

16 THE CLERK: Vice Chair Hirschi.

17 VICE CHAIR HIRSCHI: Aye.

18 THE CLERK: Representative Davila.

19 REPRESENTATIVE DAVILA: Aye.

20 THE CLERK: Representative Glaze.

21 REPRESENTATIVE GLAZE: Aye.

22 THE CLERK: Representative Janek.

23 REPRESENTATIVE JANEK: No.

24 THE CLERK: Representative Maxey.

25 REPRESENTATIVE MAXEY: Aye.

1 CHAIRMAN BERLANGA: There have been five
2 ayes, one nay. Senate Bill 361 is amended, reported
3 back to the House of the record (inaudible).
4 (End of audiotape.)

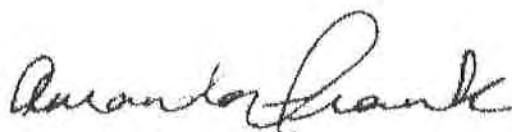
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C E R T I F I C A T E

I, AMANDA FRANK, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that this audio recording was transcribed by me to the best of my ability.

I further certify that I am neither attorney nor counsel for nor related nor employed by any of the parties to the action in which this is taken; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27th day of October, 2014.



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

TEXAS ASSOCIATION OF
ACUPUNCTURE
AND ORIENTAL MEDICINE,
Plaintiff,

v.

TEXAS BOARD OF CHIROPRACTIC
EXAMINERS and YVETTE
YARBROUGH, EXECUTIVE DIRECTOR,
IN HER OFFICIAL CAPACITY
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT

AFFIDAVIT

STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

Before me, the under signed notary public on this day personally appeared Elizabeth Canfield, known to me to be the person whose name is subscribed to this affidavit and acknowledged to me that (s)he executed the same for the purposes and consideration therein expressed and being by me duly sworn on his/her oath states:

1. At the request of Assistant Attorney General Joe H. Thrash, I obtained a certified copy of the tape recording of the proceedings of the House Committee on Public Health on May 8, 1997, and delivered that tape to Andy Fredericks at Fredericks Reporting Service for transcription in the above case. I have compared the transcription to the certified copy of the tape recording and it is an accurate and complete transcription.
2. that (s)he is over 21 years of age and fully competent to make this statement;
3. that (s)he is duly authorized to make this affidavit; and
4. that the matters contained in this affidavit are based on personal knowledge and are true and correct.



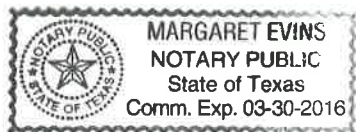
AFFIANT

2014.

SUBSCRIBED AND SWORN to before me on this the 30th day of October,

Margaret Evins

Notary Public in and for the
State of Texas



APPENDIX 15

IML S.B. 361 75(R) BILL ANALYSIS

PUBLIC HEALTH

S.B. 361

By: Madla (Gray)

5-8-97

Committee Report (Amended)

BACKGROUND

The Texas State Board of Acupuncture Examiners (acupuncture board) was created as an administratively attached board to the Board of Medical Examiners (medical board) in 1993 by the 73rd Legislature. The acupuncture board is responsible for providing an orderly system of regulating the practice of acupuncture, subject to the advice and approval of the medical board. The acupuncture board carries out its programs and functions through a nine-member board appointed by the governor and through the use of the staff of the medical board. To carry out these programs, the acupuncture board has a budget of \$59,614 and 2.18 medical board employees for fiscal year 1996.

The acupuncture board is subject to the Sunset Act and will be abolished September 1, 1997, unless continued by the Legislature. As a result of its review of the acupuncture board, the Sunset Advisory Commission recommended continuation and several statutory modifications that are contained in this legislation.

PURPOSE

S.B. 361 continues the Texas State Board of Acupuncture Examiners for an eight-year period and makes statutory modifications recommended by the Sunset Advisory Commission.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas State Board of Acupuncture Examiners (subject to the medical board's approval as per existing language) in SECTION 5 (Section 6.051(b), Article 4495b, Vernon's Texas Civil Statutes) and to the Board of Medical Examiners in SECTION 5 (Section 6.085(a) and (b), Article 4495b, Vernon's Texas Civil Statutes) and SECTION 7 (Section 6.10(j), Article 4495b, Vernon's Texas Civil Statutes) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 6.02, Medical Practice Act (Article 4495b, V.T.C.S.), by amending Subsection (1)(A), to add "nonsurgical, nonincisive" to the definition of "Acupuncture."

SECTION 2. Amends Section 6.04, Medical Practice Act (Article 4495b, V.T.C.S.), by amending Subsections (b), (d), (g), and (h), and adding Subsections (i)-(l) as follows:

(b) Prohibits registered lobbyists from serving as a member of the acupuncture board. Removes restriction on persons employed by or serving as president, vice president, secretary, or treasurer of a statewide or national organization incorporated for the purpose of representing a health care profession in Texas or the United States from serving as a member of the acupuncture board.

(d) Requires the governor to designate a member of the acupuncture board as presiding officer. Specifies that the presiding officer of the acupuncture board serves at the pleasure of the governor.

(g) Prohibits certain persons from appointment as a public member of the acupuncture board.

(h)-(j) Prohibits an officer, employee, or paid consultant of a Texas trade association in the field of health care, or their spouse, from being a member of the acupuncture board or a certain employee of the medical board. Defines Texas trade association. Removes language which made the acupuncture board subject to the open meetings law, the open records law, and the Administrative Procedure Act.

(k) Requires appointments to the acupuncture board to be made without regard to race, color, disability, sex, religion, age or national origin.

(l) Updates the Texas State Board of Acupuncture Examiners Sunset date to September 1, 2005. Makes a conforming change.

SECTION 3. Amends Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), by adding Sections 6.041 and 6.042, as follows:

Sec. 6.041. GROUNDS FOR REMOVAL FROM ACUPUNCTURE BOARD. Sets forth the grounds for removal from the acupuncture board. The validity of an action of the acupuncture board is not affected by the existence of a ground for removal of a member. Requires the executive director of the Board of Medical Examiners (medical board) to notify the presiding officer, and requires the presiding officer to notify the governor and the attorney general, of a potential ground for removal of a member. Requires the executive director or a designee to provide to members of the acupuncture board certain information regarding their qualifications for office and their legal responsibilities.

Sec. 6.042. BOARD MEMBER TRAINING. Requires a member of the acupuncture board to complete at least one course of training established under this section to assume duties and be confirmed by the senate. Requires a training program to provide certain information.

SECTION 4. Amends Section 6.05, Medical Practice Act (Article 4495b, V.T.C.S.), to require the acupuncture board, subject to the advice and approval of the medical board, to develop and implement certain policies regarding public input. Deletes a clause requiring the acupuncture board to establish a procedure for reporting and processing complaints relating to the practice of acupuncture under this article. Requires the acupuncture board to comply with certain federal and state laws. Requires the executive director of the medical board to prepare and maintain a plan regarding non-English speakers. Makes conforming changes.

SECTION 5. Amends Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), by adding Sections 6.051, 6.071, 6.075, and 6.085, as follows:

Sec. 6.051. PUBLIC INTEREST INFORMATION; COMPLAINTS. Requires the acupuncture board to prepare public information regarding board functions and complaint procedures. Requires the acupuncture board to make the information available to the public and appropriate state agencies. Requires the acupuncture board, by rule, to establish methods to provide notification of certain information to consumers and service recipients.

Allows the acupuncture board to provide such notification as specified. Requires the acupuncture board to maintain files on written complaints that the acupuncture board has the authority to resolve, provide certain information to persons involved in a complaint, and to notify the parties regarding the status of the complaint as specified. Requires the acupuncture board to keep information regarding complaints as specified.

Sec. 6.071. EXAMINATION RESULTS. Requires the acupuncture board to notify license applicants of licensing examination results as specified. Allows the acupuncture board to require a testing service to notify examinees of results. Requires the acupuncture board, on request from an applicant who failed a licensing examination, to provide an analysis of the applicant's exam performance if an analysis is available from the national testing service.

Sec. 6.075. TEMPORARY LICENSE. Allows the acupuncture board, through the executive director of the medical board, to issue a temporary license to certain applicants. Provides that a temporary license is valid for 100 days from the date issued and may be extended only for another 30 days after the date the initial temporary license expires.

Sec. 6.085. ADVERTISING. Prohibits the medical board from adopting certain rules relating to competitive bidding or advertising, except to prohibit false, misleading or deceptive practices as specified.

SECTION 6. Amends Section 6.09, Medical Practice Act (Article 4495b, V.T.C.S.), by adding Subsections (c) and (d), to establish that all money paid to the medical board under this subchapter is subject to Subchapter F, Chapter 404, Government Code. Requires the medical board to prepare an annual financial report that meets the reporting requirements in the General Appropriations Act.

SECTION 7. Amends Section 6.10, Medical Practice Act (Article 4495b, V.T.C.S.), as follows:

Sec. 6.10. New heading: ISSUANCE AND RENEWAL OF LICENSE. (b) Allows the medical board to waive any prerequisite for a license under certain circumstances.

(c) Makes a conforming change.

(d) Allows a person to renew an unexpired license as specified. Prohibits a person whose license has expired from engaging in certain activity.

(e) Allows a person to renew a license as specified if the license has been expired for 90 days or less.

(f) Allows a person to renew a license as specified if the license has been expired for less than 1 year, but more than 90 days.

(g) Prohibits license renewal if the license has been expired for 1 year or longer. Allows a person to obtain an original license by submitting to reexamination and complying with all the requirements and procedures.

(h) Allows renewal of expired licenses without reexamination in certain circumstances regarding out of state practice.

(i) Requires the medical board to send written notice of impending expiration of a license as specified.

(j) Allows the medical board, by rule, to adopt a system by which licenses expire on certain dates during the year. Requires license fees to be prorated under certain circumstances.

SECTION 8. Amends Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), by adding 6.101, as follows:

Sec. 6.101. LICENSE HOLDER INFORMATION. Requires each license holder to file certain information with the board. Requires a license holder to notify the acupuncture board of a change of address by a certain date.

SECTION 9. Amends Section 6.11, Medical Practice Act (Article 4495b, V.T.C.S.), and redesignates Sections 6.11(b)-(g) as Section 6.115, as follows:

Sec. 6.11. Allows license denial, suspension, probation, or revocation if the applicant for a license or the holder of a license, among other criteria, has been adjudged mentally incompetent by a court of competent jurisdiction or has a mental or physical condition that renders the person unable to perform safely as an acupuncturist; has practiced acupuncture in a manner detrimental to the public health and welfare; has been convicted of a felony or a crime of moral turpitude; fraudulently or deceptively uses a license; has acted in an unprofessional or dishonorable manner that is likely to deceive, defraud, or injure a member of the public; has committed an act in violation of state law if the act is connected with the person's practice as an acupuncturist; or has had the person's license suspended, revoked, or restricted, has had other disciplinary action taken by another state regarding the person's practice as an acupuncturist, or has had disciplinary action taken against the person by the uniformed services of the U.S. based on acts by the license holder similar to acts described in this section. Provides that a complaint, indictment, or conviction of a law violation is not necessary for the enforcement of a denial, suspension, probation, or revocation of an applicant for a license or the holder of a license who has committed an act in violation of certain state laws. Provides that proof of the commission of an act while in practice as an acupuncturist or under the guise of practice as an acupuncturist is sufficient for action by the medical board. Provides that a certified copy of the record of the state or uniformed services of the U.S. taking an action is conclusive evidence that a person's license has been suspended, revoked, or restricted, or the person has had other disciplinary action taken against the person by another state or the U.S. Makes other conforming and nonsubstantive changes.

Sec. 6.115. SCOPE OF PRACTICE. Redesignates Sections 6.11(b)-(g) and makes conforming changes.

SECTION 10. Amends Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), by adding Sections 6.116, 6.117 and 6.118, as follows:

Sec. 6.116. ADDITIONAL DISCIPLINARY AUTHORITY. Allows the acupuncture board certain additional disciplinary authority upon a finding that an acupuncturist has committed an offense described in Section 6.11 of this Act.

Sec. 6.117. SUSPENSION, REVOCATION, OR NONRENEWAL OF LICENSE. Sets forth the provisions regarding disciplinary hearings conducted by the State Office of Administrative Hearings.

Sec. 6.118. REHABILITATION ORDER. (a) Allows the acupuncture board,

through an agreed order or after a contested proceeding, to impose a nondisciplinary rehabilitation order on any licensee or as a prerequisite for issuing a license, on any licensure applicant as specified.

(b) Requires a rehabilitation order entered pursuant to this section to be a nondisciplinary private order and to contain findings of fact and conclusions of law. Requires a rehabilitation order, if entered by agreement, to be an agreed disposition or settlement agreement for purposes of civil litigation and to be exempt from the open records law, Chapter 552, Government Code.

(c) Allows a rehabilitation order entered pursuant to this section to impose a revocation, cancellation, suspension, period of probation or restriction, or any other terms and conditions authorized under this Act or as otherwise agreed to by the acupuncture board and the individual subject to the order.

(d) Provides that a violation of a rehabilitation order entered pursuant to this section may result in disciplinary action under the provisions of this Act for contested matters or pursuant to the terms of the agreed order. Allows a violation of a rehabilitation order to be grounds for disciplinary action based on unprofessional or dishonorable conduct or on any of the provisions of this Act which may apply to the misconduct which resulted in violation of the rehabilitation order.

(e) Requires the rehabilitation order entered pursuant to this section to be kept in a confidential file which shall be subject to an independent audit by state auditors or private auditors contracted with by the acupuncture board to perform such an audit. Allows audits to be performed at any time at the direction of the acupuncture board but requires that they be performed at least once every three years. Requires the audit results to be reported in a manner that maintains the confidentiality of all licensees who are subject to rehabilitation orders and to be a public record. Requires the audit to be for the purpose of ensuring that only qualified licensees are subject to rehabilitation orders.

SECTION 11. Amends Section 6.12(b), Medical Practice Act (Article 4495b, V.T.C.S.), to provide that a person commits a third degree felony, rather than a Class A misdemeanor, if the person commits an offense under this section.

SECTION 12. Amends Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), by adding Section 6.125, as follows:

Sec. 6.125. SUBPOENAS. Allows the executive director of the medical board or the presiding officer of the acupuncture board to issue a subpoena or subpoena duces tecum for certain purposes. Provides that failure to timely comply with a subpoena issued under this section is a ground for 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 denial of a license application.

SECTION 13. The change made by this Act to Section 6.12, applies only to an offense of which all elements are committed on or after the effective date.

SECTION 14. Makes application of changes in law made by this Act, relating to members of the acupuncture board, prospective. Provides that this Act does not prohibit a person who is a member of the acupuncture board on September 1, 1997, from being reappointed to the acupuncture board if the

person has the qualifications required for a member under Subchapter F, Medical Practice Act (Article 4495b, V.T.C.S.), as amended by this Act.

SECTION 15. Effective date is September 1, 1997.
Makes application of this Act prospective.

SECTION 16. Emergency clause.

EXPLANATION OF AMENDMENTS

Committee Amendment No. 1 makes the following change to the bill:

Deletes the amended definition of acupuncture so that the statutory definition of acupuncture remains unchanged and does not include "nonsurgical, nonincisive insertion of an acupuncture needle" as part of the definition. The purpose of the amended definition with nonsurgical, nonincisive was to allow chiropractors to practice acupuncture; however, this authority has been set forth in committee amendments 3 and 4.

Committee Amendment No. 2 makes the following change to the bill:

Updates standard Sunset language requiring members of the acupuncture board to complete at least one course of specified training. Also specifies that a person appointed to the acupuncture board is entitled to reimbursement for travel expenses incurred attending the training program.

Committee Amendment No. 3 makes the following change to the bill:

Sets out guidelines under which chiropractors may practice acupuncture. Requires chiropractors who practice acupuncture to complete a training program at a school accredited by the Council on Chiropractic Education and either the Central Education Agency or the Southern Association of Colleges and Universities. Also requires these chiropractors to maintain certain continuing education requirements in acupuncture practice as determined by the Chiropractic Board.

Committee Amendment No. 4 makes the following change to the bill:

Expands the exemption in Article 4512b, V.T.C.S., Sec.13a, subsection (b) relating to chiropractors, from using needles for drawing blood for diagnostic testing to include the use of needles for performing acupuncture. Exempts the use of a needle for performing acupuncture from the incisive and surgical procedures that chiropractors are prohibited from performing.

APPENDIX 16

HOUSE JOURNAL

SEVENTY-FIFTH LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SEVENTY-SIXTH DAY — MONDAY, MAY 19, 1997

The house met at 10 a.m. and was called to order by the speaker.

The roll of the house was called and a quorum was announced present (Record 450).

Present — Mr. Speaker; Alexander; Allen; Alvarado; Averitt; Bailey; Berlanga; Bonnen; Bosse; Brimer; Burnam; Carter; Chavez; Chisum; Christian; Clark; Coleman; Cook; Corte; Counts; Crabb; Craddick; Cuellar; Culberson; Danburg; Davila; Davis; Delisi; Denny; Driver; Dukes; Dunnam; Dutton; Edwards; Ehrhardt; Eiland; Elkins; Farrar; Finnell; Flores; Gallego; Galloway; Garcia; Giddings; Glaze; Goodman; Goolsby; Gray; Greenberg; Grusendorf; Gutierrez; Haggerty; Hamric; Hartnett; Hawley; Heflin; Hernandez; Hightower; Hilbert; Hilderbran; Hill; Hinojosa; Hirschi; Hochberg; Hodge; Holzheuser; Horn; Howard; Hunter; Hupp; Isett; Jackson; Janek; Jones, D.; Jones, J.; Junell; Kamel; Keel; Keffer; King; Krusee; Kubiak; Kuempel; Lewis, G.; Lewis, R.; Longoria; Luna; Madden; Marchant; Maxey; McCall; McClendon; McReynolds; Merritt; Moffat; Moreno; Mowery; Naishtat; Nixon; Oakley; Oliveira; Olivo; Palmer; Patterson; Pickett; Pitts; Place; Price; Puente; Rabuck; Ramsay; Rangel; Raymond; Reyna, A.; Reyna, E.; Rhodes; Roman; Sadler; Seaman; Serna; Shields; Siebert; Smith; Smithee; Solis; Solomons; Staples; Stiles; Swinford; Talton; Telford; Thompson; Tillery; Torres; Turner, B.; Turner, S.; Uher; Van de Putte; Walker; West; Williams; Williamson; Wilson; Wise; Wohlgemuth; Wolens; Woolley; Yarbrough; Zbranek.

The invocation was offered by Dewayne Beaty, Associate Pastor, First Baptist Church, Longview, as follows:

Today, O God, I hold before you the leaders of our Texas government: the members of this house of representatives, the members of the senate, the governor, the lieutenant governor, the judicial body and the other bodies of leaders of our great state—all, Heavenly Father, who are in positions of supreme leadership.

My prayer today is that each of these persons can sense the responsibility of duty and honor given them by the citizens of our great state; but, more importantly, by you Heavenly Father. Help these leaders, O God, in the loneliness of their decisions. Surround them with wise counselors, but more importantly I pray they seek your wisdom and love for their duties this day. Take, I pray, the bits and pieces of virtue that are in each of them and cause them to grow and mature. Take all destructive motives and cause them to vanish like smoke as they seek to govern this state. Help them, Father, to do good this day.

Lord, I do not know how many of these leaders really know you, nor how many of them seek you, but I know you seek them. Help them to see how good right decisions are. And where decisions must be made that are not in their best interest, deepen their sense of duty. Having seen the light of a real decision, give them the courage to walk in that light.

Amend **SB 361** in Section 3 of the bill by striking the proposed Section 6.042, Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes) (engrossed bill, page 6, line 12 thru page 7, line 14), and substituting:

Sec. 6.042. BOARD MEMBER TRAINING. (a) To be eligible to take office as a member of the acupuncture board, a person appointed to the acupuncture board must complete at least one course of a training program that complies with this section.

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

(1) the enabling legislation that created the acupuncture board and its policymaking body to which the person is appointed to serve;

(2) the programs operated by the acupuncture board;

(3) the role and functions of the acupuncture board;

(4) the rules of the acupuncture board with an emphasis on the rules that relate to disciplinary and investigatory authority;

(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 the:

(A) open meetings law, Chapter 551, Government Code;

(B) open records law, Chapter 552, Government Code; and

(C) administrative procedure law, Chapter 2001, Government Code;

(8) the requirements of the conflict of interests laws and other laws relating to public officials; and

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

(c) A person appointed to the acupuncture board is entitled to reimbursement for travel expenses incurred in attending the training program, as provided by the General Appropriations Act and as if the person were a member of the acupuncture board.

Amendment No. 2 was adopted without objection.

Amendment No. 3 (Committee Amendment No. 3)

On behalf of Representative Berlanga, Representative Gray offered the following committee amendment to **SB 361**:

Amend **SB 361** by adding a new SECTION 13 and renumbering subsequent sections of the bill, as follows:

SECTION 13. Article 4512b, Vernon's Texas Civil Statutes, is amended by amending Sec. 1 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 procedures, including but not limited to adjustment and manipulation, in order to improve the subluxation complex or the biomechanics of the musculoskeletal system, and acupuncture as defined by Subchapter F, Sec. 6.02, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes) upon completion of a training program at a school accredited by the Council on Chiropractic Education and either the Central

Education Agency or the Southern Association of Colleges and Universities and maintains certain continuing education requirements in acupuncture practice as determined by the Chiropractic Board; 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.

Representative Janek raised a point of order against further consideration of Amendment No. 3 under Rule 11, Section 2 of the House Rules on the grounds that the amendment is not germane to the bill.

The speaker sustained the point of order.

The ruling precluded further consideration of the amendment

Amendment No. 4 (Committee Amendment No. 4)

On behalf of Representative Berlanga, Representative Gray offered the following committee amendment to **SB 361**:

Amend **SB 361** by adding a new SECTION 14 and renumbering subsequent sections as follows:

SECTION 14. Article 4512b, Vernon's Texas Civil Statutes, Sec. 13a, subsection (b) is amended as follows:

Sec. 13a. (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 or for the purpose of performing acupuncture as defined by Subchapter F, Sec. 6.02, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes).

Representative Janek raised a point of order against further consideration of Amendment No. 4 under Rule 11, Section 2 of the House Rules on the grounds that the amendment is not germane to the bill.

The speaker sustained the point of order.

The ruling precluded further consideration of the amendment

Amendment No. 5

Representative Madden offered the following amendment to **SB 361**:

Amend **SB 361** as follows:

On page 5, lines 15 and 16, insert a period after the word "year," and delete the text which reads "unless the absence is excused by majority vote of the acupuncture board."

Amendment No. 5 was adopted without objection.

SB 361, as amended, was passed to third reading.

**GENERAL STATE CALENDAR
SENATE BILLS
SECOND READING**

The following bills were laid before the house and read second time:

**CSSB 298 ON SECOND READING
(Ramsay - House Sponsor)**

CSSB 298, A bill to be entitled An Act relating to juvenile court detention orders.

CSSB 298 was passed to third reading.

APPENDIX 17

EIGHTIETH DAY

TUESDAY, MAY 20, 1997

PROCEEDINGS

The Senate met at 9:30 a.m. pursuant to adjournment and was called to order by the President.

The roll was called and the following Senators were present: Armbrister, Barrientos, Bivins, Brown, Cain, Carona, Duncan, Ellis, Fraser, Gallegos, Galloway, Harris, Haywood, Lindsay, Lucio, Luna, Madla, Moncrief, Nelson, Nixon, Ogden, Patterson, Ratliff, Shapiro, Shapleigh, Sibley, Truan, Wentworth, West, Whitmire, Zaffirini.

The President announced that a quorum of the Senate was present.

The Reverend Monsignor Edward F. Jordan, Saint Theresa Catholic Church, Austin, offered the invocation as follows:

Lord God, we thank You for the skills, gifts, and graces You have given to the Members of this Senate. We seek Your guidance to help them use their wit and wisdom in the service of the people of Texas. Let them be neither intimidated by the powerful nor unmindful of the weak and vulnerable. Help them to seek justice in the face of the tragic reality of crime. Make them good stewards of taxes they must administer for the common good of the citizens of this state. Finally, keep them respectful of each other when one encounters differences of viewpoint or policy. For this we pray. Amen.

On motion of Senator Truan and by unanimous consent, the reading of the Journal of the proceedings of yesterday was dispensed with and the Journal was approved.

SENATE RESOLUTION ON FIRST READING

The following resolution was introduced, read first time, and referred to the committee indicated:

SCR 100 by Barrientos

Directing that the Business Office/Warehouse on the Texas School for the Deaf campus be named the Elisha M. Pease Building.
To Committee on Administration.

(Senator Truan in Chair)

SENATE RESOLUTION 710

Senator Barrientos offered the following resolution:

WHEREAS, On May 3, 1997, the Park Crest Middle School beginner band from Pflugerville performed at the Schlitterbahn Wave Revues Music Festival in New Braunfels; and

THE HOUSE HAS PASSED THE FOLLOWING MEASURES:

HCR 276, Designating May 20, 1997, Think Child Safety Day at the Capitol.

SB 361, Relating to the continuation and functions of the Texas State Board of Acupuncture Examiners; providing penalties.
(Amended)

THE HOUSE HAS DISCHARGED ITS CONFEREES AND CONCURRED IN SENATE AMENDMENTS TO THE FOLLOWING MEASURES:

HB 9 (Viva-voce vote)

Respectfully,

/s/Sharon Carter, Chief Clerk
House of Representatives

SENATE RULE 7.21 SUSPENDED
(Printing Rule)

On motion of Senator Madla and by unanimous consent, Senate Rule 7.21 was suspended as it relates to the printing of the House amendments to **SB 361**.

SENATE BILL 361 WITH HOUSE AMENDMENTS

Senator Madla called **SB 361** from the President's table for consideration of the House amendments to the bill.

The Presiding Officer laid the bill and the House amendments before the Senate.

Amendment No. 1

Amend **SB 361** by deleting SECTION 1, and renumbering subsequent sections accordingly.

Amendment No. 2

Amend **SB 361** in Section 3 of the bill by striking the proposed Section 6.042, Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes) (engrossed bill, page 6, line 12 thru page 7, line 14), and substituting:

Sec. 6.042. BOARD MEMBER TRAINING. (a) To be eligible to take office as a member of the acupuncture board, a person appointed to the acupuncture board must complete at least one course of a training program that complies with this section.

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

(1) the enabling legislation that created the acupuncture board and its policymaking body to which the person is appointed to serve;

(2) the programs operated by the acupuncture board;

(3) the role and functions of the acupuncture board;

(4) the rules of the acupuncture board with an emphasis on the rules that relate to disciplinary and investigatory authority;

- (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 the:
 - (A) open meetings law, Chapter 551, Government Code;
 - (B) open records law, Chapter 552, Government Code; and
 - (C) administrative procedure law, Chapter 2001, Government Code;
 - (8) the requirements of the conflict of interests laws and other laws relating to public officials; and
 - (9) any applicable ethics policies adopted by the medical board or the Texas Ethics Commission.
- (c) A person appointed to the acupuncture board is entitled to reimbursement for travel expenses incurred in attending the training program, as provided by the General Appropriations Act and as if the person were a member of the acupuncture board.

Floor Amendment No. 5

Amend **SB 361** as follows:

On page 5, lines 15 and 16, insert a period after the word "year," and delete the text which reads "unless the absence is excused by majority vote of the acupuncture board."

The amendments were read.

Senator Madla moved that the Senate do not concur in the House amendments, but that a conference committee be appointed to adjust the differences between the two Houses on the bill.

The motion prevailed.

The Presiding Officer asked if there were any motions to instruct the conference committee on **SB 361** before appointment.

There were no motions offered.

The Presiding Officer announced the appointment of the following conferees on the part of the Senate on the bill: Senators Madla, Chair; Gallegos, Galloway, Patterson, and Nixon.

HOUSE BILL 325 ON SECOND READING

On motion of Senator Shapleigh and by unanimous consent, the regular order of business was suspended to take up for consideration at this time on its second reading and passage to third reading:

HB 325, Relating to the required distance between certain businesses that sell alcoholic beverages and a day-care center or child-care facility.

The bill was read second time.

Senator Brown offered the following amendment to the bill:

Floor Amendment No. 1

Amend **HB 325** by adding a new subsection (d) as follows:

"(d) This section does not apply to a foster group home, foster family

APPENDIX 18

HOUSE JOURNAL

SEVENTY-FIFTH LEGISLATURE, REGULAR SESSION

PROCEEDINGS

SEVENTY-EIGHTH DAY — WEDNESDAY, MAY 21, 1997

The house met at 11:40 a.m. and was called to order by the speaker pro tempore.

The roll of the house was called and a quorum was announced present (Record 463).

Present — Mr. Speaker; Alexander; Allen; Alvarado; Averitt; Bailey; Berlanga; Bonnen; Bosse; Brimer; Burnam; Carter; Chavez; Chisum; Christian; Clark; Coleman; Cook; Corte; Counts; Crabb; Craddick; Cuellar; Culberson; Danburg; Davila; Davis; Delisi; Denny; Driver; Dukes; Dunnam; Dutton; Edwards; Ehrhardt; Eiland; Elkins; Farrar; Finnell; Flores; Gallego; Galloway; Garcia; Giddings; Glaze; Goodman; Goolsby; Gray; Greenberg; Grusendorf; Gutierrez; Haggerty; Hamric; Hartnett; Hawley; Heflin; Hernandez; Hightower; Hilbert; Hilderbran; Hill; Hinojosa; Hirschi; Hochberg; Hodge; Holzheuser; Horn; Howard; Hunter; Hupp; Isett; Jackson; Janek; Jones, D.; Jones, J.; Junell; Kamel; Keel; Keffer; King; Krusee; Kubiak; Kuempel; Lewis, G.; Lewis, R.; Longoria; Luna; Madden; Marchant; Maxey; McCall; McClendon; McReynolds; Merritt; Moffat; Moreno; Mowery; Naishtat; Nixon; Oakley; Oliveira; Olivo; Palmer; Patterson; Pickett; Pitts; Place; Price; Puente; Rabuck; Ramsay; Rangel; Raymond; Reyna, A.; Reyna, E.; Rhodes; Roman; Sadler; Seaman; Serna; Shields; Siebert; Smith; Smithee; Solis; Solomons; Staples; Stiles; Swinford; Talton; Thompson; Tillery; Torres; Turner, B.; Turner, S.; Uher; Van de Putte; Walker; West; Williams; Williamson; Wilson; Wise; Wohlgemuth; Wolens; Woolley; Yarbrough; Zbranek.

Absent, Excused — Telford.

LEAVES OF ABSENCE GRANTED

On motion of Representative Carter and by unanimous consent, all members who were granted leaves of absence on the previous legislative day were granted leaves for this legislative day.

RULES SUSPENDED

Representative Carter moved to suspend all necessary rules in order to take up and consider at this time, on third reading and final passage, the bills on the local, consent, and resolutions calendar which were considered on the previous legislative day.

The motion prevailed without objection.

MOTION FOR ONE RECORD VOTE

On motion of Representative Carter and by unanimous consent, the house agreed to use the first record vote taken for all those bills on the local, consent, and resolutions calendar that require a record vote on third reading and final passage, with the understanding that a member may record an individual vote on any bill with the journal clerk.

Senate Committee Substitute

CSHB 767, A bill to be entitled An Act relating to exempting certain children in foster or residential care from the payment of tuition and fees at state-supported institutions of higher education.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 54.211, Education Code, is amended to read as follows:

Sec. 54.211. Exemptions for Students in Foster or Other Residential Care. A student is exempt from the payment of tuition and fees authorized in this chapter if the student:

(1) was in foster care or other residential care under the conservatorship of the Department of Protective and Regulatory Services on or after:

(A) the day preceding the student's 18th birthday;

(B) the day of the student's 14th birthday, if the student was also eligible for adoption on or after that day; or

(C) the day the student graduated from high school or received the equivalent of a high school diploma; and

(2) enrolls in an institution of higher education as an undergraduate student not later:

(A) than the third anniversary of the date the student was discharged from the foster or other residential care, the date the student graduated from high school, or the date the student received the equivalent of a high school diploma, whichever date is earliest; or

(B) the student's 21st birthday.

SECTION 2. This Act applies beginning with tuition and fees for the 1997 fall semester.

SECTION 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

**SB 361 - REQUEST OF SENATE GRANTED
CONFERENCE COMMITTEE APPOINTED**

On motion of Representative Gray, the house granted the request of the senate for the appointment of a conference committee on **SB 361**.

The chair announced the appointment of the following conference committee, on the part of the house, on **SB 361**: Gray, chair, Hirschi, Telford, Glaze, and Janek.

**HB 65 - HOUSE CONCURS IN SENATE AMENDMENTS
TEXT OF SENATE AMENDMENTS**

Representative Kamel called up with senate amendments for consideration at this time,

HB 65, A bill to be entitled An Act relating to increases in tuition and fees charged by public institutions of higher education.

APPENDIX 19

EIGHTY-SIXTH DAY

TUESDAY, MAY 27, 1997

PROCEEDINGS

The Senate met at 9:30 a.m. pursuant to adjournment and was called to order by the President.

The roll was called and the following Senators were present: Armbrister, Barrientos, Bivins, Brown, Cain, Carona, Duncan, Ellis, Fraser, Gallegos, Galloway, Harris, Haywood, Lindsay, Lucio, Luna, Madla, Moncrief, Nelson, Nixon, Ogden, Patterson, Ratliff, Shapiro, Shapleigh, Sibley, Truan, Wentworth, West, Whitmire, Zaffirini.

The President announced that a quorum of the Senate was present.

(Senator Shapiro in Chair)

Rabbi Jack Segal, Congregation Beth Yeshurun, Houston, offered the invocation as follows:

O Lord, the word *Shalom*, "peace," appears 237 times in the Bible. That has been our goal and aim for society since the creation of the world.

However, that goal has been so elusive. Even the prophet Jeremiah said (Jeremiah 6:14; 8:11), "*Shalom, Shalom, V'en Shalom*," "I have been searching and searching for peace, but I have been unable to find it."

One of the major problems in society today is crime. In so many cities we cannot walk on our streets at night or even visit our parks during the day.

O God, our hopes and our prayers are that You will help guide our legislators so that they will be able to moderate and alleviate this problem, and that once again our streets will be truly safe and our homes will no longer have to be protected by bars, alarms, and attack dogs.

May we soon be able to say to Jeremiah because of the actions of our Texas legislators, "We have found *Shalom* in our state, our cities, and our homes." Amen.

(President in Chair)

On motion of Senator Truan and by unanimous consent, the reading of the Journal of the proceedings of yesterday was dispensed with and the Journal was approved.

truck tractor, trailer, semitrailer, or a vehicle towing a trailer, semitrailer, another motor vehicle, or towable recreational vehicle."

(2) On page 8, line 1, after "highway:", insert "or".

(3) On page 8, line 3, strike "; or", and substitute "[; or]".

(4) On page 8, strike lines 4 through 10, and substitute the following:

~~[(C) 60 miles per hour in daytime and 55 miles per hour in nighttime if the vehicle is a truck, other than a light truck, or if the vehicle is a truck tractor, trailer, or semitrailer, or a vehicle towing a trailer, semitrailer, another motor vehicle or house trailer of an actual or registered gross weight lighter than 4,500 pounds and a length of 32 feet or shorter, excluding the tow bar].~~

The amendments were read.

Senator Harris moved that the Senate do not concur in the House amendments, but that a conference committee be appointed to adjust the differences between the two Houses on the bill.

The motion prevailed.

The President asked if there were any motions to instruct the conference committee on SB 343 before appointment.

There were no motions offered.

The President announced the appointment of the following conferees on the part of the Senate on the bill: Senators Harris, Chair; Nixon, Galloway, Armbrister, and Nelson.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 361 ADOPTED

Senator Madla called from the President's table the Conference Committee Report on SB 361. The Conference Committee Report was read and was filed with the Senate on Saturday, May 24, 1997.

On motion of Senator Madla, the Conference Committee Report was adopted by a viva voce vote.

CONFERENCE COMMITTEE REPORT ON SENATE BILL 1310 ADOPTED

Senator Ellis called from the President's table the Conference Committee Report on SB 1310. The Conference Committee Report was read and was filed with the Senate on Saturday, May 24, 1997.

On motion of Senator Ellis, the Conference Committee Report was adopted by the following vote: Yeas 31, Nays 0.

SENATE BILL 1568 WITH HOUSE AMENDMENT

Senator Madla called SB 1568 from the President's table for consideration of the House amendment to the bill.

The President laid the bill and the House amendment before the Senate.

APPENDIX 2

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TEXAS BOARD OF CHIROPRACTIC EXAMINERS
Regular Board Meeting
1002 City National Bank Building
Austin, Texas

LEGISLATIVE REFERENCE LIBRARY
P. O. BOX 12488 - CAPITOL STATION
AUSTIN, TEXAS 78711

September 21 - 23, 1972

Present: Dr. M. E. Garrett, Dr. Elton Berkman, Dr. S. M. Elliott, Dr. Charles Courtin, Dr. Walter Fischer, Dr. H. H. Kennedy, Dr. W. W. Lundberg, Dr. Sterling Pruitt, Sr., Dr. Oliver Smith, and Executive Director Mr. J. Manley Head.

President Garrett called the meeting to order at 10:00 A.M. and called upon Dr. Lundberg to give the invocation.

Dr. Garrett recognized Dr. Herbie McMennamy and Dr. Charlie Walker as guests.

Dr. Elliott read minutes of last meeting dated June 14, 1972. Dr. Fischer pointed out the omission of two words and requested the change of one for better sentence structure. Motion by Dr. Smith, seconded by Dr. Fischer that minutes be approved as presented and corrected.

Motion by Dr. Berkman, seconded by Dr. Courtin that the 6 applicants be granted licences provided the grades of their examination meet requirements and their folders completed as detailed in Section 10 of the Chiropractic Act. Their names are:

- | | |
|-------------------------|--------------------------|
| 5. Dillard, Jenny P. | 4. Walter K. Mansfield |
| 2. Parrott, John L. Jr. | 1. 3. James M. Newton |
| 3. Calicutt, Robert A. | 6. Hillhouse, Raymond A. |

Dr. Garrett called the board's attention to correspondence regarding Aetna Insurance Company's stand on charges for modalities as presented by Dr. Gordon Climer and Aetna's supervisor Joseph P. Hamby.

2:15 P.M. Dr. Berkman called meeting to order and recognized Dr. Gordan Holman, Executive Director of the National Board of Chiropractic Examiners. Dr. Holman stated that his board was non-political and that they had many benefits to offer all boards. He also explained these benefits after which Dr. Garrett instructed the secretary to write the National Board a letter of thanks and appreciation for Dr. Holman's appearance.

Dr. Smith moved that this board recommend to the State Association that they initiate a feasibility study of pressing for legislation allowing the Texas Board of Chiropractic Examiners to accept a diplomat of the National Board of Chiropractic Examiners. Seconded by Dr. Kennedy and carried with Dr. Pruitt abstaining.

Dr. Garrett instructed the secretary to also send copy of the above motion to the National Board.

Page 2

Dr. Fischer moved that the Texas Board of Chiropractic Examiners adopt Mr. Head's brief on the scope of the Texas Chiropractic Act of Practice as our guideline. Seconded by Dr. Lundberg. Motion carried with six for, Drs. Pruitt and Courtin opposed, and Dr. Berkman abstaining. Dr. Garrett instructed the Secretary of the Board to inform the state association of the above action.

Dr. Garrett presented the grades of the applicants as follows:

1.	86.3	4.	82.2
2.	82.7	5.	78.3
3.	66.5 (F)	6.	82.8

Motion by Dr. Smith, seconded by Dr. Kennedy that they be certified. Dr. Berkman moved that applicant # 3 be notified that he failed pathology, public health and hygiene, physiology, and symptomology; and that he must make application for retake within one year. Motion carried.

Mr. Head presented financial report as of August 31, 1972, as attached with balance of \$7,706.39. Dr. Smith moved budget report be accepted, seconded by Dr. Fischer and carried.

News report by Dr. Pruitt who called upon Dr. Courtin to present X-ray report which was approved.

Dr. Garrett called for investigator's report, with Mr. Head calling the board's attention to his previous written report regarding Dr. Glasen's case.

Mr. Head reported that the Albrecht case was exactly the same as at the last board meeting. Motion by Dr. Berkman, seconded by Dr. Fischer to accept investigator's report. Motion carried.

Dr. Berkman gave brief report on his trip to National Board of Chiropractic Examiners Meeting in Davenport, Iowa, calling attention to his previous written report. Motion by Dr. Kennedy, seconded by Dr. Pruitt to accept report. Motion carried.

Dr. Garrett reported that he and Mr. Head had been to the Attorney General's Office regarding their opinion on the Board's motion concerning clinical examinations. Dr. Berkman moved to rescind Dr. Smith's motion of the June meeting regarding laboratory procedures, seconded by Dr. Pruitt. Motion carried with Elliott opposed.

Dr. Kennedy moved:

Examination procedures by licensees for information to determine if given cases are within the scope of the practice of chiropractic should comply with Section One that says they may employ objective or subjective means without the use of drugs, surgery, X-ray or radium therapy. Licensees shall not employ methods of examination without proper training in these specific methods.

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Motion seconded by Dr. Smith and carried.

Recessed.

September 23, 1972

Dr. Garrett called the meeting to order at 8:45 A.M. and requested enforcement report by Dr. Smith. Motion by Dr. Fischer, seconded by Dr. Pruitt to accept Enforcement Committee report. Motion carried.

Motion by Dr. Berkman, seconded by Dr. Pruitt to grant license reciprocity to D. L. Hogen and Ronald F. Kettmann. Motion carried.

Dr. Harvey Kennedy reported on study of reciprocity with other states. Dr. Berkman moved to accept reciprocity report. Seconded by Dr. Pruitt and carried.

Dr. Kennedy moved the Texas Board of Chiropractic Examiners give examinations on the third week of July and January. Motion seconded by Dr. Pruitt and carried.

Recess

Dr. Garrett recognized Drs. S. McCubbin, Curtis McCubbin, John McMurray, Bill Timberlake, C. W. Benedict, and C. E. Nearpass of Dallas County Chiropractic Society and District 5 of T.S.C.A. Dr. Nearpass made an initial appeal for the board to restrict display advertising by individual chiropractors to two column inches in size, which would conform to the board's ruling on telephone directory advertising. Dr. Stephanie McCubbin D.C.C.S. secretary, read letters supporting this request. Secretary Elliott read telegrams with similar request from Dr. Gilbert Blackwell and Dr. H. C. Vaughn. Dr. Bill Timberlake, District 5 Secretary T.S.C.A., read resolution of District 5. Dr. Herbie McMennamy, President of T.S.C.A., read resolution of their board endorsing District 5's stand. Dr. John McMurray, A.C.A. delegate spoke supporting the D.C.C.S. position as did Dr. C. W. Benedict and Dr. Curtis McCubbin.

Dr. Garrett called on Dr. Smith who interviewed Dr. Gary Bennett regarding a newspaper article in which Dr. Bennett stated that he used acupuncture in his practice. Dr. Bennett stated that he felt this technique belonged to the chiropractic profession as an adjunct to chiropractic therapy. After some discussion Dr. Garrett read a statement by the A.C.A. regarding acupuncture and instructed it be inserted in the records of this board.

Dr. Garrett recognized Dr. Kennedy who moved to amend motion by Dr. Courtin seconded by Dr. Berkman in March, 1972 pertaining to maximum newspaper advertising of 16 column inches to read, "not exceeding two column inches, except institutional advertising under the auspices of a chiropractic organization recognized by the Texas Board of Chiropractic Examiners." Seconded by Dr. Smith.

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Dr. Pruitt moved to table Dr. Kennedy's motion. Voting for: Drs. Pruitt and Courtin. Voting against: Drs. Garrett, Berkman, Elliott, Fischer, Kennedy, Lundberg, and Smith. Motion defeated 7 to 2. Dr. Kennedy's original motion carried 7 to 2 with Drs. Courtin and Pruitt voting against.

Motion by Dr. Berkman, seconded by Dr. Smith that until further information is available to the Texas Board of Chiropractic Examiners the treatment by acupuncture with needles will not be allowed. Motion carried with Dr. Elliott voting against.

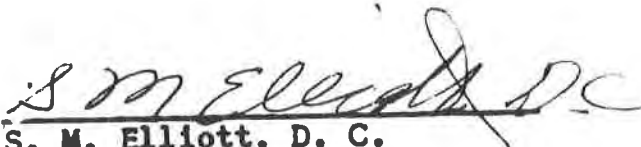
Dr. Garrett called for nominations for President. Dr. Pruitt nominated Dr. Berkman for President, seconded by Dr. Fischer. Dr. Berkman elected by acclamation.

Dr. Kennedy nominated Dr. Elliott for Vice President, seconded by Dr. Fischer and elected by acclamation.

Nomination for Secretary: Dr. Courtin nominated Dr. Pruitt for secretary. Dr. Pruitt declined nomination. Dr. Elliott nominated Dr. Lundberg, seconded by Dr. Smith. Dr. Lundberg elected as secretary by acclamation.

Meeting adjourned.

Melvin E. Garrett, Jr., D. C.
President


S. M. Elliott, D. C.
Secretary

APPENDIX 20

HOUSE JOURNAL

SEVENTY-FIFTH LEGISLATURE, REGULAR SESSION

PROCEEDINGS

EIGHTY-FIFTH DAY — WEDNESDAY, MAY 28, 1997

The house met at 1:15 p.m. and was called to order by the speaker pro tempore.

The roll of the house was called and a quorum was announced present (Record 574).

Present — Mr. Speaker; Alexander; Allen; Alvarado; Averitt; Bailey; Berlanga; Bonnen; Bosse; Brimer; Burnam; Carter; Chavez; Chisum; Christian; Clark; Coleman; Corte; Crabb; Craddick; Cuellar; Culberson; Danburg; Davila; Davis; Denny; Driver; Dukes; Dunnam; Dutton; Edwards; Ehrhardt; Eiland; Elkins; Farrar; Finnell; Gallego; Galloway; Giddings; Glaze; Goodman; Goolsby; Gray; Greenberg; Grusendorf; Gutierrez; Haggerty; Hamric; Hartnett; Hawley; Heflin; Hernandez; Hightower; Hilbert; Hilderbran; Hill; Hinojosa; Hirschi; Hochberg; Hodge; Holzheuser; Horn; Howard; Hunter; Isett; Jackson; Janek; Jones, D.; Jones, J.; Junell; Kamel; Keel; Keffer; King; Kubiak; Kuempel; Lewis, G.; Longoria; Luna; Madden; Marchant; Maxey; McCall; McClendon; McReynolds; Merritt; Moffat; Moreno; Mowery; Naishtat; Nixon; Oakley; Oliveira; Olivo; Palmer; Patterson; Pickett; Pitts; Place; Price; Rabuck; Ramsay; Rangel; Raymond; Reyna, A.; Reyna, E.; Rhodes; Roman; Sadler; Seaman; Serna; Shields; Siebert; Smith; Solis; Solomons; Staples; Stiles; Swinford; Talton; Telford; Thompson; Tillery; Torres; Turner, B.; Turner, S.; Uher; Van de Putte; West; Williams; Williamson; Wilson; Wise; Wohlgenuth; Wolens; Woolley; Yarbrough; Zbranek.

Absent, Excused — Delisi; Flores; Hupp; Krusee; Smithee.

Absent, Excused, Committee Meeting — Cook; Counts; Lewis, R.; Puente; Walker.

Absent — Garcia.

LEAVES OF ABSENCE GRANTED

The following members were granted leaves of absence for today to attend a meeting of the conference committee on **SB 1**:

R. Lewis on motion of Keel.

Cook on motion of Keel.

Counts on motion of Keel.

Puente on motion of Keel.

Walker on motion of Keel.

The following members were granted leaves of absence temporarily for today because of important business:

Hupp on motion of Edwards.

Delisi on motion of Edwards.

SB 361 - ADOPTION OF CONFERENCE COMMITTEE REPORT

Representative Gray submitted the conference committee report on **SB 361**.

Representative Gray moved to adopt the conference committee report on **SB 361**.

The motion prevailed. (Finnell recorded voting no)

SJR 33 - ADOPTION OF CONFERENCE COMMITTEE REPORT

Representative Gallego submitted the conference committee report on **SJR 33**.

(Delisi now present)

Representative Gallego moved to adopt the conference committee report on **SJR 33**.

A record vote was requested.

The motion prevailed by (Record 582): 131 Yeas, 0 Nays, 1 Present, not voting.

Yeas — Allen; Alvarado; Averitt; Bailey; Berlanga; Bosse; Brimer; Burnam; Carter; Chavez; Chisum; Christian; Clark; Coleman; Corte; Crabb; Craddick; Cuellar; Culberson; Danburg; Davila; Davis; Delisi; Denny; Driver; Dukes; Dunnam; Dutton; Edwards; Ehrhardt; Eiland; Elkins; Farrar; Finnell; Gallego; Galloway; Giddings; Glaze; Goodman; Goolsby; Gray; Greenberg; Grusendorf; Gutierrez; Haggerty; Hamric; Hartnett; Hawley; Heflin; Hernandez; Hightower; Hilbert; Hilderbran; Hill; Hinojosa; Hirschi; Hochberg; Hodge; Holzheuser; Horn; Howard; Hunter; Isett; Jackson; Janek; Jones, D.; Jones, J.; Kamel; Keel; Keffer; King; Krusee; Kubiak; Kuempel; Lewis, G.; Luna; Madden; Marchant; Maxey; McCall; McClendon; McReynolds; Merritt; Moffat; Moreno; Mowery; Naishtat; Nixon; Oakley; Oliveira; Olivo; Palmer; Patterson; Pickett; Pitts; Price; Rabuck; Rangel; Raymond; Reyna, A.; Reyna, E.; Rhodes; Roman; Sadler; Seaman; Serna; Shields; Siebert; Smith; Solis; Solomons; Staples; Swinford; Talton; Telford; Thompson; Tillery; Torres; Turner, B.; Turner, S.; Van de Putte; West; Williams; Williamson; Wilson; Wise; Wohlgemuth; Wolens; Woolley; Yarbrough; Zbraneck.

Present, not voting — Mr. Speaker(C).

Absent, Excused — Flores; Hupp.

Absent, Excused, Committee Meeting — Cook; Counts; Lewis, R.; Puente; Walker.

Absent — Alexander; Bonnen; Garcia; Junell; Longoria; Place; Ramsay; Smithee; Stiles; Uher.

**HB 196 - HOUSE CONCURS IN SENATE AMENDMENTS
TEXT OF SENATE AMENDMENTS**

Representative Maxey called up with senate amendments for consideration at this time,

HB 196, A bill to be entitled An Act relating to the issuance of a contact lens prescription and a patients' right of access to that prescription; providing penalties.

APPENDIX 21

AN ACT

relating to the continuation and functions of the Texas State Board of Acupuncture Examiners; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 6.02, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 6.02. Definitions. In this subchapter:

(1) "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; 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.

(2) "Acupuncturist" means a person who practices acupuncture.

(3) "Acupuncture board" means the Texas State Board of Acupuncture Examiners.

(4) "Chiropractor" means a licensee of the Texas Board of Chiropractic Examiners.

(5) "Executive director" means the executive director of the Texas State Board of Medical Examiners.

(6) "Medical board" means the Texas State Board of Medical Examiners.

(7) "Physician" means a licensee of the Texas State Board of Medical Examiners.

SECTION 2. Section 6.04, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by amending Subsections (b), (d), (g), and (h) and adding Subsections (i) through (l) to read as follows:

(b) A person ~~[The following persons]~~ may not serve on the acupuncture board if the:

~~[(1) a person [who]~~ 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 ~~[and its subsequent amendments; and~~

~~[(2) a person who is currently employed by or serving as president, vice president, secretary, or treasurer of a statewide or national organization incorporated for the purpose of representing a health care profession in this state or the United States].~~

(d) The governor shall designate a member of the acupuncture board as the presiding officer of the acupuncture board to serve in that capacity at the pleasure of the governor ~~[from the members of the acupuncture board].~~

(g) 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; or

(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 the acupuncture board membership, attendance, or expenses.

(h) An officer, 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 17, of the position classification salary schedule.

(i) A person who is the spouse of an officer, manager, or paid consultant of a Texas trade association in the field of health care may not be a member of the acupuncture board and may not be 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 17, of the position classification salary schedule.

(j) For the purposes of this section, a Texas trade association is a nonprofit, cooperative, and voluntarily joined 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 ~~[The acupuncture board is subject to the open meetings law, the open records law, and the Administrative Procedure Act and any subsequent amendments]~~.

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

(l) [(h)] The acupuncture board 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 subchapter expires September 1, 2005 [1997].

SECTION 3. Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Sections 6.041 and 6.042 to read as follows:

Sec. 6.041. GROUNDS FOR REMOVAL FROM ACUPUNCTURE BOARD. (a) It is a ground for removal from the acupuncture board if a member:

(1) does not have at the time of appointment the qualifications required by Sections 6.04(a) and (g) of this Act;

(2) does not maintain during service on the acupuncture board the qualifications required by Sections 6.04(a) and (g) of this Act;

(3) violates a prohibition established by Section 6.04(b), (h), or (i) of this Act;

(4) cannot because of illness or disability discharge the member's duties for a substantial part of the term for which the member is appointed; 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 of the medical board has knowledge that a potential ground for removal of a member of the acupuncture board 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 of the medical board 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.

(d) The executive director of the medical board or the executive director's designee shall provide to members of the acupuncture board, as often as necessary, information regarding their qualification for office under this subchapter and their responsibilities under applicable laws relating to standards of conduct for state officers.

Sec. 6.042. BOARD MEMBER TRAINING. (a) To be eligible to take office as a member of the acupuncture board, a person appointed to the acupuncture board must complete at least one course of a training program that complies with this section.

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

(1) the enabling legislation that created the acupuncture board and its policymaking body to which the person is appointed to serve;

(2) the programs operated by the acupuncture board;

(3) the role and functions of the acupuncture board;

(4) the rules of the acupuncture board with an emphasis on the rules that relate to disciplinary and investigatory authority;

- (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 the:
 - (A) open meetings law, Chapter 551, Government Code;
 - (B) open records law, Chapter 552, Government Code; and
 - (C) administrative procedure law, Chapter 2001, Government Code;
 - (8) the requirements of the conflict of interests laws and other laws relating to public officials; and
 - (9) any applicable ethics policies adopted by the medical board or the Texas Ethics Commission.
- (c) A person appointed to the acupuncture board is entitled to reimbursement for travel expenses incurred in attending the training program, as provided by the General Appropriations Act and as if the person were a member of the acupuncture board.

SECTION 4. Section 6.05, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 6.05. 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 educational 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) make recommendations on applications for licenses to practice acupuncture;
- (7) 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

jurisdiction of the acupuncture board ~~[establish a procedure for reporting and processing complaints relating to the practice of acupuncture under this article];~~

(8) establish the requirements for a tutorial program for students who have completed at least 48 semester hours of college; ~~[and]~~

(9) develop and implement policies that clearly separate the policymaking responsibilities of the acupuncture board and the management responsibilities of the executive director and the staff of the medical board; and

(10) recommend additional rules as are necessary for the administration and enforcement of this subchapter.

(b) The acupuncture board shall comply with federal and state laws related to program and facility accessibility. The executive director of the medical board shall prepare and maintain a written plan that describes how a person who does not speak English can be provided reasonable access to the acupuncture board's programs and services.

(c) Notwithstanding Subsection (a) of this section, the acupuncture board has no independent rulemaking authority.

SECTION 5. Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Sections 6.051, 6.071, 6.075, and 6.085 to read as follows:

Sec. 6.051. PUBLIC INTEREST INFORMATION; COMPLAINTS. (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. The acupuncture board shall make the information available to the public and appropriate state agencies.

(b) 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 complaints under this subchapter to the acupuncture board. The acupuncture board may provide for that notification:

(1) on each registration form, application, or written contract for services of an individual or entity regulated under this subchapter;

(2) on a sign prominently displayed in the place of business of each individual or entity regulated under this subchapter; or

(3) in a bill for service provided by an individual or entity regulated under this subchapter.

(c) The acupuncture board shall keep a file about each written complaint filed with the acupuncture board under this subchapter that the acupuncture board has authority to resolve. The acupuncture board shall provide to the person filing the complaint and the persons or entities complained about the acupuncture board's policies and procedures pertaining to complaint investigation and resolution. The acupuncture board, at least quarterly and until final disposition of the complaint, shall notify the person filing the complaint and the persons or entities complained about of the status of the complaint unless the notice would jeopardize an investigation.

(d) The acupuncture board shall keep information about each complaint filed with the acupuncture board under this subchapter. 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 complaints for which the acupuncture board took no action, an explanation of the reason the complaint was closed without action.

Sec. 6.071. EXAMINATION RESULTS. (a) Not later than the 30th day after the date on which a licensing examination is administered under this subchapter, the acupuncture board shall notify each examinee of the results of the examination. However, 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 on which the acupuncture board receives the results from the testing service. 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.

(b) If requested in writing by a person who fails a licensing examination administered under this subchapter, 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.

Sec. 6.075. TEMPORARY LICENSE. (a) The acupuncture board may, through the executive director of the medical board, issue a temporary license 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 prescribed by the medical board;
- (4) if licensed in another state, the District of Columbia, or a territory of the United States, is in good standing as an acupuncturist; and
- (5) meets all the qualifications for a license under this Act 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 from the date issued and may be extended only for another 30 days after the date the initial temporary license expires.

Sec. 6.085. ADVERTISING. (a) The medical board may not adopt rules under this subchapter restricting competitive bidding or advertising 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.

SECTION 6. Section 6.09, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Subsections (c) and (d) to read as follows:

(c) All money paid to the medical board under this subchapter is subject to Subchapter F, Chapter 404, Government Code.

(d) The medical board shall prepare annually a complete and detailed written report accounting for all funds received and disbursed by the medical board under this subchapter during the preceding fiscal year. The annual report must meet the reporting requirements applicable to financial reporting provided in the General Appropriations Act.

SECTION 7. Section 6.10, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 6.10. ISSUANCE AND RENEWAL OF LICENSE. (a) After consulting the acupuncture board, the medical board shall issue a license to practice acupuncture in this state to a person who meets the requirements of this subchapter and the rules adopted under this subchapter.

(b) The medical board may waive any prerequisite to obtaining a license for an applicant after reviewing the applicant's credentials and determining that the applicant holds a valid license from another state that has license requirements substantially equivalent to those of this state.

(c) The medical board shall by rule provide for the annual renewal of a license to practice acupuncture.

(d) 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 the provisions of this section.

(e) 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 one and one-half times the required renewal fee.

(f) 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 two times the required renewal fee.

(g) 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.

(h) If the person was licensed 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, the person may renew an expired license without reexamination. The person must pay to the medical board a fee that is equal to two times the required renewal fee for the license.

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

(j) 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.

SECTION 8. Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Section 6.101 to read as follows:

Sec. 6.101. 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 of the license holder's offices; and

(4) the address for the location of each of the license holder's offices if that address is 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.

SECTION 9. Section 6.11, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended, and Subsections (b) through (g) of that section are redesignated as Section 6.115, to read as follows:

Sec. 6.11. DENIAL OF LICENSE; DISCIPLINE OF LICENSE HOLDER. (a) A license to practice acupuncture may be denied or, after notice and hearing, suspended, probated, or revoked if the applicant for a license or the holder of a license:

(1) uses drugs or intoxicating liquors to an extent that affects the person's professional competence;

(2) obtains or attempts to obtain a license by fraud or deception;

(3) has been [is] adjudged mentally incompetent by a court of competent jurisdiction or has a mental or physical condition that renders the person unable to perform safely as an acupuncturist;

(4) has practiced [~~practices~~] acupuncture in a manner detrimental to the public health and welfare;

(5) violates this subchapter or a rule adopted under this subchapter;

(6) has been [is] convicted of a felony or a crime involving moral turpitude; [~~or~~]

(7) holds the person [~~himself~~] 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;

(8) fraudulently or deceptively uses a license;

(9) has acted in an unprofessional or dishonorable manner that is likely to deceive, defraud, or injure a member of the public;

(10) has committed an act in violation of state law if the act is connected with the person's practice as an acupuncturist; or

(11) has had the person's license suspended, revoked, or restricted, has had other disciplinary action taken by another state regarding the person's practice as an acupuncturist, or has had disciplinary action taken against the person by the uniformed services of the United States based on acts by the license holder similar to acts described in this section.

(b) A complaint, indictment, or conviction of a law violation is not necessary for the enforcement of Subsection (a)(10) of this section. Proof of the commission of the act while in practice as an acupuncturist or under the guise of practice as an acupuncturist is sufficient for action by the medical board under this section.

(c) A certified copy of the record of the state or uniformed services of the United States taking the action is conclusive evidence of the action under Subsection (a)(11) of this section.

Sec. 6.115. SCOPE OF PRACTICE. (a) ~~(b)~~ Except as provided by Subsection (b) ~~(c)~~ of this section, a license to practice acupuncture shall be denied or, after notice and hearing, revoked if the holder of a license has performed acupuncture on a person who was not evaluated by a physician or dentist, as appropriate, for the condition being treated within six months before the date acupuncture was performed.

~~(b)~~ ~~(c)~~ The holder of a license may perform acupuncture on a person who was referred by a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners if the licensee commences the treatment within 30 days of the date of the referral. The licensee shall refer the person to a physician after performing acupuncture 20 times or for 30 days, whichever occurs first, if no substantial improvement occurs in the person's condition for which the referral was made.

~~(c)~~ ~~(d)~~ The holder of a license must obtain reasonable documentation that the evaluation required by Subsection (a) ~~(b)~~ of this section has taken place. If the licensee is unable to

determine that an evaluation has taken place, the licensee must obtain a written statement signed by the person on a form prescribed by the acupuncture board that states that the person has been evaluated by a physician within the prescribed time frame. The form shall contain a clear statement that the person should be evaluated by a physician for the condition being treated by the licensee.

(d) ~~[(e)]~~ The medical board with advice from the acupuncture board by rule may modify the requirement of the time frame or the scope of the evaluation under Subsection (a) ~~[(b)]~~ of this section.

(e) ~~[(f)]~~ The medical board with advice from the acupuncture board by rule may modify the requirement of the time frame for commencement of treatment after referral by a chiropractor or the number of treatments or days before referral to a physician is required under Subsection (b) ~~[(c)]~~ of this section.

(f) ~~[(g)]~~ Notwithstanding Subsections (a) ~~[(b)]~~ and (b) ~~[(c)]~~ of this section, an acupuncturist holding a current and valid license may without a referral from a physician, dentist, or chiropractor perform acupuncture on a person for smoking addiction, weight loss, or, as established by the medical board with advice from the acupuncture board by rule, substance abuse.

SECTION 10. Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Sections 6.116, 6.117, and 6.118 to read as follows:

Sec. 6.116. ADDITIONAL DISCIPLINARY AUTHORITY. In addition to the authority under Section 6.11 of this Act, the acupuncture board, on finding that an acupuncturist has committed an offense described in Section 6.11 of this Act, may:

(1) require the acupuncturist to submit to the care, counseling, or treatment of a health care practitioner designated by the acupuncture board;

(2) stay enforcement of an order and place the acupuncturist 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;

(3) restore or reissue a license or remove any disciplinary or corrective measure that the acupuncture board may have imposed;

(4) order the acupuncturist to perform public service;

(5) limit the acupuncturist's practice to the areas prescribed by the acupuncture board;

(6) require an acupuncturist to report regularly to the acupuncture board on matters that are the basis of the probation; or

(7) continue or review professional education until the practitioner attains a degree of skill satisfactory to the acupuncture board in those areas that are the basis of the probation.

Sec. 6.117. SUSPENSION, REVOCATION, OR NONRENEWAL OF LICENSE. If the medical 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. Proceedings for a disciplinary action are governed by the administrative procedure law, Chapter 2001, Government Code. 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.

Sec. 6.118. REHABILITATION ORDER. (a) The acupuncture board, through an agreed order or after a contested proceeding, may impose a nondisciplinary rehabilitation order on any licensee or, as a prerequisite for issuing a license, on any licensure applicant based on one or more of the following:

(1) intemperate use of drugs or alcohol directly resulting from habituation or addiction caused by medical care or treatment provided by a physician;

(2) self-reported intemperate use of drugs or alcohol during the last five years immediately preceding the report which could adversely affect the reporter's ability to safely

practice as an acupuncturist, but only if the reporting individual has not previously been the subject of a substance abuse related order of the acupuncture board;

(3) judgment by a court of competent jurisdiction that the individual is of unsound mind; or

(4) results from a mental or physical examination, or admissions by the individual, indicating that the licensee or applicant suffers from a potentially dangerous limitation or an inability to safely practice as an acupuncturist with reasonable skill and safety by reason of illness or as a result of any physical or mental condition.

(b) A rehabilitation order entered pursuant to this section shall be a nondisciplinary private order and shall contain findings of fact and conclusions of law. A rehabilitation order, if entered by agreement, shall be an agreed disposition or settlement agreement for purposes of civil litigation and shall be exempt from the open records law.

(c) A rehabilitation order entered pursuant to this section may impose a revocation, cancellation, suspension, period of probation or restriction, or any other terms and conditions authorized under this Act or as otherwise agreed to by the acupuncture board and the individual subject to the order.

(d) Violation of a rehabilitation order entered pursuant to this section may result in disciplinary action under the provisions of this Act for contested matters or pursuant to the terms of the agreed order. A violation of a rehabilitation order may be grounds for disciplinary action based on unprofessional or dishonorable conduct or on any of the provisions of this Act which may apply to the misconduct which resulted in violation of the rehabilitation order.

(e) The rehabilitation orders entered pursuant to this section shall be kept in a confidential file which shall be subject to an independent audit by state auditors or private auditors contracted with by the acupuncture board to perform such an audit. Audits may be performed at any time at the direction of the acupuncture board but shall be performed at least once every three years. The audit results shall be reported in a manner that maintains the confidentiality of all licensees

who are subject to rehabilitation orders and shall be a public record. The audit shall be for the purposes of ensuring that only qualified licensees are subject to rehabilitation orders.

SECTION 11. Subsection (b), Section 6.12, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended to read as follows:

(b) An offense under Subsection (a) of this section is a felony of the third degree [~~Class A misdemeanor~~].

SECTION 12. Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), is amended by adding Section 6.125 to read as follows:

Sec. 6.125. SUBPOENAS. (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 for purposes of:

(1) investigations or contested proceedings related to:

(A) alleged misconduct by an acupuncturist; or

(B) an alleged violation of this Act or other law related to practice as an acupuncturist or to the provision of health care under the authority of this Act;

(2) a determination whether to issue, suspend, restrict, revoke, or cancel a license authorized by this subchapter; and

(3) a determination whether to deny or grant an application for a license under this subchapter.

(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.

SECTION 13. (a) The change made by this Act to Section 6.12, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

(b) An offense committed before the effective date of this Act is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

SECTION 14. The changes in law made by this Act in the qualifications of, and the prohibitions applying to, members of the Texas State Board of Acupuncture Examiners do not affect the entitlement of a member serving on the board immediately before September 1, 1997, to continue to carry out the functions of the board for the remainder of the member's term. The changes in law apply only to a member appointed on or after September 1, 1997. This Act does not prohibit a person who is a member of the board on September 1, 1997, from being reappointed to the board if the person has the qualifications required for a member under Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), as amended by this Act.

SECTION 15. This Act takes effect September 1, 1997, and applies only to a license issued or renewed by the Texas State Board of Medical Examiners under Subchapter F, Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes), on or after that date.

SECTION 16. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

S.B. No. 361

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 361 passed the Senate on April 24, 1997, by the following vote:
Yeas 29, Nays 0; May 20, 1997, Senate refused to concur in House amendments and requested
appointment of Conference Committee; May 21, 1997, House granted request of the Senate;
May 27, 1997, Senate adopted Conference Committee Report by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 361 passed the House, with amendments, on May 20, 1997, by a
non-record vote; May 21, 1997, House granted request of the Senate for appointment of
Conference Committee; May 28, 1997, House adopted Conference Committee Report by a
non-record vote.

Chief Clerk of the House

S.B. No. 361

Approved:

Date

Governor

APPENDIX 22



RQ-988

Texas State Board of Acupuncture Examiners

333 Guadalupe • Tower 3 • Suite 610 • Mailing Address: P.O. Box 2018 • Austin, Tx 78768-2018

Phone (512) 305-7021 • Fax (512) 305-7008

August 18, 1997

Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

988
FILE # RQ-00925-DM
I.D. # 39701
39768

Re: Request for Attorney General Opinion.

Dear Attorney General Morales:

An Attorney General Opinion is respectfully requested under the authority of Section 22 of Article IV of the Texas Constitution and Sections 402.041 through 402.045 of the Texas Government Code. An opinion is requested concerning licensed chiropractors performing acupuncture.

On September 15, 1995, the Acupuncture Board requested an Attorney General opinion in response to a letter of concern. I have attached a copy of that request for your review. On September 23, 1996, you issued Opinion No. DM-415 in response to that request. I have also attached a copy of that opinion for your review.

In Opinion No. DM-415, you suggested that article 4512b, Section 1, which authorizes a chiropractor to perform only nonsurgical, nonincisive procedures, does not authorize a chiropractor to practice acupuncture. In Senate Bill 361, the Texas Legislature amended the definition of acupuncture contained in article 4495b, Section 6.02. That definition change takes effect on September 1, 1997, and provides as follows:

"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..."

In response to this statutory change, the Texas State Board of Acupuncture Examiners received an additional letter of concern dated June 23, 1997. I have attached a copy of that letter hereto for your records. As you can see, the Board has again been asked to determine whether the practice of acupuncture is within the scope of practice for a licensed Texas chiropractor.

Based on the concerns raised in the enclosed correspondence and the significance of the issues involved, I have been directed by the Texas State Board of Acupuncture Examiners to once again request an attorney general opinion to definitively resolve this question. If additional information is

needed, please contact the Acupuncture Board's acting General Counsel, Ms. Courtney Newton, at (512) 305-7081.

Sincerely,


Bruce A. Levy, M.D., J.D.
Executive Director

Enclosure

xc: Texas State Board of Acupuncture Examiners
Texas State Board of Chiropractic Examiners

TEXAS ASSOCIATION OF ACUPUNCTURISTS

5959 West Loop S. #410
Bellaire, Tx 77401

(713) 661-0346
(713) 667-2929 (fax)
June 23, 1997

State Board of Acupuncture Examiners
P. O. Box 149134
Austin, Texas 78714-9134

Re: Request for an Attorney General Opinion if Chiropractors
can legally practice acupuncture after definition of
acupuncture is changed to make it "non-incisive".

Dear Members of the Acupuncture Board:

For a few years, some health providers in Texas have been trying through legal channels to include acupuncture in their practices and it seems that each year, they are coming closer to attaining their goals.

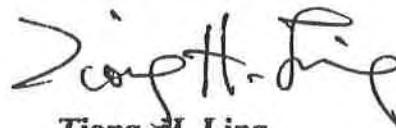
Last year, some chiropractors tried unsuccessfully to obtain Attorney General Opinion in their favor to include acupuncture treatment in their practice. Instead, the Attorney General in Opinion No. DM-415, dated September 23, 1996, ruled that, "We accordingly conclude that V.T.C.S. article 4512b, section 1, which encompasses within the practice of chiropractic only non-surgical, non-incisive procedures, does not authorize a chiropractor to practice acupuncture... .. the practice of acupuncture is not within the scope of practice for a licensed Texas chiropractor." According to General Attorney ruling, chiropractors are only authorized by law to render treatments which are "non-surgical and non-incisive" in nature but acupuncture treatment is essentially and absolutely incisive as it involves the piercing into the skin with needles.

Before the last Texas legislature, some non-acupuncturists with an interest in acupuncture have successfully influenced the Sunset bill on acupuncture, changing radically the definition of acupuncture to make it "non-surgical, non-incisive". Someone must have assumed that, if the legal definition of acupuncture treatment could be changed to read as "non-incisive", it may open the door for all other health care providers (possibly thousand) to expand their practices to include acupuncture WITHOUT violating state law. Unfortunately, when the Sunset bill

on acupuncture with inserted definition change (SB-361) to make acupuncture "non-surgical and noninvasive" was brought to the 75th Texas legislature, it was adopted without careful and critical debate. It is the very first time in acupuncture history we witness the fact that acupuncture treatment which traditionally, essentially, and absolutely involve needles, has been twisted around. So much so that in Texas, "acupuncture needles" have suddenly DISAPPEARED. Can someone assume that legally speaking, anyone can now render "acupuncture treatment without being legally recognized as using needles?" This new Texas legal definition of acupuncture ignores truth. Not only is the new definition highly polemic, it reflects high degree of ignorance. It may also be in direct conflict with F.D.A. definition which always recognizes acupuncture treatments as involving the use of needles, but classifying acupuncture needles as "experimental" for years until a few months ago, it lifted the word "experimental". Of course twisting around the fact does not make any sense. It is one of the most ridiculous things that have ever happened to acupuncture. The new definition undermines the very nature of acupuncture. Not only the establishment of the State Board of Acupuncture would be in vain, there is little doubt that public safety may also be seriously compromised.

The acupuncture community in Texas is very concerned about the sudden change of the legal definition of acupuncture. We wish to find out, a semantic loophole created by FALSIFYING the truth through legislature to make acupuncture "non-incisive" can indeed supercede acupuncture licensing requirements for other health care providers or anyone else, to practice acupuncture without violating state law. On behalf of all acupuncturists in Texas and as president of Texas Association of Acupuncturists, I humbly request that the Board of Acupuncture Examiners makes a formal request to the Attorney General for an legal opinion.

Most sincerely,



Tiong H. Ling
President, TAOA

cc: Dr. Bruce A. Levy, M.D., J.D.



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 23, 1996

Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board
of Acupuncture Examiners
1812 Centre Creek Drive, Suite 300
P.O. Box 149134
Austin, Texas 78714-9134

Opinion No. DM-415

Re: Whether the practice of acupuncture
is within the scope of practice for a
licensed Texas chiropractor and related
questions (RQ-853)

Dear Dr. Levy:

You inform us that certain health-care practitioners, who are licensed as chiropractors but not as acupuncturists,¹ 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?²
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"

¹An acupuncturist is a practitioner of acupuncture. See V.T.C.S. art. 4495b, § 6.02(2).

²We 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.

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 moxibustion³ 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.⁴ [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.⁵ 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

³"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 CYCLOPEDIA 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 CYCLOPEDIA MEDICAL DICTIONARY* M-66.

⁴For 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.

⁵We assume that the chiropractors about which you ask are not licensed acupuncturists.

acupuncture or a license encompassing the practice of acupuncture commits a class A misdemeanor. *Id.* § 6.12(b).

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 subluxation⁶ 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.⁷

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.⁸ *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

⁶"Subluxation" is "a partial dislocation, a sprain." XVII OXFORD ENGLISH DICTIONARY 42 (2d ed. 1989).

⁷The 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)).

⁸In 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)).

"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.⁹

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 CYCLOPEDIA MEDICAL DICTIONARY* 1-12 (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).

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 CYCLOPEDIA 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."¹⁰ V.T.C.S. art. 4495b, § 1.03(a)(15).

⁹Prior 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."

¹⁰The 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).

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"¹¹ or "surgical,"¹² 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.

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 acupuncture.

¹¹Courts 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.

¹²We 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. Wom*, 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).

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.

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 not within 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.

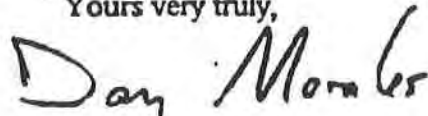
You premise your last question on an affirmative response to your first question and a negative response to your second question. We have reached the opposite conclusions. Consequently, we need not answer your last question.

S U M M A R Y

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

APPENDIX 23



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

March 30, 1998

Bruce A. Levy, M.D., J.D.

Executive Director

Texas State Board of Acupuncture Examiners

P.O. Box 2018

Austin, Texas 78768-2018

Opinion No. DM-471

Re: Whether the performance of acupuncture is within the scope of practice of a licensed Texas chiropractor (RQ-988)

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 acupuncture¹ 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.

¹When 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.

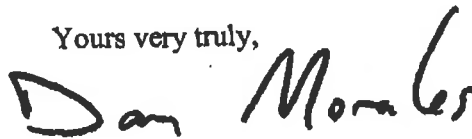
As a part of the acupuncture board's sunset legislation, the Seventy-fifth Legislature amended the definition of acupuncture in V.T.C.S. article 4495b, subchapter F (the "acupuncture statute"), to define acupuncture in part as the "nonsurgical, nonincisive insertion of an acupuncture needle." Act of 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.

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.

S U M M A R Y

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,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly stylized font.

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

APPENDIX 24

Sunset Advisory Commission



**Texas Board
of Chiropractic
Examiners**

Staff Report
February 2004

TEXAS BOARD OF CHIROPRACTIC EXAMINERS

SUNSET STAFF REPORT

The Board's Use of Opinions to Define Scope of Practice Does Not Conform to the State's Standard Process and Fails to Achieve Its Stated Intent.

Summary

Key Recommendations

- Require the Board to develop and adopt rules that clarify practices within and outside the scope of chiropractic practice, using stakeholder input early in the process.
- The Board should comply with the Attorney General opinion on needle electromyogram, and inform chiropractors that this procedure is not within their scope.

Key Findings

- The nature of chiropractic raises questions about what is and should be the appropriate scope of practice for chiropractors, under the law.
- The Board's process for defining scope of practice does not conform to standard State processes for addressing these issues, and ultimately fails to clarify the scope of chiropractic practice.
- The 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.
- The Board's efforts to define scope of practice could benefit from using the rulemaking process, which provides greater opportunities for participation by affected groups.

Conclusion

While regulatory boards need to be able to reasonably interpret the statute to regulate the profession as the Legislature has intended, their processes should be open and objective to ensure the quality and acceptance of decisions. The standard approach for resolving these types of policy issues is through rulemaking, with the Attorney General serving to clarify matters where legislative intent is not clear.

The Board's process of issuing opinions is not an appropriate way to define scope of practice. Using this non-inclusive process, the Board has essentially acted on its own to define the scope of chiropractic practice, ignoring Attorney General's opinions, and not fully complying with legislative mandates and recommendations by elected officials.

By ceasing the practice of issuing opinions and instead going through the rulemaking process to define scope of practice, the Board would do a better job of resolving lingering questions as to what procedures chiropractors can and cannot perform. Using early involvement of stakeholders in the development of rules would enable the Board to benefit from other interested parties with expertise to share. Finally, the Board complying with the Attorney General's Opinion on needle electromyogram would clarify that chiropractors may not perform the procedure. The Board should seek additional clarification from the Attorney General about whether chiropractors can interpret such a procedure.

Support

The nature of chiropractic raises questions about what is and should be the appropriate scope of practice for chiropractors, under the law.

★
Chiropractic has expanded beyond manipulations and adjustments to include many alternative treatments.

- Chiropractors claim to treat the human body as an integrated whole, using practices and procedures based on their academic and clinical training. While chiropractors have traditionally focused on neuromusculoskeletal complaints, such as headaches, joint pain, neck pain, low back pain, and sciatica, they may also provide care for other conditions for which they receive training, including allergies, asthma, digestive disorders, and others as new research is developed. As a result, chiropractic practice has expanded beyond manipulations and adjustments to include such treatments as herbal and nutritional counseling, physical and massage therapy, and acupuncture. This expansion reflects the two schools of thought that divide the profession between chiropractors who focus on the traditional therapies and those who have also incorporated alternative practices.
- The Chiropractic Act's broad description of chiropractic has allowed the expansion of the profession beyond traditional manipulations by implicitly authorizing practitioners to use a wide range of procedures to diagnose and treat patients. The Act prevents chiropractors from performing surgical and incise procedures, prescribing drugs other than drugs approved for over-the-counter sale, and using x-ray therapy or therapy that exposes the patient to radioactive materials. The textbox, *Practice of Chiropractic*, describes the scope of practice of chiropractors as defined in the Chiropractic Act.

Practice of Chiropractic¹
A person practices chiropractic if the person:
(1) uses objective and subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body, or
(2) performs nonsurgical, nonincise procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system.
- Due to the general nature of chiropractic, the Board routinely receives questions on whether the use of specific treatments and new devices fall within the licensees' scope of practice. To answer these questions, the Board issues opinions through a Technical Standards Committee, composed of three Board members that make recommendations to the Board. Once the Board adopts an opinion, it sends a notice of its decision to the person who made the request. Staff keeps a record of the opinion for its files and posts only the most frequently asked questions on the Board's Web site. The Board provides opinions merely as guidelines to individual chiropractors, letting them decide if they have the knowledge and expertise to safely use the new treatment or device based on their professional judgment.

The textbox, *Board Opinions on Practices Within Scope*, highlights a few practices that chiropractors may **perform**, according to the Board.

The Board's process for defining scope of practice does not conform to standard State processes for addressing these issues, and ultimately fails to clarify the scope of chiropractic practice.

- The Legislature takes the lead in defining the scope of practice of numerous professions and occupations. By creating new statutes or amending existing ones, it outlines the type of treatments or services that professionals may perform under their license. Legislation defining scope of practice is discussed in open meetings, providing ample opportunities for stakeholders to provide feedback. Because not all questions about proper scope may be answered by statute, the Legislature implicitly delegates authority to licensing boards, through their enabling statutes, to address these specific questions. Typically, this occurs through rulemaking, which emphasizes public inclusion and scrutiny, by required postings of proposed rules in the Texas Register and the recording of adopted rules in the Texas Administrative Code. Using this standard method, health licensing agencies, such as the Texas State Board of Medical Examiners and the Executive Council of Physical Therapy and Occupational Therapy Examiners, have adopted rules to clarify scope of practice.

Board Opinions on Practices Within Scope	
Type of Treatment/Procedure	Description
Hypnosis	The artificially induced sleeplike condition making an individual more receptive to suggestions by the hypnotist.
Acupuncture	The nonsurgical, nonincisive insertion of a needle to a specific area of the human body to treat or mitigate a human condition.
Low Level Laser Therapy	The use of a light source that is thought to generate photochemical reactions in the cells.
Manipulation Under Anesthesia (MUA)	Manipulation performed on a patient while under anesthesia to remove the patient's natural resistance to a certain range of motion.
Needle Electromyogram (Needle EMG)	The insertion of a needle into muscle tissues to determine whether a nerve is damaged or diseased, by measuring the electrical activity in the muscle.

- The Chiropractic Act does not specifically authorize the Board to define the practice of chiropractic. It provides for the Board to adopt rules and bylaws to regulate the practice of chiropractic and enforce the Act. It has a provision for the Board to issue opinions, based on a majority vote, which the Board uses to define the practice of chiropractic.² Since 1994, after an attempt at clarifying scope of practice through rules was overturned by a court, the Board has consistently opted to address these issues as Board opinions. However, the Board's process of issuing opinions does not have the clear delegation of legislative authority to clarify scope of practice.

The Board's opinions process also does not provide for adequate scrutiny or meaningful input from the public and affected parties before the Board renders an opinion. Typically, the only notification given is a listing of the questions under consideration that are posted on the Board's agenda one week before the meeting. Additionally, the Board's Technical Standards Committee, which makes scope of practice recommendations to the Board, does not have public representation and has not for the past several years. The result is that the Board misses more than the opportunity for public comment; it also misses the serious study and analysis of issues by multiple parties before it makes its decisions.




The Board's opinion process does not provide for adequate scrutiny or meaningful input from the public and affected parties.

Once adopted, the Board's opinions are not adequately made available to the public and to chiropractors. Unlike rules, which are recorded in the Texas Administrative Code for wide distribution and consistent application, Board opinions only reach the person who requested the opinion, with only a few making it to the Board's Web site. The vast majority of chiropractors are not made aware of these opinions or the guidelines to follow in performing the procedures discussed.

In its opinions affirming that procedures, such as needle EMG, are within the scope of chiropractic, the Board does not require specialized training, but indicates that chiropractors who perform these procedures without adequate training do so at their own risk. In other words, chiropractors may decide for themselves, based on their professional judgment and training what procedures are permissible. The risk to the chiropractor is the possibility of Board enforcement action that could only result from a complaint against the chiropractor. The Board cannot act to prevent chiropractors from performing these procedures simply because they lack required knowledge or expertise. This reactive approach to regulation abdicates considerable authority to chiropractors to decide what is within the scope of practice, and ultimately confuses, rather than clarifies, these issues.

The 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.

- On several occasions within the last decade, the Board has either had difficulties or has been unwilling to respond to legislative mandates and elected officials' recommendations related to scope of practice. The textbox, *History of Scope of Practice Issues*, summarizes some of the mandates and recommendations made to the Board that relate to scope of practice.
- One Board opinion has skirted the intent of the Legislature, as interpreted by the Attorney General. For the past five years, the Board has ignored an Attorney General opinion restricting chiropractors from using needles. The March 30, 1998, opinion stated that the use of needles for any other purposes than the drawing of blood or the practice of acupuncture is not within the scope of chiropractic. The effect of the opinion was to specifically exclude needle EMG from the range of procedures that chiropractors may perform under the law. However, barely a month later, on May 7, 1998, the Board issued an opinion affirming that nerve conduction studies, including needle EMG, were within the chiropractic scope of practice.¹⁴


The Board opinion regarding needle EMG skirts the intent of the Legislature, as interpreted by the Attorney General.

In July 2001, an administrative law judge from the State Office of Administrative Hearings found that needle EMG was not within the scope of practice, thereby denying reimbursement for the procedure through workers' compensation. Despite this additional ruling, the Board issued a new opinion in January 2002 reaffirming its belief that needle EMG is within the scope of chiropractic.¹⁵


History of Scope of Practice Issues

1994	A Travis County District Court enjoined several scope of practice rules because the Board did not indicate proper statutory authority. The court also overturned a Board rule defining "surgery" because it was inconsistent with the Texas Medical Act, to the extent that it would have authorized chiropractors to perform manipulation under anesthesia (MUA). ³ This procedure requires an anesthesiologist and must be performed in a hospital. The federal Health Care Financing Administration has classified MUA as surgery, which would place it outside the scope of chiropractic. In 1995, a bill that would have allowed the Board to certify chiropractors to perform MUA was amended to prohibit the Board from certifying the procedure. ⁴ Despite persistent confusion about the legality of the procedure, the Board, without seeking an Attorney General's opinion, issued an opinion in 1997 to allow chiropractors to perform MUA without being certified. ⁵
1995	The Legislature created an advisory commission, composed of five chiropractors, two physicians, one nurse, and one pharmacist to advise the Board on new and experimental diagnostic and treatment practices, procedures, or instruments within the meaning of chiropractic as defined in the Act. ⁶ Although the Board could have benefited from this additional expertise, it gave little direction to the commission, which met only once and has since been allowed to expire. ⁷
1996	The Attorney General issued an opinion stating that acupuncture is not within the chiropractic scope of practice. ⁸ Despite the opinion, the Board did not take a stand to prohibit acupuncture and numerous chiropractors continued to openly advertise for it. ⁹ The issue was resolved in 1997 when the Legislature amended the Acupuncture Act to authorize chiropractors to practice acupuncture. ¹⁰
1997	A special study of the Chiropractic Board by the Comptroller found that the Board had not fully complied with recent legislative enactments by failing to develop rules clarifying restrictions on performing incisive and surgical procedures. ¹¹ The Comptroller recommended that the Board adopt such rules and rules establishing clear and detailed guidelines on the permissible scope of practice, using the expertise of the advisory commission mentioned above. ¹² The Board never complied with the recommendations despite a written assurance to the Comptroller that it had already begun the process of introducing into rules many of its previous scope of practice opinions. ¹³

- Board opinions may influence reimbursement decisions by third-party payers, such as the workers' compensation and health insurance systems. This influence may be direct, as a result of the deference generally given to professional licensing boards to administer their acts. For example, the Texas Workers' Compensation Commission (TWCC) has traditionally recognized the role of licensing boards in defining scope of practice, and does not, as a rule, supercede the decisions of these boards. Additionally, TWCC guidelines for reimbursement of chiropractic services expand on Medicare guidelines, which reimburse only manual manipulations of the spine, to authorize reimbursement for any medically necessary procedure within the scope of practice.¹⁶ This policy places considerable authority into the hands of the Chiropractic Board to determine procedures that will be reimbursed under the workers' compensation system.¹⁷

Board opinions may also have an indirect influence on reimbursement determinations, as in the case of recent complaints against chiropractors who perform utilization reviews to determine reimbursement of other providers for their work. In its fourth quarter 2000 newsletter, the Board actively solicited complaints against peer reviewers from its licensees on the basis of fraud or abuse, or a lack of due diligence, and not mere disagreement with the peer reviewer's opinion.¹⁸ Despite acknowledged "jurisdictional questions," the Board has pursued at least two complaints

on this basis against chiropractors who made recommendations counter to the Board's opinion on needle EMG. The most recent of these cases was before the Board's Enforcement Committee on December 11, 2003. While no enforcement action was ordered in either case, the cautionary effect on chiropractors is unmistakable.



The Board does not impose additional requirements on chiropractors to ensure they can safely perform specialized procedures.

- The cumulative effect of Board actions regarding scope of practice seems to indicate a greater interest in promoting the profession than protecting the public. By essentially allowing chiropractors to decide what they can and cannot do based on their knowledge and training, the Board has opted not to impose requirements on chiropractors to ensure that they know and can demonstrate how to perform these specialized practices. Further, because training guidelines for properly performing these procedures are not readily available, neither chiropractors nor the public can get a clear picture of how these practices should be performed. Ultimately, for the Board to get involved to protect the public, it must receive a complaint against the chiropractor alleging harm or wrongdoing.

The Board's efforts to define scope of practice could benefit from using the rulemaking process, which provides greater opportunities for participation by affected groups.

- Clarifying scope of practice through the State's standard rulemaking process would ensure that the Board receives needed public input and additional expertise on technical issues by providing for adequate public notification in the Texas Register. It would also make the process more transparent and ensure that a public record of the Board's decision is maintained for the practitioners and the public in the Texas Administrative Code. Such a process would more clearly clarify the types of procedures that are within and those that are outside the scope of practice, and whether additional training or certification is needed to perform specialized procedures.
- Some agencies have also found that involving stakeholders earlier in the rule development process is a more effective way of soliciting input on proposed rules. The Legislature encourages agencies to involve stakeholders, particularly in the development of controversial rules, through a negotiated rulemaking process. Other state agencies, such as the Department of Health and the Commission on Environmental Quality, take advantage of stakeholder input early in rule development to avoid controversies and allow for more efficient rulemaking.

Recommendations

Change in Statute

1.1 Require the Board to develop and adopt rules that clarify practices within and outside the scope of chiropractic practice, using stakeholder input early in the process.

This recommendation would require the Board to cease its practice of issuing Board opinions and to follow the State's rulemaking process for clarifying scope of practice issues. Specifically, the Board would clearly define the practices and technology that chiropractors can and cannot use to diagnose

and treat patients by rule, using the input of stakeholders early in the rulemaking process. The recommendation would require the Board to submit all of its previous Board opinions to this rulemaking process. As part of this process, the Board would determine whether additional training or certification is required to practice certain procedures and use certain equipments.

This recommendation would also require the Board to develop guidelines for the use of early stakeholder input. The Board could solicit stakeholder input through low-cost methods by sending e-mail or using its newsletter and that of other related health licensing agencies, such as the boards of Medical Examiners, Physical Therapy and Occupational Therapy Examiners, and Nurse Examiners. The Board would still be required to publish the proposed rules according to the Administrative Procedure Act and allow the public an opportunity to oppose the rules or suggest alternatives during the comment period.

1.2 Repeal the Advisory Commission in statute.

This recommendation would repeal the multi-disciplinary advisory commission that had been established to advise the Board on new and experimental practices within the meaning of chiropractic. Because the advisory commission has not met in the past six years and has not been reauthorized by the Board, it has expired under the terms of the Government Code.

Management Action

1.3 The Board should comply with the Attorney General opinion on needle electromyogram, and inform chiropractors that this procedure is not within their scope.

This recommendation would direct the Board to retract its opinions on needle EMG and inform chiropractors that this procedure is not within their scope of practice, as the statute is currently worded. The recommendation would also direct the Board to enforce the Act against chiropractors who violate the Board's statute by using needle EMG on patients. The Board should seek clarification from the Attorney General as to whether chiropractors may interpret the results of needle EMGs.

1.4 The Board should discontinue its Technical Standards Committee, and ensure adequate public membership on its Rules Committee.

This recommendation would eliminate the need for the Technical Standards Committee since under Recommendation 1.1, the Rules Committee would address all scope of practice questions by developing and interpreting rules related to scope of practice using stakeholder involvement early in the rulemaking process. This recommendation would also require the Board to appoint at least one-third public membership on its rules committee.

Impact

These recommendations would require the Board to use the accepted State rulemaking process for dealing with scope of practice issues. Using a more open and inclusive process to clarify the scope of chiropractic practice would help resolve lingering questions as to what procedures a chiropractor can and cannot perform. Allowing stakeholders to provide advice and opinions earlier in the rulemaking process would allow the Board to benefit from the expertise of other interested parties, including other related health-care professions. These changes would also ensure that the Board complies with its statute and an opinion of the Attorney General by informing chiropractors that needle EMG is not within the chiropractic scope of practice.

Fiscal Implication

These recommendations would not have a fiscal impact to the State.

¹ Texas Occupations Code, sec. 201.002 (b).

² Texas Occupations Code, sec. 201.152.

³ *Chiropractic Society of Texas, et al., v. Texas Board of Chiropractic Examiners*, No 94-08315, (200th Dist. Ct., Travis County, Tex. Jan. 8, 1994).

⁴ Texas House of Representatives, floor debate for S.B. 673, (Austin, Texas, May 22, 1995). In the debate, Dr. Janek made the assertion that his amendment "does away with the practice of manipulation under anesthesia by chiropractors."

⁵ Op. Texas Board of Chiropractic Examiners (Sept. 11, 1997).

⁶ Texas Occupations Code, sec. 201.059.

⁷ Texas Comptroller of Public Accounts, *Realigning Chiropractic Oversight – A Performance Review of The Texas Board of Chiropractic Examiners* (Austin, Tx., 1997), p. 7-8.

⁸ Op. Tex. Att'y Gen. DM-415 (1996).

⁹ Texas Comptroller, *Realigning Chiropractic Oversight*, p. 7.

¹⁰ Texas Occupations Code, sec. 205.001.

¹¹ Comptroller, *Realigning Chiropractic Oversight*, p. 7.

¹² *Ibid.*, p.8.

¹³ Letter from the Texas Board of Chiropractic Examiners to the Honorable John Sharp, Comptroller of Public Accounts, February 21, 1997.

¹⁴ Op. Texas Board of Chiropractic Examiners (May 7, 1998).

¹⁵ Op. Texas Board of Chiropractic Examiners (Jan. 25, 2002).

¹⁶ Texas Workers' Compensation Commission, *Medicare, TWCC, & You*, Austin, TX (brochure).

¹⁷ In one case later reversed by the State Office of Administrative Hearings, TWCC ordered reimbursement for needle EMG, siding with the Board's opinion that the procedure is within scope instead of the Attorney General's contrary interpretation.

¹⁸ Texas Board of Chiropractic Examiners, *Texas Chiropractic Board News and Views*, (4th quarter 2000), p. 2 (newsletter).

APPENDIX 25



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

March 30, 1998

The Honorable Hugo Berlanga
Chairman, Committee on Public Health
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Opinion No. DM-472

Re: Use of injectable substances by licensed
chiropractors, and related questions (RQ-925)

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.¹ 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;

¹We 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.

(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, 4803.² 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.

We considered a closely related question in Attorney General Opinion DM-415. The issue there was whether the practice of acupuncture³ 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

²Prior 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.

³When 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.

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.⁴ 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."⁵ *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"),⁶ but only if certified by

⁴This 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.

⁵It 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.

⁶An 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 (continued...)

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.

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).⁷ 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. See *id.* 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.

⁶(...continued)
speaker." *Id.*

⁷During 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).

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."⁸ 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.⁹ We conclude that a chiropractor may be found to be in violation in such a case.

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

⁸A 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.

⁹You 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.

of a dangerous drug even if it does not carry or is not required to carry a prescription legend.¹⁰ 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.

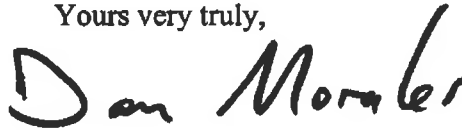
Finally, the chiropractic board asks whether chiropractors may use injectable substances in the scope of their practice that are not controlled substances, dangerous drugs, or substances otherwise barred by the Chiropractic Act. Again, the use of a needle for any purpose other than the drawing of blood 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.

¹⁰The 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).

S U M M A R Y

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,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, flowing style.

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

APPENDIX 26



TEXAS HOUSE OF REPRESENTATIVES

D.R. "TOM" UHER
Speaker Pro Tempore

February 3, 1997

The Honorable Dan Morales
Attorney General
State of Texas
Post Office Box 12548
Austin, Texas 78711-2548

Re: Legislative Intent in 1995 Amendment to Section 13a
of Vernon's Texas Civil Statutes, article 4512b

Dear General Morales:

As House Sponsor of the 1995 amendment to Section 13a, article 4512b, the Chiropractic Act of Texas ("the Act"), I wish to provide information to you concerning the intent of the 74th Legislature in selecting the phrase "incisive or surgical procedures" which is used in the amended language to Section 13a.

Prior to amendment by the Seventy-Fourth Legislature, 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."

In an attempt to further clarify what chiropractors can and cannot do, the Seventy-Fourth Legislature added the phrase "incisive or surgical procedures" to the list of prohibited practices for doctors of chiropractic. During discussions with Rep. Janek, Senator Moncrief, and other interested parties, the term "incisive" was chosen as the correct word to be used in Section 13a; explanatory language was added to clearly reflect that the use of needles by a chiropractor was permissible and was not an "incisive" procedure. Further, the term "invasive" was rejected because of its broad application that could prevent acceptable procedures by chiropractors in the treatment of these patients.

Responding to concerns of representatives for chiropractors that the word "invasive" could be construed as a much broader term than "incisive" and, in fact, could have the unintended consequence of precluding chiropractors from using needles, drafters of the Section 13a amendment chose the word "incisive" over "invasive". Further, in an attempt to make certain the

meaning of the phrase "incisive or surgical procedure" could not be construed to prohibit chiropractors' use of needles, we added the explanatory language "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 purposes of drawing blood for diagnostic testing." The reference to the use of a needle for the purpose of drawing blood was intended not to limit chiropractors' use of needles to a single purpose (i.e., of drawing blood) but to be merely illustrative of their ability to use needles.

Thank you for the opportunity to provide these comments.

Sincerely,

D. R. "Tom" Uher
Member
Texas House of Representatives

APPENDIX 27

THE CONSTITUTION OF THE STATE OF TEXAS:

**An Annotated and
Comparative Analysis**

THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS

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Participating Agencies:

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Constitutional Convention of 1974

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Texas Advisory Commission on Intergovernmental Relations

Texas Legislative Council

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inclusive definition of "officer" and, as a consequence, had frustrated the implementation of civil service systems. (See the *Explanation* of Sec. 30 for a discussion of the definition of "officer.") Adoption of this section removed the obstacles to proper functioning of civil service for a "municipality." Presumably, this means only an incorporated city. Section 3 of Article XI, However, indicates that counties and other political subdivisions may be municipal corporations—"county, city, or other municipal corporation"—and the courts have described counties as "quasi-municipal corporations." (See *Stratton v. Commissioners Court of Kinney County*, 137 S.W. 1170, 1177 (Tex. Civ. App.—San Antonio 1911, writ *ref'd*); see also the *Explanation* of Sec. 1 of Art. XI.) The supreme court did not mention that possibility when it decided a challenge of a county civil service system. (See *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974).)

By the time this section was adopted, the courts had changed course and narrowed the definition of "officer" to the extent that this section probably was no longer necessary. (See the discussion of *City of Dallas v. McDonald* in the *Explanation* of Sec. 30.) A recent supreme court decision upholding the application of a county civil service system makes it clear that this section is unnecessary for the implementation of a civil service system. (See the *Stewart* case cited earlier.)

It should be noted that the section of the constitution that authorizes cities to provide for four-year terms for city officials also excepts employees governed by civil service from the term requirement. (See Sec. 11 of Art. XI.)

Comparative Analysis

Approximately 15 states have a constitutional provision mentioning civil service or a merit system for public employees. No other state, however, appears to have a provision similar to this one. The provisions in other state constitutions are designed to abolish a "spoils system" of public employment rather than to create an exception to term requirements. Most of the states simply authorize or require the legislature to establish a merit system for employment and promotion; some of them establish a commission to administer the system and impose some enforcement provisions. The *Model State Constitution* provides:

MERIT SYSTEM. The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence. (Sec. 10.01)

Author's Comment

As the *Explanation* notes, this section was adopted to remove judicially erected obstacles to the operations of local civil service systems that apparently had already been lowered by judicial decision when the section was adopted. Nine years later, the courts lowered the obstacles even further, and it is now clear that a constitutional provision excepting "officers" subject to civil service from constitutional term requirements is unnecessary. (See *Green v. Stewart*, 516 S.W.2d 133 (Tex. 1974); *Dunbar v. Brazoria County*, 224 S.W.2d 738 (Tex. Civ. App.—Galveston 1949, writ *ref'd*).)

Sec. 31. PRACTITIONERS OF MEDICINE. The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish

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persons for mal-practice, but no preference shall ever be given by law to any schools of medicine.

History

This section originated in the Constitution of 1876 and has not been changed. Its adoption reflected a widespread move in the latter part of the 19th and early 20th centuries to control admission to medical practice. State medical societies concerned about the medical profession's public image sponsored regulatory legislation "as a response to the failure of the profession's efforts to control quackery, deception, and medical incompetence." (Quirin, "Physician Licensing and Educational Obsolescence," 36 *Albany L. Rev.* 503, 505 (1972).)

Explanation

Section 31 does two things: (1) it authorizes the legislature to regulate the practice of medicine and to punish malpractice and (2) it prohibits preferential treatment of any "schools of medicine." The first portion of the section has caused no difficulty, probably because it is superfluous. Legislative regulation of the practice of medicine by whatever means necessary to protect the people (within equal protection limitations) is within the police power of the state, without reference to constitutional authorization. (See *Collins v. Texas*, 223 U.S. 288, 296 (1912); Ex parte *Halsted*, 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) This power necessarily includes the power to punish illegal practice of medicine.

The more important—and confusing—portion of Section 31 is the last clause. The term "school of medicine" as used here does not refer to an institution for the training of physicians; rather, the courts have said it means "the system, means, or method employed, or the schools of thought accepted, by the practitioner." (Ex parte *Halsted*, 147 Tex. Crim. 453, 466, 182 S.W.2d 479, 487 (1944).) This interpretation apparently was first suggested by the supreme court in 1898 (in *Dowdell v. McBride*, 92 Tex. 239, 47 S.W. 524) and has never been challenged. Thus the effect of the clause is to prohibit the legislature from discriminating against particular kinds of practitioners, and the clause has been invoked primarily in disputes between conventional medical doctors and other types of practitioners, such as chiropractors, chiropodists, naturopaths, and osteopaths.

Section 31 contains a built-in tension. A necessary purpose of the licensing clause is to permit the legislature to determine which practitioners may be trusted to treat the public, and then to "discriminate" against the rest by barring them from practicing. But the last clause of Section 31 expressly prohibits the legislature from basing this discrimination on the school of medical thought to which the practitioner belongs.

The courts have resolved this tension primarily in two ways. First, they have held that Section 31 permits a practitioner of any school of medical thought to practice his profession as he sees fit—as long as he first obtains a conventional medical license. So long as all who wish to practice medicine are subjected to the same requirements as to education, examination, and other qualifications, the courts say there is no unconstitutional discrimination. If one is licensed to practice medicine, then he may employ "his own peculiar method of diagnosis and treatment." (See, e.g., *Schlichting v. Texas State Board of Medical Examiners*, 158 Tex. 279, 310 S.W.2d 557 (1958); *Germany v. State*, 62 Tex. Crim. 276, 137 S.W. 130 (1911).) For example, an osteopath must meet the same licensing requirements as a medical doctor; only then is he free to practice osteopathy.

The second device for accommodating practitioners other than conventional medical doctors is implemented by permitting the legislature to define medical

practice. If the activity of a particular group of practitioners is not considered the practice of medicine, then the legislature is free to "discriminate" by prescribing different licensing requirements for that profession. This is the method by which dentists and optometrists, for example, are permitted to practice without holding medical licenses. The legislature has defined a practitioner of medicine as any person:

(1) Who shall publicly profess to be a physician or surgeon and shall diagnose, treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof; (2) or who shall diagnose, treat or offer to treat any disease or disorder, mental or physical or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation. . . . (Tex. Rev. Civ. Stat. Ann. art. 4510.)

In addition, the legislature has specifically exempted dentists, optometrists, and chiropractors from the Medical Practice Act (Tex. Rev. Civ. Stat. Ann. art. 4504). These professions have their own less rigorous licensing laws. The supreme court has held that these exemptions are not "preferential treatment" in violation of Section 31 (*Schlichting v. Texas State Board of Medical Examiners*, 158 Tex., at 289; 310 S.W.2d, at 564).

Section 31 does, however, limit the legislature's power to define medical practice. The legislature cannot prescribe a different and less onerous licensing scheme for a particular profession if its activity is in fact the practice of medicine. The test seems to be whether the art in question involves the whole body and all types of ailments (as in osteopathy and naturopathy) or only a limited portion of the anatomy (as in dentistry, optometry, and chiropractic); if the art involves the former, it is the practice of medicine and an attempt by the legislature to prescribe a separate licensing scheme for that profession is preferential treatment in violation of Section 31. (*Wilson v. State Board of Naturopathic Examiners*, 298 S.W.2d 946 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).)

This distinction is the result of considerable trial and error by the legislature. As early as 1909 it was determined that osteopaths came within the definition of practicing medicine and thus must obtain a license. (Ex parte *Collins*, 57 Tex. Crim. 2, 121 S.W. 501 (1909), *aff'd sub nom.*, *Collins v. Texas*, 223 U.S. 288 (1912).) The same determination regarding naturopathy was made in 1957, when the Naturopathy Act was held unconstitutional because the practice of medicine as defined in Tex. Rev. Civ. Stat. Ann. art. 4510 included the practice of naturopathy as defined in the act, and therefore the act, in prescribing different licensing requirements, constituted an unconstitutional preference in favor of naturopathy. (*Wilson v. State Board of Naturopathic Examiners*, 298 S.W.2d 946 (Tex. Civ. App.—Austin, writ ref'd n.r.e.), *cert. denied*, 355 U.S. 870 (1957).)

The legislature was equally unsuccessful in its first attempt to regulate chiropractic separately from traditional medical practice. An early court of criminal appeals case had held that chiropractors had to qualify for a license to practice medicine under the same requirements as any other doctor. (*Teem v. State*, 79 Tex. Crim. 285, 183 S.W. 1144 (1916).) In the first Chiropractic Act, passed in 1943, the legislature defined "chiropractic" as limited to treatment of the "spinal column and its connecting tissues." The court of criminal appeals concluded that this definition embraced the whole body and therefore came within the definition of the practice of medicine; therefore the separate licensing procedures established by the act were unconstitutional as showing preference to chiropractic. (Ex parte *Halsted*, 147 Tex. Crim. 453, 182 S.W.2d 479 (1944).) The present law

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regulating the practice of chiropractic successfully limited the definition. (Tex. Rev. Civ. Stat. Ann. art. 4512b.)

Thus to regulate the practice of any of the various fields within the broad area of health care separately from the regulation of the "practice of medicine," the practice in question must be capable of a definition which distinguishes it from the practice of medicine. "While the Constitution forbids any legislation showing preference for any school of medicine, it does not forbid the legislative definition of what does and also of what does not constitute the practice of medicine." (*Baker v. State*, 91 Tex. Crim. 521, 240 S.W. 924 (1922) (upholding Optometry Act).)

The no-preference clause of Section 31 applies only to licensing. It does not prevent discrimination in practice. Thus an osteopath may be excluded from the staff of a public hospital even though he is licensed to practice medicine. (*Hayman v. City of Galveston*, 273 U.S. 414 (1927).) This is true even though the hospital is the only one in town, and even though nonstaff physicians are excluded from the hospital entirely. (*Duson v. Poage*, 318 S.W.2d 89 (Tex. Civ. App.—Houston 1958, writ *ref'd n.r.e.*).)

A curious reference to Section 31 appears in Section 51-a of Article III. The latter section authorizes the legislature to appropriate matching funds for participation in federal programs to provide medical care for welfare recipients. The last paragraph of the section provides that for these purposes the term "medical care" includes the fitting of eyeglasses by optometrists, but does not authorize optometrists to undertake eye treatment or prescribe drugs unless they are licensed physicians. This paragraph is prefaced by the statement, "Nothing in this Section shall be construed to amend, modify or repeal Section 31 of Article XVI of this Constitution" It is difficult to see how anything in Section 51-a could affect Section 31, even in the absence of this sentence. Apparently the sentence was included merely from an abundance of caution and was intended to eliminate any possibility of inadvertently expanding the permissible scope of optometrists' activities.

Comparative Analysis

No other state has a provision comparable to Section 31. However, all 50 states have legislation regulating the practice of medicine. (See generally Epstein, "Limitations on the Scope of Practice of Osteopathic Physicians," 32 *Missouri L. Rev.* 354 (1967).) The *Model State Constitution* has no similar provision.

Author's Comment

The first clause of this section, concerning licensing and malpractice, covers matters that are within the police power of the state and therefore require no specific constitutional authorization.

The only significant language in Section 31 is the no-preference clause. As the *Explanation* demonstrates, this clause does *not* prevent discrimination. The legislature is free to establish less onerous licensing requirements for such practitioners as optometrists and chiropractors by excluding them from the definition of "medical practice." The only real effect of the clause is to prevent the legislature from establishing separate licensing requirements for activities that the courts consider to be medical practice, such as osteopathy and naturopathy. As pointed out in the *Comparative Analysis*, no other state has found it necessary to deal with this matter constitutionally. Texas statutes include a prohibition against discrimination "against any particular school or system of medical practice" (Tex. Rev. Civ. Stat. Ann. art. 4504), and both Section 3 of Article I of the state constitution and the Equal Protection Clause of the Fourteenth Amendment of the

Art. XVI, § 33

federal constitution probably provide more effective protection against discrimination than does the present Section 31. Finally, this clause "has been productive of some rather specious sophistry by both the courts and the Legislature in their efforts to make reasonable distinctions in applicable law based on substantial fact differences." (3 *Constitutional Revision*, pp. 279-80.)

Sec. 33. SALARY OR COMPENSATION PAYMENTS TO AGENTS, OFFICERS OR APPOINTEES HOLDING OTHER OFFICES; EXCEPTIONS; NON-ELECTIVE OFFICERS AND EMPLOYEES. The accounting officers in this State shall neither draw nor pay a warrant or check on funds of the State of Texas, whether in the treasury or otherwise, to any person for salary or compensation who holds at the same time more than one civil office of emolument, in violation of Section 40.

History

After four amendments in a period of almost 50 years, and two proposed amendments which were defeated by the voters, this section now reads almost as it did in the original Constitution of 1876. That version read: "The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution."

Although one might guess that Section 33 was added as a reaction to "carpetbag" rule, that is not the case. Rather, it was drafted by the "carpetbaggers" themselves. The provision first appeared in the Constitution of 1869 (Art. XII, Sec. 42). The records of the Reconstruction Convention in 1868 reveal nothing about the section's purposes; the provision was adopted without discussion and without a roll call vote. (*Journal of the Reconstruction Convention of Texas*, 2d Sess. (1870), p. 477.)

Two decisions by the court of criminal appeals early in this century apparently prompted the first amendment of Section 33. In *Lowe v. State* (83 Tex. Crim. 134, 201 S.W. 986 (1918)), the court held that a district judge who became an officer in the National Guard and then went on the payroll of the federal government when called into actual military service of the United States vacated his office as judge. Four years later the same court held in *Ex parte Dailey* (93 Tex. Crim. 68, 246 S.W. 91 (1922)) that a district judge did not vacate his office by accepting the appointment of captain in the National Guard. *Lowe* was distinguishable, the court held, because in *Dailey* the judge had not been called into "actual military service of the United States." To protect officials who were members of the National Guard, Sections 33 and 40 were amended in 1926 to exclude members of the Guard and reserves from the prohibitions of both sections.

In 1932 additional amendments to both sections exempted retired armed forces officers and enlisted men. An amendment proposed but defeated in 1941 would have made Section 33 inapplicable to "officers of the United States Army or Navy who are assigned to duties in State Institutions of higher education."

The next attempted amendment of Section 33, proposed in 1961, was also defeated. It would have added retired personnel of the Air Force and Coast Guard to the list of exceptions. It also would have allowed state employees to act as consultants or as members of advisory committees with other state agencies, political subdivisions in Texas, or the federal government, or as school board members without forfeiting their state salaries provided they were not teachers. They would have been entitled to expenses for such service. Permission was made contingent upon approval by the employee's administrative head or governing board, and it was required that there be no conflict of interest.

APPENDIX 3

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11/17-20/73

TEXAS BOARD OF CHIROPRACTIC EXAMINERS

REGULAR BOARD MEETING

FEB 16 1973

LEGISLATIVE REFERENCE LIBRARY 1002 CITY NATIONAL BANK BUILDING
P. O. BOX 12488 - CAPITOL STATION AUSTIN, TEXAS

AUSTIN, TEXAS 78711
Wednesday, January 17, 1973

8:00 a.m. Examining Committee met and interviewed applicants.

8:15 Examinations began.

12:00 NOON RECESS

1:30 p.m. Examinations resumed.

5:00 Adjourned for the day.

Thursday, January 18, 1973

8:30 a.m. Examinations continued.

12:00 NOON RECESS

1:30 p.m. Practical examinations.

4:30 Adjourned for the day.

Friday, January 19, 1973

8:00 a.m. Board Meeting began. Members present: Drs. Elton Berkman, Sterling H. Pruitt, Sr., Oliver Smith, Walter Fischer, Charles Courtion, S. M. Elliott, M. E. Garrett, Jr., W. W. Lundberg and Executive Secretary, J. Manley Head. Dr. Harvey H. Kennedy was out of the State and unable to attend.

8:15 Meeting called to order by President Berkman and asked Dr. Lundberg to word the invocation.

Dr. Smith made a motion that a committee be appointed to revise the Certificates of Licensure. Second by Dr. Fischer and carried. Chair then appointed Drs. Smith and Fischer to this committee.

Motion by Dr. Fischer that the following Doctors of Chiropractic be placed on the voluntary retirement list, this being their request:

Jerry C. Chapman, D.C.	Joseph P. Gosnell, D.C.
Berta Lee Green, D.C.	Kate Nugent, D.C.

Second by Dr. Elliott and motion carried.

Motion by Dr. Courtion that license of A.D. Stone, D.C. of Haskell, Texas be cancelled for failure to pay his renewal fee. Second by Dr. Smith and carried. President Berkman called for the Executive Secretary to give his report and J. Manley Head proceeded with the budget and financial report with a balance shown, as of December 31, 1972, of \$20,656.08. The Executive Secretary's report was accepted as given.

Following the investigator's report by J. Manley Head, Dr. Courtion made a motion that report be accepted. Dr. Elliott seconded the motion and it carried.

Motion by Dr. Smith that the chairman of the School Committee communicate with the Texas Chiropractic College officials concerning the Texas Board of Chiropractic Examiners mandates regarding the program of the seminars to be acceptable for license renewal, with a return statement requested confirming their understanding and willingness to comply. It being further recommended that the seminar under consideration be held early in December. Dr. Courtion seconded the motion and motion carried. So ordered.

Page 2. Board Minutes Jan. 17-20, 1973

Motion by Dr. Garrett that the Texas Board of Chiropractic Examiners request the Texas State Chiropractic Association to amend Section 8b of the Chiropractic Act to read: "two consecutive days", by inserting the word "consecutive" following the word "two" and preceding the word "days", using refresher course requirements dated March 23, 1968 as a guideline. Dr. Fischer seconded the motion. Motion carried with Drs. Elliott and Courtion voting "no" and Dr. Pruitt abstaining.

Motion by Dr. Garrett that the Texas Board of Chiropractic Examiners grant a license to practice chiropractic in Texas to an applicant who holds a valid certificate from the National Board of Chiropractic Examiners and who meets the requirements of the Chiropractic Act of Texas, provided he has passed a satisfactory personal interview, a practical examination and has paid an additional fee of fifty (\$50.00) dollars. Motion seconded by Dr. Fischer. Motion carried.

After some discussion, it was affirmed that the examination procedures as set forth in the Chiropractic Act be adhered to.

Motion by Dr. Garrett that officers of the Texas Board of Chiropractic Examiners be elected at the July meeting, following precepts as set forth in the Chiropractic Act. Seconded by Dr. Fischer. Carried.

Dr. Fischer moved that Dr. S. M. Elliott be named the delegate from the Texas Board of Chiropractic Examiners to the meeting of the Federation of Licensing Boards this year, with Dr. Lundberg being named as alternate. Second by Dr. Smith. Carried.

Recess for lunch. Time 12:10 p.m.

Friday, January 19, 1973 1:30 p.m. President Berkman called the meeting to order. Motion by Dr. Smith to revise the Rules and Regulations of the Texas Board of Chiropractic Examiners by changing Rule #10 to read, "To employ the acupuncture system of using needles for the purpose of treating diseases or disorders of the human body, or for the relief of pain." Seconded by Dr. Pruitt. Carried.

Motion by Dr. Courtion to rescind Rule #9 of the Rules and Regulations of the Board of Chiropractic Examiners limiting newspaper advertising to two (2) column inches. Motion seconded by Dr. Pruitt. Motion failed five (5) to two (2). Vote as recorded: Drs. Elliott, Garrett, Smith, Fischer, and Lundberg "No". Drs. Courtion and Pruitt, "Yes".

Motion by Dr. Smith that the Texas Board of Chiropractic Examiners ask the Texas Attorney General's office for an official opinion as to the enforcement of Rule #9 of the Rules and Regulations of the Texas Board of Chiropractic Examiners. Second by Dr. Garrett. Carried.

Motion by Dr. Smith that the following henceforth be the official policy of the Texas Board of Chiropractic Examiners: "All changes pertaining to the rules and regulations issued or passed by the Texas Board of Chiropractic Examiners, that appear inconsistent with the Chiropractic Act of Texas, shall not become official or effective until they are approved by the Attorney General's office of the State of Texas." Motion seconded by Dr. Garrett. Carried. Dr. Elliott voting "No".

Motion by Dr. Fischer that Robert A. Calicutt and Joh Arthur Clausen, having met the requirements for licensure as detailed in Section ten (10) of the Chiropractic Act, be granted their respective licenses to practice chiropractic in the State of Texas. Second by Dr. Pruitt. Carried.

Grades posted: Calicutt, 78.3% and Clausen, 75.3%.

Committee reports were given as called, with written reports to be submitted to the Publication Committee at the July meeting for publication in the Texas Board of Chiropractic Examiners' bulletin.

Chiropractic inclusion in Medicare was discussed and the Chair appointed a committee to proceed with implementation of seminars regarding procedures to be followed in handling patients chiropractically under Medicare, with Drs. Fischer, Lundberg and Berkman to be on the committee but with all members of the Texas Board of Chiropractic Examiners to lend their aid

Page 3. Board Minutes Jan. 17-20, 1973

Board recessed until 8:00 a.m., Saturday, January 20, 1973.

Saturday, January 20, 1973

Meeting called to order by Dr. Berkman at 8:00 a.m. with all board members present. Dr. Fischer gave the invocation. Visitors present were Drs. John McMurray of Garland, Texas, Dr. C. E. Nearpass of Dallas, Texas and Roger Canard of Dallas, Texas.

There was a discussion of the Texas State Board of Examiners in the Basic Sciences' apparent policy on accepting or refusing to accept applicants for Basic Science Certificates. The Chair recommended that this matter be referred to the School Committee and the Executive Secretary and that they work out an equitable, expeditable procedure.

Motion by Dr. Fischer that Rolfe Vereide Lunde be granted a license to practice chiropractic in the State of Texas, by reciprocity, he having met the requirements as set forth in the Chiropractic Act of Texas, pending receipt of a letter of recommendation from the State in which he is licensed, as to his ethical and moral characteristics. Multiple second. Motion carried.

At this point in the agenda, hearings were scheduled on violations of Rule #9 of the Rules and Regulations and the Chair directed that the minutes so indicate. The following proceedings are in the nature of hearings of the Texas Board of Chiropractic Examiners for alleged violations of the Rules and Regulations of the Texas Board of Chiropractic Examiners pursuant to and in conjunction with the Chiropractic Act of the State of Texas.

Hearings: James S. Jackowski, D. C. of De Soto, Texas, being duly sworn and having heard the charges read and the evidence introduced, entered a pleas of guilty and agreed to cease and desist, sign an affidavit, so stating, and abide by the rulings of the Texas Board of Chiropractic Examiners.

Clifford H. Hoyer, D. C., of McAllen, Texas, being duly sworn and having heard the charges read and the evidence introduced, entered a plea of Nolo Contendere but did agree to cease and desist, sign an affidavit, so stating, and abide by the rulings of the Texas Board of Chiropractic Examiners.

R. B. Drennan, D. C., of Dallas, Texas, represented by Attorney Creighton Maynard, was duly sworn, charges were read and evidence introduced, alleging violation of Rule #9 of the Rules and Regulations of the Texas Board of Chiropractic Examiners. On advice of counsel, Creighton Maynard, that the defendant not testify against himself, counsel entered pleas of "not guilty" for Dr. Drennan.

Additional visitors now included Drs. Charles Downing and Carl Matthews of San Antonio, Texas.

Sterling H. Pruitt, Sr., D.C., of Fort Worth, Texas, represented by Attorney Creighton Maynard, was duly sworn, the charges were read and the evidence introduced alleging violation of Rule #9 of the Rules and Regulations of the Texas Board of Chiropractic Examiners. On advice of counsel that the defendant not testify against himself, counsel entered a plea of not guilty for Dr. Sterling Pruitt, Sr.

Sterling Pruitt, Jr., D.C., of Fort Worth, Texas, represented by Attorney Creighton Maynard, was duly sworn, charges were read and evidence introduced alleging violation of Rule #9 of the Rules and Regulations of the Texas Board of Chiropractic Examiners. On advice of counsel

that the defendant not testify against himself, counsel entered a plea of not guilty for Dr. Sterling Pruitt, Jr.

Mary Ann Pruitt, D.C., of Fort Worth, Texas, not being present and not having presented a valid reason for absence, she having been notified of the charges and of the hearing, it was decided to hold the hearing in absentia. The charges were identical to those of the other alleged violations, that being violation of Rule #9 of the Rules and Regulations of the Texas Board of Chiropractic Examiners. The charges were read and the evidence introduced to be duly considered by the Texas Board of Chiropractic Examiners in rendering its decision.

Dr. Carl Matthews of San Antonio, Texas, chairman of the Peer Review Committee of the Texas State Chiropractic Association, appeared before the Board, requesting the presence of a member of the Texas Board of Chiropractic Examiners at the Leadership Conference, which is a qualifying program for peer review personnel, dealing with cost control and quality control of chiropractic services. The meeting to be held February 3rd and 4th, 1973 at the Host Airport Hotel, Houston, Texas. The Chair appointed Dr. S.M. Elliott to represent the Texas Board of Chiropractic Examiners at this meeting.

Motion by Dr. Fischer that the Chiropractic Society of Texas Convention program, having met the requirements of the Texas Board of Chiropractic Examiners for license renewal, be approved. Second by Dr. Pruitt. Carried.

Motion by Dr. Elliott that the Texas State Chiropractic Association Convention program, having met the requirements of the Texas Board of Chiropractic Examiners for license renewal, be approved. Second by Dr. Garrett. Carried.

Motion by Drs. Courtion and Garrett that New Mexico State Chiropractic Convention program must be submitted to this Board by the 15th day of March, 1973, before said program can be approved for license renewal by the Texas Board of Chiropractic Examiners.

Motion by Dr. Garrett that A.C.A. and I.C.A. Convention programs and the Convention programs of all Chiropractic Colleges meeting the requirements of the Texas Board of Chiropractic Examiners for license renewal, be approved. Second by Dr. Courtion. Carried.

Due to the extenuating circumstances and necessary changes of the printed agenda, Dr. Fischer made the motion that the minutes of the last Texas Board of Chiropractic Examiners meeting be approved as published. Second by Dr. Elliott. Carried.

Mr. Head thanked the Board on behalf of himself and Mrs. Lindsey for the remembrance during the Christmas Season.

Dr. Garrett commented on the size of various State Boards, both within and without the State of Texas, and urged that future thinking along this line be considered by the Chiropractic profession.

Enforcement Committee chairman, Dr. Smith, directed the discussion on the violations of Rule #9 and asked for the Board's decision on the Doctors charged with those violations. The Board's decisions follow:

John E. Boyce, D.C., of McAllen, Texas, majority voted to find Dr. Boyce guilty of violation of Rule #9, with Drs. Courtion, Pruitt and Lundberg voting not guilty.

Page 5.

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C. H. Hoyer, D.C., Majority voted to find Dr. Hoyer guilty of violation of Rule #9. Drs. Courtion and Pruitt voting not guilty.

James S. Jackowski, D.C., Majority voted to find Dr. Jackowski guilty of violation of Rule #9. Drs. Pruitt and Courtion voting not guilty.

The Chair recommended that charges against Drs. Boyce, Hoyer and Jackowski be dropped pending receipt of signed affidavit agreeing to cease and desist violation of Rule #9. Recommendation sustained by majority vote.

R. B. Drennan, D.C., Majority voted to find Dr. Drennan guilty of violation of Rule #9. Drs. Courtion and Pruitt voted not guilty.

Sterling H. Pruitt, Sr., D.C., Majority voted to find Dr. Sterling H. Pruitt, Sr. guilty of violation of Rule #9. Drs. Courtion and Pruitt voted not guilty.

Sterling H. Pruitt, Jr., D.C., Majority voted to find Dr. Sterling H. Pruitt, Jr. guilty of violation of Rule #9. Drs. Courtion and Pruitt, Sr. voted not guilty.

Mary Ann Pruitt, D.C., Majority voted to find Dr. Mary Ann Pruitt guilty of violation of Rule #9. Drs. Courtion and Pruitt, Sr. voted not guilty.

Motion by Dr. Fischer that the Texas Board of Chiropractic Examiners withhold pronouncing sentence on Drs. R. B. Drennan, Sterling H. Pruitt, Sr., Sterling H. Pruitt, Jr. and Mary Ann Pruitt, until the Attorney General's office has ruled on the validity of Rule #9. Multiple second and motion carried.

Dr. Courtion commented briefly, indicating there is a possibility of his not being on the Board after his present term expires. He stated that he had thoroughly enjoyed working with the members of the Board of Chiropractic Examiners.

Dr. Elliott commented briefly with a similar statement.

Dr. Garrett stated that he is not seeking reappointment and wished the Board well.

Meeting adjourned at 12:30 p.m., Saturday, January 20, 1973

President Berkman requested Drs. Fischer and Lundberg to meet with him following lunch to begin preparation for seminars on Medicare procedures, as suggested by the National Chiropractic Organization.

Elton H. Berkman, D.C.,
President

W. W. Lundberg, D.C.,
Secretary

APPENDIX 4

OFFICIAL MINUTES OF THE REGULAR MEETING OF THE
TEXAS BOARD OF CHIROPRACTIC EXAMINERS

July 17, 18, 19, and 20, 1974

1212 City National Bank Building
Austin, Texas

AUG 12 1974

LEGISLATIVE REFERENCE LIBRARY
P. O. BOX 12488 - CAPITOL STATION
AUSTIN, TEXAS 78711

Wednesday, July 17, 1974

9:00 a.m. Examination committee in charge conducting examinations.

Thursday, July 18, 1974

9:00 a.m. Examinations continued.

2:30 p.m. The full board was called to order by President Dr. W. W. Lundberg. All members reported present.

The President called on Dr. Oliver Smith to give the opening prayer.

Motion by Dr. Berkman - seconded by Dr. Pruitt that the minutes of the June 5 - 7, 1974 meeting as published be approved. The motion was unanimously adopted.

President Lundberg called on Mr. Donald Nobles, the Executive Secretary for his report.

He presented a request for information from Dr. D. C. Tweed as to his securing a Texas Chiropractic license by reciprocity with Ohio.

REPLACEMENT OF LICENSE REQUESTED:

Dr. R. B. Taft requested the Board to issue him a replacement license which he declared was destroyed by U.P.S. Motion by Dr. Courtion - seconded by Dr. Stewart, that a replacement license be issued. The motion was unanimously adopted.

LICENSE RENEWAL REQUESTED:

Dr. Harry Graham requested information for an approved list of seminars for license renewal. He is to be advised by Mr. Nobles that it is necessary for him to attend a recognized chiropractic college one week for each year or fraction thereof that his license was suspended.

Mr. Nobles presented the proposed budget and explained the necessity for an increase in license renewal fee.

Motion by Dr. Berkman - seconded by Dr. Kennedy, to accept the Executive Secretary's Report - The motion was unanimously adopted.

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Board Minutes
July 17-20, 1974

ENFORCEMENT COMMITTEE REPORT:

Dr. Courtion reported on several cases under investigation. They are: Dr. Progule vs Mrs. Corona, Mrs. Elaine Hassell, Dr. Robert Griffin, Dr. F. L. Dorsey, Dr. Stafford Martin.

SPECIAL EXAMINATIONS:

Motion by Dr. Garrett - seconded by Dr. Stewart that no more special examinations be given after 1974. The motion was unanimously adopted.

HEALTH CARE PROVIDERS:

Motion by Dr. Berkman - seconded by Dr. Smith that Dr. Floyt E. Barbee, Dr. L. E. Barrows, and Dr. Don W. Pulse be certified to the Health Department as having met the requirements of this Board as providers of Health Care. The motion was unanimously adopted.

LICENSE GRANTED:

Motion by Dr. Berkman - seconded by Dr. Kennedy that the following candidates be granted a license to practice chiropractic after having met the requirements and passed the examination of this Board. They are:

Dr. James C. Lovell	86
Dr. John E. Petty	80
Dr. James S. Golden	81+

The motion was unanimously adopted.

NATIONAL BOARD DIPLOMATES:

Motion by Dr. Berkman - seconded by Dr. Kennedy that the following candidates after having met the requirements for licensure and possessing a Diplomate from the National Board of Chiropractic Examiners, and having passed the Practical Examination of this Board be granted a license. They are:

Dr. Patrick J. Thomas	95
Dr. Arvin E. Gardner	92
Dr. Edward W. Rongers	88
Dr. Karen Hammel	95

The motion was unanimously adopted.

FEDERATION OF CHIROPRACTIC LICENSING BOARDS:

Dr. Lundberg the official representative of this board reported

Board Minutes
July 17-20, 1974

on the results of the meeting. Motion by Dr. Smith - seconded by Dr. Pruitt that the Federation of Chiropractic Licensing Board's report be accepted. The motion was unanimously adopted.

It being 6:40 p.m. Dr. Berkman moved, that the Board stand recessed until 8:30 a.m. - July 19, 1974. Dr. Pruitt seconded the motion and it was adopted.

Friday, July 19, 1974

8:30 a.m. Resumed Regular Board Meeting.

RECIPROCITY:

Motion by Dr. Berkman - seconded by Dr. Kennedy that the application of Dr. Jack Oren Taylor for a Texas license by reciprocity with Kentucky be approved and license granted. The motion was unanimously adopted.

COMMITTEE REPORTS:

1. News Release Committee was discussed by Dr. Smith and he asked for pertinent information to be included as educational material to the profession. He discussed the needs at length and stressed the importance of it.
2. Advertising Review Committee: The president called on Dr. Smith to report on this committee and he pointed out the necessity for guidelines governing advertisements. Medicare, Workmens Compensation, etc. should not be contained in any personal advertisement.
3. Educational and School Committee: An extensive report was given on the activities of this committee by Dr. Berkman.
4. X-ray Committee: Dr. Kennedy presented a written report.
5. Public Health Committee: Dr. Berkman reported on the importance of raising the license renewal allowable to \$ 50.00, etc.
6. Processing and Examination Committee report was given by Dr. Lundberg.
7. Budget Committee: Dr. Pruitt presented a written report for the News Release Letter.

Motion by Dr. Courtion - seconded by Dr. Pruitt that all Committee reports be approved and that the work be implemented as soon as possible. The motion was unanimously adopted.

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Motion by Dr. Garrett - seconded by Dr. Berkman that a licensee may conduct an examination of a patient by employing objective and subjective means without piercing the skin to determine whether such a case falls within the realm of chiropractic. The motion was unanimously adopted.

It being 12:20 p.m. the Board recessed until 2:00 p.m.

The president called the meeting to order at 2:05 p.m.

HEARINGS:

Dr. N. S. Progule's case was scheduled for investigation and witnesses heard. Mr. Carl Young from Southwest Reporting Service, and the Honorable Larry Vick, Counsel for Dr. Progule were present. Mrs. Linda Corona, the complainant, was sworn in as she took the witness stand. After making allegations and being extensively questioned by counsel, she was dismissed. Dr. M. A. Huneycutt was called as an expert witness.

Mrs. Debbie Anderson and Mrs. Betty Progule, both chiropractic assistants employed by Dr. Progule's office were witnesses in the case. Counsel Vick put Dr. Progule on the stand for questioning. The Board deliberated over the allegations and made the following deposition: Dr. Smith moved that Dr. Progule be exonerated of the allegations made against him by Mrs. Corona and that this board not prefer charges against him. The motion was seconded by Dr. Stewart and unanimously adopted.

Note: The board instructed the President to write Mrs. Corona of the Board's decision.

Dr. E. R. Stephenson is called in for a hearing on alleged violations of section 1 and 14A subsection 6 of the chiropractic act. After much discussion Dr. Stephenson agreed to cease and desist the use of acupuncture, acupressure, acutherapy in connection with his chiropractic practice nor use any of the above mentioned terms or the prefix "acu" in any of his advertisements in the future. Upon the above premise no further action was taken by the board.

ADVERTISEMENT VIOLATION:

Dr. F. L. Dorsey was called in to answer charges of violations of the advertising code. Dr. Dorsey acknowledged the advertisement but stated that it was not printed as he had given it to the publisher. Dr. Courtion moved that Dr. Dorsey be found guilty as charged and that he be placed on probation for one

Board Minutes
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year. The motion was seconded by Dr. Berkman and unanimously adopted.

RULE 10 AMENDED:

Dr. Smith moved that the following resolution be adopted:

whereas, the American illustrated Medical Dictionary, Dorland, latest edition, defines acupressure as "Compression of a blood vessel by inserting needles into adjacent tissues";and

whereas, said dictionary defines acupuncture as "the insertion of needles into a part for the production of counter irritation";and

whereas, said dictionary defines "acu-" as "Combining form-denoting relationship to a needle" and

whereas, the Attorney General of the State of Texas had ruled that the use of needles in chiropractic is prohibited;

NOW THEREFORE BE IT RESOLVED, that Rule 10 of the Rules and Regulations of the Texas Board of Chiropractic Examiners be amended to read as follows:

"Rule 10.(A) To employ the acupuncture system of using needles for the purpose of treating diseases or disorders of the human body, or for the relief of pain.

(B) To employ needles in any manner or to advertise any procedure under any name that denotes or implies that needles are used in the procedure or to employ the terms 'acupuncture', 'acupressure', 'acutheraapy', or any other term containing the prefix 'acu-' in connection with any procedure."

The motion was seconded by Dr. Stewart and unanimously adopted.

BLUE BOOK

Dr. Berkman moved that the 'Blue Book' containing the chiropractic act be brought up to date with the rules and statutory changes by having them published in the news letter. The motion was seconded by Dr. Smith and unanimously adopted.

Recessed until 8:00 a.m. July 20, 1974.

Saturday, July 20, 1974

8:10 a.m. President Lundberg called the meeting to order.

Dr. Berkman moved that the CST proposal for 1975 refresher program be approved. The motion was seconded by Dr. Pruitt and

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unanimously adopted.

BOARD POLICY:


Dr. Berkman moved; that adjunctive measures, when employed by the doctor must be used in conjunction with an adjustment. When adjunctive measures are utilized requiring extended time, charges must be commensurate with the length of time spent with the patient; however, charges should be within the relative value scale set by the State and National Associations. The motion was seconded by Dr. Pruitt and unanimously adopted.


AM-BU-TRAC:

The President appointed a special committee to investigate Am-Bu-Trac and report to the Board.

The committee is: Dr. Smith, Chairman
Dr. Garrett,
Dr. Fischer.

There being no further business Dr. Pruitt moved that we stand adjourned at 12:05 p.m. July 20, 1974. The motion was seconded by Dr. Fischer and adopted.


W. W. Lundberg, D. C.
President


Walter H. Fischer, D. C.
Secretary - Treasurer.

APPENDIX 5



The Attorney General of Texas

JIM MATTOX
Attorney General

February 16, 1984

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1367
Telecopier 512/475-0266

Honorable Margaret Moore
Travis County Attorney
P. O. Box 1748
Austin, Texas 78767

Opinion No. JM-125

Re: Constitutionality of rules
of Texas State Board of Medical
Examiners relating to acupunc-
turists

714 Jackson, Suite 700
Dallas, TX. 75202-4506
214/742-8944

Dear Ms. Moore:

You have requested our opinion as to whether the current regulations of the Texas State Board of Medical Examiners concerning the practice of acupuncture violate the constitutional rights of acupuncture patients and practitioners. We find that four of the regulations do not meet the "reasonable relationship test."

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

The Medical Practices Act, article 4495b, section 1.03, subsection 8(A), V.T.C.S., defines as "practicing medicine" those

1001 Texas, Suite 700
Houston, TX. 77002-3111
713/223-5886

who shall diagnose, treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method and to effect cures thereof and charge therefor, directly or indirectly, money or other compensation.

806 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1685
512/682-4547

For purposes of this opinion, we will assume that this definition encompasses all who perform acupuncture for compensation. Thompson v. Texas State Board of Medical Examiners, 570 S.W.2d 123, 127, (Tex. Civ. App. ~ Tyler 1978, writ ref'd n.r.e.), citing several out-of-state decisions, held that acupuncture was within the definition of practicing medicine. Nevertheless, a number of other healing arts or professions which otherwise would constitute the practice of medicine have been excluded from the definition of "practicing medicine" by the legislature. See, e.g., articles 4512(b) (chiropractors); 4512c (psychologists); 4512d (athletic trainers); 4512e (physical therapists); 4513-4528c (nurses); 4542a (pharmacists); 4543-4551h (dentists); 4552-1.02 (optometrists); 4567-4575a (podiatrists), V.T.C.S. Acupuncture has not been so excluded.

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

The Texas State Board of Medical Examiners is charged with the primary responsibility for regulating the practice of medicine, and

has the authority to issue regulations concerning acupuncture. V.T.C.S. art. 4495b. The question raised by your letter is whether 22 Texas Administrative Code, sections 183.1-183.12 meet constitutional standards. These sections establish a system in which physicians supervise acupuncturists. In addition to giving the physician general responsibility for the acupuncture practitioner, the regulations are very specific in regard to the place and manner of the supervision. Among the requirements of the regulations are the following: (1) the acupuncturist is not allowed to work in a location "physically separate" from the supervising physician, 22 T.A.C. §183.6(a); (2) a physician may supervise only one acupuncturist, 22 T.A.C. §183.7; (3) there may be no separate billing for services rendered by the acupuncturist, 22 T.A.C. §183.5; and (4) an acupuncturist must wear a name tag with printing at least 3/8 inches in height with the designation "Mr., Miss, Mrs. or Ms." and surname plus "acupuncturist." 22 T.A.C. §183.4(c).

The "reasonable relationship test" is the basic constitutional standard for determining whether state statutes and regulations comply with the Fourteenth Amendment to the United States Constitution. The reasonable relationship test requires that regulations and statutes be rationally related to a constitutionally permissible purpose. Vance v. Bradley, 440 U.S. 93 (1979); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). In the case of the board's regulations regarding acupuncture, protection of the public health is unquestionably a permissible purpose. Thus, here the only issue under this test is whether the board's regulations are reasonably calculated to effect that purpose.

In Wensel v. Washington, (D.C. Super. Ct. 1975), reprinted as the appendix to Lewis v. District of Columbia Commission on Licensure to Practice the Healing Art, 385 A.2d 1148, 1154 (D.C. 1978), the court used the "reasonable relationship test" to examine regulations which permitted only a licensed physician or someone under the direct and immediate supervision of a licensed physician to perform acupuncture and required that the acupuncturist not receive fees from patients but instead be an employee of the supervising physician. The parallels to the Texas regulations are quite obvious. The court in Wensel found that local medical schools did not train physicians in acupuncture and that doctors in the District of Columbia did not have skill and knowledge in the area. The court also found that the acupuncture regulations, which purported to protect the public health, in fact authorized licensed physicians to administer or supervise acupuncture treatment, notwithstanding their total lack of knowledge of acupuncture, and prevented knowledgeable and skilled individuals from practicing the art. The court held that under such facts the entire body of regulations was without a rational basis and therefore violated the due process clause of the United States Constitution.

The court in Andrews v. Ballard, 498 F. Supp. 1038, 1051 (S.D. Tex. 1980), which held unconstitutionally void earlier regulations of the Texas Board of Medical Examiners respecting acupuncture, found that "Texas medical schools . . . do not presently offer formal training in either the theory or practice of acupuncture." You state that this continues to be the case. 22 Texas Administrative Code, sections 183.1-183.12 require that a supervising physician submit information on his or her professional background, including medical education, internship, residency, hospital staff positions, and "such other information the board deems necessary, especially including his or her familiarity with the practice of acupuncture." However, you state that the board approves supervising physicians without actually examining or testing their knowledge of or competency in the field of acupuncture. This failure of the board to examine or test sponsoring physicians' competence in the particular field of acupuncture and the continuing absence of formal training in acupuncture in the state's medical schools parallel the fact findings of the court in Wensel that resulted in the invalidation of acupuncture regulations of the District of Columbia.

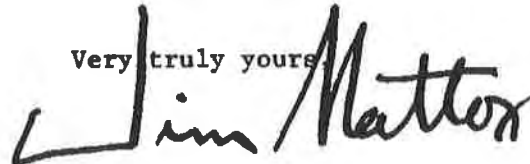
These facts become of greater constitutional significance when they are viewed in the context of the four specific provisions of the Texas regulations which were referred to above. We can find no rational relationship between protecting the public health and (1) restricting an acupuncturist from having "an office independent of or physically separate from the supervising physician" without a relevant description of the work prohibited in that office or regardless of the proximity of the office to the supervising physician and his ability to supervise, (2) allowing only one acupuncturist per supervising physician, without regard to the physician's competence, (3) preventing separate itemized billing for acupuncturist services, or (4) compelling the wearing of lapel pins. Hence, the respective Texas Administrative Code provisions, i.e., the last sentence of subsection (a) of section 183.6, the first sentence of section 183.7, section 183.5, and subsection (c) of section 183.4, are void on their face. When regulations such as these are coupled with a regulatory scheme in which there is no meaningful examination into the competency of the sponsoring physician in the particular field of acupuncture and apply in a state whose medical schools offer no formal training in acupuncture, then, as in Wensel, the regulations as a whole may not be reasonably related to safeguarding the public health and could therefore be unconstitutional in their entirety.

S U M M A R Y

Four specific Board of Medical Examiners Regulations, concerning acupuncture, 22 Texas Administrative Code, sections 183.4(c), 183.5 the last sentence of section 183.6(a), and the first

sentence of section 183.7, are in violation of the Fourteenth Amendment of the United States Constitution because there is no rational relationship between them and the protection of the public health.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive, slightly stylized font. The first name "Jim" is written in a larger, more prominent script than the last name "Mattox".

J I M M A T T O X
Attorney General of Texas

TOM GREEN
First Assistant Attorney General

DAVID R. RICHARDS
Executive Assistant Attorney General

Prepared by Colin Carl
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Rick Gilpin, Chairman
Colin Carl

APPENDIX 6

21300.2

M 668

6-9-88

C.1

JUL 26 1988

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
BOARD MEETING MINUTES
JUNE 9, 1988

Notice having been duly posted with the Office of the Secretary of State, the Texas Board of Chiropractic Examiners met in open session at 2:00 p.m., on June 9, 1988, in the Pancho Villa room at the Westin Paso Del Norte, 101 South El Paso Street, El Paso, Texas.

LEGISLATIVE REFERENCE LIBRARY
P. O. BOX 12488 - CAPITOL STATION
AUSTIN, TEXAS 78711

ROLL CALL

Present:

Clay Salyer, D. C., President
Dennis Teal, D. C., Vice President
David Albracht, D. C.
James Franklin, D. C.
Jay Perreten, D. C.
Raymond Wheless

Absent:

Edmund Lacy, Ph.D., Secretary-Treasurer
Ben Procter, Ph.D.
Sterling Pruitt, Sr., D. C.

Call to Order

Dr. Salyer called the meeting to order and made an announcement as to the presence of a quorum.

Approval of Minutes

Dr. Teal made a motion, seconded by Dr. Albracht, to approve the minutes of the February 26, 1988, Board meeting.

Yeas:

All Board members present voted "yes".

Nays:

None

Public Hearing concerning Adjunctive Therapy, Section 75.4, Rules of Practice

Dr. Salyer gave a brief statement concerning guidelines in conducting the Public Hearing.

Richard Combs, Physical Therapy Association, and Lester Prieto, Physical Therapy Association, wished to reserve their comments until later in the hearing.

Dr. Michael R. Martin, representing Texas Chiropractic Association, stated the proposed amendment to the Adjunctive Therapy rule should be withdrawn. Dr. Martin stated the rule as it stands is acceptable.

Dr. M. T. Morter, Jr. reserved comment until a later time.

Gene Kelly, Attorney, was in attendance as representative of Dr. M. T. Morter, Jr. Mr. Kelly stated the proposed rule is not well drafted, and pointed out several deficiencies and legal problems with the proposed rule.

Dr. M. T. Morter, Jr. asked that the proposed rule be withdrawn because he felt the public would not benefit. Richard Combs and Lester Prieto objected to the rule as written.

There were no other comments.

Public Hearing concerning examining applicants on physiotherapy, Section 71.8(a)(c), Rules of Practice.

Richard Combs, Physical Therapy Association, stated that administering a physiotherapy examination is not necessary.

Lester Prieto, Physical Therapy Association, suggested the need to change the terminology from physical therapy to physical modalities.

There were no other comments.

New Business:

Board discussion was held and consideration given as to the legality of an executive session regarding Peer Review.

Dr. Franklin made a motion, seconded by Dr. Albracht, to hold discussion about Peer Review in open meeting. Attorney General Representative Nazario Saldana advised that Peer Review is of public interest and should be discussed in open meeting. Dr. Salyer suggested that this be brought up when appropriate on the agenda. All Board members agreed.

Yeas: All Board members present voted "yes".

Nays: None

Board Committee Reports:

Dr. Albracht reported on a letter he had received from Doctors Hospital in Houston, Texas, and the response letter he had drafted, regarding hospital protocol. Dr. Salyer called for Board approval of that reply, and future responses to same inquiries, with approval of Nazario Saldana. Dr. Teal had questions concerning the letter. Discussion followed. Dr. Perreten made a motion, seconded by Dr. Franklin, to accept draft letter.

Yeas: All Board members present voted "yes".

Nays: None

Board consideration to adopt Section 78, Chiropractic Radiologic Technologists, Rules of Practice, relating to the certification of chiropractic radiologic technologists.

Mr. Nazario Saldana acknowledged his approval of the proposed rule as amended. Dr. Teal stated he felt the use of cineradiography should be included in the rule as a dangerous procedure. Dr. Franklin objected to making a quick decision concerning this rule and Dr. Albracht agreed. Dr. Franklin stated he felt that comments should be received from chiropractic colleges concerning educational requirements for Radiologic Technologists.

Dr. Franklin made a motion, seconded by Dr. Albracht, to table Radiologic Technologists rule until the July Board meeting.

Yeas: Drs. Salyer, Albracht, Franklin, Perreten, and Mr. Wheless voted "yes".

Nays: Dr. Teal

Board consideration to adopt the repeal of Section 77.2(2) thru (10), Rules of Practice, relating to Publicity.

Dr. Teal made a motion, seconded by Dr. Albracht, to adopt the repeal of Section 77.2(2) thru (10).

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration of Budget request for Fiscal Year 1990-1991.

Dr. Teal made a motion, seconded by Dr. Perreten, to accept proposed budget request.

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to amend Section 75.3, Rules of Practice, relating to Diagnostic Technique:

Discussion was held by the Board to propose to amend Section 75.3, Diagnostic Technique, by deleting the phrase "but shall not include vaginal, rectal, or breast examinations". The rule as amended would read:

"Diagnostic techniques are authorized where necessary to make proper diagnosis preparatory to

spinal treatment. Such techniques include but are not limited to: x-rays and physical examination."

Dr. Teal made a motion, seconded by Dr. Albracht, to propose to amend the rule by deleting the phrase "but shall not include vaginal, rectal, or breast examinations".

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to repeal the last sentence in Section 75.1(5), Rules of Practice, relating to advertising.

Discussion was held concerning the repeal of the last sentence relating to advertising the practice of chiropractic in public places.

Dr. Teal made a motion, seconded by Dr. Albracht, to propose to repeal the last sentence in Section 75.1(5).

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to repeal Section 75.1(3), Rules of Practice, relating to advertisement terms.

Discussion was held concerning the repeal of the use of advertising terms such as "most modern", "scientific", "latest procedures", "best equipped", or any other like words or phrases.

Dr. Perreten made a motion, seconded by Dr. Teal, to propose to repeal Section 75.1(3).

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to repeal Section 75.1(7), Rules of Practice, relating to acupuncture.

Discussion was held concerning the repeal of Section 75.1(7) relating to the use of the acupuncture system of using needles to treat diseases and disorders of the human body and for the relief of pain.

Dr. Teal made a motion, seconded by Mr. Wheless, to propose to repeal Section 75.1(7) regarding acupuncture.

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to repeal Section 75.1(8), Rules of Practice, relating to employing the use of needles.

Discussion was held concerning the repeal of Section 75.1(8) relating to employing needles in any manner or advertising any procedure that implies needles are used.

Dr. Teal made a motion, seconded by Mr. Wheless, to propose to repeal Section 75.1(8) regarding the use of needles.

Yeas: All Board members present voted "yes".

Nays: None

Dr. Salyer called for a fifteen minute recess.

Dr. Salyer called the meeting to order.

Board discussion and consideration to amend and clarify Section 75.4, Rules of Practice, relating to Adjunctive Therapy.

Discussion was held concerning the adoption of the proposed amendments to the Adjunctive Therapy rule. Dr. Franklin suggested contacting the chiropractic colleges for their comments on adjunctive therapy. Dr. Albracht suggested an alternative that the rule should include those standards of physical medicine practiced as related to the spine. Dr. Salyer reminded the Board members that a motion was made and passed to table action on the rule at the February board meeting. Dr. Salyer stated that before further action, the Board must vote to take the motion off the table. Dr. Franklin made a motion, seconded by Dr. Albracht, to take the motion off the table.

Yeas: Drs. Albracht, Franklin, and Mr. Wheless voted "yes".

Nays: Drs. Salyer, Teal, and Perreten voted "no".

The motion remains on the table.

Board discussion and consideration to amend Section 71.10(a)(b), Rules of Practice, relating to reexaminations.

Discussion was held concerning reexaminations relating to passing scores on reexaminations.

Dr. Teal made a motion to require the same scores on reexam as required by statute on the initial exam. There was no second. A statement was made that scoring for reexams is in the statute. Dr. Teal

made a motion, seconded by Dr. Albracht, to propose to repeal Section 71.10(a)(b).

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to amend Section 71.3(a), Rules of Practice relating to qualifications of applicants for examination.

Discussion was held concerning qualifications of applicants. Dr. Salyer stated that an Attorney General's Opinion Request 1295 determined that as long as the applicant takes courses at an institution that issues credits accepted by the University of Texas at Austin, the applicant may take the required science courses at any post-secondary institution. No action was taken to amend this rule.

Board discussion and consideration to repeal, in its entirety, Section 77.3, Rules of Practice, relating to advertising guidelines.

Dr. Perreten made a motion, seconded by Mr. Wheless, to propose to repeal Section 77.3, Advertising Guidelines, Rules of Practice.

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to repeal, in its entirety, Section 77.4, Rules of Practice, relating to advertisement of fees.

Dr. Perreten made a motion, seconded by Dr. Albracht, to propose to repeal Section 77.4, Advertisement of Fees, Rules of Practice.

Yeas: All Board members present voted "yes".

Nays: None.

Board discussion and consideration to repeal, in its entirety, Section 77.5, Rules of Practice, relating to miscellaneous advertising.

Dr. Albracht made a motion, seconded by Dr. Franklin, to propose to repeal Section 77.5, Miscellaneous, Rules of Practice.

Yeas: All Board members present voted "yes".

Nays: None.

Dr. Salyer stated that the Board would discuss the definition of "subluxation" and "adjustment" at the July Board meeting.

Board met in Executive Session to discuss legal and personnel matters.

Federal Trade Commission Report.

Discussion was held concerning the recommendation made to the Board by the Federal Trade Commission concerning several advertising rules that are now in effect. The Federal Trade Commission recommended that the Board repeal or revise Rules 75.1(1), 75.1(3), 75.1(5), 75.1(6), 77.2(1), 77.2(2), 77.2(3), 77.2(4), 77.2(5), 77.2(8), 77.2(9), 77.2(10), 77.3, 77.4(b) and 77.5(b).

Dr. Perreten made a motion, seconded by Dr. Franklin, that the Board accept the Federal Trade Commission recommendations.

Yeas: All Board members present voted "yes".

Nays: None.

Texas Chiropractic Association Legislative Committee report.

Dr. Salyer reported to the Board the following legislative recommendations from the Texas Chiropractic Association for consideration by the Board:

Section 8a(d)(e), Suspension of License for Non-Renewal, Texas Chiropractic Act, suggested changing to 1 year instead of 2 years.

Section 8b(2), Pre-requisites to Annual Renewal, Texas Chiropractic Act, suggested taking out everything down to "provided that new licensees during twelve (12) months immediately preceding said January 1st, by examination, shall be granted renewal without attending said educational programs".

Section 9, Reciprocity, Texas Chiropractic Act, suggested changing the word "equal" to "equivalent" in the first sentence and add to the end of the same sentence "and that he has continuously practiced chiropractic for at least five (5) years preceding application to this Board".

Section 10(a), Examinations, Texas Chiropractic Act, suggested adding "every applicant for licensure by examination shall pass by the time he makes application to sit for the Texas Chiropractic examination has taken and successfully passed all parts of the exam given by the National Board of Chiropractic Examiners, including written clinical competency exam and such conditions established by rule of the Board and all applicants for licensure by examination successfully pass a practical

examination given by the Board and a written examination testing applicants knowledge and understanding of the laws and regulations in regard to the practice of chiropractic in the State. The Board may elect to give these examinations in the student's last semester who hold satisfactory grades upon receipt of a certified copy of diploma, issue a license".

Section 10(d), Examinations, Texas Chiropractic Act. Omit last sentence in its entirety.

Dr. Mike Martin, Chairman, Texas Chiropractic Association Legislative Committee, commented on recommendations. Dr. Martin also suggested the appointment of a Board Legislative Committee to work with the Texas Chiropractic Association Legislative Committee. Dr. Salyer made recommendation for Legislative Committee: Drs. Salyer, Teal, Franklin, Perreten, and Mr. Wheless.

Board consideration to adopt Section 71.8(a) and (c), Rules of Practice, relating to examining applicants on physiotherapy and relating to National Boards.

Dr. Teal made a motion, seconded by Dr. Albracht, to adopt Section 71.8(a), Practical and Theoretical Examinations, Rules of Practice, concerning administering a physiotherapy examination to candidates using the National Board physiotherapy exam.

Yeas: All Board members present voted "yes".

Nays: None.

Dr. Perreten made a motion, seconded by Dr. Teal, to adopt Section 71.8(c), Practical and Theoretical, Rules of Practice, with changes to read: The board shall grant a license to an applicant that has successfully passed all parts of the National Board exams.

Yeas: All Board members present voted "yes".

Nays: None

Board discussion and consideration to amend and clarify Section 75.4, Rules of Practice, relating to Adjunctive Therapy.

Dr. Franklin made a motion, seconded by Mr. Wheless, to untable the Adjunctive Therapy rule.

Yeas: Drs. Salyer, Albracht, Franklin, Perreten, and Mr. Wheless

Nays: Dr. Teal

Dr. Franklin made a motion, seconded by Dr. Albracht, to withdraw the proposed Adjunctive Therapy rule.

Yeas: Dr. Salyer, Albracht, Franklin, Perreten, and Mr. Wheless

Nays: None

Abstained: Dr. Teal

Board discussion and consideration of any unfinished and/or new business and additional general information concerning agency operations:

No unfinished business.

New Business: Dr. Albracht made a motion, seconded by Dr. Franklin, that the Board discuss Peer Review, and open discussion to comments from the audience.

Yeas: Drs. Salyer, Albracht, Franklin, Perreten, and Mr. Wheless

Nays: None

Abstained: Dr. Teal

Dr. Salyer recognized Dr. George Aubert, Texas Chiropractic Association. Dr. Aubert discussed a letter that Dr. Carroll Guice, D.C. wrote as Chairman of Peer Review Committee to Dr. Bill Timberlake, D.C. Dr. Aubert stated he was very upset about the letter and asked why the Board would allow a letter to be written that appears to regulate fees. Dr. Aubert requested the Board appoint a new Chairman for the Peer Review Committee. Dr. Salyer recognized Dr. Bill Timberlake, D.C. Dr. Timberlake explained his knowledge of distribution of the letter.

Board discussion followed.

Dr. Albracht made a motion, seconded by Dr. Perreten, to further investigate into what actually happened with the assistance of Mr. Nazario Saldana, Attorney General Representative, then restructure Peer Review Committee and appoint new members.

Mr. Saldana suggested restructuring of Peer Review Committee at the next Board meeting, with posting of such intent in Texas Register. He also suggested that stationery not be given to anyone except Board members in the future.

Raymond Wheless made an amendment to Dr. Albracht's motion, that the Board ask for Dr. Guice to resign

from the Executive Peer Review Committee.
Dr. Albracht seconded.

Yeas: All Board members present voted "yes".

Nays: None

Dr. Albracht made a motion, seconded by Dr. Perreten, that no policy be set until approved by the Board and reviewed with Assistant Attorney General Nazario Saldana. Discussion followed. Dr. Albracht withdrew the motion.

Dr. Salyer asked Mr. Saldana what procedure the Board should follow to restructure the Peer Review Executive Committee. Mr. Saldana stated the Board does have the authority to ask Peer Review Committee members to resign. Dr. Franklin inquired as to whether the Attorney General's office has an investigative process. Dr. Michael Martin made comments on Peer Review.

Dr. Salyer recognized Dr. Oliver Smith, Jr., D.C. Dr. Smith commented that the Department of Health could assist the Board.

Adjournment: There being no further business, the meeting was adjourned.

Clay Salyer DC
Dr. Clay Salyer, D. C.

7-21-88
Date

Jennie Smetana
Jennie Smetana, Notary Public
State of Texas
Commission Expires: 6-1-91

7-21-88
Date

(SEAL)

APPENDIX 7



Texas State Board of Acupuncture Examiners

1812 CENTRE CREEK DRIVE, SUITE 300
P.O. BOX 149134
AUSTIN, TEXAS 78714-9134

(512)834-7728
FAX (512)834-4597

RECEIVED

SEP 19 1995

RQ-833

September 15, 1995

Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Opinion Committee

FILE # ML-35965-95

I.D. # 35965

Re: Request for Attorney General Opinion

Dear Attorney 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 licensed chiropractors performing acupuncture and chiropractors advertising that they perform acupuncture.

Attached is a letter of concern that has brought this matter to the attention of the Texas State Board of Acupuncture Examiners. This letter provides a synopsis of the general concerns related to the following issues:

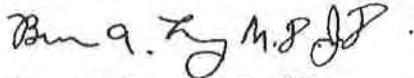
- (1) Is the practice of acupuncture within the scope of practice for a licensed Texas chiropractor?
- (2) Is licensure as an acupuncturist required for a licensed Texas chiropractor to engage in the practice of acupuncture?
- (3) If the practice of acupuncture is within the scope of practice for a licensed Texas chiropractor and licensure as an acupuncturist is not required, is advertising the practice of acupuncture by a licensed chiropractor in violation of statutes prohibiting false or misleading advertising if the chiropractor fails to indicate in the advertisement that he is not licensed by the Texas State Board of Acupuncture Examiners?

Your attention is invited to the enclosed letter from Mr. David Cohen who wrote to this agency on behalf of the Texas Acupuncture Association. This correspondence addresses these issues and provides statutory references in support of the position that the practice of acupuncture is not within the scope of practice for a licensed chiropractor and an acupuncture license is required for chiropractors who wish to perform acupuncture. In addition, the enclosed correspondence provides support for the position that advertising the practice of acupuncture by a chiropractor is

false and misleading and in violation of state statute.

Based on the concerns raised in the enclosed correspondence and the significance of the issues involved, I have been directed by the Texas State Board of Acupuncture Examiners to request an attorney general opinion to definitively resolve these questions. If additional information is needed, please contact the agency's General Counsel, Tim Weitz, at 834-7728 ext. 480.

Sincerely,

A handwritten signature in dark ink, appearing to read "Bruce A. Levy, M.D., J.D.", with a stylized flourish at the end.

Bruce A. Levy, M.D., J.D.
Executive Director

Enclosure

xc: Texas State Board of Acupuncture
Texas State Board of Chiropractic Examiners

APPENDIX 8



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

September 23, 1996

Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board
of Acupuncture Examiners
1812 Centre Creek Drive, Suite 300
P.O. Box 149134
Austin, Texas 78714-9134

Opinion No. DM-415

Re: Whether the practice of acupuncture
is within the scope of practice for a
licensed Texas chiropractor and related
questions (RQ-853)

Dear Dr. Levy:

You inform us that certain health-care practitioners, who are licensed as chiropractors but not as acupuncturists,¹ 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?²
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"

¹An acupuncturist is a practitioner of acupuncture. See V.T.C.S. art. 4495b, § 6.02(2).

²We 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.

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 moxibustion³ 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.⁴ [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.⁵ 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

³"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 CYCLOPEDIA 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 CYCLOPEDIA MEDICAL DICTIONARY M-66*.

⁴For 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.

⁵We assume that the chiropractors about which you ask are not licensed acupuncturists.

acupuncture or a license encompassing the practice of acupuncture commits a class A misdemeanor. *Id.* § 6.12(b).

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 subluxation⁶ 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.⁷

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.⁸ 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

⁶"Subluxation" is "a partial dislocation, a sprain." XVII OXFORD ENGLISH DICTIONARY 42 (2d ed. 1989).

⁷The 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)).

⁸In 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)).

“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.⁹

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 CYCLOPEDIA 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).

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 CYCLOPEDIA 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.”¹⁰ V.T.C.S. art. 4495b, § 1.03(a)(15).

⁹Prior 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.”

¹⁰The 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).

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"¹¹ or "surgical,"¹² 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.

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 acupuncture.

¹¹Courts 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.

¹²We 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).

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.

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 not within 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.

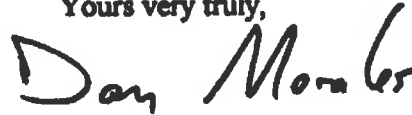
You premise your last question on an affirmative response to your first question and a negative response to your second question. We have reached the opposite conclusions. Consequently, we need not answer your last question.

S U M M A R Y

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,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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

APPENDIX 9

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7-11-97

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
BOARD MEETING MINUTES
JULY 11, 1997

Notice having been duly posted with the Office of the Secretary of State, the Texas Board of Chiropractic Examiners met in open session on July 11, 1997, at the William P. Hobby Building, 333 Guadalupe, Room 102, Austin, Texas.

Roll Call

Present:

Oliver R. Smith, Jr., D.C., President
Carolyn Davis-Williams, D.C., Vice-President
Lisa Garza, J.D.
Richard Gillespie, D.C.
Hubert Pickett
Cynthia Vaughn, D.C.

Absent:

Keith Hubbard, D.C., Secretary-Treasurer
Dora Valverde
John Weddle, D.C.

Guests:

Judge John Cornyn
Judge, Texas Supreme Court
Brenda Loudermilk
Assistant Attorney General
Christine C. Leftwich
Law office of John D. Pringle
Des Taylor, Attorney
Dr. Renese Garcia
Dr. James Polk
Other staff in attendance

Meeting was called to order by Dr. Oliver Smith. Guests were acknowledged

Swearing in of new Board members Lisa Garza, Richard Gillespie, D.C., Cynthia Vaughn, D.C. by Judge John Cornyn of the Texas Supreme Court.

Item I

Approval of the minutes of the May 8, 1997 Board meeting.

Discussion: None

Action: A motion was made to accept the minutes as presented and seconded. The motion carried unanimously.

Item II

Report of the President on Board activities since last Board meeting.

Discussion: Dr. Smith reported:

1. Third Quarter Measures Report. Dr. Smith discussed the results of the last audit report received about the agency and his concern for the poor outcome.

2. Dr. Smith read a letter addressed to Joyce Kershner commending her for her help with processing National Board results.

Item III

A. Enforcement Committee Report

1. Enforcement action from September 1, 1996 to July 1, 1997

Discussion: Dr. Davis-Williams discussed the report and its details. Dr. Smith asked Dr. Davis-Williams to clarify and explain to the new Board members about the unusually high number of informal conferences held recently, as well as discuss the reasons why the older cases are still pending. Mr. Zavala also contributed to the explanation. Dr. Vaughn asked about the differences between informal and formal conferences, and received information regarding the enforcement process from Ms. Loudermilk.

Action: None required.

2. Cases #94-29, 94-64, 95-5, 95-6, 95-8, 95-9, 95-10, 95-11, 95-70, 95-81, 95-191, 95-195, 95-324, 96-1, 96-80, 96-161, 96-206, 96-238, 97-12 to 97-170

Discussion: Discussion of cases 94-29 and 94-64 and presentation of an agreed order to be approved and signed by the Board. Dr. Smith asked for a brief overview of the cases. Ms. Loudermilk discussed the cases.

Action: A motion was made by Dr. Cynthia Vaughn to accept the agreed order as presented and seconded by Dr. Carolyn Davis-Williams. The motion carried unanimously.

3. Compliance visits status

Discussion: Dr. Smith offered historical information regarding compliance visits to the new Board members. Ms. Loudermilk talked about her concerns with compliance visits, and possible violation of the Fourth Amendment,

in terms of conducting warrantless inspections. She expressed concern that current statute does not specifically authorize compliance visits; that the general authority currently given to the Board is not sufficient to allow for compliance visits. She also pointed out that the Board does not have rules in place dealing with compliance visits. Ms. Loudermilk discussed the attempted passage of a bill which would have allowed the Board to conduct compliance visits. However, the bill died. Ms. Loudermilk gave her legal opinion to the Board, that it should not conduct compliance visits. She recommended advising the Comptroller's office, which initially suggested that the Board perform compliance visits, that this was not within the legal capabilities of the Board.

Action: None required, Information Only

4. C.L.E.A.R. training

Discussion: Mr. Zavala discussed the training program he attended, which included how to perform compliance checks, interviewing witnesses and other techniques used during the investigation process. He also talked about the differences in the enforcement processes between this and other agencies.

Action: None required.

5. Solicitation

Discussion: Ms. Loudermilk discussed the issue as it will be affected on September 1, 1997 when the new laws take effect. She stated that up until now, the Board had no statutory authority to take action against solicitation. A bill that would have outlawed solicitation died during the recent Legislative session, along with the compliance visit bill. However, House Bill 1327 was passed, which amended the Barratry provisions within the Penal Code to include any professional among those who cannot solicit business other than in writing, unless requested to do so. Dr. Vaughn asked for clarification of "professional employment" as described within House Bill 1327. Dr. Smith asked for further clarification of House Bill 1327. Ms. Loudermilk stated that violation of the new law will be enforced by the local District Attorney, as it is a Class A misdemeanor to solicit in writing within 30 days, if it is a first violation. Subsequent violations are a Third Degree Felony. Solicitation in person or by telephone is an automatic Third Degree Felony, punishable by up to ten years in prison with a maximum fine of \$10,000. Ms. Loudermilk stated that solicitation complaints received by the Board should be investigated, and then forwarded on to the District Attorney's office for prosecution. Ms. Loudermilk suggested that the Board notify its licensees of the change in the law and the consequences of violations.

Ms. Loudermilk also discussed House Bill 399, which amended the transportation code relating to information gathered about accidents; dispatcher

logs, accident reports, etc. Beginning September 1, 1997, restrictions will be placed on who can obtain this information, and what criteria must be met in order to receive this information. Des Taylor, attorney for the Texas Chiropractic Association, noted to the Board that in fact this bill was vetoed.

Dr. Smith also noted other amendments which were lost during this past Legislative session.

Ms. Loudermilk also discussed her recent discovery of Article 4505a, entitled "Soliciting Patients", which has been on the books since 1981. It states: "No masseur, optometrist or any other person who practices the art of healing the sick or afflicted with or without the use of medicine shall employ, or agree to employ, pay or promise to pay, reward or promise to reward any person...for securing, soliciting, or drumming patients or patronage." The penalty is from \$100 to \$200 for each offense. Ms. Loudermilk stated she is not aware of who is responsible for enforcing this law.

Action: None required.

B. Licensure and Educational Standards Committee

1. Reminder letter to schools and associations regarding January 15 deadline for submission of continuing education courses

Discussion: Recommendation of the committee to move the deadline to November 15 to allow staff to review the submitted C.E. courses and it is also recommended that the Board send a letter of notification to each sponsor informing them of the new deadline.

Action: A motion was made by Mr. Hubert Pickett to move the deadline and send out a reminder letter to all sponsors. A second was made by Dr. Carolyn Davis-Williams. The motion carried unanimously.

Dr. Smith made a point of order to clarify to the new Board members that a quorum was not established for the Licensure and Educational Standards Committee, so he merely sat in as an ad hoc member with Mr. Pickett. Therefore the committee recommendations do not reflect a quorums opinion.

2. Request for waiver of rule regarding non-qualification for Provisional licensure due to failing Texas Boards: Dr. Renese Garcia

Discussion: Mr. Pickett discussed the situation of Dr. Garcia. Dr. Garcia addressed the Board and discussed her history and the events leading to the Board meeting today. Dr. Smith discussed Rule 79.1(a)(3) which states that an individual may not fail an exam given by the Board. Ms. Loudermilk stated that

the Board cannot go against its rules as established. To do so would require a change in that rule. Dr. Smith suggested that this committee may want to address a time limit to this rule.

Action: Mr. Pickett moved to table this issue for further review. A second was given by Dr. Cynthia Vaughn. The motion carried unanimously.

3. Ratification of results of June 5, 1997 Jurisprudence exam

Discussion: Recommendation that the results be ratified

Action: Mr. Pickett moved that the results be approved. A second was made by Dr. Carolyn Davis-Williams. The motion carried unanimously.

4. Request for reconsideration of denial of continuing education seminar: Activator Methods

Discussion: Recommendation that the seminar be approved as a result of the changes in continuing education requirements and the uniqueness of the situation.

Action: Mr. Pickett moved to approve the seminar for continuing education credit. A second was made by Dr. Richard Gillespie.

Discussion: Dr. Smith clarified the time limit for submission as November 15.

Action: The motion carried unanimously.

5. Request for approval of continuing education seminars presented in Austin by Los Angeles Chiropractic College

Discussion: Recommendation that the seminars be approved.

Action: Mr. Pickett moved to accept the additional locations. A second was made Ms. Lisa Garza. The motion carried unanimously.

6. Request for waiver of continuing education hours: Dr. Guy Leutwyler, Dr. Daniel Cripe

Discussion: The committee felt Dr. Cripe's request for a waiver was premature.

Action: Mr. Pickett moved to deny his request for waiver. A second was made by Dr. Richard Gillespie. The motion carried unanimously.

Discussion: Recommendation of the committee to send information to Dr. Leutwyler regarding forthcoming disability guidelines and continuing education in order to apply for a waiver, involving video instruction.

Action: Mr. Pickett moved to send Dr. Leutwyler the information. Dr. Williams seconded. The motion carried unanimously.

7. Request for waiver of two hour General Chemistry requirement for licensure: Dr. Sylvia Caldwell

Discussion: Mr. Pickett reviewed her letter to the Board. It is the committee recommendation to send this back to the full committee in order to determine if there are any options that can be considered.

Action: Mr. Pickett moved to send Dr. Caldwell's request back to the full committee. Dr. Smith amended the motion to deny her initial request. The amended motion was accepted. A second was made Dr. Carolyn Davis- Williams. The motion as amended carried unanimously.

8. Request for allowance of continuing education hours obtained in 1996 to count for 1998/1999 renewal: Dr. C.L. Roth

Discussion: Recommendation of the committee to approve the request.

Action: Mr. Pickett moved to accept Dr. Roth's request. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

9. Request for reinstatement of license: Dr. Mark Dunn, Dr. Darrell English, Dr. David Morgan, Dr. James Polk, Dr. Michael Hill, Dr. Jill Perez, Dr. Robert Johnson, Dr. Van Nice, Dr. Victoria Ashcraft

Discussion: The committee feels as though they need more information from Dr. Dunn in order to make a decision. Information such as evidence as to where is has practiced for the last two years. Dr. Smith outlined this exemption to the new Board members, referring them to statute, Section 8a(e).

Action: Mr. Pickett moved for a request for more information from Dr. Dunn. A second was made by Ms. Lisa Garza.

Discussion: Dr. Vaughn explained that her copy of his letter was poor, and asked for clarification of his reasoning for request for reinstatement. Dr. Smith summarized Dr. Dunn's reasoning, and stated applying for provisional licensure was an option that Dr. Dunn was not aware of, and the Board is requesting the information in order to try and grant him his request.

Action: The motion carried unanimously.

Discussion: Mr. Pickett requested information regarding where he practiced for the past 2 years be presented to the Board.

Action: Mr. Pickett moved for denial of Dr. English's request for reinstatement. A second was made by Dr. Carolyn Davis-Williams. The motion carried unanimously.

Discussion: Dr. Vaughn asked for clarification of the rules. Ms. Loudermilk noted that Dr. English's letter states that he has not been in practice since August, 1995.

Action: The motion carried unanimously.

Discussion: Recommendation that, due to insufficient information presented, Dr. Morgan's request be denied.

Action: Mr. Pickett moved for denial of reinstatement of Dr. Morgan's license. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

Discussion: Mr. Pickett gave background information regarding Dr. Polk's situation. Dr. Polk addressed the full Board regarding his previous employer and his employer's failure to renew Dr. Polk's license, as was the agreement reached between Dr. Polk and his employer. Dr. Smith offered clarification as to the rules involved. Dr. Vaughn asked a question of Dr. Polk. Dr. Smith asked Ms. Loudermilk if the Board had any options to offer Dr. Polk. Ms. Loudermilk restated the rules regarding this particular request.

Action: Mr. Pickett moved to deny Dr. Polk's request for reinstatement. A second was made Dr. Cynthia Vaughn. The motion carried unanimously.

Discussion: The committee discussed Dr. Hill's situation, and believes it falls under the same guidelines as previous requests. Mr. Pickett suggested Dr. Hill apply for provisional licensure. Dr. Smith asked about Dr. Hill's previous disciplinary action with this state. Ms. Loudermilk had a question about the nature of Dr. Hill's lack of renewal, whether or not it related to his past disciplinary action.

Action: Dr. Smith moved that Dr. Hill try to qualify for relicensure under Section 8a(e) of the Act. A second was made by Dr. Carolyn Davis-Williams. The motion carried unanimously.

Discussion: Recommendation that the Dr. Perez' request be denied based on Section 8a(e) of the Act.

Action: Mr. Pickett moved for denial of the request. A second was made Dr. Cynthia Vaughn. The motion carried unanimously.

Discussion: Recommendation upon verification of Dr. Johnson's being licensed and practicing in another state for the past two years, and in good standing in that state, to grant approval of his request.

Action: Mr. Pickett moved to approve Dr. Johnson's request after verification of his license in good standing for the past two years in another state. A second was made Dr. Richard Gillespie. The motion carried unanimously.

Discussion: Recommendation that Dr. Van Nice's request be denied based on Section 8a(e) of the Act.

Action: Mr. Pickett moved to deny Dr. Van Nice's request for reinstatement. A second was made by Dr. Caroyln Davis-Williams.

Discussion: Dr. Smith asked for legal opinion regarding the exemption status, if Dr. Van Nice is currently within the state of Texas. Ms. Loudermilk stated a determination must be made as to the allowance of any hiatus prior to applying for a Texas license. Dr. Smith asked that denial be dropped, and ask for more information regarding his previous activity in the state from which he came. Ms. Loudermilk also asked if Dr. Van Nice is currently practicing in Texas, based on his letterhead he sent to the Board. Ms. Loudermilk also suggested putting wording into the letter to be sent to Dr. Van Nice that he should not be practicing in this state until he is granted a license.

Action: The motion was defeated unanimously.

Action: Mr. Pickett moved to request additional information from Dr. Van Nice to determine if he qualifies for relicensure under Section 8a(e) of the Act, and to ask his prior status of practice. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

Discussion: Recommendation of request for additional information from Dr. Ashcraft for possible relicensure under Section 8a(e) of the Act.

Action: Mr. Pickett moved to request additional information from Dr. Ashcraft before a final determination is made. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

10. Background checks on applicant for provisional licensure.

Discussion: Mr. Pickett discussed the situation regarding Dr. Hansen. Mr. Pickett discussed the need to verify the standing of the applicant, and also to check CIN-BAD as part of the verification process. Dr. Vaughn asked for clarification about provisional licensure. Dr. Smith discussed the nature of the past disciplinary action taken against Dr. Hansen, as it was a sexual misconduct case. Ms. Loudermilk assisted in reviewing the paperwork sent to the Board regarding this case, and pointed out that this complaint was dismissed. As such, she advised that it should have no bearing on the Board's decision. Dr. Smith addressed the anonymous letter that was sent to the Board regarding Dr. Hansen. Ms. Loudermilk discussed Section 14 and 14a of the Act in relation to denying Dr. Hansen the ability to sit for the exam. Ms. Loudermilk suggested referring this matter back to staff to gather appropriate information documenting the case, and then either refer the matter to the Enforcement Committee or back to the full Board. Should the Board choose to deny his application, notify Dr. Hansen that he has the option of having a hearing before the Office of Administrative Hearing in order to contest the Board's denial.

Ms. Kershner asked for direction as to how to address this issue with Dr. Hansen, since he is currently unaware of the anonymous letter sent to the Board in regards to his past disciplinary action. Ms. Loudermilk suggested informing him that the Board is investigating information received regarding his application for licensure, and that future action will take place after a final determination.

Action: Mr. Pickett moved to request additional information from Dr. Hansen, and to forgo making any determination about his ability to sit for the Jurisprudence exam until an investigation can be completed. A second was made by Dr. Richard Gillespie. The motion carried unanimously.

11. Licensure Status Designations

Discussion: Mr. Pickett addressed the issue of chiropractors wanting to come back into active status from a retired status. Mr. Pickett recommended addressing this issue before the full committee, and returning their decision to the Board at a later time. Ms. Loudermilk noted that the current statute does not address the issue of a retired status. Ms. Loudermilk recommended that the Board review its rules regarding retired status to insure compliance with the Act. Mr. Wolff addressed the issue of the previous Executive Director informing chiropractors that they could go on retired status and later reactivate their license.

Action: Mr. Pickett moved that the matter be referred back to this committee for further evaluation. A second was made by Dr. Carolyn Davis-Williams. The motion carried unanimously.

12. Request for waiver of continuing education submission deadline:
Terri Bogar, National College of Chiropractic

Discussion: Recommendation of the committee the request be approved.

Action: Mr. Pickett moved for approval of the request for waiver.
A second was made by Dr. Richard Gillespie. The motion carried unanimously.

The Board went into a short recess at 3:20 p.m.
The Board resumed the meeting at 3:35 p.m.

C. Executive Committee

A quorum of the committee members met to discuss:

1. Open records fee schedule

Discussion: Dr. Smith discussed that the agency now following the fee schedule as set by the General Services Commission. Ms. Loudermilk discussed the change in the law no longer requiring agencies to adopt rules regarding setting fees for open records requests. The fees set by the General Services Commission will now be the guidelines for all state agencies.

Action: Dr. Oliver Smith made a motion to accept the fee schedule as set by the General Services Commission. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

2. Position Reclassification: Rafael Villarreal IV

Discussion: Dr. Smith discussed that the Executive Committee would be performing all agency evaluations together in the early part of August, and possibly reclassifying some employee positions.

Action: None required.

3. Proposal for new telephone system

Discussion: Dr. Smith discussed the new telephone system proposed. Dr. Smith also discussed the hiring of a temporary worker to assist in answering the phone.

Action: Dr. Smith moved to accept approval of the proposed telephone system. A second was made by Mr. Hubert Pickett. The motion carried unanimously.

4. Proposal for leasing of new copier for agency office

Discussion: Dr. Smith discussed the proposal.

Action: Dr. Smith moved to adopt the leasing proposal. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

5. Executive Director search process

Discussion: Dr. Smith discussed the Executive Director job description. Dr. Smith explained the current status of the search process to the new Board members.

Action: None required.

D. Ad Hoc Committee on Legislative Affairs

1. Discussion of recent legislation affecting the Chiropractic profession

Discussion: Dr. Smith addressed the issue of acupuncture. Dr. Smith stated that the Attorney General's initial opinion was that acupuncture was not within the scope of practice because it was considered insisive and a surgical procedure. The Board asked the Attorney General to revisit that opinion. The recent Legislative session determined that acupuncture is not a surgical or incisive procedure. Dr. Gillespie discussed the rumor of a federal law describing acupuncture as an incisive procedure, which in turn would supersede state law. Dr. Vaughn noted that the last item under the Executive Committee schedule had not been addressed. Dr. Oliver Smith stated this issue will be addressed by rule at the next board meeting.

Action: None required.

C. Executive Committee

6. Agency staff vacation/sick leave status

Discussion: Dr. Smith discussed the reasoning behind suspending staff vacation and sick leave upon the Executive Director's leaving at the end of May. Dr. Smith noted that all the issues have been addressed and this policy could be relaxed and worked out between current staff.

Action: Dr. Smith moved to rescind the order removing sick and vacation leave. A second was made by Dr. Cynthia Vaughn. The motion passed unanimously.

E. Rules Committee

1. Proposed amendments to Section 73.3: Continuing Education

Discussion: Dr. Smith discussed the issues that this section addresses. Ms. Loudermilk gave the Board a different copy of the rule than what was within the Board members packets. Ms. Loudermilk explained that the differences were merely grammatical, and did not involve any significant changes.

Action: Dr. Smith moved to submit the rule to the Texas Register for publication. A second was made by Dr. Richard Gillespie. The motion carried unanimously.

F. Technical Standards Committee

1. Request for clarification on status of laws concerning Chiropractors and acupuncture: Dr. Laura Moore

Discussion: Recommendation based on Legislative changes that acupuncture is within the scope of practice, and that rules be developed to address acupuncture accordingly.

Action: Dr. Smith moved to accept acupuncture as within the scope of practice, and to develop rules to address it accordingly. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

2. Scope of practice regarding animal adjustments: Dr. Gilda Morales

Discussion: Dr. Smith discussed the fact that the Board has no jurisdiction over animal adjustments.

Action: Dr. Smith moved to notify Dr. Moore that the Board has no jurisdiction regarding this matter, and refer her to the Veterinary Board. A second was made by Dr. Carolyn Davis-Williams.

Discussion: Ms. Loudermilk discussed her knowledge of this matter in reference to the rules of the Veterinary Board.

Action: The motion carried unanimously.

3. HEEL Biotherapeutics questionnaire

Discussion: Dr. Smith addressed the issues raised by the questionnaire. Dr. Smith notes that some of these issues are still pending before the Attorney

General. Dr. Smith noted that he had discussed some of these issues with Representative Bob Glaze, and believes that homeopathy is unregulated therefore in part may be within the scope of Chiropractic in Texas.

Action: Dr. Smith moved to answer the questions "Can Chiropractors in your state practice homeopathy?" and "Can Chiropractors in your state prescribe homeopathic and/or administer prescription homeopathic medications?" in the affirmative, and to answer the question "Can Chiropractors in your state administer prescription homeopathic medications by injection?" with: "This is currently under review by the Attorney General's Office in our state." A second was made by Dr. Richard Gillespie. The motion carried unanimously.

Item IV

Consideration and approval of the Consumer Guide

Discussion: Dr. Smith discussed the importance of the guide to the public as to how to file a complaint. Dr. Smith commented that the word "detail" needs to be underlined in order to emphasize the importance of providing as much information as possible. Dr. Gillespie asked if the office receives questions regarding how to file a complaint. Mr. Zavala addressed his question, and explained the procedure as described to the prospective complainant. Dr. Smith asked if complainants are allowed to respond to the chiropractor's response to the complaint. Ms. Loudermilk noted that this is something that the Enforcement Committee is currently addressing. Ms. Loudermilk stated some problems she had with the guide, but Mr. Zavala corrected her misunderstandings. Dr. Vaughn questioned how the guide assists the public if it is mailed out after a complaint is received. Dr. Smith explained the importance of this guide in informing the complainant about the enforcement procedure and its requirements. Dr. Smith asked to change the form to read "..what the complaint is in as much detail as possible."

Action: Dr. Smith moved to accept the Consumer Guide as amended. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

Item V

Appointment of Board members to Committees

Discussion: Dr. Smith addressed the issue of which committees need to be filled. Dr. Smith moved to place Dr. Gillespie and Dr. Vaughn to the Technical Standards Committee with Dr. Vaughn as the Chair, to place Dr. Gillespie on the Rules Committee, and to place Ms. Garza on the Enforcement Committee.

Action: Dr. Oliver Smith made a motion and was second by Dr. Carolyn Davis-Williams

Item VI

Items to be considered for future agenda

Discussion: Dr. Smith noted that the election of Board officers needs to take place at the next Board meeting, as well as electing the representatives to the Federation of Chiropractic Licensing Boards.

Action: None required.

Adjourned

Oliver R. Smith, Jr., D.C., President

Date

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9-11-97

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
BOARD MEETING MINUTES
SEPTEMBER 11, 1997

Notice having been duly posted with the Office of the Secretary of State, the Texas Board of Chiropractic Examiners met in open session on September 11, 1997, at the William P. Hobby Building, 333 Guadalupe, Room 102, Austin, Texas.

Roll Call

Present:	Oliver R. Smith, Jr., D.C., President Carolyn Davis-Williams, D.C., Vice-President Keith Hubbard, D.C., Secretary-Treasurer Richard Gillespie, D.C. Cynthia Vaughn, D.C. John Weddle, D.C. Dora Valverde
Absent:	Lisa Garza, J.D. Hubert Pickett
Guests:	Brenda Loudermilk, Assistant Attorney General Teresa Barajas, Texas Worker's Compensation Commission Juanita Salinas, Texas Worker's Compensation Commission John Pringle, J.D. R.J. Kelly, D.C., CST Ray Wiegand, D.C. Jeff Friedman, Attorney Jaime R. Morales, D.C. Des M. Taylor, Attorney Roger W. Calton, Attorney Thaddeus Hedges, D.C. John Martin, D.C. Kevin Kanz, D.C. Other staff in attendance

Meeting was called to order at 1:48 by Dr. Oliver Smith. Guests were acknowledged.

Item I Approval of the minutes of July 11, 1997 Board meeting.

Discussion: None

Action: A motion was made by Dr. Cynthia Vaughn to accept the minutes as presented and seconded by Dr. Carolyn Davis-Williams. The motion carried unanimously.

Item II

Report of the President on Board activities since last Board meeting.

Discussion: Dr. Smith reported:

1. An update on the condition of former employee, Rafael Villegas, following a recent accident.
2. The recent hiring of Leslie Mitchell in the position of Administrative Technician I, as of September 15, 1997.
3. Freddy Wolff, financial officer was thanked for his work and assistance in acquiring the new computers for the agency.
4. The implementation on the new computerized telephone system at the agency that will improve TBCE's effectiveness.
5. The new Xerox copier has been ordered and is to be delivered to the agency soon.
6. Attended meeting at the Attorney General's office this morning with the Opinions committee regarding concerns over recent conflicting opinions and the length of time in receiving opinions requested by this Agency.
7. Invitation from the Attorney General's Office to attend the Governor's Liability Conference held September 22-23, 1997.

Item III

A. Enforcement Committee Report

1. Enforcement Action September 1, 1996 – August 31, 1997

Discussion: Dr. Carolyn Davis-Williams reported on the fiscal year-end complaint cases filed; gave total number cases received, closed and pending. Mr. Zavala commented that there were approximately 100 less case filed in fiscal year 1997 than fiscal year 1996.

2. Cases #94-19, 95-5, 95-6, 95-8, 95-9, 95-10, 95-11, 95-191, 96-126, 96-238, 97-62, 97-70, 97-71 through 97-210

Discussion: No discussion.

Action: None taken.

Item IV

B. Licensure and Educational Standards Committee. Dr. Hubbard served as committee chair in the absence of Mr. Pickett. A quorum of the committee met to discuss the following.

1. Repeal of ability to take jurisprudence examination prior to graduation from Chiropractic College.

Discussion: Dr. Hubbard discussed the reason for the proposed change.

Action: A motion was made by Dr. Hubbard to accept the committee's recommendation to repeal. Seconded by Dora Valverde. The motion carried unanimously.

2. Guidelines to establish a limit on number of years in the past you may have failed the Board exam to be eligible to reciprocate.

Discussion: Dr. Hubbard reported the committee recommended ten (10) years as the number of years in the past a chiropractor might have failed the Board exam if the chiropractor is practicing in another state with no enforcement actions or licensing problems, they would be eligible to reciprocate.

Action: A motion was made by Dr. Hubbard to accept the committee's recommendation. A second was made by Ms. Valverde. The motion passed unanimously. The action will be referred to the Rules committee.

3. Ratification of results of August 7, 1997 Jurisprudence exam.

Discussion: None

Action: Dr. Hubbard made a motion to ratify the results. A second was made by Dr. Cynthia Vaughn. The motion carried unanimously.

4. Revision to jurisprudence examination.

Discussion: Dr. Smith suggested delegation of authority to the Licensing & Education committee to provide appropriate changes to the examination before the next examination date, October 2, 1997.

Action: A motion was made to have the committee provide appropriate changes prepared before next examination date of October 2, 1997. A second was made by Dr. Gillespie. The motion passed unanimously.

5. Request for reinstatement of terminated license: Martin Andries, D.C.

Discussion: Dr. Hubbard explained Dr. Andries' circumstances related to renewing his license in a timely manner. Dr. Hubbard further explained the doctor did not have adequate proof that he tried to comply with Board standards to keep his license updated, therefore, the committee was unable to grant his request of reinstatement according to Section 8a(e).

Action: A motion made by Dr. Hubbard that Dr. Martin Andries be denied reinstatement based on his failure to provide proof of attempted compliance with the Acts guidelines for renewal. A second was made by Dr. Vaughn. The motion carried unanimously.

6. Reconsideration of request for provisional licensure: Raymond Wiegand, D.C.

Discussion: Dr. Hubbard reported that Dr. Wiegand's request was denied previously. At the time, Massachusetts did not meet the requirements to reciprocate. At this date, Massachusetts meets all requirements, so the committee suggests the Board grant Dr. Wiegand the ability to seek licensure in the state of Texas.

Action: Dr. Hubbard made a motion that Dr. Wiegand be allowed to seek licensure in the state of Texas due to Massachusetts now meeting reciprocity requirements. A second was made by Ms. Valverde. The motion passed unanimously.

7. Request for approval of correspondence course in Public Health in lieu of chiropractic college course passed with a "D": Stavros Mentos, D.C.

Discussion: The circumstances of the request were reviewed.

Action: Dr. Hubbard made a motion to instruct Ms. Joyce Kershner to contact Dr. Mentos' graduating school with the inquiry if they'll accept correspondence course scores. The motion was seconded by Ms. Valverde. The motion carried unanimously.

8. Request for reinstatement of retired license: Mary B. Anderson, D.C.

Discussion: The committee discovered an error that her license was placed in a retired status.

Action: Dr. Hubbard made a motion to reinstate the license of Dr. Anderson. The Board would waive all late fees or re-examination requirements, but would require a status letter on her license from the state of California. A second was made by Dr. Gillespie. The motion carried unanimously.

9: Request of waiver for continuing education hours: R.G. Raines, D.C.

Discussion: Dr. Hubbard reported the board was in the final process of adopting the proposed rule that will allow doctors to take continuing education hours using FCER videotapes in certain situations. The committee moved to contact Dr. Raines upon final adoption of the Board rule indicating FCER tapes will be used by doctors with a physical handicap that prevents them from attending continuing education courses, etc.

Action: Dr. Hubbard made a motion that Dr. Raines be contacted regarding the Board's final acceptance of using the FCER video tapes in lieu of continuing education hours. Motion was seconded by Ms. Valverde. The motion passed unanimously.

10. Request for reinstatement of terminated license: Jaime Morales, D.C.

Discussion: Dr. Hubbard explained the circumstances around Dr. Morales attempt to comply with board standards for license renewal. Dr. Morales presented proof of renewal efforts in the form of a copy of a cashier's check.

Action: Dr. Hubbard made a motion to reinstate Dr. Morales' license due to proof of his attempt at compliance with Board renewal guidelines. A second was made by Ms. Valverde. The motion passed unanimously.

11. Establish guidelines for pre-chiropractic education.

Discussion: Dr. Hubbard reported that the committee would like to empower Ms. Joyce Kershner to evaluate transcripts without having to present them to the board unless there are specific problems.

Dr. Smith stated that this change would be noted in the agency's policy and procedural manual.

Action: Dr. Hubbard made a motion that Ms. Kershner be empowered to evaluate transcripts to determine whether applicants meet the guidelines for pre-chiropractic education. A second was made by Ms. Valverde. The motion passed unanimously.

12. Approval of 1998-1999 license renewal form.

Discussion: The committee elected to eliminate the request for an insurance number on the current renewal form. A suggestion to replace this with a social security number was put to Ms. Loudermilk, the board's attorney general representative. Ms. Loudermilk explained the social security number would be confidential and ultimately the decision to leave the social security number off was reached. On the new form, Chiropractors who mark "retired" must understand their license is inactive and cannot be reinstated. The committee decided the renewal would state the retirement status is permanent and the statement would have to be signed before returning the renewal form to TBCE.

Dr. Smith suggested additional questions regarding the retirement issue be worked out with the staff and legal representation for the clarification of options on how to achieve consistency in license renewal with the way it is presented in the statute and rule which is currently in conflict.

Action: Dr. Hubbard made a motion to defer the final version of the 98-99 license renewal form to staff and legal counsel. A second was made by Ms. Valverde. The motion carried unanimously.

Item V

C. Executive Committee. A quorum of the committee met to discuss the following agenda items:

1. Search for Executive Director

Discussion: Dr. Smith reported on the discussion of the committee regarding the hiring of an executive director. The position is still open and the Board is still accepting applications. Dr. Smith stated the position would be closed when a large enough pool of applicants is compiled. The Description the of executive director's position in the Governor's Job Bank was modified to open the position to qualified applicants who may not have extensive chiropractic regulatory knowledge.

Action: No action taken.

2. Performance Evaluation for staff.

Discussion: The executive committee acknowledges the tremendous job done by the staff in maintaining agency operation without an executive director. The decision to reclassify Freddy Wolff, currently serving as our financial officer, and John Zavala, our enforcement officer, in addition to all raises has been tabled to ensure the agency has the funds available to award raises to staff. The

committee will make changes when the agency's financial situation is more thoroughly evaluated.

Action: No action taken.

3. Consideration and approval of: 1998 Meeting Dates.

Discussion: The executive committee moved to change all meeting dates in 1998 to Thursdays. The meeting dates for 1998 are January 8, 1998, March 5, 1998, May 7, 1998, July 9, 1998, September 11, 1998, and November 5, 1998.

Action: The executive committee moved to accept these dates as amended. A second was made by Dr. Hubbard. The motion passed unanimously.

Item VI

D. Report from Peer Review Committee

1. Appointments to Peer Review Committee

Discussion: Dr. Smith reviewed the report written by Dr. Tom Georges, D.C.

Action: Dr. Smith moved as requested to appoint Dr. Leff as Area 1 Executive Peer Review Committee member. A second was made by Dr. Vaughn. The motion carried unanimously.

Action: Dr. Smith moved as requested to appoint the following doctors as local Peer Review members: Dr. J. Weislow and Dr. Patricia Miller in Area 1. Dr. Gary Sanders, Dr. Steve Remlinger, Dr. J. Guest, and Dr. Allen Haynes in Area 2. Dr. Michell Jarad, Dr. Bart Patzer, Dr. Dave Starke, and Dr. Rich Lawlor in Area 4. Dr. Randy Holmes and Dr. Robert Jahne in Area 5. Dr. Vaughn seconded the motion. The motion passed unanimously.

Item VII

E. Technical Standards Committee. A quorum of the committee met to discuss the following agenda items:

1. Acupuncture: Guidelines

Discussion: Dr. Cynthia Vaughn reported that the committee continues to feel needle acupuncture is within the scope of practice which was further supported by the recent legislation (SB 361). Parameters will be established to train doctors, specify continuing education requirements, and satisfy OSHA implications in such procedures.

Action: Dr. Vaughn moved the written guidelines be forwarded to the Rule committee for consideration. The motion was seconded by Dr. Weddle. The motion passed unanimously.

2. Manipulation Under Anesthesia: Guidelines

Discussion: Dr. Vaughn stated the committee met and agreed that Manipulation Under Anesthesia was within the scope of chiropractic in Texas. The board cannot adopt a process to certify this procedure, according to the law. TBCE is prohibited from certifying manipulation under anesthesia, so it is prudent not to include any language in Rule that would be interpreted as a certification.

Ms. Loudermilk stated the Board may approach this issue differently, stating instead failure to exercise due diligence can be charged against someone with not enough technical training in this procedure. The Board can recommend background training to make sure experience is obtained.

Dr. Weddle was concerned that chiropractors are not tested on manipulation under anesthesia, needle EMG's, or acupuncture by either the Board or National Board, but the Board, by these guidelines, is giving authority for chiropractors to do these procedures.

Dr. Smith stated as new procedures are developed minimum standards will be set up for proper training so chiropractors can utilize these practices safely.

Action: Dr. Vaughn motioned to re-language the three documents to state all are within scope of practice and the Board, in keeping with due diligence, professional conduct, and proper training, recommend the following guidelines in terms of training and go on to list the parameters. A second was made by Dr. Hubbard. The motion passed unanimously.

3. Needle EMGs: Guidelines. The Technical Standards committee originally developed these guidelines in a December 1995 meeting but they are being presented again before being sent to Rule. Motion made by Dr. Vaughn and seconded by Dr. Hubbard to include this procedure in those being developed as guidelines. Motion passed unanimously.

4. Solicitation

Discussion: Dr. Vaughn reported that after a brief discussion, the committee decided the issue did not require further action in light of recent legislation that went into affect.

Ms. Loudermilk commented that solicitation has been potentially enjoined and additional information will be provided, as it becomes available.

Action: No action taken.

5. Practice of needle acupuncture: Rick Tillman, D.C., Alan Bonebrake, D.C.

Discussion: Dr. Vaughn discussed the letters submitted asking for a Board opinion regarding the appropriate use of needle acupuncture. The committee voted to send a letter to Dr. Tillman stating that in light of recent legislation in the form of Senate Bill 361, chiropractors can practice needle acupuncture and an acupuncturist may practice under their license.

Dr. Smith suggested the wording of the letter should include that the chiropractor be properly certified.

Ms. Loudermilk commented that the letter should also include what the required guidelines are.

Dr. Smith further remarked that a properly licensed acupuncturist can work in conjunction, but not under, a chiropractor's license and the letter should be properly worded to state this.

Action: Dr. Vaughn moved to answer "Yes" to needle acupuncture being within scope and "No" to an acupuncturist working under a D.C. by outlining the stipulations regarding their use in a letter to Dr. Tillman. A second was made by Dr. Davis-Williams. The motion passed unanimously.

6. Auriculotherapy without needle insertion: G.L. Brettmann, D.C.

Discussion: Dr. Vaughn reported that the technical standards committee feels auriculotherapy without needle insertion is within scope of the chiropractic practice.

Action: Dr. Vaughn motioned to send letter to Dr. Brettman informing him that auriculotherapy without needle insertion is within scope of practice. A second was made by Dr. Gillespie. The motion passed unanimously.

7. Injectable nutrients or vitamins/medical records: Kenneth McWilliams, D.C., Eric K. Cerre, D.C., and Philip E. Snowden, D.C.

Discussion: The committee discussed the injectable use of nutrients or vitamins, Dr. Vaughn explained that this item is currently awaiting a Attorney General's opinion and the committee cannot respond until a statement is received from the Attorney General's office. On the issue of medical records, Dr. Vaughn stated that the Attorney General's office has stated that a reasonable fee may be charged, but does not specify the fee amount.

Action: Dr. Vaughn moved that a letter to Dr. McWilliams, Dr. Cerre, and Dr. Snowden be sent upholding the Board's "no opinion" status on the injectable issue and include a copy of the statement regarding reasonable medical fees. Dr. Weddle seconded the motion. The motion passed unanimously.

8. Work hardening/work conditioning programs: Brian Lee Day, D.C.

Discussion: Dr. Vaughn reported that the committee felt work hardening/work conditioning programs were within scope of practice.

Action: Dr. Vaughn motioned to send a letter to Dr. Day stating work hardening/work conditioning programs are within the scope of practice. A second was made by Dr. Weddle. The motion passed unanimously.

9. Status of Acupuncture between October 1995 and September 1996: Donna T. Brown representing OUM and Associates.

Discussion: Dr. Vaughn stated that due to a time limitation, a letter was sent to Ms. Brown by Dr. Smith responding to the item, so the item was withdrawn from the committee notes and no action was required. A copy of the letter was passed out.

Action: No action taken.

10. Pre-pay plans: Michael K. Shanks, D.C.

Discussion: Dr. Vaughn reported that the committee discussed the issue. At the present time, the Board has no jurisdiction over what a chiropractor can or cannot charge a patient. The matter would be to refer Dr. Shanks to the Texas Board of Insurance or seek private legal counsel.

Action: Dr. Vaughn made a motion to send letter be sent to Dr. Shanks stating the Board has no jurisdiction regarding fees and recommend Dr. Shanks seek private legal counsel and/or pose the question to the State Board of Insurance. A second was made by Dr. Weddle. The motion passed unanimously.

Item VIII

F. Rules Committee

1. Needle EMGs
2. Manipulation Under Anesthesia
3. Acupuncture

Discussion: Dr. Hubbard explained the rule-making process and requested the following items be placed in rule form to address these procedures.

Ms. Loudermilk explained there are new guidelines for rules in the latest appropriations act, under Section 167. She further stated there must be a review of current rules prior to proposing changes or additions to existing rules. She recommended the Board continue with the rule-making process, but comply by proposing a review of present rules, then place any changes, amendments or adoptions to be made in the Texas Register.

Dr. Hubbard made a motion to continue with the preparations to file the above-proposed rules. A second was made by Dr. Weddle. The motion passed unanimously.

4. Final adoption of amendments to 22 TAC § 73.3, relating to continuing education: video option.

Discussion: Dr. Hubbard explained the purpose of the video option is for disabled chiropractors to meet continuing education requirements by using FCER tapes.

Action: Dr. Hubbard made a motion for final adoption of amendments to Rule 73.3, in addition to Ms. Kershner be directed to contact the FCER regarding the availability of the tapes and information on how the program will be evaluated to make sure chiropractors are achieving the adequate number of hours. The motion was seconded by Dr. Gillespie. The motion passed unanimously.

5. Proposed amendments to 22 TAC § 73.3, relating to continuing education: regarding the board presented hours.

Discussion: Dr. Smith was concerned about wording "as scheduled by the Board for the upcoming calendar year", which is open to rather broad interpretation.

Ms. Loudermilk explained that the Board should decide well in advance when they plan to make a presentation at the five scheduled Board meetings to prevent problems with scheduling for those putting on the seminar.

Action: Dr. Hubbard motioned to publish the proposed amendments. A second was made by Dr. Williams. The motion passed unanimously.

6. Proposed amendments to 22 TAC § 79.1, relating to provisional licensure.

Action: Dr. Hubbard motioned to place the proposed amendment for publication. A second was made by Dr. Weddle. The motion passed unanimously.

Item IX

G. Election of Texas Board of Chiropractic Examiners

1. Vice-President

Discussion: Dr. Smith explained the requirement for electing new Board officers occur after the appointment of new Board members and opened the floor to nominations for vice-president. Dr. Hubbard nominated Dr. Carolyn Davis-Williams for the position.

Action: After no further nominations, Dr. Smith moved to accept by acclamation. Dr. Weddle seconded the motion. The motion passed unanimously.

2. Secretary-Treasurer

Discussion: Dr. Smith opened the floor to nominations for secretary-treasurer. Dr. Davis-Williams nominated Dr. Hubbard for the position.

Action: After no further nominations, Dr. Smith moved to accept by acclamation. Dr. Weddle seconded the motion. The motion passed unanimously.

3. Representatives to Federation of Chiropractic Licensing Boards

Discussion: Dr. Smith stated that he and Dr. Weddle are the current representatives and opened the floor for nominations of new representatives. There were no new nominations.

Action: Dr. Smith moved that he and Dr. Weddle would retain their positions as representatives to the Federation of Chiropractic Licensing Boards. The motion was seconded by Dr. Vaughn. The motion passed unanimously.

Item X

H. Appointment to Advisory Commission

Discussion: Dr. Smith opened the floor for nominations for the one vacant appointment. Ms. Dora Valverde nominated Dr. Cynthia Vaughn. Dr. Hubbard stepped down from his position and nominated Dr. Gillespie.

Action: Dr. Smith moved to accept the nominations by acclamation. A second was made by Dr. Weddle. The motion passed unanimously.

Item XI

Items to be considered for future agenda

Action: A motion was made by Dr. Hubbard to re-open Item VIII (4), amending it to read that the chairman of the Rules Committee should be authorized to sign final order instead of the Enforcement Committee chairman. A second was made by Dr. Weddle. The motion passed unanimously.

Adjourned.