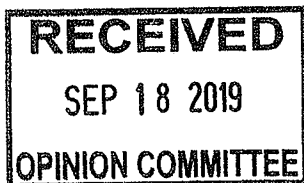


TEXAS HOUSE OF REPRESENTATIVES



PONCHO NEVÁREZ

DISTRICT 74

September 16, 2019

Honorable Ken Paxton Attorney General of Texas
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0307-KP
FILE # ML-48617-19
I.D. # 48617

Subject: Whether real estate inspectors possess statutory authority to perform inspections of sewer lines by camera in Texas.

Dear Attorney General Paxton:

I respectfully request your opinion under TEX. GOV'T CODE § 402.042(c) addressing whether real estate inspectors possess statutory authority to perform inspections of sewer lines by camera (*sewer scope inspections*) in Texas.

Plumbers are subject to TEX. OCC. CODE ch. 1301. The Texas State Board of Plumbing Examiners promulgates its rules under 22 TEX. ADMIN. CODE chs. 361, 363, 365, and 367. **Real estate inspectors** are subject to TEX. OCC. CODE ch. 1102. The Texas Real Estate Commission promulgates its rules for inspectors under 22 TEX. ADMIN. CODE §§ 535.201–.240.

On the one hand, the Plumbing Board has promulgated rules authorizing plumbers to perform sewer scope inspections. TEX. OCC. CODE § 1301.002(7)(D) (defining “plumbing” as “the installation, repair, *service*, or maintenance of a fixture, appurtenance, appliance, or piping” (emphasis added)); 22 TEX. ADMIN. CODE § 361.1(a)(37)(B) (“The term ‘service’ includes, but is not limited to, cleaning a drain or sewer line using a cable or pressurized fluid, or performing a camera inspection through a code-approved existing opening.”).¹

On the other hand, there is nothing that necessarily prohibits real estate inspectors from performing sewer scope inspections too. A “real estate inspection” is defined as “a written or oral *opinion as to the condition of the improvements to real property, including structural items, electrical items, mechanical systems, plumbing systems, or equipment.*”

¹ This Rule in section 361.1, however, appears to be invalid and thus voidable under TEX. GOV'T CODE §§ 2001.035(a) (“A rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034.”) and 2001.033(a)(1)(B) (“A state agency order finally adopting a rule must include . . . a reasoned justification for the rule as adopted consisting solely of . . . a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted . . .”).

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TEX. OCC. CODE § 1102.001(9) (emphasis added). Inspecting plumbing systems is thus expressly within the scope of the practice of real estate inspection. That much is not in question. The issue is whether inspecting sewer lines with a camera or scope is part of an inspector rendering “opinions as to the condition of plumbing systems.”

The Texas Real Estate Commission promulgates home inspection requirements. The Commission’s rules *require* an inspector to inspect specific aspects of a plumbing system. 22 TEX. ADMIN. CODE § 535.231. In particular, the rules require that “the inspector shall . . . report as Deficient . . . deficiencies in . . . water supply pipes and waste pipes.” *Id.* § 535.231(a)(1)(B)(v)(I). And while an inspector is not required to inspect anything “buried, hidden, latent, or concealed” or “sub-surface drainage systems,” *id.* § 535.227(d)(1)(D)–(E), the Commission’s rules do not prohibit (and thus authorize) an inspector from providing “a higher level of inspection performance than required by these standards of practice” or inspecting “components and systems in addition to those listed under the standards of practice,” *id.* § 535.227(a)(4).

Nevertheless, the Real Estate Commission has taken the position in two postings on its website (likely promulgating a new rule²), that a home inspector may not perform a sewer scope inspection *unless* the inspector is also a licensed plumber.³

But the Real Estate Commission’s position/rule is neither required by law nor supported by reason. This is a simple, indeed common, instance of a statutory overlap in permissible activities that may be performed by licensed plumbers and home inspectors. Both can “inspect” plumbing systems, but for different purposes. Home inspectors inspect plumbing systems to provide an opinion regarding their condition. Plumbers inspect plumbing systems to diagnose a problem and make a repair. Both activities are statutorily authorized by these professions’ respective governing chapters, and there is no requirement or reason for the Real Estate Commission to prohibit home inspectors from performing this service.

² The position staked out by the Real Estate Commission on its website probably amounts to a *rule* because it is a statement of general applicability that implements, interprets, and prescribes law or policy. TEX. GOV’T CODE § 2001.003(6). And because it is a rule, it is voidable because it was not properly promulgated under Texas’s Administrative Procedures Act. *Id.* § 2001.035(a).

³ *Frequently Asked Questions*, TEX. REAL ESTATE COMM’N, <https://www.trec.texas.gov/public/frequently-asked-questions> (last visited July 10, 2019); Christine Anderson, *Can An Inspector Perform A Sewer Line Inspection?*, TEX. REAL ESTATE COMM’N (Aug. 7, 2018), <https://www.trec.texas.gov/article/can-inspector-perform-sewer-line-inspection>.

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As you know, Texas courts construe scope-of-practice statutes in the Occupations Code by looking to the governing chapter's plain language—not language found in another profession's governing chapter. *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 40 (Tex. 2017); *Tex. Ass'n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam'rs*, 524 S.W.3d 734, 744–45 (Tex. 2017). Sometimes terms in one profession's scope-of-practice statute may overlap with another's. *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists*, 511 S.W.3d at 41. But to be sure, simply because one profession may perform a particular activity under its scope-of-practice statute does not preclude another profession from performing the same activity under its separate scope-of-practice statute. *See id.*; *see also Rogers v. Tex. Bd. of Architectural Exam'rs*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.).

Here, the statutory definition of “real estate inspection” under TEX. OCC. CODE ch. 1102 is certainly broad enough to encompass sewer scope inspections so long as the sewer scope inspection is for the purpose of providing an opinion regarding the condition of a plumbing system and is not for the purpose of installing, repairing, servicing, or maintaining a plumbing system. Sewer scope inspections, in and of themselves, are not “plumbing” under TEX. OCC. CODE ch. 1301 when not done for the purpose of installing, repairing, servicing, or maintaining a plumbing system.

This is an instance of two separate chapters of the Occupations Code regulating two separate professions encompassing the same activity done for different purposes. Though the scope of “real estate inspection” is broad enough to encompass performing a sewer scope inspection of a plumbing system, the Real Estate Commission advises its licensees on its website that only licensed plumbers can perform those inspections.⁴ This advice seems incorrect, harmful, and in need of clarification.

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Your ruling is urgent because the future of the Plumbing Board is in doubt. While Governor Abbott has temporarily reinstated it, should the Plumbing Board ultimately dissolve and should the Real Estate Commission's advice stand, *there will be no licensed sewer-camera inspectors in Texas*. A ruling from your Office affirming that both plumbers *and* real estate inspectors may use camera scopes to inspect sewer lines will provide a much-needed backstop to Governor Abbott's executive order.

I appreciate your prompt attention to this matter.

With kindest regards, I remain,

Sincerely,

A handwritten signature in cursive script, appearing to read "Poncho Nevarez".

Poncho Nevarez