



Texas Association of Acupuncture and Oriental Medicine

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Texas Sunset Commission

12/14/16

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Dear Sunset Commission members and staff:

The State of Texas appropriately requires a license for the practice of acupuncture and has set out robust standards of education and training in order to practice acupuncture safely and legally. However, the acupuncture profession and the Acupuncture Board continue to be challenged by other agencies taking overly liberal interpretations of their statutory authority, and presuming authority to allow their licensees to practice acupuncture without an acupuncture license – with inadequate or no standards of training, and no regulatory oversight.

For Licensed Acupuncturists who have played by the rules to meet the robust standards and requirements laid out by the state to protect the public, this is a frustrating situation and one that represents a very real threat to the integrity of the practice of acupuncture, and to the economic liberty and livelihood of Licensed Acupuncturists.

TAAOM has raised these concerns directly with all relevant regulatory agencies, and in 2014 initiated litigation to address issues related to Chiropractic Board rules adopted referencing the acupuncture chapter as a grant of rulemaking authority. The public record supports that the Texas Board of Chiropractic Examiners has repeatedly taken creative liberties in its interpretation of its statutory authority, resulting in numerous lawsuits. And in our own lawsuit with the Chiropractic Board, the Third Court acknowledged that cases construing the scope of chiropractic in relation to other healthcare fields have been a recurring theme of litigation, and respectfully asked the Legislature to solve these problems caused by a lack of statutory clarity. Chiropractic advocates have referenced the Court's plea to the Legislature in relation to their request for diagnosis, but it is in fact from TAAOM's case where we challenged the Chiropractic Board on adopting acupuncture rules beyond its statutory authority.

Our issue goes back to 1997 when the statutory definition of acupuncture was changed from the logical and straightforward "insertion of an acupuncture needle" to the "non-surgical, non-incisive insertion of an acupuncture needle." Nowhere else *on the planet* is acupuncture defined this way, and such a definition is in fact contrary to the very training and education required by the State to become a licensed acupuncturist.¹

And yet, it was by using these two words found in the Acupuncture Chapter that the Chiropractic Board claimed authority to allow its licensees to practice acupuncture without an acupuncture license, with substandard training, and with no regulatory oversight.

¹ See '[Clean Needle Technique Manual, 7th Edition](#)' published by the Council of Colleges of Acupuncture and Oriental Medicine, which is required training as a condition of licensure in Texas.

Notably, the Acupuncture Board holds the position that acupuncture is, in fact, an incisive procedure:

“The definition of acupuncture in the Texas Acupuncture Practice Act, §205.001(2) of the Tex. Occ. Code, can be a source of confusion in that it contains statements requiring clarification. The Act states: “Acupuncture” means: the nonsurgical, nonincisive insertion of an acupuncture needle...” **Acupuncture is an incisive and invasive procedure.**” The needle is applied subcutaneously. There can be bleeding or bruising.” (Emphasis added)²

The former Executive Director of the Chiropractic Board has stated as much.³ And even the Texas Chiropractic Association (TCA), in its amicus filed in support of the Chiropractic Board, concedes: “Common sense tells us that all needles are, by their nature, incisive...”

Remarkably, TCA goes on to qualify this by adding: **“That means ‘acupuncture needles’ are not needles when used to perform acupuncture.”** (Emphasis added)⁴ This last statement highlights the absurdity of the prospect of Licensed Acupuncturists having to further litigate to demonstrate that piercing the skin with an acupuncture needle is in fact an incisive procedure, just as it is absurd for the Chiropractic Board to claim otherwise, and to waste taxpayer dollars doing so.

Importantly, the Third Court of Appeals has now affirmatively rejected the logic of AG Opinion DM-471 which supported the Chiropractic Board’s claim that it can draw on two words from the Acupuncture Chapter as a basis for rulemaking authority.^{5,6} Accordingly, TAAOM has recently petitioned the Chiropractic Board to amend its rules to conform to the Chiropractic Chapter.

TAAOM likewise urges the Legislature, through the Sunset process, to remove the words “non-surgical, non-incisive” from the Acupuncture Chapter. They serve no purpose but to obfuscate the original statutory definition of acupuncture, and can no longer be used by the Chiropractic Board as a grant of authority. This simple clarification would more accurately reflect the true nature of the practice of acupuncture and would clean up a statutory distortion that has spawned costly and unnecessary regulatory and legal disputes.

The insertion of an acupuncture needle is the practice of acupuncture, and the State of Texas has already established the minimum standards of training to practice acupuncture safely. The practice of acupuncture should be regulated accordingly.

Sec. 205.003 of the Acupuncture Chapter provides an affirmative exemption from the requirements of the chapter for those licensed to practice medicine, expressly states that it does not permit the

² Texas State Board of Acupuncture Examiners, [CPT Code Billing Position Statement](#)

³ “While [acupuncture] is in practice an incisive procedure, it’s defined as non-incisive.” See July 11, 2012 Chiropractic Board ad hoc meeting, at 1:46:00, available at <http://www.tbce.state.tx.us/Hearings/Acupuncture20120711.mp3>.

⁴ See Texas Chiropractic Association Amicus in Support of Appellee TBCE, p.4, available at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=ac3261c1-4063-4b74-b1e6-67ea795b0f66&coa=coa03&DT=Brief&MedialD=f6b3c888-9118-4813-a597-49f0dd7bce53>

⁵ See March 30, 1998 AG Opinion DM-471, available at <https://texasattorneygeneral.gov/opinions/opinions/48morales/op/1998/hm/dm0471.htm>

⁶ See August 18, 2016 Third Court of Appeals Opinion in NO. 03-15-00262-CV, available at <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=7794d88d-7a26-4caa-9e17-e9f6c6424f6f&coa=coa03&DT=Opinion&MedialD=4ec82dd4-a317-4225-8f47-594ace68d97e>

unauthorized practice of medicine, and limits any other potential exemptions to individuals licensed by the state and acting within the scope of that license. Sec. 205.303 provides limited and specific allowances for Acudetox specialists to be certified by the medical board. Neither chiropractors nor physical therapists are listed as allowable providers of “acudetox”, and they are not mentioned or specified elsewhere as exempted from the licensing requirements of the acupuncture statute. It is inappropriate as a matter of policy that agencies, with no expertise in the practice of acupuncture and no clear grant of authority to include acupuncture within their licensees’ scope of practice, have been allowed to skirt established standards of education and training by claiming exemption from the requirements of the Acupuncture Chapter of the Occupations Code.

These overly creative interpretations of statute--predicated on such notions as when an acupuncture needle is inserted into the body in the practice of so-called “dry needling” that this somehow does not constitute the practice of acupuncture, or that an acupuncture needle piercing the flesh with the capability of causing bruising or bleeding, or even organ puncture is somehow non-incisive--have resulted in wildly disparate levels of training among different providers. These range from single weekend workshops for Physical Therapists; to 100-hour short courses for Chiropractors (with no required clinical component); to four-year Master’s program of nearly 3000 hours, including a *minimum* of 870 clinical hours for Licensed Acupuncturists. Patients have no idea these disparities in training exist, and at the hands of undertrained, unregulated providers of acupuncture are subject to poor results, painful treatment, or even serious bodily injury.

The regulation of these practices is likewise all over the map. The PT Board has adopted no standards of training and embarked upon no rulemaking, but rather has simply allowed its licensees to essentially self declare competence in a practice that is not part of the Physical Therapy curriculum. And while the Chiropractic Board has claimed authority to regulate the practice of acupuncture by its licensees, and has adopted rules to that effect, the standards of training are arbitrarily low and the board does not actually know which chiropractors are practicing acupuncture or with what level of training. Neither is acupuncture a part of the Chiropractic educational curriculum.

The Texas State Board of Acupuncture Examiners is the agency actually charged with regulating the practice of acupuncture in Texas, and the agency charged with enforcing against individuals practicing acupuncture without a license. The Acupuncture Board is put in a difficult position when it is in fact the licensees of other healthcare agencies who are the ones practicing acupuncture without clear statutory authority to do so, and without an acupuncture license. The current lack of statutory clarity found in the Acupuncture Act is a source of confusion and frustration for patients, practitioners, and regulators alike, and is inconsistent with already established standards deigned to protect the health, safety, and welfare or the citizens of Texas. I thank you for your consideration of these important regulatory and policy issues.

Respectfully,



Wally Doggett L.Ac. – TAAOM president



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The Texas Board of Chiropractic Examiners (hereafter “the Board”) has relied exclusively on the analysis of Attorney General Opinion DM-471(1998) as a legal basis to allow its chiropractic licensees to practice acupuncture without meeting the requirements set out for the practice of acupuncture in Chapter 205 of the Occupations Code.

Based on the insertion of two words into the Acupuncture Chapter of the Occupations code, nonsurgical and nonincisive, DM-471 reasoned that by reading the Chiropractic Chapter and Acupuncture Chapter of the occupations code together (“in pari materia”) acupuncture could be construed as within the scope of the practice of chiropractic.

This foundational premise was recently invalidated in an opinion issued by the Third Court of Appeals when the court affirmatively rejected “in pari materia” as a legitimate interpretation of statutory construction as pertains to the Chiropractic and Acupuncture Chapters of the Occupations Code. (NO. 03-15-00262-CV, Opinion issued 8/18/2016)

With the reasoning of DM-471 no longer applicable as the legal foundation for rules previously adopted by the Board, the Texas Association of Acupuncture and Oriental Medicine (hereafter “TAAOM”) hereby petitions the Board to initiate a formal process to consider any and all revisions necessary to appropriately conform Chiropractic Board rules with this recent Third Court of Appeals finding, and to engage in substantive stakeholder discussions under Chiropractic Chapter Sec. 201.1526 regarding policy issues raised by the recent Third Court of Appeals decision.

TAAOM recognizes that the Court’s decision in the above mentioned summary judgment case did not, as a matter of law, invalidate specific rules adopted by the Board authorizing its licensees to practice acupuncture. We recognize also that the Third Court remanded to District Court some of the questions raised in this case, because it determined the analysis required an evidentiary review and could not be decided as a matter of law in a summary judgment case.

However, the Third Court's finding invalidating DM-471 as legal guidance effectively voids the foundational argument for rulemaking authority the Board has presumed it had, and that it has used to adopt rules authorizing its chiropractic licensees to practice acupuncture. Any rulemaking activity undertaken by the Board while asserting and acting under this presumed authority from Chapter 205, now found to be unlawful, is necessarily undermined and all relevant TBCE rules should be revised to conform with this finding regarding DM-471 and with the statutory authority granted to the Board in Chapter 201 of the Occupations Code.

We urge the Board to consider and recognize the benefits and cost efficiencies to be gained from engaging proactively to address these issues as a matter of rulemaking policy. We are hopeful that efforts by the Board to engage stakeholders in meaningful and substantive discussions envisioned in Sec. 201.1526 of Chapter 201 will generate appropriate rule revisions, avoid the expense of additional litigation that Texas taxpayers will be required to pay to defend, and preclude the need for and costs associated with possible enforcement proceedings directed by the requirements and limitations set out for the practice of acupuncture in Chapter 205.

TAAOM submits this formal rulemaking petition in writing, pursuant to rules adopted by the Board, and as authorized by the APA, §2001.021(a). We urge the Board to recognize the rulemaking implications of the Court's finding regarding DM-471, and to work with acupuncture stakeholders to discuss, evaluate, and implement all rule revisions identified through the stakeholder process as necessary to ensure that all rules adopted by the Board conform with authority granted to the Board in Occupations Code Chapter 201.

Sincerely,

Wally Doggett
President, TAAOM