



Texas State Board of Medical Examiners

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June 19, 2000

JUN 22 2000

COMMISSION COMMITTEE

Honorable John Cornyn
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

REGISTERED MAIL

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JUN 22 2000

OPEN RECORDED DIVISION ✓

RE: Request for Written Opinion

Dear General Cornyn:

Pursuant to Section 402.042 of the Texas Government Code, I respectfully request that you issue a written opinion on two questions affecting the public interest and my official duties as Executive Director of the Texas State Board of Medical Examiners (hereinafter referred to as the "Board" or "TSBME").

I. QUESTIONS

The TSBME is statutorily authorized to regulate the certification of each Non-Profit Health Organization ("NPHO") doing business in Texas under Section 5.01(a) of the Texas Medical Practices Act and now codified as Section 162.001 of the Texas Occupations Code (hereinafter referred to as the "Act"). The TSBME seeks an opinion concerning the following questions:

- (1) Is the operation of a foreign corporation as a NPHO lawful under the Act and rules of the TSBME?
- (2) May TSBME continue to interpret statutory language of the Act, "is a nonprofit corporation under the Texas Non-Profit Corporation Act," to mean a corporation formed and organized under the Texas Non-Profit Corporation Act?

II. OVERVIEW

Until the issue of certification of a Foreign NPHO was raised by a recent application, the Board has worked under the presumption that all NPHOs were corporations formed and organized in Texas. Questions about this presumption were raised at the Board meeting on March 31, 2000, after a discussion and debate concerning foreign non-profit corporations seeking 5.01(a) certification and renewal of certification in Texas. The Board was informed that a recent internal audit indicated that the total number of NPHOs currently certified in Texas is 322. Of this total, eight of those are foreign non-profit corporations (hereinafter referred to as "Foreign NPHOs"). The remaining 314 are non-profit corporations formed and organized under the laws of the State of Texas (hereinafter referred to as "Domestic NPHOs").

Since the original enactment of Section 5.01(a) of the Act in 1971, TSBME has interpreted the statutory language, "is a nonprofit corporation under the Texas Non-Profit Corporation Act," to mean a corporation formed and organized under the Texas Non-Profit Corporation Act. (hereinafter referred to as the "TNPCA"). As a result, all of the certified NPHOs are Domestic NPHOs, except for the eight Foreign NPHOs which have

been certified due to clerical oversight. In order not to penalize the eight Foreign NPHOs because of TSBME's oversight, the Board took action at its March 31, 2000 meeting directing Board staff to request an opinion from the Office of the Attorney General and to adopt policy to allow any previously approved Foreign NPHOs up to 12 months to file Articles of Incorporation with the Office of the Secretary of State of Texas, if the Attorney General finds the certification of foreign corporations as NPHOs not to be in compliance with the law.

III. STATUTORY AND REGULATORY AUTHORITY

Section 162.001 of the Medical Practice Act, TEX. OCC. CODE ANN. (Vernon, 2000), authorizes the Board by rule to certify a NPHO. Section 162.001(b) sets out the following statutory requirements for certification as a NPHO (emphasis added):

(b) The board shall certify and approve a health organization that:

(1) *is a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes)* organized to:

- (A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area;
- (B) support medical education in medical schools through grants and scholarships;
- (C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine;
- (D) deliver health care to the public; or
- (E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;

Pursuant to its rule-making authority, the Board adopted Chapter 177 of Title 22, Texas Administrative Code (hereinafter referred to as the "Rules"). Rule 177.3, Qualifications for Certification, sets out the following requirements for certification as a NPHO (emphasis added):

Rule 177.3. Qualifications for Certification. A health Organization meeting the following qualifications shall be certified by the Texas State Board of Medical Examiners:

- (1) the Health Organization is formed solely by persons licensed by the Texas State Board of Medical Examiners;
- (2) *the Health Organization is a non-profit corporation under the provisions of the Texas Non-profit Corporation Act;*
- (3) the Board of Directors of the Health Organization consists solely of persons licensed by the Texas State Board of Medical Examiners and actively engaged in the practice of medicine;
- (4) the Health Organization is not established or organized or operated in contravention to or with the intent to circumvent any of the provisions of the Act; and
- (5) the Health Organization makes application, submits reports, pays fees and otherwise complies with the provisions of this chapter.

IV. DISCUSSION

A. PROHIBITION AGAINST CORPORATE PRACTICE OF MEDICINE

NPHOs are special health organizations because they allow the employment of physicians for the purpose of practicing medicine by a corporation, thus providing an exception to the prohibition against the corporate practice of medicine in Texas. When first introduced by statute in 1971, the purpose of the NPHO was to encourage the employment of physicians to diagnose and treat historically underserved populations

through organizations operated as migrant, community, or homeless health centers. In the early 1990's, however, the NPHO began to be used as an entity able to execute capitation contracts in the emerging field of managed care.

The Board has the obligation and responsibility to insure that NPHOs and the physicians associated with them do not violate the Texas prohibition against the corporate practice of medicine. Employment of a physician by a non-physician entity has been judicially construed to be a violation of this prohibition. (See, e.g., *Woodson v. Scott & White Hospital*, 186 S.W.2d 720 (Tex.App. 1945, writ ref'd w.o.m.)) Prohibited conduct includes a relationship in which the physician lends his license to a non-physician or corporation, as well as generally aiding or abetting the unlicensed practice of medicine. (See, e.g., *F.W.B. Rockett, M.D. v. Texas State Board of Medical Examiners*, 287 S.W.2d 190 (Tex.Civ.App. – San Antonio 1956, writ ref'd n.r.e.)) (See also, *Garcia v. Texas State Board of Medical Examiners*, 385 F.Supp. 434, judgment aff'd, 421 U.S. 995 (1975); *Flynn Brothers v. First Medical Assoc.*, 715 S.W.2d 782 (Tex.App. – Dallas 1986, writ ref'd n.r.e.)) This conduct by a licensed Texas physician is subject to disciplinary action by the Board under Section 164.052(a)(11) and (17) of the Medical Practice Act, TEX. OCC. CODE ANN. (Vernon 2000). Under Section 165.152 of the Medical Practice Act, TEX. OCC. CODE ANN. (Vernon 2000), the unlicensed practice of medicine is, at a minimum, a Class "A" misdemeanor and a repeated offense is a third degree felony. The Board's obligation to enforce the ban on the corporate practice of medicine includes: (1) the obligation to protect physicians from the potential violation of

the prohibition through unwitting involvement with a NPHO that is not formed and organized pursuant to the Act and Rules; (2) the obligation to protect the public from the corporate practice of medicine.

B. REGULATORY RESPONSIBILITY

To meet this obligation to enforce the prohibition against the corporate practice of medicine, the Board needs the ability to analyze whether a corporation applying for certification in Texas as a NPHO meets both the letter and spirit of the Act and Rules. Section 162.001, TEX. OCC. CODE ANN. (Vernon 2000), directs the Board to revoke certification if it determines that the organization is established, organized, or operated in violation of or with intent to circumvent any provision of the Act. In addition, the Board must ensure that each NPHO is accountable to the Board, under the control and jurisdiction of the Board, and never does business in Texas unless it is certified by TSBME. If a NPHO is formed and organized under the TNPCA, the Board is able to consistently evaluate whether the structure, operations, and accountability of the organization meet the requirements of the Act and the Rules. If a NPHO is formed and organized pursuant to the corporation laws of another state, the Board and staff must go outside of the TNPCA and Texas case law to evaluate each applicant.

One issue involving each foreign corporation is accountability. Will the structure of a foreign corporation meet all of the requirements of the Act and the Rules? The potential problems in determining accountability for a foreign corporation are

demonstrated in the applications that were received from the Foreign NPHOs organized under the law of Delaware. The accompanying information explained that the Bylaws set out different classes of members, so that the requirements of both Delaware law and the Act regarding the appropriate delegation of power to the directors and to the corporate member could be satisfied. The information then proceeded to set out certain actions that require approval by a certain class of membership. The relevant statutory and case law to interpret the organizational structure is that of Delaware.

Another issue involving each foreign corporation applicant is timing. Will there be a period when the corporation is operating in Texas prior to certification? In order to seek a Certificate of Authority in Texas, the organization will have been previously incorporated in another state, and will have presumably executed contracts with health care providers. The foreign corporation then seeks certification as a NPHO in Texas. It appears that, under this methodology, there will be an operational period that could include Texas health care providers prior to certification by the Board. During this period, the Board would have no jurisdiction over the foreign corporation's provision of health care services. Are the foreign corporation and the Texas physicians associated with it violating the ban on corporate practice of medicine during this period?

Another important issue is consistency. Will the structure and operation of the foreign corporation be consistent with those of a domestic corporation? Physicians who are asked to participate as directors may be familiar with the format and operation of a

Domestic NPHO, but not be aware of differences with a Foreign NPHO. These differences may not be identified until after a violation of the ban against corporate practice of medicine has occurred.

Another important issue for each foreign corporation is control and jurisdiction. The Texas Non-Profit Corporation Act, TEX. REV. CIV. STAT. ANN, Article 1396, Section 8.01(A) (Vernon 2000), clearly contemplates that foreign corporations organized and governed by laws of foreign countries shall be entitled to procure a Certificate of Authority under the TNPCA. If questions arise, will the Foreign NPHO depend on the laws of another state or country to explain or defend its position? Will the TSBME be faced with the possibility of pursuing a violation of the Act in another state or country?

Another important concern is the issue of insolvency. As NPHOs assume greater market risks with capitation contracts, the risk of insolvency rises. If a foreign NPHO becomes insolvent, corporate member liabilities and asset distribution will be governed by the interpretation of foreign laws pursuant to Section 8.02(A)(2) of the TNPCA. Since no provision of the TNPCA requires foreign corporations to be formed and organized under the laws of the United States, will the citizens of Texas be protected against the possibility of sheltering assets in offshore NPHOs, which are beyond the reach of U.S. Bankruptcy courts?

To meet its obligations to certify organizations that comply with the intent of the Act, to enforce the ban against the corporate practice of medicine, and to ensure accountability, control, and consistency with NPHOs, TSBME seeks to be able to continue to interpret the Act to mean corporations formed and organized under the TNPCA.

C. LEGISLATIVE HISTORY

A review of the legislative history of the Act indicates that the statute enabling NPHOs was originally passed in 1971 by the 62nd Texas Legislature, Act of June 4, 1971, 62nd Leg., R.S., Ch. 627, Art. 4509a, 1971 TEX. GEN. LAWS 2041 (current version AT TEX. OCC. CODE ANN. Sec. 162.001 (Vernon 2000)). (This original statutory enactment is hereinafter referred to as "Article 4509a.") This was two years prior to that period beginning in 1973 when the activities of the Texas Legislature began to be recorded and made available to the public. Consequently, there is no authoritative legislative history of this statute available to provide the reasoned opinion of the legislative context regarding the enactment of Article 4509a.

Mr. Sam V. Stone, Jr. testified in favor of the bill that created Article 4509a before the Public Health Committees of the Texas Legislature, in his capacity as Assistant General Counsel for the Texas Medical Association. Mr. Stone recently provided information about the history of this statute by testimony at the Board's March 21, 2000 meeting. Mr. Stone testified that: (1) he drafted the language for presentation to

lawmakers as it was adopted; (2) the original intent was to require an organization to be formed and organized under the TNPCA; (3) this limitation was imposed in order to avoid opening up the statute to the corporate practice of medicine.

The original codification in 1971 of Article 4509a was unchanged until its repeal in 1981, when it was recodified as Section 5.01(a) of Article 4495b, TEX. REV. CIV. STAT. ANN. (Vernon 1981). Section 5.01(a) was amended in 1991 and 1995 to arrive at its present form. In 1999, Section 5.01(a) was recodified as Section 162.001 of the Texas Occupations Code. However, there has been no change to the following language currently set out in Section 162.001 since its original enactment as Article 4509a in 1971: “is a nonprofit corporation under the provisions of the Texas Non-Profit Corporations Act.”

The Board promulgated formal rules for certification of NPHOs in January 1976, as 22 Tex. Admin Code 177.1 and 177.2. Under the language of Rule 177.1(a)(2)(A), the requirements for certification of a NPHO by the TSBME include, “a copy of the certificate of incorporation under the Texas Non-Profit Corporation Act.” In April 1992, the Board repealed the old 22 Tex. Admin. Code 177.2 and adopted a new 22 Tex. Admin. Code 177.1, “Certification of Nonprofit Health Corporations.” The language adopted in 1976 for this requirement remained the same. In January 1996, the Board repealed the old 22 Tex. Admin. Code 177.3 and adopted a new 22 Tex. Admin. Code 177.3. The language of this requirement was changed to conform to language of the Act

as follows: “(2) the Health Organization is a non-profit corporation under the provisions of the Texas Non-Profit Corporation Act.” This language remains in effect at the current time. The language of the first rule in 1976 clearly indicates that the intent of the statute was for the organization to be a domestic corporation.

The Foreign NPHOs at issue were certified and renewed in a time period that extended from 1995. During this period, the relevant language of the Act did not change. The only change in the relevant language of the Rules was to conform the language of the Rules to that of the Act. There was no change in the Board’s policy or statutory interpretation to alter the presumption that all NPHOs were formed and organized in Texas.

D. LEGISLATIVE INTENT

The TSBME is the administrative agency authorized by the Act to regulate physicians and NPHOs. A basic tenet of administrative law is that an administrative agency is a creature of statute; it has only those powers expressly conferred by statute and those necessary to accomplish its duties. Once created, however, an administrative agency must interpret its enabling statutes to establish, develop, administer, and enforce its regulatory program.

Since the first enactment of Article 4509a in 1971 and subsequent rules, the TSBME has interpreted the language, “is a nonprofit corporation under the Texas Non-

Profit Corporation Act” to mean a domestic corporation. This interpretation has been utilized as a necessary means to enforce the prohibition against the corporate practice of medicine with NPHOs and their associated physicians. While other aspects of regulation of NPHOs have developed and changed pursuant to changes in the health care industry, this interpretation of this section of the Act and the Rules has remained constant for almost 30 years. As a result of clerical oversight, a very few foreign corporations applying for certification have been approved and renewed. A recent question concerning the application by a Foreign NPHO for original certification has raised the issue for debate and deliberation. The Board has taken action to ensure that these foreign corporations will not be penalized. However, the Board’s statutory interpretation has not changed. The Board seeks an opinion on whether it may continue to interpret the Act and the Rules as it has been doing for almost 30 years.

Texas has historical precedent for deference to an agency’s interpretation of its statutes. The Texas Supreme Court spoke on this issue as early as 1944 in *Stanford v. Butler*, 181 S.W.2d 269 (Tex. 1944). In *Stanford*, the Supreme Court established the following rule of judicial deference (hereinafter referred to as the “Butler Factors”): (1) agency interpretation is legally relevant in determining the meaning of an ambiguous or doubtful statute; (2) contemporaneous construction by an agency charged with the statute’s administration is not absolutely controlling, but is worthy of “serious consideration,” has much persuasive force, and is entitled to “great weight;” (3) the agency’s statutory construction ordinarily will be upheld if it is reasonable. Reliance on

legislative intent along with agency interpretation has endured in Texas, and courts continue to use the Butler Factors when reviewing an agency's interpretation of its statutes.

The validity of the TSBME's interpretation of Section 162.001(b)(1) is supported by an analysis utilizing the Butler Factors as follows:

1. The language of the statute is not clear as to whether the organization must be formed and organized under the TNPCA or not. Mr. Hilgers and the NPHOs that he represents contend that the statute is clear that foreign corporations qualify. However, all other applicants for Board certification as a NPHO have formed domestic corporations because of their understanding of the statute.
2. TSBME has construed the statute consistently for almost 30 years, since its enactment in 1971.
3. TSBME's construction is reasonable in view of TSBME's regulatory obligation to enforce the prohibition against the corporate practice of medicine.

Two other significant factors which also argue that TSBME should be allowed to continue to interpret the Act as is has done since 1971, include the following:

1. The unofficial report of legislative intent indicates the intent to limit certification to domestic corporations.
2. Even if a statute is not ambiguous on its face, Section 311.023 of the Texas Government Code states:

In construing a statute, whether or not the statute is considered ambiguous or its face, a court may consider among other matters the:

(6) administrative construction of the statute;

(TEX. GOV'T CODE ANN., Section 311.023 (Vernon Supp. 1998)).

V. SUMMARY

The TSBME is authorized by the Act to certify NPHOs, and the physicians associated with them, in order to ensure that the prohibition against the corporate practice of medicine is not violated and compliance with the intent of the Act. For almost 30 years, the TSBME has worked under the presumption that one requirement for certification was incorporation in Texas as a domestic corporation. This presumption arises out of the statutory interpretation that the following language contained in the Act means formed and organized under the TNPCA: "is a nonprofit corporation under the Texas Non-Profit Corporation Act."

A recent review indicated that eight foreign corporations out of a total of 322 NPHOs have been inadvertently certified. The Board seeks the opinion of the Attorney General to determine if the operation of foreign corporations as a NPHO is lawful under the Act and Rules, and whether the Board may continue its interpretation of the statute to require an organization to be formed and organized under the TNPCA.

Honorable John Cornyn,
June 19, 2000
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I appreciate your attention to this request for an opinion. Mr. David Hilgers represented each of the eight Foreign NPHOs during the application process for certification. I am enclosing information prepared by Mr. Hilgers, which represents his position on these issues. If you require further information, please contact me at (512) 305-7017.

Sincerely yours,



Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners

xc: William H. Fleming, III, M.D.

Enclosure
BAL/plf