

TO: Texas Sunset Advisory Commission
Chairs, House and Senate Health Committees

FROM: Shipley and Associates, Inc.

DATE: February 23, 1993

RE: Final Report, TBCE Performance Analysis

This report summarizes a comprehensive performance analysis of the Texas Board of Chiropractic Examiners (TBCE) as a regulatory agency. The study is designed to answer the question: "Does the TBCE effectively regulate chiropractic in the state of Texas?"

As the data will show, the TBCE is in chaos and has been for years. It fails to regulate chiropractic in Texas: complaint processing and resolution are inefficient, files are incomplete, and rules are proposed expanding the scope of practice of chiropractic beyond statutory boundaries and without sufficient research or public hearings. The victims of the TBCE's patterns, policies, and procedures are not only those who pay insurance premiums (including workers' comp) but also Texas consumers who expect a state licensing agency to prudently exercise its police power in the public interest. In essence, chiropractic in Texas is an unregulated industry.

The Sunset process affords a unique, once-in-a-decade opportunity to impose substantive reforms on the TBCE. Many of the proposed reforms suggested herein should be evaluated for their applicability to other health licensing agencies as well.

This study is an independent analysis of the regulatory functions of the Texas Board of Chiropractic Examiners undertaken by Shipley and Associates, Inc. Of Austin. Shipley and Associates retains all editorial rights. The study was funded jointly by (in alphabetical order): the Texas Allergy Society, the Texas Medical Association, the Texas Orthopedic Association, Texas Physical Medicine and Rehabilitation, the Texas Physical Therapy Association, the Texas Radiological Society, the Texas Society of Anesthesiologists, and the Texas Society of Internal Medicine.

Table of Contents

I.	Methodology.....
II.	TBCE Structure and Organization..... A specific summary on the TBCE's boardmembers, meetings, operating staff, Peer Review service, education and licensure exams and fees.
III.	Enforcement..... An analysis of the TBCE's enforcement program including the handling of complaints, record- keeping, and disciplinary actions.
IV.	Legislative Background..... A review of legislation and attorney general rulings pertaining to the scope of practice of chiropractic in Texas.
V.	Chiropractic Abuses..... A summary of billing frauds and misleading advertising by chiropractors in Texas.
VI.	Texas Chiropractic Association..... A review of TCBE's relationship with the TCA.
VII.	Conclusions.....

I. METHODOLOGY

This performance analysis is based on a compilation of public documents explaining and describing the structure, function and procedures of the TBCE. Sources include Vernon's Civil Statutes, the The Texas Administrative Code, the Texas Chiropractic Act (and subsequent amendments), TBCE brochures and Sunset Advisory Commission documents.

In addition, a number of Open Records requests were filled at the TBCE board minutes for the past five years, all complaints and the accompanying documentation against licensed chiropractors for 1992 (with a small sampling from other years), TBCE performance targets, budgets, and annual reports.

Available public information was compiled on the profession's trade association, the Texas Chiropractic Association (TCA), including background, policy, membership, and PAC documents.

Finally, news articles, chiropractic journals, advertisements, national regulations and state-by-state comparisons of rules, chiropractic colleges, and legislation were analyzed.

II. TBCE STRUCTURE AND ORGANIZATION

General Background

The TBCE is composed of nine members appointed by the governor with the concurrence of the senate. Members sit for staggered six-year terms. Six of the members must be practicing chiropractors who have resided in Texas for a period of five years preceding appointment, while the remaining three members must be from the general public (V.T.C.S. Art. 4512b, Sec. 3).

The nine members serving on the Board as of January 1992 are:

NAME	TITLE	RESIDENCE	TERM ENDS
James E. Franklin, D.C.	Pres.	San Antonio	4/26/93
David E. Albracht, D.C.	V.P.	Amarillo	4/26/93
Nancy Z. Jones, D.C.	Sec/Treas	Dallas	8/3/95
George Aubert, D.C.		Tomball	8/3/95
Nancy Brannon		Gainsville	8/3/97
Carroll V Guice, D.C.		Longview	8/3/97
Clay Salyer, D.C.		Dublin	8/3/97
Raymond G. Wheless		Plano	4/26/93
John H. Wright		Houston	8/3/95

Operating Staff

According to the TBCE's Agency Strategic Plan 1992-1998, the TBCE's staff is comprised of three employees: Executive Director, Administrative Technician I, and Administrative Technician II. This staff is charged with the administrative and licensing portion of the examining process which includes evaluating all applications and transcripts to ensure that all applicants are qualified under the requirements of the Minimum Standards Act of Texas. In addition, the staff is responsible for verifying continuing education hours, collecting all annual fees as well as fees for verification of licensing requirements, examinations, reexaminations, and reciprocal licenses.

One of the TBCE's primary responsibilities is to protect the public by enforcing and regulating the practice of chiropractic, but there are no full or part-time investigators or personnel dedicated to enforcement at the TBCE. Members of the TBCE serve on an Enforcement Committee to review and analyze all complaints/inquiries received by the Board. Although it has funding for contract investigators, the TBCE states in its Agency Strategic Plan 1992-1998(p.7):

"Enforcement procedures are hindered due to the fact that the agency does not have an investigator on staff...problems arise when trying to contract with experienced individuals who have qualifications, expertise, and knowledge of the profession."

According to the minutes from 8/17/89, TBCE members serve on seven different committees: Enforcement, Rules, Education and Testing. Public Relations, Budget, Reciprocity, and Peer Review. According to the minutes, the Board voted to create policy notebooks for each committee. However, in response to Open Records request, TBCE Executive Director Patte Kent stated that no such notebooks exist. With the exception of limited information on Peer Review and Enforcement, it is not possible to determine how often these committees meet or their specific duties and powers.

Peer Review:

The Texas Chiropractic Act (V.T.C.S. Art. 4512b(1)) established a TBCE peer review service in 1985. The TBCE appoints an executive chiropractic peer review committee of six volunteer chiropractors "from lists of qualified doctors who have been nominated for membership by the various chiropractic associations in the State of Texas" (TBCE Peer Review Guidelines, 1985; Art.4) to direct the activities of local peer review committees. All members of chiropractic peer review committees must participate in a TBCE-approved peer review training program.

According to the peer Review Guidelines:

According to the Peer Review Committee is to resolve conflicts between chiropractors, 3rd party payor and/or patients. The method to be used is mediation. Each party to the mediation must act in good faith and participate voluntarily. A mediator which is the statutory function authorized, is: one who acts as a friendly inter-venor in the disputes of other, with their consent, for the purpose of adjusting differences. Any resolutions gained from the mediation process shall always remain confidential...(Art. 5)

Interested parties requiring Peer Review mediation should submit in writing their request for a peer review to the area chairman...The letter should consist of the patient's name, 3rd party payor, insured's name and policy number, type of claim and the reason for mediation. Also included should be: (1) An outline of previously made efforts to resolve the dispute. (2) A non-refundable check for \$50. (Art. 8) (NOTE: There is no information detailing how this money is used.)

"Mediation Process (1) Mediator contracts both parties individually by phone. a) Discusses mediation agreement form. b) Gathers more information to clarify dispute if necessary. c) Assesses party's orientation toward compromise settlement. d) Determines time for conference call among parties if appropriate." (Art. 9)

A summary is made of each mediation by the local mediator which includes the outcome of the mediation and the names of the parties involved. Written records are kept of each mediation and of Executive Peer Review Committee meetings. According to TBCE Executive Director Patte Kent stated that all Peer Review matters are handled by Larry Montgomery, a chiropractor in Belton who is a member of the Executive Peer Review Committee. In a telephone conversation on December 14, 1992, Larry Montgomery said that the purpose of the Peer Review Committee is to mediate only necessity of care cases between two parties and that most peer review cases involved insurance companies.

(NOTES: First, this mediation process does not seem to fit with the traditional definition of "peer review." Second, Art. 10(8) of the Guidelines stipulates, "Both parties are allowed to request copies of the written records, under the Texas Open Records Act..." However, Larry Montgomery will not release any additional information pending "legal opinions as to whether those insurance companies and private practitioners who submit claims to Peer Review are giving implied consent to allow their names and business interest released". Montgomery letter, 1/26/93. Third, it is unclear how the Texas Open Records Act can be selectively applied.)

The Executive Peer Review Committee reports periodically at TBCE meetings, along with the other TBCE committees. According to Board minutes, on January 26, 1991, a motion was made to name a certain chiropractor to the Peer Review Committee. After discussion, the motion was withdrawn, and the Board decided to "notify TCA to select another member." On August 3, 1991, "Discussion was held concerning the list of doctors recommended to the Board by the Texas Chiropractic association for the Peer Review Committee." The Board voted to accept each of the recommended chiropractors.

On June 10, 1992, Larry Montgomery presented to the Board a summary of Peer Review activities for the previous two years. In his report, Montgomery requested that the TBCE consider several new rules to "simplify the Peer Review process for the area coordinators." His recommendations include creating a TBCE stipulation that all chiropractors become Peer Review certified (it is not clear what this entails) prior to renewing their licenses, and ensuring TBCE disciplinary action against any Peer Review certified chiropractor who refuses to help mediate. Montgomery closes his report, "we feel it is IMPERATIVE that the board give Peer Review some type of power and recourse so that we can better serve the public."

Board Meetings

The minutes of TBCE meetings from January 1988 through August 1992 were collected and review. (As of this writing, the minutes from the November 1992 meeting have not been approved.) Most of the meetings lasted one or two days and took place in Austin, with other meetings taking place in Houston, the Dallas/Fort Worth area and El Paso. The 11/10/92 meeting was the first to have a court reporter to record and transcribe the minutes. (NOTE: According to TBCE Executive Director Patte Kent, previous meetings were recorded by a TBCE staffer who transcribed them whenever time permitted. The Board has not approved the continued use of a court reporter.)

According to the minutes, TBCE meetings include approval of previous minutes, general committee business, committee reports, discussion on issues concerning the practice of chiropractic, an executive officers' report from TCA, and an executive session for legal advice and discussion of civil cases involving the TBCE.

The TBCE meets sporadically - five times in 1988, three times in 1989, twice in 1990, three times in 1991, and five times in 1992 (including November). As noted in the TBCE's Second Quarter Report on Key Performance Targets :FY 1992):

"The full Board must make the final ruling on disciplinary matters. Since the board does not meet on a set basis, the cases sometimes sit for a period of time, waiting for the next Board meeting, and full Board approval."

This results in a low number of complaints being resolved as a percent of complaints received. For example, in the first quarter of FY '92 the TBCE's case resolution rate was 32%. The First Quarter Report on Key Performance Targets (FY 1992) states: "Inforcement will be given priority during the second quarter." In the second quarter complaint resolution rose only to 49% and during the third the case resolution rate again dropped to 33% (Fourth Quarter Report on Key Performance Targets FY 1992).

Education and Licensure Examinations

There are two accredited chiropractic colleges in Texas. Texas Chiropractic College (Pasadena) and Parker College of Chiropractic (Dallas) are accredited by the Council on Chiropractic Education and the Southern Association of Colleges and Schools and are both non-profit, private institutions. According to its 1991-1993 Catalogue, the Texas Chiropractic College is owned by United Texas Chiropractic Education Foundation, Inc., "a non-profit subsidiary of the Texas Chiropractic Association" (p. 9) After graduation from an accredited school, applicants for licensure in Texas are required to pass a series of exams as stipulated by the Texas Chiropractic Act.

According to the National Board of Chiropractic Examiners (NBCE), each state licensing board is the ultimate authority in its state and can therefore choose which sections of the national board exam (4 parts created and administered by the NBCE) are required or if the national boards are required at all. Each state decides if passing the national exam alone is sufficient for licensure, if a combination of the national and state exams is required for licensure, or if the state exams alone are sufficient for licensure. In addition, the NBCE has a recommended passing score, but each state has the final decision whether to accept that recommendation or to establish its own passing score.

According to the Federation of Chiropractic Licensing Boards (which does not regulate but only encourages that states have similar licensure requirements), Texas requires that applicants take all four parts of the NBCE exam as well as a two-part state exam covering X-rays and the Texas Chiropractic Act. These requirements are included in the Texas Chiropractic Act.

There is no printed information available on the process for writing and administering the state licensing exam, but the current TBCE Executive Director said that the state exams are administered by TBCE members on the Education Committee with the assistance of one or two staff members and 10 al chiropractors. The state exams are given at the chiropractic colleges, and all records are kept at the TBCE office. Any updates or changes to the exam are written by TBCE members on the Exam Committee and do not have to be approved by the board as a whole.

Fees

Licensing fees are set by the Texas Chiropractic Act (VTCS Art. 4512b Sec. 11B), which specifies that the TBCE shall establish "reasonable and necessary fees for the administration of this Act, Not to exceed...

Annual Renewal	\$400
Reciprocal License	400
Examination Fee	320
Reexamination Fee	275
Verification of Licensing	
Requyrenebts Fee	75

The TBCE currently charges the maximum fee set by law.

III. ENFORCEMENT

As all regulatory agencies, the TBCE is charged with the task of ensuring that licensed chiropractors follow the laws set forth by the Texas legislature in the Texas Chiropractic Act. By statute, enforcement is one of the three basic functions of the TBCE.

It is difficult to tell exactly how many complaints are received annually by the TBCE. According to the Agency Strategic Plan, the TBCE received 363 complaints from January through August 1992. However, when asked for all the 1992 complaints subject to Open Records, the TBCE staff was only able to find 118 cases, even though their "complaint log" for 1992 shows that there should be 172 filed complaints. (NOTE: The Texas Open Records Act does not cover pending cases.)

According to its own Consumer Guide (1988), upon the receipt of a written complaint, the TBCE will:

- "a. acknowledge receipt.
- b. contact you regarding receipt of your allegation.
- c. keep you informed to the progress of the investigation."

However, even after a review of the files, it is impossible to determine whether these steps are followed. Most of the files are missing crucial pieces of correspondence to the complainants.

According to the TBCE's new executive Director, Patte Kent (at a 12/15/92 meeting) and from additional research, the following are true:

1. Although the Chiropractic Act stipulates "the Board shall keep an information file about each complaint filed with the Board relating to a chiropractor are found in the chiropractor's general file (filed alphabetically), which includes license number, examination information, transcripts, etc.. It cannot be determined whether there have been multiple complaints made against a chiropractor without going through the entire file. (NOTE: Ms. Kent stated TBCE staff members were separating the complaints and creating "complaint files" as they were pulling files to review for this report.)

2. The "Complaint Logs" are the only comprehensive record kept of complaints received by the TBCE. These logs consist of photocopied, legal size, handwritten sheets which are supposed to include a case number, date received, complaint, chiropractor's name, nature of the complaint, and the action or actions taken by the TBCE in response (a total record consists of one line across the page). According to Ms. Kent there is no guarantee that the enforcement/complaint logs match the actual files.

3. The "information files" themselves are haphazard. Files are incomplete, and in some cases it is impossible to determine the nature of the complaint or the final outcome. TBCE correspondence is equally random; some complainants receive notification, many do not. (NOTE: In the files reviewed, the chiropractor's explanation/defence was generally accepted, over the complainant's, even in matters of sexual harassment and abuse, with little or no apparent investigation.)

4. The nature of the complaint determines the action taken by the TBCE. When a complaint comes in, the Executive Director and the Enforcement Committee (George Aubert, D.C., and John Wright for 1992) review the complaint, decide the nature and seriousness of the complaint, are supposed to send out an appropriate response letter. For the past few months, computerized form letters were supposed to go to each complainant and to the chiropractor, notifying each as to the status of the complaint. Again according to Ms. Kent, there was no consistency as to which letter, if any, was sent to the complainant or the chiropractor. However, in reviewing the 1992 files it was discovered that most do not contain letters to the complainant acknowledging receipt of the complaint, any indication of forwarding the chiropractor's response to the complaint, or notifying the complainant of the TBCE's final action in the case.

5. The chiropractor is given the opportunity to respond to a complaint in writing. In the event that an informal conference is deemed necessary, the chiropractor meets with the Enforcement Committee (two TBCE members), the TBCE Executive Director, and The TBCE representative from the Attorney General's office. The chiropractor is also allowed to bring legal counsel. Informal hearings are scheduled randomly. A form letter is sent to the chiropractor notifying him/her that a hearing has been scheduled and his/her presence is requested. (NOTE: Although the chiropractor does not have to appear, a majority of cases reviewed were found in favor of the chiropractor when he/she did appear. In addition, there is only evidence of one TBCE member's

participation in any enforcement activities, even though there are two members on the Enforcement Committee.)

6. Formal hearings are held under the Texas Administrative Code. Again, information is difficult to assess because there is no separate file or log of these cases.

7. Ms. Kent also said there has never been a set time frame for trying to resolve complaints. Several files in 1992 alone show complaints being filed in 1991 and not resolved until early or mid 1992.

8. The Texas Chiropractic Act states "each local chiropractic peer review committee shall review and evaluate chiropractic treatment and services in disputes involving a chiropractor and a patient or person obligated to pay a fee" (Art. 4512b (1) Sec. 3 (a)). However, Ms. Kent stated Peer Review is set up to determine if a chiropractor is charging fairly for services, based on disputes between chiropractors and insurance companies, whereas all patient-generated complaints are supposed to go to the Enforcement Committee.

In terms of the nature of the complaints filed against Texas chiropractors for 1992: of the 118 actual case files,

8% involved solicitation of accident victims;

8% involved insurance fraud;

10% involved sexual misconduct;

15% involved false advertising;

17% involved unprofessional conduct

(ranging from negligent care to failure to provide records);

30% involved fee disputes;

6% were miscellaneous complaints

(for example, a DC failed to procure a special chair for a patient);

6% cannot be classified due to incomplete documentation.

*Less than 1/3 of the 118 cases contained letters to the complainant.

*Only 16% had any sort of tracker or log of events and actions taken.

*Only 14% (16 cases) were classified as violations and resulted in any action taken against the chiropractor, with a majority of the actions being letters of reprimand or warning.

*11% (13 cases) did not contain enough information in the file to determine whether the TBCE had taken any action.

The files were analyzed within each category of complaint. Under the category of sexual misconduct, of the 12 complaints filed, 10 were declared "no violation" by the TBCE, one resulted in the chiropractor being required to take a 15 hour ethics course, and the resolution of one case was unclear.

There is no apparent system or pattern for addressing these complaints. For example, Case #92-37 for fondling a female patient's breast was dismissed as a "no violation" based on the chiropractor's statement versus the patients. (NOTE: It took the TBCE a year to resolve this case.) However, Case #92-4 was classified as a violation and the chiropractor was required to attend an ethics seminar for referring a patient to a massage therapist who then "embraced the patient in a suggestive manner." No mention is made of any action taken against the therapist.

In another case (case number not listed in the file), a chiropractor prescribed and requested the prescription for drugs on behalf of a patient, a direct violation of the Chiropractic Act. The chiropractor turned himself in to the Board on January 23, 1992 and the TBCE held a formal hearing on April 14, 1992. The result of the hearing was an Agreed Order to revoke the chiropractor's license for one year, with the requirement that he not be affiliated with any chiropractor, chiropractic or other health care facility, and not perform chiropractic services in any manner whatsoever. The Order was signed on April 30, with a plea from the chiropractor that the revocation be dated retroactively to February; he presented an affidavit stating that he had been living under the terms of the Order since he had been fired in February. According to the June 10, 1992 TBCE minutes, the Board was told that it could not legally take a retroactive action, and the chiropractor's license was revoked for one year effective June 10, 1992. (NOTE: On close examination of this file, we discovered a letter from another chiropractor stating that this chiropractor had adjusted one of her patients in March of 1992, and a phone log recording the same information. No where in the file or the minutes is there any mention of this fact, or of any investigation of this inconsistency.)

In a 1989 case (case number not in the file), a female patient accused her male chiropractor of "penetrating her with his finger" during a treatment and trying to "stimulate her sexually." The chiropractor was arrested on June 15, 1989 and signed a statement that he later tried to claim was not true. A Hearings Examiner was called in, and after reviewing her findings, the TBCE issued an Order on August 10, 1992 to revoke the chiropractor's license on the grounds of grossly unprofessional conduct and an "imminent peril to the public health, safety, and welfare." According to the March 19, 1992 minutes of the TBCE, the chiropractor addressed the TBCE concerning reinstatement of his license. "(He) discussed rehabilitation he has undergone over the past twelve months, and stated that he would like to address the Board at the next meeting to get the process started to regain his license. Dr. Salyer (TBCE member) stated that he objects to the fact that (the chiropractor) is doing hands-on chiropractic in another doctor's office ...after the Board revoked his license." (NOTE: First, there is no indication in this file that the chiropractor has undergone any kind of rehabilitation. Second, there is no investigation of Salyer's claim that the chiropractor continued to practice chiropractic nor is there any discussion at the March 19 meeting of whether Salyer's claim is valid. Third, the situation does not appear in the minutes of the subsequent TBCE meeting. There is no way of determining from TBCE records if the chiropractor's license is being reinstated, or even if he is currently practicing without his license.)

Of the 30% of the 1992 complaints filed for fee disputes or fraud in billing, only one case resulted in a violation. The remaining 34 cases that resulted in "no violation" included overcharging for services, advertising "free" consultations but then charging for x-rays, and double-billing insurance companies. Another common complaint as in Case#92-195, is charging insurance patients a much higher rate than cash patients. A patient claims the chiropractor told her "he just gave his patients a break" by charging the higher price to insurance companies. In another complaint against a chiropractic clinic, a patient claims that the clinic bills at

one rate for cash, one rate for insurance and a third rate for personal injury. The patient's insurance company was billed \$157.00 for an office visit, even though the patient said she was told a cash charge for the visit would have been \$30.00. (NOTE: Charging different rates for the same procedure violates Sec.21.79E of the Texas Insurance Code.)

Although it is a common complaint, the latter case involving the claim of different billing has several dimensions. The patient originally sent her letter of complaint with background information to the Texas Chiropractic Association because she did not know who else to send it to. She received a letter of response from her chiropractor, an indication the TCA contacted the chiropractor directly and not the TBCE. (NOTE: The TCA took what should have been a TBCE enforcement matter into its own hands without contacting the TBCE.)

Only because the patient was not satisfied with the chiropractor's response did she forward another copy of her letter to the TBCE. There is no TBCE paperwork of any kind in this file - no response, no letter to the chiropractor, no final action. Only the 1992 complaint log shows the "no violation" outcome of this case. In addition, the log indicates four complaints in five months against this same clinic, one of which is still pending from 10/91 while the other three resulted in "no violation."

PROBLEM: The enforcement system at the TBCE is inefficient and outdated. Files are incomplete and in disarray. Hearings are randomly scheduled and are not recorded nor are complainants allowed to attend.

Recommendations:

*Increase the full-time staff at TBCE headquarters in Austin and in investigative positions across the state. Each health oversight agency should have full-time and trained investigators, and their costs should be reflected in annual budgets.

* One of the two members on the Enforcement committee should always be a public member of the TBCE and should always be present at disciplinary hearings.

* In addition, all state agencies across the board should be computerized, with all files classified and organized as required by law.

* Hearings should have a set schedule throughout the year and complainants should always be notified of hearings and given the required status reports.

* Make it mandatory for chiropractors to report any known violations of the Act by another chiropractor.

* Consider the installation of an 800 number, and thus increased public access, for reporting complaints to the TBCE.

IV. LEGISLATIVE BACKGROUND

The Texas Board of Chiropractic Examiners was created in 1949 to regulate the practice of chiropractic in accordance with the Chiropractic Act of Texas (V.T.C.S., Art. 4512B). The TBCE's responsibilities include "conducting examinations, issuing licenses, promulgating rules and regulations, and revoking licenses on grounds specified in Article 4512b, Section 14a, V.T.C.S." (Report on the Financial Related Audit of Licensing Agencies, Oct. 1990). Currently, the TBCE is charged with the regulation of over 2,500 Texas chiropractors.

In its original form, the Texas Chiropractic Act read:

"Any person shall be regarded as practicing chiropractic within the meaning of this Act who shall employ objective or subjective means without the use of drugs, surgery, X-ray therapy or radium therapy, for the purpose of ascertaining the alignment of the vertebrae of the human spine, and the practice of adjusting the vertebrae to correct any subluxation or misalignment thereof...."

Since 1949, however, the TBCE has expanded the definition of chiropractic. The current Texas Chiropractic Act reads:

"A person shall be regarded as practicing chiropractic within the meaning of this Act if the person: (1) uses objective or subjective means to analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body; (2) uses adjustments, manipulation, or other procedures in order to improve subluxation or the biomechanics of the musculoskeletal system...." (V.T.C.S. Art. 4512B, Sec. 1).

Legislation/Attorney General Rulings

During the 60th Legislature (1959), Texas Legislators passed the Healing Art Identification Act that stipulated, "The following are the legally required identifications, one of which must be used by practitioners of the healing art:... (4) If licensed by the Texas Board of Chiropractic Examiners: chiropractor: doctor, D.C.: doctor of Chiropractic, D.C." (V.T.C.S. Art. 4590c, Sec. 3).

During the 71st Legislative Session (1989), Texas legislators passed SB169 which redefined the role of chiropractors, allowed them to dispense non-prescription drugs and authorized them to "analyze, examine or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body." SB169, because it broadened the scope of practice beyond the human spine, underwent scrutiny by some chiropractors who claimed "the changes will move chiropractors into practices for which they are not trained" and described "the new definition as too broad and the drug-dispensing changes as a dangerous departure from tradition that will eventually lead to poor treatment and expensive malpractice cases" (Ft. Worth Star-Telegram, 3/14/89).

On December 28, 1990, in response to an opinion request from TBCE President James Franklin, Attorney General Jim Mattox ruled Chiropractors may call themselves "chiropractic physicans." In his opinion (JM-1279) Mattox writes:

"We disagree that section 3 of article 4590c, V.T.C.S., prohibits the use by a licensee of your board of the title "chiropractic physician" and thereby precludes your board from promulgating a rule permitting the

designation....Rather, we construe the statute to set forth, in effect, minimum requirements with which the regulated professionals must comply." (NOTE: This opinion was issued on one of Mattox's last days in office and is controversial in terms of its ramifications for chiropractic advertising and insurance reimbursement.)

During the 72nd Session (1991), legislators passed SB857 amending the Chiropractic Act in reference to the grounds for refusing, revoking, or suspending licenses. The amendment prohibits the chiropractor from soliciting "patients or potential patients who, because of their particular circumstances, are vulnerable to undue influence" which "include but are not limited to" motor vehicle injuries, work related injuries or accident victims.

TBCE Proposed Rules

In 1991 and 1992, the TBCE proposed 48 regulatory changes to the Texas Chiropractic Act. These proposals are contained in:

<u>Texas Administrative Code Chapters</u>	<u>No. of proposed changes</u>
TAC Ch. 71, Applications and Applicants	7
TAC Ch. 73, Licenses and Renewals	10
TAC Ch. 75, Rules of Practice	11
TAC Ch. 77, Advertising/Public Communication	6
TAC Ch. 78, Chiropractic Radiologic Technologist	1
TAC Ch. 79, Reciprocity	1
TAC Ch. 80, Practice of Chiropractic	12

Within these areas, Chapters 75 and 80 relate directly to administrative attempts to expand scope of practice.

Ch. 75.7. Authorized Practices, Techniques, and Procedures:

"(a) Licensees of this board are authorized to use clinical and physical examinations, laboratory examination, diagnostic imaging, electrodiagnostic testing and other forms of testing and measurement used to properly evaluate and examine patients...."

(c) Licensees of this board are authorized to utilize osseous and soft tissue adjustments and manipulative techniques, physical and rehabilitative therapy, acupuncture and other reflex techniques, exercise therapy, immobilization, splinting, bracing or supportive techniques, patient education, advice and counsel, nutritional and herbal supplements, nonlegend medication, and other treatment services and procedures in order to provide therapeutic and preventative care for a patient..." (proposed in varying forms on 9/13/91, 2/4/92 and 12/15/92; not yet passed)

Ch. 80.2. Titles:

"(a) A licensee may use any of the following titles:

- (1) chiropractor;
- (2) doctor of chiropractic;
- (3) D.C.;
- (4) doctor, D.C.;
- (5) chiropractic physician; or
- (6) any derivative of the previously listed terms with the exception of

the term 'chiropractic physician' which shall not be modified or altered in such a manner that would result in the use of the title 'physician' by itself...." (proposed in varying forms 1/7/91 and 1/18/91; the latter version became effective 3/18/91)

The most recent expansions have been into the controversial areas of acupuncture (TAC Ch, 75.7.) and Manipulation Under Anesthesia (MUA), a chiropractic adjustment to a patient under general anesthesia. Although no guidelines have been written or rules proposed for MUA, at their 11/10/92 meeting, the TBCE voted first to endorse this procedure in Texas and then to develop guidelines for the procedure. There is no evidence in the TBCE minutes reviewed showing that any hearings were held or research conducted on the safety and public benefit of chiropractic MUAs or acupuncture. (NOTE: Acupuncture could be considered an invasive technique which would run contrary to the tradition of chiropractic. Although osteopaths have been performing MUAs for many years, only nine states have approved MUA as a chiropractic technique.)

Chiropractic Encroachment into Physical Therapy

There are two main attorney general rulings in this area. In 1986, Attorney General Jim Mattox was asked to issue an opinion on "whether a public agency may offer physical therapy services without employing a licensed therapist if such services are offered by or under the supervision of a licensed physician." The opinion (JM-421) is based on the clause in the Physical Therapy Act that states the act and its prohibitions "do not apply to a licensee of another state agency performing health-care services within this scope of the applicable licensing act (V.T.C.S. art. 4512e, §7)."

According to Mattox, "a doctor who is licensed to practice medicine in Texas can perform all the functions of a physical therapist within the scope of his medical license. Also, a doctor can delegate certain medical acts to any qualified person:....If the requirements of article 4495(b); section 3.06(d)(1) are met, a person who is not a licensed physical therapist but who is acting under a doctor's supervision may perform medical acts that come within the definition of 'physical therapy' in article 4512e, section 1(1)."

(NOTE: Mattox's opinion does not address the following questions: 1) what kind of "doctor" must be in the supervisory role; 2) who or what determines whether a delegate for the doctor is qualified and properly trained; 3) must the supervising doctor be present when the delegate performs his/her duties.)

In a related opinion, Mattox was asked to determine whether a chiropractor may advertise that he performs physical therapy (JM-1211, 8/21/90.) Mattox again referred to the Physical Therapy Act's exemption of licensees of other state agencies performing health-care services.

Mattox raises the issue of whether "performing health-care services" includes advertising those services, and proceeds to answer the question by referring to section 5a of the Chiropractic Act (V.T.C.S. art. 4512b). The statute states "a person may not practice chiropractic without being licensed to do so by the Texas Board of Chiropractic Examiners." However, the article goes on to specifically state that physical therapist does not use the term 'chiropractor' or chiropractic' in connection with his or her name or practice (Section 13d).

Mattox concludes, "Since the legislature, while exempting physical therapists from the terms of the Chiropractic Act, has in plain terms forbade them to advertise themselves as chiropractors, it must be presumed that the legislature knows how to prohibit advertising when it wants to do so." (NOTE: Therefore, a licensed chiropractor who is not a licensed physical therapist may advertise his services as physical therapy - regardless of whether this misleads the general public.)

Over the past 4-5 years, the chiropractic profession has expanded its scope of practice and its billing capabilities. A common area of expansion seem to be rehabilitation clinics owned by one or more chiropractors who refer patients to the their own clinic but whose names do not appear on any billings, nor do they preform any of the treatments. Instead, billings are signed by another chiropractor or a physical therapist, although in numerous cases treatments are administered by unlicensed personnel.

One example of this type of billing fraud is found in a published guide titled The Golden Mean Rehab System. Published in 1991 by Medi Enterprises, Inc., a Dallas-based company owned by Jerry and Diann Mobley, this manual is "a helpful guide" for those who want to open their own exercise rehabilitation clinic:

* First section: "Benefits of the Golden Mean Rehab System. 4. Accelerate your debt reduction/accumulation-'Conservatively speaking', rehab services can increase your collections by \$5,000-\$10,000 per month or as much as 1/2 of your chiropractic collections."

* Other sections: "Does My Rehab Therapist Need To Be Certified To Do Rehab? (answer no); What Type of Patient is A Candidate For Rehab? (answer: personal injury, auto accident, sports injuries, workers comp, soft tissue injuries, chronic pain patients, and from the business perspective, those patients with INSURANCE and CASH)."

* Quotes: Realistically, 8 weeks of rehab is good. Beyond 6-8 weeks you may begin to have reimbursement problems."

"Nobody knows what medical necessity really means, its [sic] just part of the game, Insurance companies use this to delay or deny payment." (Includes sample Statement of Medical Necessity, several letters of necessity for specific tests).

Note on sample rehab workout bill; \$50 for billing code 97530, kinetic activities to increase strength, coordination, range of motion-"If the insurance company should ask you, this is a 30 minute procedure."

One of the document analyzed for this report is a deposition (Case No. B-89,303; Ector County, 161st Judicial District; Jan. 16, 1992) in which a number of statements mirror sections of the Golden Mean handbook. The deposition is from a law suit against Santa Fe Rehab in Midland, a clinic owned by 20 people, several of whom are chiropractors. The depostion is from a physical therapist who is a partner in the clinic.

According to the deposition, two of the more common tests, the Venous flow study and the Myogram,"if done properly," will take up to half an hour, and are billable in the upper 97000 codes. In addition, it is acknowledged that many of the tests at the rehab are routinely performed by non-licensed personnel, including a receptionist.

A chiropractor from the Denver Institue for Rehabiliitaion Training recently conducted a seminar for chiropractors in Houston called "The Business of Doing Business". The seminar sells not only the idea of opening a rehab center but also "state of the art" equipment to chiropractors so they can bill in the upper 97000 levels of reimbursement codes. The chiropractor conducting the seminar says, "If I'm going to do work on the patient, I might as well get as many dollars per treatment as I can or per examination as I can. So therefore, I want all many equipment to be billable in that upper code."

In terms of chiropractic asvertisements in the yellow pages and chiropractic journals, a yellow pages ad for a chiropractic office in McAllen lists "Back Pain, Headaches, Jaw Problems, Fatigue, Arthritis, Hypoglycemia, Allergies, Frequent Colds, Indigestion, Dyslexia, Joint Pain" as the ailmente aided by chiropractic treatment.

The Texas Journal of Chiropractic (Nov. 1990) has an ad for Subliminal Support System with an Austin post office box: "Relaxing Music, Subliminal Messages, Positive Thoughts, Healing Support. Subliminal Chiropractic messages support Chiropractic patient care. Generate additional profits for your practice..."

PROBLEM: The primary goal of certain chiropractors in Texas seems to be make money, not to heal, as evidenced by at-home training videos, misleading asvertising, guides on how to bill in higher reimbursement codes and the general expansion of practice into controversial areas.

Recommendations:

* Enforcement must be made a priority.

* Advertising must be regulated strictly, and organizations promoting chiropractic as a "get rich quick" scheme must be eliminated altogether.

* Continuing education must match scope of practice, and any expansion of scope of practice must be the result of legislation, not rulemaking.

* There must be strict laws requiring disclosure of relationships between clinic, between chiropractors and therapists, and between chiropractors and MDs. In addition, there should be restrictions on self-referral and ownership that should apply to licensees of all state health agencies.

VI. TEXAS CHIROPRRACTIC ASSOCIATION

The Texas Chiropractic Association is the largest trade association for chiropractors in Texas. Like other trade associations, the TCA is charged with protecting its members' interest. Even though the Chiropractic Act stipulates that no member if the TBCE may be "an officer, employee, or paid consultant of a statewide or national trade association in the health-care industry" (Sec. 3(d)), it appears the TCA may exert undue influence into the matters of the TBCE:

1. According to a WFAA-TV series (ABC-Dallas, 11/22/91) 26 new rules that the TBCE approved at its 8/3/91 meeting were allegedly written by two members of the TCA and one TBCE member. Other TBCE members were not provided with copies of the rules, before the board meeting, and prior to voting on these rules, the TBCE voted 5-3 to limit discussion to three minutes for each rule change and to not take public comment. One section of rules, dealing with diagnosis and testing deemed "necessary" a whole new realm of tests which are of "questionable scientific value, allowing chiropractors to make millions more each year."

2. In the same story, a former TBCE member talked about the TCA's influence over TBCE members. In the interview he said, "I felt pressure being exerted on me by the trade association to do things they wanted me to." Another TBCE member was quoted in the same program, "Anybody who doesn't agree with the TCA faces a profession boycott." And during a TBCE meeting this same member said, "I have seen my friends physically threatened. I have been physically threatened, financially threatened [by the TBCE]...." (10/25/91 TBCE minutes, p. 40).

3. One TBCE member is quoted as saying at the 10/25/91 meeting:

"You guys have really screwed up as far as I am concerned. You went about it the wrong way. You let the trade association write these rules...If we don't straighten our act up and quit listening to the scientific affairs division of the Texas Chiropractic Association and any other bunch, I am going to recommend with this Board be restructured or be abolished" (pp.39-40)

4. In 1987, the TCA assumed ownership of the Texas Chiropractic College, and this year both the current and most recent past president of the TCA sit on the Board of Regents.

5. George Aubert, the TBCE member who controls enforcement, is among the Postgraduate/Visiting faculty of the Texas Chiropractic College. Aubert's faculty status may be illegal: The Chiropractic Act (Sec 3(c)) states "No member of said Board (TBCE) shall be a stockholder, or have any financial interest whatsoever in any chiropractic college." The Agency Strategic Plan for 1992-1998 states "No member of the Faculty or Board of Trustees of any chiropractic school."

6. Recently, a meeting between TBCE and TCA members with the Attorney General's office came under criticism. According to the Houston Chronicle, "Two regulators of the chiropractic profession joined industry lobbyists in trying to discourage Attorney General Dan Morales from investigating illegal business practices by chiropractors, an industry source said, ... Another chiropractor...was outraged that members of the examiners' board...would join members of the professional association in discussing regulatory matters with the Attorney General" (4/30/92).

7. The TCA controls the process of nomination to the Executive Peer Review Committee as stated in Art. 4 of the Peer Review Guidelines.

VII. CONCLUSIONS

Does the TBCE effectively regulate chiropractic in the state of Texas? No. The TBCE is failing in its capacity of record-keeper and enforcement agency. Complaint files are unorganized and incomplete, and there are no personnel dedicated to enforcement matters. Compounding the problem is the fact that from "1989 to 1991 the number of complaints received by the Board has increased by an average of 92.7% (Agency Strategic Plan, 1992-1998). In addition, advertising practices are highly questionable. Rule after rule has been promulgated to expand the scope of practice, without the same emphasis placed on training, continuing education, and enforcement, or concern for legislative authority. These problems cannot be attributed solely to lack of funds or small staff, but rather indicate the board's disregard for its function as a regulatory agency.

GENERAL RECOMMENDATIONS:

1. The entire TBCE needs to be restructured and if regulations have been violated, there should be appropriate investigations and penalties. Current TBCE members should resign, and new ones should be appointed by the Governor with intense confirmation hearings by both the Senate Nominations and Health Committees.

2. The TBCE Enforcement Committee, as well as the enforcement committees of each of the health regulatory agencies, should include at least two members of the public and all proceedings should be documented. Complainants should be given the option to attend informal hearings. The Enforcement Committees should follow the law and notify complainants that their complaint has been received and then give the complainants periodical status updates.

3. A joint investigation by the Texas Insurance Commission and the Texas Workers Compensation Commission on potential chiropractic insurance fraud and double billing should be undertaken immediately. The investigation should also review current chiropractic reimbursement schedules.

4. Legislative action should be taken to create a malpractice insurance act for chiropractors that outlines standards of care and personal liability for chiropractors.

5. There should be legislative action taken to change chiropractors standard practice of self-referral, to demand public disclosure on partnerships with PTs and MDs, and to enforce strict penalties for sexual abuse and harassment. Certainly this standard should be applied to all licensed health providers.

6. In the public interest, the TBCE should ensure that continuing education keeps pace with expanding scope of practice. Proposed rules on expanding practice should be researched, documented, given hearings and be authorized through legislation. After these steps are taken, the rules should not be put into effect unless they are preceded by appropriate education and training. In addition, consideration should be given to including courses on professional ethics and sexual harassment in continuing education programs.

7. The focus of TBCE's peer review services should be shifted from insurance dispute resolution to actual evaluation of a chiropractor's performance by his peers. Reevaluate Peer Review Guidelines to ensure compliance with both the Texas Open Records and Open Meetings Acts.

Given the pervasive and institutionalized patterns of abuse, we recommend that the TBCE be placed under review by the Sunset Commission for a minimum of two years. This will ensure that necessary changes are implemented in a timely fashion.