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By Opinion Committee at 4:56 pm, Feb 01, 2022

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Executive Director

February 1, 2022

VIA EMAIL TO [OPINION.COMMITTEE@OAG.TEXAS.GOV](mailto:OPINION.COMMITTEE@OAG.TEXAS.GOV)

The Honorable Ken Paxton  
Attorney General of Texas  
Attn: Opinions Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear Mr. Paxton:

The Texas Behavioral Health Executive Council (hereinafter referred to as “the Council”) respectfully requests a Texas Attorney General Opinion regarding the rule review process for the Council, as required by Tex. Gov’t Code Sec. 2001.039, given the unique nature of the Council’s rulemaking authority.

H.B. 1501, 86<sup>th</sup> Leg., R.S. (2019) created the Council and authorized the Council to regulate, administer, and adopt rules for the practice of marriage and family therapy, professional counseling, psychology, and social work. H.B. 1501 transferred rulemaking authority from the Boards for each of these professions to the Council. By way of example, see Tex. Occ. Code Sec. 507.153(c) which states: “[t]he executive council retains authority for final adoption of all rules and is responsible for ensuring compliance with all laws regarding the rulemaking process.” See also 22 Tex. Admin. Code Sec. 881.20. But under H.B. 1501 the rulemaking power of the Council is not absolute, because Tex. Occ. Code Sec. 507.153(a) states:

(a) Unless the rule has been proposed by the applicable board for the profession, the executive council may not adopt under this chapter or Chapter 501, 502, 503, or 505:

(1) a rule regarding:

- (A) the qualifications necessary to obtain a license, including limiting an applicant’s eligibility for a license based on the applicant’s criminal history;
- (B) the scope of practice of and standards of care and ethical practice for the profession;
- (C) continuing education requirements for license holders; or

(2) a schedule of sanctions for violations of the laws and rules applicable to the profession.

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Therefore, certain types of rules must first be proposed to the Council by the underlying professional Board before the Council may consider proposing or adopting them. Part of the Council's mission is to provide active state supervision through a controlling number of non-market participants serving on the Council, so if a Board's recommended rule proposal implicates federal antitrust law, by limiting competition, the Council has the authority to conduct a substantive review of the proposal and may reject or recommend modifications. The Council reviews rule proposals for other reasons as well, see Tex. Occ. Code Sec. 507.153(b) and (d) and 22 Tex. Admin. Code Sec. 881.20.

Where this rulemaking process intersects with a potential conflict is when it is applied to the agency review of existing rules as required by Tex. Gov't Code Sec. 2001.039. Under this process a state agency must review its rules every four years by assessing whether the reasons for initially adopting a rule continue to exist and shall then readopt, readopt with amendments, or repeal a rule as the result of such a review.

When the Council conducts a review of all its rules the question arises, if the Council determines that a particular rule, in a category enumerated by Tex. Occ. Code Sec. 507.153(a), cannot legally be readopted the Council can recommend changes to the underlying Board but if the underlying Board chooses not to amend its rules is the Council left with no other option but repealing the entire rule? The complete repeal of a rule may have severe consequences, so would the Council have the ability to repeal parts of a rule sua sponte or would doing so violate Tex. Occ. Code Sec. 507.153(a)? The general purpose of H.B. 1501 was to create an umbrella agency to provide a level of oversight and review for the underlying professional Boards, so the legislative intent seems clear that the Council can exercise some level of review of existing rules but to what extent?

#### **Affected or Interested Groups or Parties**

The Council has identified the following persons or groups likely to be interested in the opinion.

National Association of Social Workers Texas  
810 W. 11<sup>th</sup> Street  
Austin, Texas 78701

Texas Counseling Association  
1204 San Antonio St., Ste. 201  
Austin, Texas 78701

Texas Psychological Association  
P.O. Box 163236  
Austin, Texas 78716

Texas Association of Psychological Associates  
P.O. Box 601374  
Dallas, Texas 75360

Texas Association of School Psychologists  
14070 Proton Rd.  
Dallas, Texas 75244

Texas Association for Marriage and Family  
Therapy  
1401 Lavaca St., Ste. 712  
Austin, Texas 78701

Office of the Governor  
Attn: Regulatory Compliance Division  
P.O. Box 12428  
Austin, Texas 78711-2428

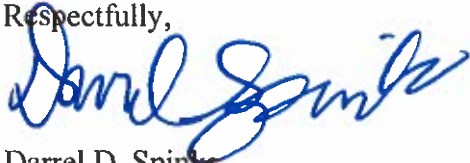
Christian Counselors of Texas  
P.O. Box 377  
Joshua, Texas 76058

LPC Associates of Texas  
2616 Reeves Cir., #B  
Austin, Texas 78741-5624

Texas Society for Clinical Social Work  
909 NE Loop 410, Ste. 730  
San Antonio, Texas 78209

The Council appreciates your review of this matter and looks forward to your opinion. If additional information is required, please contact Patrick Hyde, the Council's General Counsel, at (512) 305-7700.

Respectfully,

A handwritten signature in blue ink, appearing to read "Darrel D. Spinks". The signature is fluid and cursive, with the first name being the most prominent.

Darrel D. Spinks  
Executive Director  
Texas Behavioral Health Executive Council