

48 Op. Att'y Gen. No. 7

ACUPUNCTURISTS - Education, training and licensing;
ACUPUNCTURISTS - Medical doctors and acupuncture;
COMMERCE, DEPARTMENT OF - Educating, training, and licensing acupuncturists;
COMMERCE, DEPARTMENT OF - Medical doctors and acupuncture;
HEALTH - Educating, training, and licensing acupuncturists;
HEALTH - Medical doctors and acupuncture;
HEALTH BOARDS AND DISTRICTS - Educating, training, and licensing acupuncturists;
HEALTH BOARDS AND DISTRICTS - Medical doctors and acupuncture;
MEDICINE - Educating, training, and licensing acupuncturists;
MEDICINE - Medical doctors and acupuncture;
ADMINISTRATIVE RULES OF MONTANA - Rules 8.28.501(1), 8.28.511;
MONTANA CODE ANNOTATED - Title 37, chapters 3, 13; sections 37-3-102(6), 37-13-103(1), -104, 37-13-301, -302.

HELD:

1. If a licensed physician wishes to represent himself or herself as licensed to practice the discipline of acupuncture, the physician must acquire a license to practice acupuncture under title 37, chapter 13.
2. A physician licensed under Mont. Code Ann. title 37, chapter 3, may, as part of his or her practice of medicine, use solid needles to perform therapeutic modalities without first acquiring a license to practice acupuncture under title 37, chapter 13.

September 3, 1999

Lawrence McEvoy, M.D., President
Montana Board of Medical Examiners
Professional and Occupational Licensing Division
Department of Commerce
P.O. Box 200513
Helena, MT 59620-0513

Dear Dr. McEvoy:

You have requested my opinion on the following question:

May a physician licensed under title 37, chapter 3 of the Montana Code Annotated use solid needles to practice acupuncture without first acquiring a license to practice acupuncture under title 37, chapter 13?

I.

The Montana Board of Medical Examiners regulates the practice of medicine by physicians and the practice of acupuncture by acupuncturists. Acupuncture is defined as "the diagnosis, treatment, or correction of human conditions, ailments, diseases, injuries, or infirmities by means of mechanical, thermal, or electrical stimulation effected by the insertion of solid needles. The term includes the use of acupressure and the use of oriental food remedies and herbs." Mont. Code Ann. § 37-13-103(1).

A person may not practice acupuncture or use the title "acupuncturist" in Montana unless the person is licensed pursuant to Mont. Code Ann. title 37, chapter 13. See Mont. Code Ann. § 37-13-301. A person is qualified to be licensed as an acupuncturist in Montana if the person is 18 years or older, is of good moral character, is a graduate of an approved school of acupuncture, and has passed an examination prepared and administered by either the Board of Medical Examiners or the National Commission for the Certification of Acupuncturists. Mont. Code Ann. § 37-13-302(2). No exception to either the education requirement or the examination requirement exists in rule or statute for licensed physicians who wish to practice acupuncture.

An approved school of acupuncture is defined by statute as one which is approved by the National Accreditation Commission for Schools and Colleges of Acupuncture and Oriental Medicine (NACSCAOM) and offers a course of at least 1000 hours of entry-level training in acupuncture or an equivalent curriculum approved by the Board of Medical Examiners. Mont. Code Ann. § 37-13-302(2)(c). The Board of Medical Examiners recently adopted an "advisory rule" clarifying that an approved school of acupuncture is one which is either (1) approved by the NACSCAOM and has a curriculum of at least 1000 hours of entry-level training in recognized branches of acupuncture; or (2) a school which, although not approved by NACSCAOM, offers a curriculum which is the equivalent of a 1000-hour course of entry-level training in recognized branches of acupuncture. Mont. Admin. R. 8.28.511.

The Board of Medical Examiners has determined to review "equivalent curriculum" on a case-by-case basis. Mont. Admin. R. 8.28.501(1). The authority to approve an "equivalent curriculum" includes the right to approve an equivalent curriculum for licensed physicians who wish to become licensed acupuncturists. The fact the Board has chosen not to adopt an equivalent acupuncture curriculum for licensed physicians confirms that licensed physicians are currently subject to the same education requirements as anyone else wishing to become a licensed acupuncturist. Unless the Board of Medical Examiners either adopts or approves on a case-by-case basis an applicable "equivalent curriculum," a licensed physician must take a 1000-hour approved course in order to become a licensed acupuncturist.

The above conclusion is supported by Mont. Code Ann. § 37-13-104(1)(b), which provides: "A doctor of medicine, osteopathy, chiropractic, dentistry, or podiatry may not practice acupuncture in this state unless that doctor has completed a course and passed an examination in acupuncture as required by this chapter." See also Mont. Code Ann. § 37-13-301. Licensed physicians are, however, relieved from taking additional examinations in anatomy, physiology, chemistry, dermatology, diagnosis, bacteriology, materia medica and other subjects required by their existing license. Mont. Code Ann. § 37-13-104(1)(a).

II.

The question remains, however, whether a licensed physician may use solid needles as part of a treatment or therapeutic modality within his or her "practice of medicine." The practice of medicine includes "the diagnosis, treatment, or correction of or the attempt to or the holding of oneself out as being able to diagnose, treat, or correct human conditions, ailments, diseases, injuries, or infirmities, whether physical or mental, by any means, methods, devices, or instrumentalities." Mont. Code Ann. § 37-3-102(6). You have asked whether the phrase "by any means, methods, devices, or instrumentalities" permits a licensed physician who is not a licensed acupuncturist to use solid needles as part of a treatment or therapeutic modality.

The 1995 legislature, along with clarifying the definition and upgrading the standards of the practice of acupuncture, attempted to address the question of whether medical doctors can use solid needles when it adopted Mont. Code Ann. § 37-13-104(2) and (3). See legislative history for ch. 340, 54th Leg. (Mont. 1995).

Mont. Code Ann. § 37-13-104(2) and (3) states:

(2) Except as provided in 37-13-301 and with particular regard to the insertion of solid needles used to perform acupuncture, this chapter is not intended to limit, interfere with, or prevent a licensed health professional from practicing within the scope of the health professional's license.

(3) This chapter does not affect the practice of an occupation by an individual who does not represent to the public that the individual is licensed under this chapter.

Unfortunately, those subsections do not provide a definitive answer to your question.

Mont. Code Ann. § 37-13-104(2) is internally ambiguous. If the word "except" qualifies only the phrase "as provided in 37-13-301," the legislature most likely intended to permit medical doctors to insert solid needles to perform acupuncture. However, if the legislature intended the word "except" to also qualify the

phrase following the word "and," that subsection would ban a licensed physician who is not a licensed acupuncturist from inserting solid needles used to perform acupuncture.

Mont. Code Ann. § 37-13-104(3) emphatically states that the statutes regarding acupuncturists do not apply to anyone who does not represent him- or herself to the public as a licensed acupuncturist. This subsection directly conflicts with Mont. Code Ann. § 37-13-104(2), if the latter subsection is interpreted to prohibit medical doctors from using solid needles to perform acupuncture. It also conflicts with Mont. Code Ann. § 37-13-104(1)(b) with respect to whether a medical doctor must complete an approved course and pass an approved examination in order to practice acupuncture.

The apparent ambiguity between Mont. Code Ann. § 37-3-104(1)(b), (2), and (3) permits reliance on legislative history to determine legislative intent. Lovell v. State Comp. Mut. Ins. Fund, 260 Mont. 279, 285, 860 P.2d 95, 99 (1993). My review of the legislative history disclosed no information that would help resolve this conundrum.

The ambiguous nature of the statute also makes it difficult to apply the typical rules of statutory construction. A fundamental rule of statutory interpretation requires that all statutes concerning a subject be read together, with each given effect if reasonably possible. See Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981). I have already determined that Mont. Code Ann. § 37-13-104(2) is internally ambiguous and that § 37-13-104(2) and (3) may be mutually exclusive. Additionally, § 37-13-104(3) appears to conflict with §§ 37-13-104(1)(b) and -301(1). It is impossible to give effect to each of these subsections.

The 1969 legislature enacted Mont. Code Ann. § 37-3-102(6). That statute defines the practice of medicine as the "diagnosis, treatment or correction" of "human conditions, ailments, diseases, injuries, or infirmities" by any "means, methods, devices, or instrumentalities." The 1995 legislature, by adopting Mont. Code Ann. § 37-13-104(2), may have intended to exclude acupuncture from the "means, methods, devices, or instrumentalities" licensed physicians are permitted to perform. However, § 37-3-102(6) was not amended to reflect such a change. Repeals by implication are not favored. State v. Gafford, 172 Mont. 380, 388, 563 P.2d 1129, 1134 (1977). Therefore, it cannot be assumed that the legislature silently amended or repealed § 37-3-102(6) when it passed § 37-13-104(2). Conversely, the 1995 legislature may have intended, by adopting § 37-13-104(3), to ensure that a licensed physician can use treatment methods including solid needle therapy as long as the physician does not represent him- or herself to be a licensed acupuncturist.

You recently provided me with a position paper and transcript of a Board of Medical Examiners meeting. Both documents indicate the Board agreed to inform me of the following:

No. 1, that we're saying that we feel solid needle therapy may be used by a licensed physician and surgeon. No. 2, that this is not to be construed as allowing any individual to hold themselves out as a certified acupuncturist unless that individual has gone through the certified acupuncturist training and certification.

Board Meeting of March 13, 1999, Tr. at 74, lines 15-22.

Great deference is afforded an agency's interpretation of the laws it enforces. Norfolk Holdings, Inc. v. Montana Dep't of Rev., 249 Mont. 40, 44, 813 P.2d 460, 462 (1991). This is particularly true in fields such as medicine, where a high level of expertise exists. I find the Board's interpretation of these statutes to be persuasive. It gives meaning to the majority of the statutes and subsections involved and construes conflicting statutes in a manner which gives effect to each section, while protecting the public from the unlicensed practice of acupuncture.

The Board's interpretation is also consistent with the legislative purpose for the legislation, the protection of the public health, safety, and welfare and the protection of the public from "the unauthorized and unqualified practice of acupuncture." Mont. Code Ann. § 37-13-102. The Board of Medical Examiners apparently assumes a medical doctor is properly trained to provide treatment with solid needles. If a

medical doctor performs the treatment without proper training or exceeds the scope of his or her license, the doctor is subject to the Board's disciplinary jurisdiction.

THEREFORE, IT IS MY OPINION:

1. If a licensed physician wishes to represent himself or herself as licensed to practice the discipline of acupuncture, the physician must acquire a license to practice acupuncture under title 37, chapter 13.
2. A physician licensed under Mont. Code Ann. title 37, chapter 3, may, as part of his or her practice of medicine, use solid needles to perform therapeutic modalities without first acquiring a license to practice acupuncture under title 37, chapter 13.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/mas/lrb