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OPINION COMMITTEE



AARON PEÑA

TEXAS HOUSE OF REPRESENTATIVES
DISTRICT 40

FILE # M1-46783-11

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RQ-0984-GA

July 11, 2011

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Honorable Greg Abbott
Attn. Nancy S. Fuller
Chair, Opinion Committee
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Opinion

Dear Ms. Fuller:

This is to request that the Attorney General of Texas issue an opinion pursuant to article IV, section 22, of the Texas Constitution and pursuant to section 402.042 of the Texas Government Code.

SUMMARY OF REQUEST

This request asks whether the medical doctor member of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments may sell hearing instruments at retail as a part of his or her practice of otolaryngology without running afoul of the prohibition in section 402.053(d).

OCCUPATIONS CODE PROVISIONS

Like many state agencies, the membership of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments balances the need for expertise in the field of fitting and dispensing with the need for independence from the industry. The Committee consists of nine members, six of whom must have been engaged in the practice of fitting and dispensing for at least five years, two of whom must be members of the public, and one of whom is a medical doctor who specializes in otolaryngology. TEX. OCCUPATIONS CODE §402.051 (Vernon Supp. 2010) The Code prohibits public members from having industry interests and affiliations. TEX. OCCUPATIONS CODE §402.052 (Vernon Supp. 2010) The Code prohibits all Committee members from having certain affiliations with trade associations and lobbyists. Finally, to preserve the

independence of the medical doctor member, the Code prohibits the medical doctor member from having a financial interest in a hearing instrument retailer, wholesaler, or manufacturer. TEX. OCCUPATIONS CODE §402.053(d) (Vernon Supp. 2010)

Section 402.053(d) provides:

A committee member appointed under Section 402.051(a)(2) may not have a financial interest in a hearing instrument manufacturing company or in a wholesale or retail hearing instrument company.

TEX. OCCUPATIONS CODE §402.053(d) (Vernon Supp. 2010) At issue here is whether this section prohibits a medical doctor member of the Committee and Dispensing of Hearing Instruments from selling hearing instruments as a part of his or her practice of otolaryngology. Although that clearly constitutes a “financial interest,” is it a financial interest “in a wholesale or retail hearing instrument company”?

The legislative intent for these provisions of Chapter 402 are clear – to balance the need for expertise in the field of fitting and dispensing with the need for independence from the industry. From the structure of sections 402.051, 402.052, and 402.053, the fitting and dispensing members of the Committee are the ones who provide expertise in fitting and dispensing. What the medical doctor member provides is medical expertise, not fitting and dispensing expertise. To allow the medical doctor member to have *any* financial interest in fitting and dispensing upsets that balance. *See* Tex. Att’y Gen Op. No. DM-18, at p. 5 (1991) (interpreting a similar provision to conclude that “financial interest” includes employment and that the individual who serves as the audiologist member of the predecessor to the Committee may not be employed by a hearing aid wholesale, retail, or manufacturing company) In this manner, reading Chapter 402 as a whole and sections 402.051, 402.052, and 402.053 together results in the conclusion that the medical doctor member may not sell hearing instruments.

On the other hand, it could be argued that an individual medical doctor’s practice is not a “wholesale or retail hearing instrument company” within the meaning of section 402.053(d) if the medical doctor sells hearing instruments solely to his or her patients as a part of the doctor’s practice. In other words, the argument could be made that the Texas Legislature would have said “may not *sell or* have a financial interest in” instead of just “may not have a financial interest in” if that is what the legislature intended. In Tex. Att’y Gen Op. No. DM-18, at p. 4, however, the Attorney General rejected a similar argument. In that opinion, it was urged that, had the legislature intended to prohibit employment, as opposed to “have a financial interest” in, it would have said so. The Attorney General reviewed the provision in the context of the Chapter as a whole and decided such an interpretation would destroy the balance of interests between the industry and independence. Similar considerations apply here.

Moreover, there is no practical reason a “retail hearing instrument company” should not logically include *any* facility that sells hearing instruments to the public. The

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term "retail" simply means "[t]he sale of goods or commodities to ultimate consumers, as opposed to selling to those who intend to resell the items." *Blacks's Law Dictionary* 1317 (7th Ed. 1999) Likewise, the term "company" has no special meaning that would exclude a medical practice. Although the term "company" often connotes a corporation, it can include a group of people, an association, or a partnership that carries on a commercial or industrial enterprise. See *Blacks's Law Dictionary* 274 (7th Ed. 1999) The intent of the prohibition in section 402.053(d) was clear, to apply to three levels -- the manufacturing, wholesaling, or retailing level -- not to somehow limit the prohibition to an enterprise organized solely for the purpose of selling hearing instruments. Nothing in section 402.053(d) suggests that the company must be separate from the medical practice for the prohibition to apply. To adopt such a narrow interpretation is inconsistent with the overall balancing of interests between the industry and independence created under sections 402.051, 402.052, and 402.053.

For these reasons, I request that you issue an opinion on whether the medical doctor member of the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments may sell hearing instruments at retail as a part of his practice of otolaryngology without running afoul of the prohibition in section 402.053(d).

Your attention to this request is greatly appreciated. Please let my office know if you need additional information.

Sincerely,



Aaron Peña
State Representative

cc: The Texas Committee in the Fitting and Dispensing of Hearing Instruments