

Testimony of Wally Doggett, President, Texas Association of Acupuncture and Oriental Medicine
November 10, 2016 Sunset Advisory Commission Public Hearing

For the record, I am Wally Doggett, president of the Texas Association of Acupuncture and Oriental Medicine which represents Licensed Acupuncturists throughout Texas.

I'd like to highlight some problems with board governance as exemplified by TBCE acupuncture rule making.

During the last Sunset review of the Chiropractic Board, the Legislature directed the board to engage in formal rulemaking to clarify within existing statutory authority what is and what is not chiropractic, and to identify and engage relevant stakeholders earlier in the process of developing rules – *before* publishing proposed rules in the Texas register for comment.

Subsequently the board went on to adopt rules without sufficient or valid statutory authority, asserting repeatedly it had been directed by the Legislature to DEFINE its own scope of practice, not just to clarify it in the context of authorities granted in the Chiropractic Code.

TBCE used language from other statutes to adopt rules. As represented in its Self Evaluation Report, the board claimed two words from the Acupuncture Chapter of the Occupations Code as the basis of authority for its acupuncture rules.

Not once was input from acupuncture stakeholders solicited early in the rule development process in the manner envisioned in the 2005 Sunset directive to the Board.

With the Third Court of Appeals having recently affirmatively rejected an interpretation of statutory construction whereby the TBCE claims regulatory authority from the Acupuncture Chapter, TAAOM now has petitioned the board to more appropriately engage with stakeholders and to conform its acupuncture rules to the constraints of the Chiropractic Chapter of the Occupations Code.

Toward that end, we stand ready to work with the Board in good faith and are hopeful that we can resolve these important issues in a common-sense and inclusive manner that avoids the need for more costly litigation.

We have provided Commission members with copies of our petition to the Chiropractic Board, and if there is any further clarification or other way TAAOM can be of assistance in this process, we are here to help.



TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE
PUBLIC COMMENTS ON THE
THE TEXAS BOARD OF CHIROPRACTIC EXAMINERS
SUNSET ADVISORY COMMISSION STAFF REPORT

November 16, 2016

The Texas Association of Acupuncture and Oriental Medicine (TAAOM) respectfully submits the additional comments and background for consideration by the Sunset Commission as it reviews the Texas Board of Chiropractic Examiners.

TAAOM highlights concerns it has with board governance and the board's rulemaking process as exemplified by:

- 1) Asserting rulemaking authority allowing the Board to "define" rather than "clarify" chiropractic scope of practice when adopting rules subsequent to the addition of Sec. 201.1525 to the Chiropractic Chapter of the Occupations Code during the last Sunset review of TBCE in 2005.
- 2) Inadequate stakeholder involvement in developing these rules as envisioned in Sec. 201.1526, also added to the Chiropractic Act during the 2005 TBCE Sunset review.
- 3) Adoption of acupuncture rules utilizing authority not granted to the Board in Chapter 201, which has been clarified by the recent disruption of the foundational legal argument the Chiropractic Board has relied upon to adopt rules related to acupuncture. (Third Court of Appeals NO. 03-10-00673-CV—Opinion issued August 18, 2016)

TAAOM appreciates the comments made by representatives of the Chiropractic Board in public testimony before the Sunset Commission. The current TBCE board president expressed a clear policy position that any past tendency toward scope expansion by the board is no longer present and will not occur on his watch. The Texas Chiropractic Association has stated support of the position that the practice of chiropractic is as allowable by statute, and as taught at accredited schools of chiropractic.

As such, we commend the new leadership of the Texas Board of Chiropractic Examiners for expressing a strong public commitment to conforming rulemakings to the plain language of the

Chiropractic Chapter. TAAOM looks forward to working cooperatively with the Board and stakeholders in this endeavor as relates to the practice of acupuncture.

Background and AG Opinion DM-471

Acupuncture became a licensed and regulated profession in Texas in 1993. After AG Opinion DM-415 (1996) determined acupuncture as *not* within the scope of chiropractic because it is incisive, chiropractic advocates persuaded the Texas Legislature to change the basic definition of acupuncture in the recently enacted Acupuncture Act from “the insertion of an acupuncture needle” to “the nonsurgical, *nonincisive* insertion of an acupuncture needle”.

Expressly prohibited in the Chiropractic Chapter from making an incision into any tissue, cavity, or organ by *any* implement and lacking clear statutory authority to perform acupuncture, the chiropractors chose an indirect amendment to the Acupuncture Chapter of the Occupations Code as a means to an end.

Subsequent to a change to the definition of acupuncture, the Board sought another AG Opinion. DM-471 (1998) was issued, which reasoned that based upon this change in statute, and by reading the Chiropractic and Acupuncture Chapters *together*; acupuncture could be construed as within the scope of chiropractic.

As of August 18, 2016, however, the Third Court of Appeals has affirmatively rejected the logic of DM-471, stating unequivocally that the Chiropractic Board is constrained in its authority to the Chiropractic Chapter of the Occupations Code, and that a statutory interpretation whereby the Chiropractic and Acupuncture Chapters read together result in a grant of authority to the Chiropractic Board is invalid.

While the TBCE did not mention litigation with the acupuncture association in its Self Evaluation Report, it did reference its authority to allow its licensees to practice acupuncture, specifically citing the words “nonincisive, nonsurgical” in the Acupuncture Chapter, and AG Opinion DM-471.

With this authority no longer valid, TAAOM has respectfully petitioned the board to amend its rules to conform to the constraints of the Chiropractic Chapter of the Occupations Code (Section 201). A copy of this petition was provided to the Sunset Commission at the public hearing on November 10, 2016.

Rules to Clarify Scope of Practice: Occupations Code, Sec. 201.1525

During the last TBCE Sunset review, Section 201.1525 was added to the Chiropractic Chapter directing the board to engage in formal rulemaking and to clarify by rule, in the context of authorities granted in the Chiropractic Chapter, what is and what is not chiropractic.

Despite this straightforward legislative directive, TAAOM observes that the Chiropractic Board has interpreted the Sunset mandate as a grant of authority to “define” versus simply to “clarify” the scope of chiropractic.

This approach has resulted in the Chiropractic Board being sued repeatedly: Over needle EMG, manipulation under anesthesia, vestibular-ocular-nystagmus testing, acupuncture, and also its utilization of medical terminology related to the nervous system and the “subluxation complex.”

To avoid a continuation of costly litigation, TAAOM welcomes the opportunity to engage in a meaningful and inclusive manner with TBCE to conform its rules related to acupuncture.

Stakeholder involvement in developing rules as envisioned in Sec. 201.1526

Sec. 201.1526 of the Chiropractic Chapter of the Occupations Code states:

“DEVELOPMENT OF PROPOSED RULES REGARDING SCOPE OF PRACTICE OF CHIROPRACTIC. (a) This section applies to the process by which the board develops proposed rules under Section [201.1525](#) **before** the proposed rules are published in the Texas Register and **before** the board complies with the rulemaking requirements of Chapter [2001](#), Government Code.” (Emphasis added)

Also:

“The board shall establish methods under which the board, to the extent appropriate, will ***seek input early in the rule development process from the public and from persons who will be most affected by a proposed rule.*** Methods must include identifying persons who will be most affected and soliciting, at a minimum, the advice and opinions of those persons. Methods may include negotiated rulemaking, informal conferences, advisory committees, and any other appropriate method.”(Emphasis added)

The Chiropractic Board engaged in rulemaking related to acupuncture in 2005-2006, 2009-2010, and again in 2012-2013. To my knowledge, TAAOM has consistently been made aware of TBCE acupuncture rulemaking only by monitoring the Texas Register and identifying proposed rules of interest to the acupuncture profession upon publication for public comment.

While Section 201.1526 of the Chiropractic Chapter directs the Board to “seek input early in the rule development process from the public and from persons who will be most affected by a proposed rule”, TAAOM is unaware of any effort initiated by TBCE to solicit early input from the acupuncture community in rulemaking related to acupuncture. Additionally, TBCE has not employed any of the proactive methods innumerationed in the Sunset mandate for involving stakeholders in rules development, including the use of negotiated rulemaking, informal conferences or professional advisory committees. In fact, TAAOM's experience has been in stark contrast to the spirit or letter of Section 201.1526.

As an illustration, in 2009, it was only *after* proposed rules were published in the Texas Register and TAAOM had requested a public hearing to formally discuss a proposed rule related to acupuncture that a working group was convened by the Chiropractic Board. Similarly, in a 2012 TBCE rulemaking to establish an acupuncture specialty designation within the chiropractic profession, a working group was again convened only *after* proposed rules were published in the Texas Register, and *after* TAAOM collected over 2000 signatures.

Acupuncture rules adopted by the Chiropractic Board- Policy Implications.

The net result of all this is a chiropractic regulatory board that is lacking in acupuncture expertise having adopted standards in rules which fall well short of any meaningful standards of training in acupuncture. Further, while the Board has claimed the authority to regulate acupuncture, it has, in fact, failed to so. Despite having adopted “training standards” which require chiropractors to receive anywhere from 100 hours training with no actual clinical component, to 1800 hours with robust clinical training, the Board does not know which chiropractors are practicing acupuncture or with what level of training. As a policy matter, this is inconsistent with the Legislature's affirmative decision to license the practice of acupuncture and to demand those performing it demonstrate the ability to do so safely and competently.

Your consideration of these important issues would be greatly appreciated by the Texas acupuncture community, including practitioners, students, and patients alike. Toward that end, TAAOM is available to serve as a resource to the Sunset Commission and looks forward to working in good faith to resolve outstanding policy issues impacting the integrity of the acupuncture profession.

Sincerely,



Wally Doggett, L.Ac. - President
Texas Association of Acupuncture and Oriental Medicine