



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 17, 1993

Mr. C. Thomas Camp
Executive Director

Texas State Board of Dental Examiners
P.O. Box 13165
Austin, Texas 78711-3165

Letter Opinion No. 93-50

Re: Clarification of Attorney General
Opinion DM-136 (1992) (ID# 16818)

Dear Mr. Camp:

You ask several questions in clarification of Attorney General Opinion DM-136 (1992). In that opinion, we concluded that the Texas State Board of Dental Examiners (the "board") was not authorized to enact certain rules relating to dental health care workers infected with the human immunodeficiency virus ("HIV") or the hepatitis B virus ("HBV"), *see generally* 17 Tex. Reg. 1093-94 (1992) (to be codified at title 22, sections 190.223, 190.224 of the Texas Administrative Code), because they were inconsistent with subchapter I of chapter 85 of the Health and Safety Code ("subchapter I").

First, you ask whether the American Dental Association ("ADA") qualifies as a "health professional association" as that term is used in subchapter I. Specifically, section 85.204 in that subchapter provides in pertinent part: "Health professional associations and health facilities should develop guidelines for expert review panels and identify exposure-prone procedures, as defined by this subchapter." Health & Safety Code § 85.204(b)(4). The ADA is a "professional society of dentists" organized to "encourage the improvement of the health of the public and to promote the art and science of dentistry." D. BUREK, *ENCYCLOPEDIA OF ASSOCIATIONS* 1367 (25th ed. 1991). We believe that the ADA is a "health professional association" as that term is used in section 85.204.

In your second question, you ask if this office wishes to reconsider the board's authority to establish an expert review panel in light of various points raised in your letter. We do not. The fact that the ADA has issued guidelines that "specifically call for state dental boards to establish and appoint expert review panels" has no bearing on our conclusion in Attorney General Opinion DM-136 that the board is not authorized to promulgate rules which are inconsistent with subchapter I. As we stated in Attorney General Opinion DM-136:

[T]he rules provide that the *board* will establish and designate an expert review panel. Board Rules § 109.223(d). *Subchapter I of chapter 85 of the Health and Safety Code, however, does not authorize statewide licensing agencies to establish expert review panels.* Indeed, section 85.204(b)(4) of the Health and Safety Code

suggests that such expert review panels will be established by "[h]ealth professional associations and health facilities." In subchapter I, licensing entities are mentioned only in section 85.205, which provides that a health care worker who fails to comply with subchapter I is "subject to disciplinary procedures by the appropriate licensing entity." We believe that *if the legislature had intended to give licensing agencies a greater role in reviewing the conduct of HIV- and HBV-infected health care workers, it would have explicitly provided for such a role.*

Attorney General Opinion DM-136 (1992) at 6 (emphasis added) (footnote omitted).

As noted above, subchapter I provides that "[h]ealth professional associations and health facilities should develop guidelines for expert review panels and identify exposure-prone procedures as defined by this subchapter." Health & Safety Code § 85.204(b)(4). The fact that the ADA has issued guidelines which suggest that state dental boards establish expert review panels, however, does not authorize the board to do so. The ADA guidelines cannot authorize the board to establish an expert review panel absent explicit statutory authorization from the legislature. *See* Tex. Const. art. II, § 1 (vesting the legislative power of Texas in the legislature). As we stated in Attorney General Opinion DM-136, subchapter I mentions licensing entities only in connection with disciplinary procedures. It neither explicitly or implicitly authorizes licensing agencies to establish expert review panels, and it has not been amended since Attorney General Opinion DM-136 was issued to provide for such authorization. Nothing in your letter undermines our conclusion in that opinion that the board is not authorized to establish an expert review panel.

Next you ask if Attorney General Opinion DM-136 construes subchapter I to permit an expert review panel to release information about dental health care workers infected with HBV to the board, or to prohibit an expert review panel from releasing any information to the board for any purpose. In Attorney General Opinion DM-136, this office considered rules pursuant to which an expert review panel established by the board was required to release information to the board's secretary and executive director for purposes of monitoring the worker's compliance with conditions set by the review panel. Attorney General Opinion DM-136 at 6-7. This office did not reach the question whether an expert review panel established in conformance with subchapter I would be prohibited from releasing information to the board solely for disciplinary purposes. *See* Health & Safety Code § 85.205 ("A health care worker who fails to comply with this subchapter is subject to disciplinary procedures by the appropriate licensing entity.").¹

¹Your letter suggests that section 81.046(c)(3) of the Health and Safety Code would authorize an expert review panel to release information to the board. We disagree. That provision governs information about certain reportable diseases in the possession of the Department of Health or a "health authority." The term "health authority" does not encompass an expert review panel under subchapter I. *See* Health & Safety Code § 81.003(2) (defining "health authority").

Finally, you ask if Attorney General Opinion DM-136 concluded that all of the "infection control" rules promulgated by the board exceed its authority, or if that conclusion is limited to section 109.223, subsections (c) and (d), and section 109.224(a). As we stated in that opinion, most of the rules promulgated by the board applied to all dental health care workers, not just those infected with HIV or HBV. *Id.* at 1. Because we understood the board to be particularly concerned about its authority to promulgate rules pertaining to dental health care workers who know they are infected with HBV or HIV, specifically section 109.223, subsections (c) and (d), and section 109.224(a), we confined our analysis to those provisions. *See id.*; *see also id.* at 7 (concluding "that the board's rules *relating to HIV- and HBV-infected dental health care workers* are inconsistent with subchapter I" and therefore exceed the board's authority). Therefore, Attorney General Opinion DM-136 does not address whether rules generally applicable to all dental health care workers exceed the board's authority.

S U M M A R Y

The American Dental Association ("ADA") is a "health professional association" as that term is used in section 85.204(b)(4) of the Health and Safety Code. The fact that the ADA has issued guidelines that "specifically call for state dental boards to establish and appoint expert review panels," has no bearing on the conclusion in Attorney General Opinion DM-136 (1992) that the board is not authorized to establish an expert review panel. Attorney General Opinion DM-136 does not address whether an expert review panel established in conformance with subchapter I of chapter 85 of the Health and Safety Code would be prohibited from releasing information to the board for disciplinary purposes, or whether "infection control" rules generally applicable to all dental health care workers exceed the board's authority.

Yours very truly,



Mary R. Crouter
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Opinion Committee