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What Happens in Texas Won't Stay in Texas

By James Edwards, DC

In 1933, Texas Attorney General Dan Moody met with the Texas Medical Association (TMA) at a convention in Fort Worth and promised in an address that he would "*run all the chiropractors in Texas into the Gulf of Mexico.*" Even though he was unsuccessful, it's *déjà vu* all over again because the TMA is now attempting to strip diagnosis from Texas doctors of chiropractic and in effect, accomplish what Moody could not: run us all into the Gulf of Mexico.

Without question, what happens in Texas on the issue of diagnosis will most certainly not stay in Texas. In fact, I am absolutely convinced that if political medicine is victorious in Texas – a state with over 4,000 DCs and the powerful Texas Chiropractic Association (TCA) – the AMA and state medical associations will be emboldened and attempt to repeat the process in every state, one by one.

So, be forewarned: If Texas doctors of chiropractic lose this battle with the political medicine machine, set your clock because it will only be a matter of time before they attack in your state; and they will do so armed with their Texas victory as "Exhibit A." For that reason, and no matter what state you live in, I urge you to join this fight. But before I tell you how to enlist, allow me to give you a brief background and update you on the latest legal developments.

The Ongoing Battle Against Organized Medicine

After the Texas Board of Chiropractic Examiners (TBCE) adopted an administrative rule in 2006 appropriate for the practice of chiropractic in Texas, the TMA filed a lawsuit to strike it down. After hearings, the district court judge ruled in 2010 that the TBCE rule should be struck down in four areas. His ruling stated that the rule should not allow DCs to 1) diagnose subluxation complexes; 2) diagnose conditions beyond the spine and musculoskeletal system for the purpose of referral; 3) perform MUA; and 4) perform needle EMG.

Of course, the TCA and the TBCE appealed that ruling; below is an abbreviated synopsis of the communique sent out by their attorneys (Mr. Jeb Boyt and Mr. Jason Ray) after the matter was heard by a three-judge panel at the appellate level. The argument took place in Austin on Wednesday, Sept. 14, 2011. Chief Justice Jones (an appellate specialist with a keen interest in these agency matters), Justice Pemberton (the governor's former general counsel and a bright young justice who many think is destined for the Texas Supreme Court) and Judge Henson (the only woman on the panel, and very experienced and practical in her analysis) composed the panel which will render the decision.

Overall, both spectators and lawyers uniformly agreed that TCA was very well-represented at the argument. The TMB and TMA attorneys, on the other hand, did not appear to be particularly prepared. The primary issue discussed by the court and the attorneys was diagnosis. MUA received a fair amount of discussion, while needle EMG received surprisingly little discussion.

The discussion as to diagnosis focused on the statutory language and the distinction between a preliminary diagnosis and a definitive diagnosis. Remember that the district court judge decided that DCs could almost always form a preliminary diagnosis (also called a provisional diagnosis or tentative diagnosis) for the purpose of referral to another health care provider, but could only "definitively" diagnose (which he took to mean an absolute certain diagnosis) a patient when the diagnosis would require chiropractic treatment.

For example, assume that a DC sees a possible tumor on an X-ray. The district court judge ruled that the DC could refer the patient to another health care provider with a preliminary (or tentative) diagnosis of cancer if that is what the DC believed the tumor to be. But the judge said that it would be improper for a DC to perform the tests necessary to determine with absolute certainty whether the mass was actually a cancerous tumor or not (because that would be a definitive diagnosis). The judge reasoned that since DCs can't treat tumors or cancer, then there was no reason to permit them to engage in those types of diagnostic tests.

The TMA argued that the TBCE's rule allowed DCs to diagnose anything, including cancer and other things like multiple sclerosis, which DCs cannot treat. Mr. Matt Wood (representing the TCA) did a great job explaining that the board's rule did not permit unlimited definitive diagnosis. He explained that a *subluxation complex* is a term specific to DCs in the law and the Chiropractic Act is the only place where you will find that term. Since DCs are the only health care providers able to treat subluxation complexes, it stands to reason that DCs should be able to diagnose them.

Mr. Wood also brought up the fact that the Texas legislature appeared to intend to permit DCs to diagnose almost any condition, because the Chiropractic Act permits DCs to draw blood for diagnostic purposes. That section of the act does not limit what the blood can be drawn to test for. Therefore, why would the legislature specifically allow DCs to draw blood unless it was to diagnose conditions outside of the biomechanical condition of the spine and musculoskeletal system? The judges appeared to be interested in that line of reasoning.

The discussion of MUA dealt with both the language of the statute and briefly with legislative intent. Remember that the district judge said that the chiropractic board's rule allowing MUA was improper because MUA is in the surgery section of the CPT codebook. Although it is fairly complicated, as a practical matter the Chiropractic Act defines a "surgical procedure" as whatever is listed in the surgical section of the CPT codebook.

TCA legal counsel argued that the district judge's decision was wrong because the Chiropractic Act *does not prohibit* MUA, and in fact it expressly permits "manipulation," without any limit. It does not say manipulation "but only when conscious."

Justice Pemberton asked if it mattered that MUA was in the surgery section of the CPT codebook. Mr. Wood said that the part of the Chiropractic Act which defines "surgical procedure" as being whatever is in the CPT codebook was unconstitutional. He said that it was common for the legislature to "delegate" the responsibility for defining certain words to an agency or another part of the government. But here, he said, it is important to realize that the CPT codebook is written by the American Medical Association, which means it actually determines the scope of chiropractic because it defines what is (and is not) a "surgical procedure."

Since surgery by DCs is prohibited, the AMA actually has the power to define what DCs can do, simply by changing what is in the surgery section of the CPT codebook. Mr. Wood pointed out that the Supreme Court has never permitted the legislature to allow a competitor like the TMA (or the AMA) to define the scope of

its competitor’s practice. In fact, the Supreme Court has declared those sorts of legislative delegations to private parties (like the AMA, which creates and publishes the CPT codebook) unconstitutional several times in the past. That comment made the judges sit up and take notice.

In that regard, the court also asked some welcome questions relating to whether the Texas Legislature improperly delegated to the AMA the ability to define a surgical procedure. No one from the TMB or the TMA had an answer to that question.

Regarding needle EMG, Justice Pemberton asked the medical board to reconcile its interpretation of "incisive" with the allowance for DCs to use needles under the Acupuncture Act. As in their brief, the attorney for the medical board did not have much of a response on this point. But Justice Henson seemed very interested in comparing the size of the EMG needles with the needles for acupuncture. Justices Pemberton and Jones asked about the incisiveness of a needle to draw blood, and about whether withdrawing blood was actually withdrawing tissue.

A Chiropractic Matter

At the end of the argument, the court raised an interesting question as to the degree of "deference" owed the chiropractic board’s interpretation of the Chiropractic Act as set forth in the definition of "incisive" and other portions of the rule. One of the judges on the panel recently authored an opinion that addressed the degree of "deference" owed in a dispute as to the overlap in practice between architects and engineers. The attorneys were given the opportunity to submit a supplemental letter brief distinguishing that case from this one. The TCA’s theme in the appeal was all about "deference." Mr. Wood said, ″In 2006, the Texas Board of Chiropractic Examiners adopted a rule that defined the scope of practice for chiropractors in Texas. That rule was reasonable, and is entitled to deference. The trial court, however, showed the rule no deference and struck down several parts of it. This court should reverse the trial court’s judgment on each of those issues."

TCA legal counsel closed by stressing – on the basis of deference – that the TBCE alone has the responsibility to interpret the act, enforce it and make sure it makes sense. Counsel also pointed out that Texas courts have consistently said that if an agency’s interpretation of its own statute is reasonable (even if the court disagrees with the way the agency interprets it), then the court should defer to the agency and let the agency make the decision. That principle of deferring to the agency is even stronger when the subject matter is complex or where the subject matter requires special knowledge, like it does on these issues.

Help Protect Your Profession

So, there you have it. The case is now fully before the court and a ruling may be rendered before publication of this issue. But no matter what the ruling, the losing side will certainly appeal to the Texas Supreme Court. As a result, raising additional funds to continue the fight is absolutely essential. Let me repeat that: Raising additional funds to continue the fight is absolutely essential!

Sam Houston once said, "Texas has yet to learn submission to any oppression, come from what source it may." In regard to this fight, Texas DCs are doing their job to fight this latest medical oppression. In fact, Texas DCs contributed $40,000 in the month of October 2011 alone. But that is not nearly enough to finish the job.

Because "what happens in Texas will not stay in Texas," the TCA needs financial support from every DC, no matter where you practice. If we win here, many state battles can and will be averted. But lose here in Texas and trust me, it's only a matter of time before this same medical oppression will move to your backyard.

Right now, while it is on your mind, please go to www.chirotexas.org/archive/donate and make a monthly pledge of whatever amount you can – $10, $25, $50, $100 or more – to help fight political medicine. This is an extremely important battle; help fight it today and defend the profession you hold so dear.

For background information, read our feature article, "Texas Judge Rules on Diagnosis Issue: Is Some Better Than None?" in the Oct. 21, 2010 issue of *DC*.

Click here for more information about James Edwards, DC.

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