



TEXAS

STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

RECEIVED *Ensuring Quality Podiatric Medicine for the People of Texas*

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MAR 30 2000

77 YEARS
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OPINION COMMITTEE Monday, March 27, 2000

The Honorable John Cornyn
Office of the Attorney General, Opinion Committee
Texas Attorney General
Office of the Texas Attorney General
300 W 15th St
Austin TX 78701

FILE # ML-41343-00

I.D. # 41343

RQ-0211-JC

RE: Request for Attorney General's Opinion

Dear General Cornyn:

On February 16, 2000, the Texas State Board of Podiatric Medical Examiners (the "Board") voted to request a formal Attorney General's Opinion on the following issues:

1. Does the Board have the statutory authority to conduct on-site compliance inspections of podiatric physicians' medical practice locations to verify compliance with all aspects of the podiatry practice laws?
2. If the answer to question #1 is "yes", does that statute and does the Board rule adopted pursuant to that statute meet the requirements of the Fourth Amendment of the U.S. Constitution?
3. If the answer to question #1 and #2 is "yes", may the Board, pursuant to its enabling statute, conduct on-site compliance investigations of licensee medical practice locations when the licensee objects to the presence of the compliance inspector and/or attempts to deny the inspector access to the practice site?
4. If the answer to question #3 is "no", does the Board have any authority, outside of its enabling statute, that allows the Board to conduct on-site compliance inspections, over the protests of our licensee?

BOARD'S STATUTORY AUTHORITY:

The Podiatric Medical Practice Act, Tex. Occup. Code Ann., §202.602 (formerly V.T.C.S., Art. 4573e), codified by Acts 1999, 76th Leg., Ch. 388, §1, 1999 Tex. Leg. Serv. 1554, 1579, states:

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"The Board by rule shall develop a system to monitor a podiatrist's compliance with this chapter. The system must include (1) procedures for determining whether a podiatrist is in compliance with an order issued by the Board and, (2) a method of identifying and monitoring each podiatrist who represents a risk to the public." (See copy of above statute attached as ATTACHMENT #1).

Section 202.262 of the Act provides:

"(a) A person licensed under this chapter must conspicuously display both the license and an annual renewal certificate for the current year of practice at the location where the person practices.

(b) The person shall exhibit the license and renewal certificate to a Board representative in the representative's official request for examination or inspection."

BOARD'S COMPLIANCE MONITORING RULE:

The Board's rule regarding compliance monitoring may be found in 22 Tex. Adm. Code §376.11. Due to the length of the rule, it is not reproduced in this letter. However, a copy of the rule is attached as Attachment #2 for reference.

BACKGROUND:

The Board is the agency that regulates the practice of podiatric medicine in Texas. In 1994, recognizing the need to conduct compliance monitoring of its licensees, the Board adopted the provisions of §376.11, Monitoring Licensee Compliance, which became effective on April 25, 1994, (19 TexReg 2721). At their August 25, 1994 Board Meeting, in order to facilitate compliance inspections, a "Compliance Monitoring Report" (*see ATTACHMENT #3) designed by agency staff was presented to the Board for their approval.

Since then, the question has been raised several times as to whether the Board has the statutory authority to conduct on-site compliance inspections, and if so, whether the statute providing that authority is constitutional under the fourth amendment of the federal constitution, protecting against unreasonable searches and seizures. The question has also arisen as to whether the Board may conduct an on-site inspection over the protest of the podiatric physician.

The Board has determined that it is in the best interest of protecting the health and welfare of the citizens of Texas for the Board to conduct on-site inspections of licensees, to verify that they are conducting the practice of podiatric medicine in a lawful, safe and ethical manner. Compliance inspections anticipated would include inspections of the office of licensees that are currently subject to a disciplinary Board order and podiatric physicians against whom a complaint has been filed. The Board also wishes to conduct random inspections of podiatric physicians as a part of a comprehensive compliance program, embracing the concept that; the licensee who protests the compliance inspector's presence the loudest, was most likely to be the individual most needing to have a compliance inspection.

The Board decided that due to the limited funds available to our agency, it would be unwise to use our limited appropriation inspecting only a very limited percentage of our licensees (those licensees agreeing to an on-site inspection) who were, most likely, the ones least needing this oversight. Further the Board noted that by conducting on-site inspections, they would be substantially increasing our agency's travel, during a time when a statewide travel cap had been mandated by the legislature for all state agencies. As such, the Board tabled the idea of performing compliance inspections.

During a recent Small Agency Management Control Follow-up Audit conducted by the State Auditor's Office, they found that; "The Board should seek resolution regarding the issue of whether they have authority to conduct on-site inspections of podiatrists operating in Texas." This Report further recommended that, "...if the Board wants to perform inspections, it should request a formal Attorney General's Opinion. However, if the Board determines that it does not want to conduct inspections, it should repeal the rule."

Based on the Auditor's recommendations, at the Board's February 16, 2000 meeting, the Board considered the above issues and by unanimous vote, reaffirmed its desire to conduct compliance inspections. It further

voted to ask the Board's Executive Director to request a formal Attorney General's Opinion, to resolve the issue of whether the Board has the statutory and constitutional authority to conduct these inspections, particularly in cases where the licensee being inspected is non-cooperative and refuses to allow an inspection of their practice.

Please feel free to call me in the event that you have further questions or need additional information to facilitate your making a decision in this matter.

Sincerely,



Allen M. Hymans
Executive Director

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