TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

December 1, 2016

Ken Levine
Executive Director
Sunset Advisory Commission
P.O. Box 13066
Austin, Texas 78711

via email to sunset@sunset.texas.gov

RE: Sunset staff report on the Texas Board of Chiropractic Examiners

Dear Director Levine:

The Texas Medical Association (TMA) is a private, voluntary, nonprofit association of more than 49,000 Texas physicians and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its mission is to "Improve the health of all Texans." TMA's diverse physician members practice in all fields of medical specialization.

TMA appreciates this opportunity to provide comments on the Sunset staff report on the Texas Board of Chiropractic Examiners (Chiropractic Board), and applauds the diligence of the Sunset staff in its comprehensive review of the Chiropractic Board. At this time, TMA would like to address some of our concerns that are not specifically covered in the Sunset staff report, but which have been raised by another stakeholder in its letter to the Sunset Commission.

1. **The Texas Chiropractic Act should not be expanded to incorporate "diagnosis" within the Act**

The word "diagnose" does not appear in the definition of the "practice of chiropractic" in the Texas Chiropractic Act.[1] That definition is limited to the use of objective or subjective means "to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body" and the use of certain procedures "to improve the subluxation complex or the biomechanics of the musculoskeletal system."[2] In contrast, the definition of "practicing medicine" in the Medical Practice Act specifically includes the diagnosis of a disease, disorder, deformity or injury.[3] A district court recently held that the Texas Board of Chiropractic Examiners' use of the term "diagnosis" in 22 Tex. Admin. Code § 78.13(d) "exceeds the scope of chiropractic as defined in Tex. Occ. Code § 201.002(b) and is therefore void."[4] TMA believes that expanding the Texas Chiropractic Act to allow chiropractors to "diagnose" all

[1] TEX. OCC. CODE § 201.002(b)(1).
[2] TEX. OCC. CODE § 201.002(b)(1), (2).
[3] TEX. OCC. CODE § 151.002(a)(13).
[4] *Texas Med. Assoc. v. Texas Bd. of Chiropractic Exam'rs, et al.*, No. D-1-GN-11-000326 (Travis County Dist. Ct.).

medical conditions would potentially allow them to diagnose a wide range of diseases and other serious medical conditions for which they are not qualified.

2. **<u>The Texas Chiropractic Act should not be revised to define and include "chiropractic medicine" within the Act</u>**

It has been suggested by the aforementioned stakeholder that the Texas Chiropractic Act should be revised to include the term "chiropractic medicine" and a definition for that term. TMA believes that there is a potential to mislead the public if the term "chiropractic medicine" is defined and included in the Act. While there are other professional licensing statutes that include the term "medicine" in reference to the profession licensed (e.g., "veterinary medicine"), there is obviously less potential for the public to be misled into believing that the individual so licensed is a physician. Because the public may not be as aware of the scope of chiropractic (e.g., by use of the terms "subluxation complex," "biomechanics," etc.), the term "medicine" should be avoided as it may imply the authority to practice medicine – which is solely within the purview of licensed physicians.

3. **<u>The Texas Chiropractic Act should not be revised to define and include "chiropractic physician" within the Act</u>**

Similarly, TMA believes that the addition of the term "chiropractic physician" in the Texas Chiropractic Act also will create confusion for the public. TMA opposes any attempt to revise the Texas Chiropractic Act to define and include "chiropractic physician" within the Act. The fact that a reimbursement mechanism such as Medicare may utilize the term "chiropractic physician" does not lessen the public confusion that could occur if the Texas Chiropractic Act were changed to allow chiropractors in Texas to call themselves "chiropractic physicians." Moreover, the question whether a chiropractor may use the term "chiropractic physician" has been addressed in both statutory and case law.[5] Additionally, a recent study has underscored the public's overwhelming opinion that only licensed medical doctors or doctors of osteopathic medicine should be able to call themselves "physicians."

A. Statutory Law

The Texas Chiropractic Act provides that the Chiropractic Board may refuse, revoke, suspend or probate the licensure of a person for "advertising using the term 'physician' or 'chiropractic physician' or any combination or derivation of the term 'physician.'"[6] Additionally, the Healing Art Identification Act authorizes only those who are licensed by the Texas Medical Board and who hold either a doctor of medicine or doctor of osteopathy degree to use the term "physician" as a professional identification.[7] Chiropractors are restricted to use of the terms "chiropractor," "doctor, D.C.," "doctor of chiropractic," or "D.C."[8] Finally, the Health Professions Council Act prohibits as false, misleading or deceptive advertising any advertising that "causes confusion or misunderstanding as to the credentials, education, or licensing of a health care professional."[9] Clearly, the Texas Legislature has expressed its intent to circumscribe the terminology that may be used by chiropractors in Texas in describing their practices, to exclude their use of the term "chiropractic physician."

B. Case Law

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[5] *See* TEX. OCC. CODE § 201.502(a)(22); *Seabolt v. Texas Bd. of Chiropractic Exam'rs*, 30 F.Supp.2d 965 (S.D. Tex. 1998).
[6] TEX. OCC. CODE § 201.502(a)(22).
[7] TEX. OCC. CODE § 104.003 (b), (c).
[8] TEX. OCC. CODE § 104.003 (e).
[9] TEX. OCC. CODE § 101.201(b)(5).

In the *Seabolt* case, the validity of the advertising prohibition was challenged by a group of chiropractors seeking a declaration that the law was unconstitutional. The court upheld the law prohibiting such advertising. It said that the Texas Legislature could enact laws to prevent speech that is misleading and to protect the public.[10] TMA believes that the term should be avoided in order to lessen the potential misunderstanding of the nature and scope of practice by a chiropractor, and to avoid the misperception that the individual is authorized to engage in the practice of medicine.

C. Recent Study

As part of its "Truth In Advertising" campaign, the American Medical Association (AMA) commissions an annual survey to determine whether, and the degree to which, the public may be confused about the differences between various kinds of health care providers. A copy of the 2015 survey is attached as Exhibit "A." Among other queries, the survey asks whether "[o]nly licensed medical doctors or doctors of osteopathic medicine should be able to use the title 'physician.'"[11] In 2014 (the year of the latest available polling results), **94%** of the public queried responded that they "Agree" with that statement.[12] In another question in the same survey, the AMA asked whether a chiropractor "is a medical doctor."[13] **Twenty-two percent** responded "Yes."[14] If nearly one-quarter of the public already thinks (mistakenly) that chiropractors are medical doctors, then this misperception could only increase if chiropractors were allowed to use the term "chiropractic physician." TMA strongly agrees with the following AMA statement on the importance of truth-in-advertising with regard to health care practitioner labels: "Confusion about who is and who is not qualified to provide specific patient care undermines the reliability of the health care system and can put patients at risk."[15]

The AMA nationwide survey results are not alone in their finding that the term "chiropractic physician" creates confusion for the public. The public holds similar views close to home, according to an earlier survey of Texas residents. In reviewing the evidence for and against chiropractors' use of the term "chiropractic physician," the Fifth Circuit in *Seabolt* cited a 1998 survey by the Eppstein Group as "[d]efendant's most compelling evidence demonstrating the confusing and misleading nature of the term 'chiropractic physician' or 'chiropractic sports physician'...."[16] In its opinion, the Court cited the Eppstein Group survey findings "that **thirty-five percent** of the eight hundred Texans surveyed believed that a chiropractic physician was a chiropractor who had attended medical school. **Forty-eight percent** believed chiropractic physicians had additional training and/or skills that ordinary chiropractors did not possess. **Thirteen percent** believed that a chiropractic physician was a highly trained chiropractor. **All of these impressions are wrong**."[17]

4. <u>Chiropractors should not be permitted to advertise specializations or training</u>

In support of its recommendation for a new statutory provision allowing chiropractors to advertise their specializations or special training, the aforementioned stakeholder has argued that statutory restrictions on the advertising of chiropractic specializations violate a chiropractor's First Amendment right to freedom of speech. It is settled case law that "commercial speech that is false, deceptive, or misleading may be

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[10] *Seabolt*, 30 F.Supp.2d 965, 968-969.
[11] American Medical Association, *"Truth In Advertising" Campaign*, AMA Advocacy Resource Center (2015), at 3.
[12] *Id*.
[13] *Id*. at 2.
[14] *Id*.
[15] *Id*. at 3.
[16] *Seabolt*, 30 F.Supp.2d 965, 968.
[17] *Seabolt*, 30 F.Supp.2d 965, 968 (emphases added).without offending

prohibited in its entirety by the State without offending the Constitution."[18] TMA believes that the enactment of a statute permitting chiropractors to advertise specializations or training (e.g., "chiropractic sports physician," "chiropractic neurologist") would serve to mislead the public, as a chiropractor does not attend medical school; indeed, physicians are required to undergo years of postgraduate training in order to be board certified, "while most new chiropractors go immediately into practice."[19]

5. **The Texas Chiropractic Act should not be revised to define and include "neuromusculoskeletal" within the Act**

The aforementioned stakeholder has suggested that the scope of practice under the Texas Chiropractic Act should be expanded to include a definition for "neuromusculoskeletal" within the Act. TMA disagrees. The neurological system is not included in the definition of chiropractic; only the "biomechanical condition" of the musculoskeletal systems and spine is included.[20] If the term "neuromusculoskeletal" were defined and included in the Act, chiropractors could diagnose and treat neurological diseases and disorders without referral to a physician specialist. The suggested term should not be added as a definition in the Texas Chiropractic Act as it would inappropriately expand the scope of chiropractic.

Conclusion

On behalf of the Texas Medical Association, we appreciate the opportunity to provide these comments regarding the Sunset staff report of the Texas Board of Chiropractic Examiners. If you have any questions, please contact either of the undersigned at TMA's main number, (512) 370-1300.

Sincerely,

Donald P. Wilcox
Vice President and General Counsel
Texas Medical Association

Matthew T. Wall
Assistant General Counsel
Texas Medical Association

[18] *Seabolt*, 30 F.Supp.2d 965, 968, *citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).
[19] *Id*.
[20] TEX. OCC. CODE § 201.002(b).