TENNESSEE
ATTORNEY GENERAL
OPINIONS
mobilization, including active and passive movement, rehabilitation procedures, treatment planning, instruction, modification and consultative services in the establishment of physical therapy programs for patients, all under the written or oral referral of a licensed doctor of medicine, dentistry or osteopathy. (Emphases supplied).

The descriptive literature which you supplied to this office states that an electronic muscle relaxer ‘transmits [a] signal through the leads to carbonized rubber contact pads placed over the muscles. When switched on, [the machine] sends signals to selected muscles which . . . contract and relax rhythmically’. The purported result of this electronic stimulation is increased muscle strength and improved muscle tone. In other words the machine apparently achieves the effects of a program of vigorous physical exercise without the effort that such a program requires. Cast in terms of the definition of physical therapy set out above, the device requires the evaluation of a bodily condition, i.e., a determination by the operator concerning the relative strength and tone of a subject's muscle groups and the amount of treatment required to increase those qualities to a particular desired level (‘treatment planning’). The equipment requires treatment of said condition by means of electronic stimulation; i.e., ‘use of . . . the properties of . . . electricity’. Finally, the electronic stimulation causes rhythmic contraction and relaxation of the subject's muscles, which constitutes either ‘active or passive movement’.

*2 Section 63-13-102 covers a very broad spectrum of activities, including the operation of this device. Similarly, the definition includes, e.g., leading aerobic exercise classes, or instruction, in the use of weight training equipment. However, by its terms, § 63-13-102 applies only when the activity is performed under the referral of a physician, dentist, or osteopath.

Thus, if a physician were to prescribe a program of treatment requiring use of this device, it would be necessary that a licensed physical therapist operate the device. In all other circumstances, use and operation of the device is not regulated.

If you have further questions or comments about this matter, please feel free to contact us.

Sincerely,
William M. Leech, Jr.
Attorney General & Reporter

William B. Hubbard
Chief Deputy Attorney General

Michael Lee Parsons
Assistant Attorney General


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Office of the Attorney General
State of Tennessee

Opinion No. 95-033

April 6, 1995

Advertising and Treatment by Massage Therapists.

Senator Ben West, Jr.
Suite 37, Legislative Plaza
Nashville, TN 37243–0160

QUESTIONS

1. May a massage therapist in the State of Tennessee lawfully advertise that he or she “treats” one or more “conditions”?

2. May a massage therapist in the State of Tennessee lawfully perform therapeutic massage pursuant to a prescription from a licensed primary care provider, and if so, may he or she advertise this service?

OPINION

1. No. The “treatment” of any “condition” through massage constitutes “therapeutic massage,” and only licensed physical therapists and certain other health-related professionals may lawfully engage in “therapeutic massage.” Any advertisement by a person who is not legally qualified to perform “therapeutic massage” that he can or she can “treat” “conditions” through massage would constitute a criminal violation of T.C.A. § 63–1–123 as well as deceptive advertising in violation of the Tennessee Consumer Protection Act.

2. No. A massage therapist who is not a licensed physical therapist or other health-related professional licensed to practice therapeutic massage may not perform therapeutic massage under any circumstances and may not advertise that he or she is capable of performing such services.

ANALYSIS

Title 63 Chapter 1 of the Tennessee Code Annotated consists of general statutes governing those branches of the healing arts [FN1] that the State of Tennessee regulates. T.C.A. § 63-1-101 et seq. Additionally, Title 63 contains more than twenty separate chapters that are specific to the particular branches of the healing arts. T.C.A. § 63-3-101 et seq. Generally, the various branches of the healing arts fall under the regulatory power of the Department of Health's Division of Health Related Boards ("Division") and of a separate examining and licensing board. See, T.C.A. § 63-1-122. The Division and each board have concurrent authority as to enforcement over a particular branch of the healing arts. Id. Generally, in the absence of an exemption, it is a criminal violation for a person to practice a branch of the healing arts without a license, certification or registration as required by law. See, e.g., T.C.A. § 63-1-123; T.C.A. § 63-6-203 (practice of medicine); T.C.A. §§ 63-13-301, 63-13-308 (practice of physical therapy).


the health specialty that is involved in health promotion, prevention and treatment of any injury, condition or disease through the evaluation and treatment of such injury, condition or disease by the use of ... massage ... therapeutic exercises and procedures....

*2 T.C.A. § 63-13-102. (emphasis added). The Therapy Act specifies that a person may not practice physical therapy or otherwise hold himself/herself out as being able to practice physical therapy unless the Board of Occupational and Physical Therapy ("Board") licenses that person and that person complies with the Board's rules and chapter 13. T.C.A. § 63-13-301(a). The Therapy Act further states:

The provisions of this part are not intended to include nor limit the activities of persons legitimately engaged in the nontherapeutic administration of baths, massage, and normal exercise.

T.C.A. § 63-13-301(e). (emphasis added). The fundamental rule of statutory construction is to ascertain the legislative purpose and to effectuate it. See, e.g., Worral v. Kroger, Co., 545 S.W.2d 736, 738 (Tenn.1977); James Cable Partners, L.P. v. City of Jamestown, 818 S.W.2d 338, appeal den., cert. den., 112 S.Ct. 872, 116 L.Ed.2d 777. Legislative intent is to be derived primarily from the plain and ordinary meaning of the language contained therein when read in the context of the entire statute. Id. The Tennessee Legislature has clearly differentiated between therapeutic and nontherapeutic massage. Therapeutic massage may only be practiced by an individual who has met the licensure requirements for physical therapy, or who has met the licensure requirements for any other health-related profession which may properly utilize therapeutic massage, [FN2] or who is otherwise exempted. T.C.A. §§ 63-13-206(a)(1) and 63-13-301.

On the other hand, the Legislature has specifically regulated the practice of non-therapeutic massage by enacting the Massage Act. T.C.A. § 63-18-102. Unlike other branches of the healing arts, which are subject to the jurisdiction of a state administrative entity, the Legislature has not established a state administrative board with authority over practitioners of massage. Rather, in all counties adopting the Massage Act, persons or massage establishments engaged in the business of massage for compensation are regulated by county massage registration boards. T.C.A. § 63-18-105. Persons or massage establishments engaged in the business of massage for compensation are required to register with the county massage registration board. T.C.A. § 63-18-105. The Massage Act narrowly defines "massage" as:

The art of body massage, by hand or with a mechanical or vibratory device, for the purpose of massaging, re-
ducing or contouring the body, and may include the use of oil rubs, heat lamps, salt gloves, hot and cold packs, tub, shower or cabinet baths. The procedures involved include, but are not limited to, touching, stroking, kneading, friction, vibration, percussion and medical gymnastics.

T.C.A. § 63–18–103(3).

The Legislature has clearly precluded a massage therapists from “treating” any “condition” by means of massage, because such a practice constitutes therapeutic massage, which the Therapy Act has clearly regulated. Therefore, unless an individual is licensed to practice physical therapy or is licensed to practice another health-related profession which may properly utilize therapeutic massage, or is otherwise exempted, a massage therapist may not “treat” “conditions.” See, T.C.A. § 63–13–301(b).

*3 Commercial speech is speech which proposes a commercial transaction. Pittsburgh Press Co. v. Pittsburgh Com’n on Human Rel., 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). Although the First Amendment protects commercial speech, some forms of regulation are permissible. Virginia State Board of Pharmacy v. Virginia Cit. Cons. Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Speech which advertises illegal behavior may be prohibited. Pittsburgh Press, supra, at 2561. The right of the State, under its police power, to regulate the practice of the healing arts is firmly established. See, Davis v. Beeler, 207 S.W.2d 348, 185 Tenn. 638 (1947). This right “is not absolute, but one that must be exercised in a reasonable manner and so as not to interfere with private rights....” State v. Greeson, 124 S.W.2d 253, 255, 174 Tenn. 178 (1939).

T.C.A. § 63–1–102(2) defines “practice of the healing arts” as including “offering” to treat a physical or mental condition. An advertisement constitutes an “offering” to treat a “condition,” because it proposes a commercial transaction between the offeror and consumer. Section 63–1–123 makes it a crime to practice the healing arts without a license. Therefore, offering to treat a condition by an unlicensed person is a crime. Moreover, as discussed above, a massage therapist who is not licensed to practice physical therapy or another health-related profession which may properly utilize therapeutic massage, or is not otherwise exempted is engaging in unlawful behavior when giving therapeutic massages. Thus, the State may invoke its police power to prohibit such a massage therapist from advertising the “treating” of “conditions.”

Similarly, the Consumer Protection Act of 1977, T.C.A. § 47–18–101 et seq., makes it unlawful for a person to engage in unfair or deceptive acts or practices affecting the conduct of any trade or commerce. T.C.A. § 47–18–104(a) and (b)(27). The advertisement by a massage therapist that he or she can “treat conditions” is deceptive because a massage therapist is not statutorily qualified to do so. Thus, in this instance, it is unlawful for a massage therapist to advertise the “treating” of a “condition” if that individual has not met the licensure requirements for physical therapy, or is licensed to practice another health-related profession which may properly utilize therapeutic massage or is otherwise exempted. See, T.C.A. § 63–13–301(b). It is the Opinion of this office that a massage therapist may not advertise the “treating” of “conditions.”

II.

Based on the analysis in part one, a massage therapist may not “treat” any “condition” unless that individual is a licensed physical therapist, or is licensed to practice another health-related profession which may properly utilize therapeutic massage or is otherwise exempted. Where a statute is unambiguous, a court must ascertain and give effect
to the intention and purpose of the General Assembly as expressed in the four corners of the statute. Gabel v. Lerma, 812 S.W.2d 580 (Tenn.Ct.App.1990). The Legislature has not enacted a statutory exception which permits a massage therapist to treat a condition with a prescription from a licensed primary care provider. Therefore, the treating of a condition with a prescription from a licensed primary care provider constitutes therapeutic massage. Thus, it is unlawful for a massage therapist, whether registered or unregistered, to treat specific conditions with a prescription from a licensed primary care provider, unless that individual has met the licensure requirements for physical therapy or is licensed to practice another health-related profession which may properly utilize therapeutic massage or is otherwise exempted. See, T.C.A. § 63–13–301(b). Thus, it is the Opinion of this office that a massage therapist may not lawfully advertise the “treating” of “conditions” with a prescription from a licensed primary care provider.

*4 Charles W. Burson
Attorney General and Reporter

Michael E. Moore
Solicitor General

Sandra E. Keith
Assistant Attorney General

[FN1] T.C.A. § 63–1–102 defines “Practice of the healing arts” as follows: offering or undertaking to diagnose, treat, operate on, or prescribe for any human pain, injury, disease, deformity, or physical or mental condition.

[FN2] T.C.A. 63–13–301(b) provides: “Nothing in this part, however, shall prohibit any person licensed to practice any of the other health-related professions in this state under any other law from engaging in the practice for which he is licensed.”


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Office of the Attorney General
State of Tennessee

Opinion No. 01-002

January 4, 2001

Membership of a Professional Limited Liability Company for the Practice of Electrolysis

The Honorable Phillip Pinion
State Representative
109 War Memorial Building
Nashville, Tennessee 37243-0177

QUESTION

Can a medical doctor and a registered nurse, who has been trained in electrolysis, be members of a professional limited liability company (PLLC) for the practice of electrolysis?

OPINION

No. Assuming, for purposes of this opinion, that PLLCs “for the practice of electrolysis” are authorized by law, we believe that current statutory and regulatory authority permits a physician or registered nurse to be a member of a PLLC “for the practice of electrolysis” only if he or she holds a license to practice electrology. [FN1]

We are aware, however, of nothing that would prohibit a medical doctor from being a member of a PLLC for the practice of medicine, and engaging, in that capacity, in the practice of activities that would otherwise constitute the practice of electrolysis. Furthermore, while the regulations promulgated by the Board of Medical Examiners do not permit a registered nurse to be a member of a PLLC “for the practice of medicine,” such PLLC could employ a registered nurse who is not licensed as an electrologist to perform electrolysis services under the doctor’s supervision and control.

ANALYSIS

You question whether a medical doctor and a registered nurse, who has been trained in electrolysis, can be members of
a professional limited liability company (PLLC) "for the practice of electrolysis." [FN2] As is described below, we believe that current statutory and regulatory authority permits a physician or registered nurse to be a member of a PLLC "for the practice of electrolysis" only if he or she holds a license to practice electrology.

It is important to note, in the first place, that absent specific statutory exemption, all persons who engage in the practice of electrolysis in this state must be licensed to do so by the Board of Electrolysis Examiners. Tenn. Code Ann. §§ 63-26-118, 63-26-122. Practice of electrolysis without a license is a Class C misdemeanor.

Second, Section 48-248-401 of the legislation governing professional limited liability companies, entitled "Eligible members," provides, in relevant part:

(a) A PLLC may have persons not licensed to practice a profession described in the PLLC's articles in Tennessee as members only if the licensing authority which licenses the professionals forming such PLLCs specifically so authorizes...

(c) The membership interest purported to be held by a person in violation of this section or a rule promulgated under this section is void.

(Emphasis added).

Thus, in the situation about which you inquire, a doctor or nurse who is not licensed to practice the profession described in the PLLC's articles (electrology) may be a member of a PLLC for the practice of electrolysis only if the licensing authority which licenses the doctor (the Board of Medical Examiners) or the nurse (the Board of Nursing) specifically so authorizes.

*2 The Board of Medical Examiners is established at Section 63-6-101(a) of the Medical Practice Act. We have examined the Medical Practice Act and its implementing regulations which have been adopted by the Board of Medical Examiners; i.e., Tenn. Code Ann. §§ 63-6-101, et seq.; Tenn. Comp. Adm. R. & Regs. Chaps. 0880-1 through 0880-8. Nothing in any of these statutes or regulations gives "specific authoriz[ation]" which would permit a physician not licensed to practice electrology to be a member of a PLLC "for the practice of electrolysis." Similarly, the Board of Nursing, established at Section 63-7-201 of the Nursing Practice Act, is the licensing authority which licenses and regulates nurses. No provision of the Nursing Practice Act nor of its implementing regulations gives the required "specific authoriz[ation]" for a registered nurse not licensed to practice electrology to be a member of a PLLC "for the practice of electrolysis." Tenn. Code Ann. §§ 63-7-101, et seq., Tenn. Comp. Adm. R. & Regs. Chaps. 1000-1 through 1000-4.

We thus conclude that unless a physician or a registered nurse holds a license to practice electrolysis, he is not permitted by current statutory and regulatory authority to be a member of a PLLC "for the practice of electrolysis."

We are aware, however, of nothing that would prohibit a medical doctor from being a member of a PLLC "for the practice of medicine," and engaging, in that capacity, in the practice of activities that would otherwise constitute the practice of electrology. The "practice of medicine" is broadly defined as "treat[ing], or profess[ing] to diagnose, treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another." Tenn. Code Ann. § 63-6-204(a)(1). The Electrologists Practice Act itself recognizes that physicians, and particularly dermatologists, may
be substantially involved in the practice of electrology. See, e.g., Tenn. Code Ann. §§ 63-26-104(a)(2),
63-26-111(4)(C).

Furthermore, while the regulations promulgated by the Board of Medical Examiners do not permit a registered nurse
to be a member of a PLLC for the practice of medicine (Tenn. Adm. Comp. R. & Regs. 0880-8-2-.02(14),
0880-8-2-.03(2), 0880-8-2-.04(1)), such PLLC could employ a registered nurse who is not licensed as an electrologist
to perform electrology services under the doctor's supervision and control. In such circumstances, the doctor must
make an evaluation of each patient and supervise a diagnostic screening with respect to the patient; furthermore, the
registered nurse cannot hold himself out to be a licensed electrologist. See generally, Tenn. Code Ann. § 63-26-108(b).

*3 Paul G. Summers
Attorney General & Reporter

Michael E. Moore
Solicitor General

Sue A. Sheldon
Senior Counsel

[FN1]. The Electrologists Practice Act defines the terms “electrolysis” and “electrology” in similar fashion. “Electrology” is “the art and practice relating to the removal of hair from the normal skin of the human body by application of an electric current to the hair papilla by means of a needle or needles so as to cause growth inactivity of the hair papilla and thus permanently remove the hair.”Tenn. Code Ann. § 63-26-102(3). “Electrolysis” is “the process by which the hair is removed from the normal skin by the application of an electric current to the hair root by means of a needle or needles, whether the process employs direct electric current or short wave alternating electric current or combination of both, or by F.D.A. approved laser beam process designated for permanent hair removal.”Tenn. Code Ann. § 63-26-102(5). The terms will be used interchangeably in this opinion.

[FN2]. While we have assumed, for purposes of this opinion, that PLLCs “for the practice of electrolysis” are authoriz
er by law, we must note, as is described below, that we have some question that this is so.

In 1994, Tennessee enacted legislation which authorized the formation of professional limited liability companies
provides that a PLLC is formed by delivering to the secretary of state for filing articles that state it is a PLLC and
that, among other matters, its purpose is to render specified “professional services.” Tenn. Code Ann. §
48-248-104(a) provides that a limited liability company (LLC) may elect professional LLC status under §
48-248-103 “solely for the purpose of rendering professional services (including services ancillary to them)
...”Tenn. Code Ann. § 48-248-203(a) prohibits a PLLC from “render[ing] any professional service or engag[ing]
in any business other than the professional service and business authorized by its articles.”

The term, “professional service,” as it is used in the chapter governing PLLCs, is defined as:

A service that may be lawfully rendered only by a person licensed or otherwise authorized by a licensing
authority in this state to render the service and that may not be lawfully rendered by a corporation under the
Tennessee Business Corporation Act, compiled in chapters 11-27 of this title or by an LLC under chapters

201-248 of this title."

In Tenn. Op. Atty. Gen. 94-131 (11/8/94), we opined that it is not unlawful for a general corporation to engage in the business of providing professional physical therapy services, as opposed to medical or optometric services, in Tennessee. In reaching this conclusion, we reexamined the common law principles of the "corporate practice doctrine" as such principles had been applied by the Tennessee Supreme Court in State ex rel. Loser v. National Optical Stores, Co., 189 Tenn. 433, 225 S.W.2d 263 (1949), noted the absence of any statute specifically prohibiting the practice of physical therapy by a general corporation, and recognized important differences between the provision of physical therapy services and the provision of medical and optometric services. Id. For similar reasons, we see no legal impediment to the provision of electrology services by a general corporation or by a general limited liability corporation.

As a result, because electrology services may be lawfully rendered by a general corporation or general LLC, they do not fall within the definition of a "professional service," as the term is defined by and used in the legislation governing PLLCs. We thus question whether the statutes governing professional limited liability companies authorize the formation of PLLCs "for the practice of electrolysis."


END OF DOCUMENT

Office of the Attorney General
State of Tennessee

Opinion No. 05-171

December 6, 2005

Physical and Occupational Therapy Reimbursements Under the Medical Fee Schedule

Honorable Stephen I. Cohen
State Senator
30th Senatorial District
Suite 8, Legislative Plaza
Nashville, TN 37243-0030

QUESTION

Does the method of reimbursing physical and occupational therapy ("PT/OT") facilities under the medical fee schedule, as prescribed in Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, violate the equal protection provisions of the Tennessee Constitution?

OPINION

No. The method of reimbursing PT/OT facilities under the medical fee schedule, as prescribed in Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, does not violate the equal protection provisions of the Tennessee Constitution because reimbursing PT/OT facilities differently, based on whether the referring physician has an interest in the facility, is rationally related to a legitimate state interest.

ANALYSIS

Pursuant to Tenn. Code Ann. § 50-6-204(i)(1) (2005) the Commissioner of the Department of Labor and Workforce Development promulgated, by public necessity rules, a comprehensive medical fee schedule for the reimbursement of medical services provided in a workers' compensation matter. [FN1] The medical fee schedule is a "Medicare-based system," employing conversion factors. Tenn. Comp. R. & Regs. 0800-2-18.01(1). The amount of reimbursement is determined by a two-step process: Determine what Medicare would reimburse for such services, then multiply that amount by the applicable percentage.

listed in the medical fee schedule. [FN2]

Under two of the medical fee schedule rules, Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) and Tenn. Comp. R. & Regs. 0800-2-18-.09, PT/OT facilities are reimbursed differently, for the same services, based on whether the facility is "physician-affiliated" or "independently-owned." Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) prescribes the applicable percentages for reimbursement of PT/OT services as follows:

<table>
<thead>
<tr>
<th></th>
<th>Conversion Factor</th>
<th>As a percent of TN Medicare Rate</th>
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<tbody>
<tr>
<td>Physical and Occupational Therapy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Independently-owned Facilities-For</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First 6 visits</td>
<td>$56.85</td>
<td>150%</td>
</tr>
<tr>
<td>Visits 7-12</td>
<td>$49.27</td>
<td>130%</td>
</tr>
<tr>
<td>Visits over 12</td>
<td>$37.90</td>
<td>100%</td>
</tr>
<tr>
<td>Physician-affiliated Facilities-For</td>
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<tr>
<td>First 6 visits</td>
<td>$49.27</td>
<td>130%</td>
</tr>
<tr>
<td>Visits 7-12</td>
<td>$39.79</td>
<td>105%</td>
</tr>
<tr>
<td>Visits over 12</td>
<td>$37.90</td>
<td>100%</td>
</tr>
</tbody>
</table>

Tenn. Comp. R. & Regs. 0800-2-18.09(1) defines a "physician-affiliated" facility as:

one in which the referring physician has any type of financial interest, which includes, but is not limited to, any type of ownership, interest, debt, loan, lease, compensation, remuneration, discount, refund, rebate, dividend, distribution, subsidy, or other form of direct or indirect benefit of any kind, whether in money or otherwise, between the facility to whom the physician refers a person for services and that physician. Any hospital based PT or OT facility shall also be deemed "physician-affiliated" if the referring physician is an employee of such hospital, or if he or she receives a benefit of any kind from the referral.

*2 Thus, if a physician refers a patient to a facility in which he has an interest, that facility is considered a "physician-affiliated" facility, and its reimbursements for the first 6 visits is 130% of the Medicare rate. Visits 7 through 12 would be reimbursed at 105% of the Medicare rate. However, if a physician refers a patient to a facility in which she does not have an interest, that facility is considered independently-owned and will receive 150% of the Medicare rate for the first 6 visits and 130% of the Medicare rate for visits 7 through 12.

The question posed is whether this method of reimbursement is permissible under Tennessee law. The request suggests that reimbursing facilities differently, based on whether the referring physician has an interest in the facility, may unfairly discriminate against physical/occupational therapists working in a "physician-affiliated" facility. [FN3] The question also encompasses the issue of whether the different treatment of facilities under Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 is an appropriate legislative classification that comports with the equal protection provisions of the Tennessee Constitution. We conclude that Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 bear a rational relation to a legitimate state interest and are therefore constitutional.

Two equal protection provisions of the Tennessee Constitution must be considered. Tenn. Const. art. 1, § 8 provides as follows:
No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

Similarly, Tenn. Const. art. XI, § 8 provides, in relevant part, as follows:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pay the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

We begin analyzing an equal protection issue by ascertaining the level of scrutiny to be applied. State v. Tester, 879 S.W.2d 823, 828 (Tenn. 1994). Because there are no suspect classes or fundamental rights at issue here, the method of reimbursing PT/OT facilities is subject to reduced scrutiny. See Brown v. Campbell County Bd. of Educ., 915 S.W.2d 407, 413 (Tenn. 1995). Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 do not violate the equal protection provisions of the Tennessee Constitution if they have “a reasonable relationship to a legitimate state interest,” Gallaher v. Elam, 104 S.W.3d 455, 461 (Tenn. 2003), or if “any set of facts can reasonably be conceived to justify” them. Brown, 915 S.W.2d at 414.

*3 It is the opinion of this Office that reducing workers’ compensation premiums is a legitimate state interest. See generally 2004 Tenn. Pub. Acts ch. 962 § 42(a). Lower workers’ compensation premiums encourage employers, and the jobs they create, to locate or stay in Tennessee.

Providing lower reimbursements to “physician-affiliated” facilities than to “independently-owned” facilities, according to Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, is rationally related to this interest because it creates a lower profit for the “physician-affiliated” facility. Doing so decreases the referring physician’s incentive to make unnecessary referrals, thereby decreasing costs to insurance companies. Lower costs for insurance companies translates to lower workers’ compensation premiums for employers.

Paul G. Summers
Attorney General

Michael E. Moore
Solicitor General

Lauren S. Lamberth
Assistant Attorney General


[FN2]. The result of this formula will be used only if it is less than the service provider’s usual charge or any other contracted price, i.e., reimbursement will be the lesser of all these amounts. Tenn. Comp. R. & Regs. 0800-2-18-.02(2)(b).

[FN3]. For the purposes of this Opinion, we assume that it is possible for individual physical/occupational therapists to be paid
differently, based on the reimbursement their facility will receive, even though individual physical/occupational therapists are paid directly by their facility, not as a reimbursement under the medical fee schedule.


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Office of the Attorney General  
State of Tennessee  

Opinion No. 07-55  

April 23, 2007  

Performance of Spinal Manipulation  

Gary Odom  
House Majority Leader  
18A Legislative Plaza  
Nashville, TN 37243-0167  

QUESTION  

Under current law, may physical therapists legally perform spinal manipulation, as that term is defined in Tenn. Code Ann. § 63-43-101(c)(1)?  

OPINION  

No person licensed under Title 63, Professions of the Healing Arts, including licensed physical therapists, may perform a spinal manipulation or spinal adjustment, as those terms are defined in Tenn. Code Ann. § 63-4-101(c)(1), without first having fulfilled the requirements of that section.  

ANALYSIS  

The term “spinal manipulation” appears to be a term of art used with respect to chiropractic practice. Tenn. Code Ann. § 63-4-101 defines “chiropractic” and “chiropractic physicians,” and addresses chiropractic education and training and scope of practice. Tenn. Code Ann. § 63-4-101(c)(1) defines “spinal manipulation” and “spinal adjustment” as interchangeable terms that identify a “method of skillful and beneficial treatment where a person uses direct thrust to move a joint of the patient's spine beyond its normal range of motion, but without exceeding the limits of anatomical integrity.” That section prohibits any person licensed under Title 63, Professions of the Healing Arts, from performing such spinal manipulation or spinal adjustment without first having the “legal authority to differentially diagnose, and having received a minimum of four hundred (400) hours of classroom instruction in spinal manipulation and spinal
adjustment," as well as having received a “minimum of eight hundred (800) hours of supervised clinical training at a facility where spinal manipulation or spinal adjustment is a primary method of treatment."Id. Further, Tenn. Code Ann. § 63-4-101(c)(1) provides that a violation of this section is an unlawful practice of chiropractic and is "grounds for the offending health care provider's licensing board to suspend, revoke, or refuse to renew such provider's license or take other disciplinary action allowed by law."

Tenn. Comp. R. & Regs. 0260-2-.02(3), "Spinal manipulation/Spinal adjustment," further regulates performance of this treatment technique, and provides, in pertinent part, as follows:

(a) Training must be performed in chiropractic institutions or institutions that specialize in spinal manipulative therapy. Spinal manipulation is a highly skilled maneuver that requires adequate training. Four hundred (400) hours of classroom instruction and eight hundred (800) hours of supervised clinical training are considered a minimum level of education to properly administer the techniques.

(b) Spinal manipulation must be performed by hand or with the use of instruments such as Activator, Grottic, Petitbon, or Sweat instrumentation.

(c) Manipulation moves the spinal segments beyond their normal range of motion for the correction of nerve interference and articular dysfunction, but without exceeding the limits of anatomical integrity.

(d) A chiropractic diagnosis is necessary to properly establish the indications and contraindications before the administration of the spinal manipulation procedure.

Both the above regulation and statute address the scope of practice of chiropractic physicians. The term “chiropractic” is defined as “the science and art of locating and removing interference with nerve transmission and nerve function,” while a chiropractic physician “diagnoses and treats neuromuscular and musculoskeletal conditions through physical agent modalities and manipulative therapies.” Tenn. Code Ann. § 63-4-101(a). The adjustment, manipulation, or treatment “shall be directed toward restoring and maintaining the normal neuromuscular and musculoskeletal function and health of the patient,” and a chiropractic physician “will also make appropriate health referrals for conditions that may not be treated by physical agent modalities and manipulative therapies.” Id.

On the other hand, Tenn. Code Ann. § 63-13-103(15) defines the “practice of physical therapy” as including, among other things, “[e]xamining, evaluating and testing individuals with mechanical, physiological and developmental impairments, functional limitations, and disability or other health and movement-related conditions in order to determine a physical therapy treatment diagnosis, prognosis, a plan of therapeutic intervention, and to assess the ongoing effect of intervention.” Tenn. Code Ann. § 63-13-103(15)(A). Moreover, Tenn. Code Ann. § 63-13-103(15)(B) also includes the following in the definition of the “practice of physical therapy”:

Alleviating impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include, but are not limited to: therapeutic exercise; functional training; manual therapy; therapeutic massage; assistive and adaptive orthotic, prosthetic, protective and supportive equipment; airway clearance techniques; debridement and wound care, physical agents or modalities, mechanical and electrotherapeutic modalities; and patient-related instruction.

(Emphasis added).

Thus, it appears to us that there are at least certain semantic similarities between the scope of practice applicable to chiropractors, and the scope of practice applicable to physical therapists. For example, a chiropractic physician di-
agnoses and treats neuromuscular and musculoskeletal conditions "through physical agent modalities and manipulative therapies," Tenn. Code Ann. § 63-4-101(a), while a physical therapist alleviates impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include "manual therapy" and "physical agents and modalities," Tenn. Code Ann. § 63-13-103(15)(B). Further, it appears to us that in some respects, at least, the definition of the term "manipulation" in the Board of Chiropractic Examiners' Rules, Tenn. Comp. R. & Regs. 0260-2-01(18), may be similar in meaning to the definition of the term "manual therapy techniques" found in the Committee on Physical Therapy's Rules, Tenn. Comp. R. & Regs. 1150-1-01(26).[FN1]

*3 Yet, clearly the practice of chiropractic and the practice of physical therapy are two separate and distinct health care professions, each operating under different boards, each with separate licensure requirements. Moreover, Tenn. Code Ann. § 63-4-101(c) expressly provides that "spinal manipulation" and "spinal adjustment" may be provided only by health care providers who have fulfilled the specific requirements of that section of the chiropractic practice act. Further, Tenn. Code Ann. § 63-13-109(a), concerning the unauthorized practice of medicine and the scope of practice of physical therapists, provides that "[n]othing in that chapter shall be construed as allowing physical therapists to practice medicine, osteopathy, podiatry, chiropractic, or nursing."[FN2] Therefore, while the physical therapy scope of practice might include performing manual therapy techniques on a patient's spine, or using physical agents and modalities on a patient's spine, nevertheless, a licensed physical therapist may not perform or hold himself or herself out as performing "spinal manipulation," as that term is used in Tenn. Code Ann. § 63-4-101(c)(1), without first having fulfilled the requirements of that section.

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Michael E. Moore
Solicitor General

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Assistant Attorney General

[FN1]. Tenn. Comp. R. & Regs. 0260-2-01(18) defines "manipulation" as a "passive movement for the purpose of testing joint space mobility and/or a manual intervention utilized for releasing muscles and less contractible structures that have lost elasticity with their effects on joint function, and which is not designed to bring about articular change when locked out of its physiologic joint space and/or range of motion." Tenn. Comp. R. & Regs. 1150-1-01(26) defines "manual therapy techniques" as consisting of "a broad group of passive interventions in which physical therapists use their hands to administer skilled movements designed to modulate pain, increase joint range of motion; reduce or eliminate soft tissue swelling, inflammation, or restriction; induce relaxation; improve contractile and noncontractile tissue extensibility; and improve pulmonary function. These interventions involve a variety of techniques, such as the application of graded forces."

[FN2]. Tenn. Code Ann. § 635-13-109(b) further provides that the "scope of practice of physical therapy shall be under the written or oral referral of a licensed doctor of medicine, chiropractic, dentistry, podiatry or osteopathy, with exceptions as stared in § 63-13-301 [63-13-303]."


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Office of the Attorney General
State of Tennessee

Opinion No. 12-27

February 29, 2012

Authority of Physical Therapy Board

The Honorable Bo Watson
Speaker Pro Tempore
Senate District 11
13 Legislative Plaza
Nashville, Tennessee 37243-0211

QUESTIONS

1. Does the Physical Therapy Board have authority under Tenn. Code Ann. § 63-13-315(c) to apply for injunctive relief in any court of competent jurisdiction to enjoin a chiropractor from advertising that the chiropractor offers “physical therapy,” in violation of Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310, where the services offered by the chiropractor are not performed by or under the direction of a licensed physical therapist?

2. Does the Physical Therapy Board have authority under Tenn. Code Ann. § 63-13-313(8) to impose civil penalties against a chiropractor based on his or her use of the term “physical therapy” in the chiropractor’s advertisements, in violation of Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310?

OPINIONS

1. Tenn. Code Ann. § 63-13-315(c) provides that the Physical Therapy Board may, through the Office of the Attorney General and Reporter, apply for injunctive relief in any court of competent jurisdiction to enjoin any person from committing an act in violation of the “Occupational and Physical Therapy Practice Act,” codified at Tenn. Code Ann. §§ 63-13-101 to -318. Tenn. Code Ann. § 63-13-301(b) provides that “[n]o person shall practice or in any manner claim to be engaging in the practice of physical therapy or designate as being a physical therapist unless duly licensed as a physical therapist” in accordance with the Act, while § 63-13-310 prohibits the use of the term “physical therapy,” “physical therapist” and related terms unless such services are provided by or under the direction of a physical
therapist licensed in accordance with the Act.

2. Upon proof of violation of any provision of the Act, the Physical Therapy Board has authority under Tenn. Code Ann. § 63-13-313(8) to impose civil penalties pursuant to Tenn. Code Ann. § 63-1-134. Tenn. Code Ann. § 63-1-134 permits the Board to impose civil penalties against any person required to be licensed, permitted or authorized by the Board in an amount not to exceed one thousand dollars ($1,000) for each separate violation of a statute, rule or order pertaining to the Board.

**ANALYSIS**

1. Tenn. Code Ann. § 63-13-301(b) provides that “[n]o person shall practice or in any manner claim to be engaging in the practice of physical therapy or designate as being a physical therapist unless duly licensed as a physical therapist” in accordance with the Occupational and Physical Therapy Practice Act, codified at Tenn. Code Ann. §§ 63-13-101 to -318. Further, Tenn. Code Ann. § 63-13-310, which concerns unlawful use of titles or designations indicating licensure, provides in pertinent part as follows:

   *2 (b) It is unlawful for any person or for any business entity, its employees, agents or representatives to use in connection with such person’s name or the name or activity of the business the words “physical therapy,” “physical therapist,” “physiotherapy,” “physiotherapist,” “registered physical therapist,” “licensed physical therapist,” or the letters “PT,” “LPT,” or “RPT” or any other words, abbreviations or insignia indicating or implying directly or indirectly that physical therapy is provided or supplied, including the billing of services labeled as physical therapy, unless such services are provided by or under the direction of a physical therapist licensed in accordance with this part.

   (c) Nothing in this chapter shall be construed as restricting a person licensed or certified under any other law of this state from engaging in the profession or practice for which the person is licensed or certified; provided, that the person does not claim to be a physical therapist, a physical therapist assistant or a provider of physical therapy.

Tenn. Code Ann. § 63-13-310(b) & (c) (emphasis added).[FN1]

Tenn. Code Ann. § 63-13-315(c) provides that the Physical Therapy Board may, through the Office of the Attorney General and Reporter, apply for injunctive relief in any court of competent jurisdiction to enjoin any person from committing an act in violation of the Act. That subsection further states “injunctive proceedings are in addition to, and not in lieu of, all penalties and other remedies prescribed in this chapter.”

2. Tenn. Code Ann. § 63-13-313(8) provides in pertinent part that the Board may, upon proof of violation of any provision of the Act, “[i]mpose civil penalties for violation of this chapter pursuant to § 63-1-134.” Specifically, the Physical Therapy Board has authority under Tenn. Code Ann. § 63-1-134 to impose civil penalties against any person required to be licensed, permitted or authorized by the Board in an amount not to exceed one thousand dollars ($1,000) for each separate violation of a statute, rule or order pertaining to the Board. This statute provides:

   With respect to any person required to be licensed, permitted or authorized by any board, commission or agency attached to the division of health related boards, each respective board, commission or agency attached to the division of health related boards, each respective board, commission or agency may assess a civil penalty against such person in an amount not to exceed one thousand dollars ($1,000) for each separate violation of a statute, rule
or order pertaining to such board, commission or agency. Each day of continued violation constitutes a separate violation.
Tenn. Code Ann. § 63-1-134(a). Tenn. Code Ann. § 63-1-134(b) allows each board, commission or agency to establish by rule a schedule designating the minimum and maximum civil penalties that may be assessed under that section, and also includes several statutory factors that may be considered in establishing civil penalties. These factors, along with a schedule of civil penalties, are set forth in the Rules Governing the Practice of Physical Therapy. Tenn. Comp. R. & Regs. 1150-01-.15(5). Under this authority, the Physical Therapy Board possesses the requisite authority to assess a civil penalty against a chiropractor who inappropriately uses the term “physical therapy” in the chiropractor’s advertisements. Any action by the Board to impose such a penalty must be taken in conformity with the Tennessee Uniform Administrative Procedures Act, codified at Tenn. Code Ann. §§ 4-5-101 to -404.

*3 A chiropractor’s inappropriate use of the term “physical therapy” in advertisements may also violate certain other Tennessee laws. Specifically, Tenn. Code Ann. § 63-13-315(a) states that any person who engages in an activity requiring a license issued under the Act, and who fails to obtain the required license, who violates any other provision of the Act, or who uses any word, title or representation implying that the person is licensed to engage in the practice of physical therapy, commits a Class B misdemeanor. That subsection clarifies that “[a] person claims to be a physical therapist when using a title, letters or any description of services that incorporates one (1) or more of the terms, designations or abbreviations specifically restricted under §§ 63-13-103 and 63-13-310.” Tenn. Code Ann. § 63-13-315(a).[FN2]

In this respect, as we discussed in a prior opinion of this Office concerning advertising and treatment by massage therapists using therapeutic massage, Op. Tenn. Att'y. Gen. No. 95- 033 (April 6, 1995), the Consumer Protection Act of 1977 makes it unlawful for a person to engage in unfair or deceptive acts or practices affecting the conduct of any trade or commerce. Tenn. Code Ann. § 47-18-104(a) and (b)(27). (Similar to the penalty for violation of Tenn. Code Ann. § 63-13-315(a), such unfair or deceptive acts or practices also are Class B misdemeanors and can be subject to a $1,000.00 civil penalty for each violation of the Tennessee Consumer Protection Act pursuant to Tenn. Code Ann. §§ 47-18-104(a) and 47-18-108(b)(3)).[FN3] In our earlier opinion, we wrote that advertisement by a massage therapist that he or she can “treat conditions” is deceptive because a massage therapist is not statutorily qualified to do so, and further that it was unlawful for a massage therapist to advertise the “treating” of a “condition” if that individual had not met the licensure requirements for physical therapy, or was not otherwise appropriately licensed or exempted under the law that then was in effect. Likewise, if a chiropractor were to advertise that he or she offers “physical therapy” where such services are not performed by or under the direction of a licensed physical therapist, then in our opinion such chiropractor would violate both Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310 and would likely also violate the Consumer Protection Act of 1977. Learned professionals are not exempt from claims related to their business practices brought under the Tennessee Consumer Protection Act of 1977. Proctor v. Chattanooga Orthopaedic Group, P.C., 270 S.W.3d 56, 61 (Tenn. Ct. App. 2008).

Finally, the Chiropractic Examiners Board has promulgated rules pursuant to Tenn. Code Ann. § 63-4-122 to regulate the nature, manner, content and extent of advertising by practitioners who are under the jurisdiction of that Board. Tenn. Comp. R. & Regs. 0260-02-.20. Acts or omissions by a licensed chiropractor in the context of advertisements that violate this rule shall constitute unethical and unprofessional conduct and subject the licensees to disciplinary action by the Chiropractic Examiners Board under Tenn. Code Ann. § 63-4-114. [FN4] The proscribed conduct includes “[p]romotion of a professional service which the licensee knows or should know is beyond the licensee’s ability
to perform,"”[a]ny misrepresentation of a material fact,” and “[m]isrepresentation of a licensee’s credentials, training, experience or ability.” Tenn. Comp. R. & Regs. 0260-02-.20(4)(c), (j) and (p). Therefore, if the Chiropractic Examiners Board, based on proof presented to that Board during a disciplinary contested case hearing, were to find that a chiropractor had advertised “physical therapy” services in violation of Tenn. Code Ann. § § 63-13-301(b) and 63-13-310, the Board could reasonably conclude that such chiropractor had violated the above advertising rule and impose appropriate disciplinary action.

*4 Robert E. Cooper, Jr.
Attorney General and Reporter

William E. Young
Solicitor General

Sara E. Sedgwick
Senior Counsel

[FN1]. Tenn. Code Ann. § 63-13-103 sets out the definitions used in the Act, including “physical therapist” in Tenn. Code Ann. § 63-13-103(11) as “a person who is licensed pursuant to this chapter to practice physical therapy,” and “physical therapy” under Tenn. Code Ann. § 63-13-103(13) as “the care and services provided by or under the direction and supervision of a physical therapist who is licensed pursuant to this chapter.”

[FN2]. Tenn. Comp. R. & Regs. 1150-01-.03(2) provides that “[i]t is unlawful for any person who is not licensed in the manner prescribed in Title 63, Chapter 13 of the Tennessee Code Annotated to represent himself as a physical therapist or physical therapy assistant or to hold himself out to the public as being licensed by means of using a title on, including but not limited to, signs, mailboxes, address plates, stationery, announcements, advertising, the internet, telephone listings, calling cards, or other means of professional identification.”

[FN3]. Tenn. Code Ann. § 63-1-123(a) provides further: “Any person, except those expressly exempted from the provisions of this chapter by § 63-1-110 or § 63-1-111 who practices the healing arts as defined in this chapter, or any branch thereof, without first complying with all the provisions of this chapter, including the provisions of all laws now in force regulating the practice of the various branches of the healing arts, and any person who violates any of the provisions of this chapter commits a Class B misdemeanor.”

[FN4]. Tenn. Code Ann. § 63-4-114(4) permits the Chiropractic Examiners Board to suspend, revoke or otherwise discipline a chiropractor’s license if the chiropractor is found guilty of “[i]mmoral, unethical, unprofessional or dishonorable conduct,” while § 63-4-114(13) permits such discipline where the chiropractor is found guilty of “[i]ntroducing statements made or causing the publication or circulation of fraudulent advertising relative to any disease, human ailment or condition.”


Office of the Attorney General
State of Tennessee

Opinion No. 14-62

June 19, 2014

Trigger-Point Dry Needling and the Practice of Physical Therapy

Brigina T. Wilkerson, PT
Chair
Tennessee Board of Physical Therapy
665 Mainstream Drive
Nashville, Tennessee 37243

QUESTION

Is Intramuscular Manual Therapy ("IMT"), also known as Trigger-Point Dry Needling, within the scope of the practice of physical therapy under the Occupational and Physical Therapy Practice Act, Tenn. Code Ann. §§ 63-13-101 to -318?

OPINION

No.

ANALYSIS

Under the Occupational and Physical Therapy Practice Act, "practice of physical therapy" means:
(A) Examining, evaluating and testing individuals with mechanical, physiological and developmental impairments, functional limitations and disability or other health and movement-related conditions in order to determine a physical therapy treatment diagnosis, prognosis, a plan of therapeutic intervention and to assess the ongoing effect of intervention;
(B) Alleviating impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include, but are not limited to, therapeutic exercise, functional training, manual therapy, therapeutic massage, assistive and adaptive orthotic, prosthetic, protective and supportive equipment, airway clear-
ance techniques, debridement and wound care, physical agents or modalities, mechanical and electrotherapeutic modalities and patient-related instruction;
(C) Reducing the risk of injury, impairments, functional limitation and disability, including the promotion and maintenance of fitness, health and quality of life in all age populations; and
(D) Engaging in administration, consultation, education and research[.]
Tenn. Code Ann. § 63-13-103(15). IMT, or “dry needling,” involves the application of a fine, filiform needle to the neuromusculoskeletal system to restore movement, reduce pain, and address other musculoskeletal disorders. [FN1] Dry needling must therefore be regarded as a therapeutic intervention, but it is not listed among the therapeutic interventions identified in § 63-13-103(15)(B). Although that list is not exclusive, and includes “manual therapy,” “physical agents and modalities,” and “mechanical and electrotherapeutic modalities,” nothing in subdivision -103(15)(B) clearly indicates a legislative intent to include within the practice of physical therapy the invasive use of needles for therapeutic purposes. See Tidwell v. Collins, 522 S.W.2d 674, 676 (Tenn. 1975) (“The premier rule of statutory construction is to ascertain and give effect to the legislative intent.”). Furthermore, while there are no doubt distinctions to be drawn between the two, dry needling’s obvious similarity to acupuncture cannot be ignored, and physical therapists may not perform acupuncture, which is a branch of medicine. See Tenn. Code Ann. § 63-6-1002(a), (b).

*2 Under Tenn. Code Ann. § 63-6-1001(7), “practice of acupuncture’ means the insertion of acupuncture needles and the application of moxibustion to specific areas of the human body based on oriental medical diagnosis as a primary mode of therapy.” In 2005, this Office opined, precisely because acupuncture is regarded as a branch of medicine, that chiropractors may not practice a treatment modality that uses the insertion of needles to bring about the same result. See Tenn. Att'y Gen. Op. 05-20 (Mar. 8, 2005). That “same result” is “the promotion, maintenance and restoration of health and the prevention of disease.” Tenn. Code Ann. § 63-6-1001(2). In 2006, the legislature amended the acupuncture certification statutes to expressly except chiropractors who have satisfied certain requirements. See 2006 Tenn. Pub. Acts, ch. 775, § 2 (amending Tenn. Code Ann. § 63-6-1002(a)); see also Tenn. Code Ann. § 63- 4-101(a) (“Nothing in this chapter shall be construed to authorize the chiropractic physician to practice any branch of medicine osteopathy, ... or surgery, acupuncture being the exception.”) (emphasis added).

Similar legislation would be necessary in order to bring dry needling within the scope of the practice of physical therapy. See, e.g., 2014 Utah Laws ch. 354 (amending physical-therapy-practice statute to include trigger-point dry needling among therapeutic interventions).[FN2] Like acupuncture, dry needling uses the insertion of needles for therapeutic purposes—to restore movement, reduce pain, and address other musculoskeletal disorders. Although current rules of the Tennessee Board of Physical Therapy allow physical therapists to perform kinesiologic electromyography (invasive needle study of the muscles to determine the degree and character of a muscle during certain movements) and diagnostic electromyography (invasive needle study of multiple muscles for diagnosis of muscle and nerve disease), the purposes of these procedures are solely academic or diagnostic, and they may be performed only in a university setting or upon referral from an allopathic or osteopathic physician, a dentist, or a podiatrist. See Tenn. Comp. R. & Regs. 1150-01-.02(1)(b)(2)(i), (iii); id. 1150-01-.04(4).

Robert E. Cooper, Jr.
Attorney General and Reporter

Joseph F. Whalen
Acting Solicitor General

Sara E. Sedgwick
Senior Counsel

[FN1]. “Dry needling (DN) is a skilled intervention used by physical therapists (where allowed by state law) that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments.” Physical Therapists & the Performance of Dry Needling 2 (Jan. 2012), available at http://www.apta.org/StateIssues/DryNeedling/

[FN2]. This legislative change in Utah came in the wake of an opinion from the Utah Department of Commerce's Division of Occupational and Professional Licensing that trigger-point dry needling fell outside the scope of the practice of physical therapy because the “Division's research regarding the practice of trigger point dry needling confirms that it is the practice of acupuncture.” October 22, 2013 letter from Debra F. Hobbins, Bureau Manager, Division of Occupational and Professional Licensing, available at http://www.acupuncturesafety.org/Resources/Documents/UtahD OPL.pdf.


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STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

June 19, 2014

Opinion No. 14-62

Trigger-Point Dry Needling and the Practice of Physical Therapy

QUESTION

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OPINION

No.

ANALYSIS

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(A) Examining, evaluating and testing individuals with mechanical, physiological and developmental impairments, functional limitations and disability or other health and movement-related conditions in order to determine a physical therapy treatment diagnosis, prognosis, a plan of therapeutic intervention and to assess the ongoing effect of intervention;

(B) Alleviating impairments and functional limitations by designing, implementing, and modifying therapeutic interventions that include, but are not limited to, therapeutic exercise, functional training, manual therapy, therapeutic massage, assistive and adaptive orthotic, prosthetic, protective and supportive equipment, airway clearance techniques, debridement and wound care, physical agents or modalities, mechanical and electrotherapeutic modalities and patient-related instruction;

(C) Reducing the risk of injury, impairments, functional limitation and disability, including the promotion and maintenance of fitness, health and quality of life in all age populations; and
(D) Engaging in administration, consultation, education and research.]

Tenn. Code Ann. § 63-13-103(15). IMT, or “dry needling,” involves the application of a fine, filiform needle to the neuromusculoskeletal system to restore movement, reduce pain, and address other musculoskeletal disorders. Dry needling must therefore be regarded as a therapeutic intervention, but it is not listed among the therapeutic interventions identified in § 63-13-103(15)(B). Although that list is not exclusive, and includes “manual therapy,” “physical agents and modalities,” and “mechanical and electrotherapeutic modalities,” nothing in subdivision -103(15)(B) clearly indicates a legislative intent to include within the practice of physical therapy the invasive use of needles for therapeutic purposes. See Tidwell v. Collins, 522 S.W.2d 674, 676 (Tenn. 1975) (“The premier rule of statutory construction is to ascertain and give effect to the legislative intent.”). Furthermore, while there are no doubt distinctions to be drawn between the two, dry needling’s obvious similarity to acupuncture cannot be ignored, and physical therapists may not perform acupuncture, which is a branch of medicine. See Tenn. Code Ann. § 63-6-1002(a), (b).

Under Tenn. Code Ann. § 63-6-1001(7), “practice of acupuncture’ means the insertion of acupuncture needles and the application of moxibustion to specific areas of the human body based on oriental medical diagnosis as a primary mode of therapy.” In 2005, this Office opined, precisely because acupuncture is regarded as a branch of medicine, that chiropractors may not practice a treatment modality that uses the insertion of needles to bring about the same result. See Tenn. Att’y Gen. Op. 05-20 (Mar. 8, 2005). That “same result” is “the promotion, maintenance and restoration of health and the prevention of disease.” Tenn. Code Ann. § 63-6-1001(2). In 2006, the legislature amended the acupuncture certification statutes to expressly except chiropractors who have satisfied certain requirements. See 2006 Tenn. Pub. Acts, ch. 775, § 2 (amending Tenn. Code Ann. § 63-6-1002(a); see also Tenn. Code Ann. § 63-4-101(a) (“Nothing in this chapter shall be construed to authorize the chiropractic physician to practice any branch of medicine osteopathy, . . . or surgery, acupuncture being the exception.”) (emphasis added).

Similar legislation would be necessary in order to bring dry needling within the scope of the practice of physical therapy. See, e.g., 2014 Utah Laws ch. 354 (amending physical-therapy-practice statute to include trigger-point dry needling among therapeutic interventions). Like acupuncture, dry needling uses the

1 “Dry needling (DN) is a skilled intervention used by physical therapists (where allowed by state law) that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments.” Physical Therapists & the Performance of Dry Needling 2 (Jan. 2012), available at http://www.apta.org/StateIssues/DryNeedling/

2 This legislative change in Utah came in the wake of an opinion from the Utah Department of Commerce’s Division of Occupational and Professional Licensing that trigger-point dry needling fell outside the scope of the practice of physical therapy because the “Division’s research regarding the
insertion of needles for therapeutic purposes—to restore movement, reduce pain, and address other musculoskeletal disorders. Although current rules of the Tennessee Board of Physical Therapy allow physical therapists to perform kinesiologic electromyography (invasive needle study of the muscles to determine the degree and character of a muscle during certain movements) and diagnostic electromyography (invasive needle study of multiple muscles for diagnosis of muscle and nerve disease), the purposes of these procedures are solely academic or diagnostic, and they may be performed only in a university setting or upon referral from an allopathic or osteopathic physician, a dentist, or a podiatrist. See Tenn. Comp. R. & Regs. 1150-01-.02(1)(b)(2)(i), (iii); id. 1150-01-.04(4).

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