UPDATE ON THE STATUS OF THE SCOPE OF PRACTICE OF PODIATRY IN TEXAS

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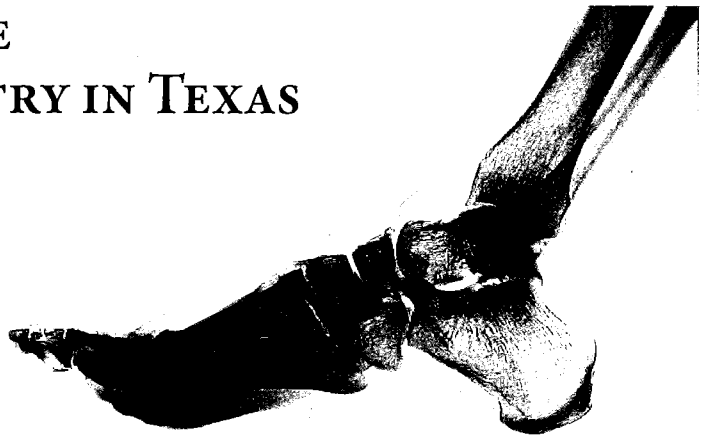

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The scope of practice of podiatry has been the focus of recent case rulings at the appellate and district court levels. This article will examine law concerning the scope of practice of podiatry and the impact the recent rulings may have on that scope.

PRACTICE OF MEDICINE IN TEXAS

There is no inherent right to practice medicine in Texas. In Texas, no one is allowed to practice medicine without a license from the Texas Medical Board.[3] By the power of Article XVI, section 31 of the Texas Constitution and the general police power to protect the public health, the Texas Legislature has specifically defined the practice of medicine, and has prescribed rules and regulations governing the practice thereof, under the Medical Practice Act (MPA).[4] The MPA defines the practice of medicine as follows:

"Practicing medicine means the diagnosis, treatment or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who: (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services."[5]

Whether one has publicly professed to be a physician does not depend on whether he or she has made a verbal claim to be a medical doctor, physician, or a surgeon--courts have held that a "public profession" depends on what one does, not only on what one says.[6]

Indeed, the regulation of those who practice medicine is so important to the people of Texas that the Texas Constitution prevents the Legislature, or any state agency, from enacting laws or regulations that allow a person to practice medicine unless that person satisfies the same requirements and standards applicable to all others who practice medicine in Texas.[7] Why, then, can other healthcare providers such as podiatrists legally treat a physical disease or disorder of the human body without a medical license? This is because the Legislature provides in the MPA an ***exemption--a specific carve-out-- for certain individuals*** from compliance with the many regulations of the practice of medicine.[8] One of those exemptions is for licensed podiatrists; the Legislature has exempted from the regulation of the MPA a "licensed podiatrist engaged ***strictly*** in the practice of podiatry as defined by law."[9] Therefore, stated differently, a podiatrist treating patients who is not engaged strictly in the practice of podiatry as defined by law could arguably be practicing medicine, and subject to the MPA as well as to regulation by the Texas Medical Board (TMB).

PRACTICE OF PODIATRY IN TEXAS

The practice of podiatry in Texas is governed by statue, and that has been the case since 1923.[10] The Texas Legislature has defined podiatry as "the treatment of or offer to treat any disease, disorder, physical injury, deformity, or ailment of the human foot any system or method."[11] Also pursuant to Texas statute, the Texas State Board of Podiatric Medical Examiners (TSBPME) adopts rules to govern the regulation of the practice of podiatry.[12] The TSBPME regulation of the practice of podiatry and rule making authority is not without bounds, however. The board *must* act *"consistent with the law regulating the practice of podiatry"* and the law of this state.[13] Its regulation can be challenged in court. One who seeks to challenge the board's rule making actions must bring a declaratory action in a *Travis County* district court.[14] This statutory authorization allowing a person to challenge the validity or applicability of an agency rule, if it is alleged that the rule or its threatened application interferes with or impairs a legal right or privilege of the plaintiff, is a legislative grant of subject matter jurisdiction.[15] This is precisely what occurred in *Texas Orthopaedic Association* v. *Texas State Board of Podiatric Medical Examiners*, 254 S.W.3d 714 (Tex. App.--Austin 2008, pet. denied). In that case, the TSBPME's rule making was challenged, and the challenged rule was declared invalid by the court of appeals.[16]

TEXAS ORTHOPAEDIC ASSOCIATION V. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS (TOA V. TSBPME)

In TOA v. TSBPME, the Texas Orthopaedic Association, et. al., sought a declaratory judgment that a rule promulgated by the TSBPME defining "foot" impermissibly expanded the scope of podiatry. The case was properly brought in a Travis County District court, as required by the Texas Government Code.[17] The TSBPME rule challenged in that case defined "foot" as follows:

"The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, by ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes."[18]

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The Travis County district court declared that the rule was valid, but the Third Court of Appeals reversed the trial court and invalidated the rule, holding that the *"rule defining 'foot' impermissibly expanded practice of podiatry beyond treatment of foot."*[19] The court wrote in its opinion that the rule authorized podiatrists to treat parts of the body outside the traditional scope of podiatry without satisfying the requirements of the MPA, and that such authorization "exceeds the *limited exemption* given to podiatrists and *would constitute the unauthorized practice of medicine."*[20]

The court also correctly noted that any change to the scope of practice must be made by the Legislature. In a footnote, the appellate court wrote: "The statutory authority currently in place limits podiatrists to the treatment of 'the foot...it is clear that 'the foot' does not include the full portion of the body included within the definition of the Rule...

Compelling arguments might be made as to whether--from a medical standpoint--it is reasonable to allow a practitioner treating the foot to consider and threat other anatomical systems that interact with and affect the foot. ***This is a debate to be had at the legislature."***[21]

Hendrick Medical Center Case

Recently, however, a district court in Abilene (not an appellate court) has issued what may be considered by some as a conflicting opinion.[22] The facts surrounding that case are that in 2011, Hendrick Medical Center (HMC) in Abilene allegedly gave two podiatrists on the medical staff written notice that their podiatry privileges would be administratively reduced by the elimination of all ankle privileges. According to the facts of that case, HMC indicated in the notice that the decision to eliminate ankle privileges was based on its interpretation of the law that defines the scope of the practice of podiatry. The podiatrists and the podiatric medical association filed suit against HMC in

Taylor County District Court, seeking injunctive and declaratory relief regarding their ankle privileges. On October 2, 2013 the district court judge for Taylor County entered an interlocutory declaratory judgment that the following surgical procedures are within the scope of podiatry as defined in the Texas Occupations Code:

1) ankle fusion; 2) pantalar fusion; 3) open reduction-internal fixation (ORIF) of ankle fracture to treat unstable talus; 4) ankle arthrotomy to treat talus; 5) tibial/fibular osteotomy to treat talus; 6) calcaneal osteotomy; 7) cuneiform osteotomy with bone graft; 8) gastrocnemius recession; 9) tendo-Achilles lengthening; 10) detachment and re-attachment of Achilles tendon with resection of posterior calcaneal exostosis; 11) flexor hallucis tendon transfer; 12) tibialis posterior tendon transfer; and 13) decompression posterior tibial nerve.[23]

This ruling has not been appealed, and it therefore remains a trial court declaratory judgment. Generally an appellate court ruling holds a greater precedent value than a trial court judgment.

An interesting aspect of this trial court case is that the plaintiffs sought a declaratory judgment under the Texas Declaratory Judgments Act.[24] That Act requires that *all persons who have any interest that would be affected by the declaration must be made parties to the suit.*[25] Importantly, the Act clearly states that a declaratory judgment *"does not prejudice the rights of a person not a party to the proceeding."*[26] Therefore, it does not appear that the HMC ruling is binding on other individuals or entities not parties to the HMC suit.

Summary

In summary, podiatrists are exempted from the requirements of the MPA and the TMB when they practice *strictly* within the scope of practice of podiatry. The scope of practice of podiatry is defined by the Texas Legislature. The Legislature has vested power in the TSBPME to write rules regulating the practice of podiatry, but if the TSBPME exceeds its rule making authority, a challenge to that rule making must be brought in a *Travis County* district court, and any subsequent judgment by a Travis County district court is appealed to the *Third Court of Appeals in Austin*. The TSBPME's rule defining the foot and authorizing treatment other than the foot was appropriately challenged in Travis County district court, and the Third Court of Appeals invalidated that rule. *The Legislature has not amended the statute that existed when the court of appeals made its ruling, i.e., it has not authorized the treatment by podiatrists beyond the foot.* Therefore, podiatrists who might perform the procedures at issue in the Taylor County case could arguably and potentially be at risk of regulation by the Texas Medical Board for the unauthorized practice of medicine.

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[3] *TEX. OCC. CODE § 155.001. When the Legislature enacted the Medical Practice Act it made the following specific finding: "[T]he practice of medicine is a privilege and not a natural right of individuals and as a matter of public policy, it is necessary to protect the public interest through enactment of this subtitle to regulate the granting of that privilege and its subsequent use and control[.]" TEX. OCC. CODE § 151.003 (West 2004).*

[4] *TEX. OCC. CODE § 151.001 et seq; TEX. CONST. ART. XVI § 31.*

[5] *TEX. OCC. CODE § 151.002(a)(13).*

[6] *Green v. State, 137 S.W.3d 356 (Tex.App.—Austin 2004, pet ref'd); Kelley v. Texas State Board of Medical Examiners, 467 S.W.2d 539, 542 (Tex.Civ.App.-- Fort Worth 1971, writ ref'd n.r.e.)*

[7] *Article 16, section 31, of the Texas Constitution states the following: The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for malpractice, but no preference shall ever be given by law to any schools of medicine.*

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