

Texas State Board of Medical Examiners



RQ-877

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I.D. # 38630

Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Opinion Committee

Re: Request for opinion - Optometry/Use of Cocaine

Dear Attorney General Morales:

An Attorney General Opinion is respectfully requested under the authority of Section 22 of Article IV of the Texas Constitution and Sections 402.041 through 402.045 of the Texas Government Code. An opinion is requested concerning the authority of the Texas Optometry Board and the scope of the Texas Optometry Act, V.A.C.S., article 4552 to allow optometrists to possess and administer cocaine for diagnostic purposes.

The Texas Optometry Board has promulgated rules so as to authorize the use of cocaine by optometrists as a diagnostic drug (Exhibit A).

The authority of the Texas Optometry Board to promulgate this rule has been questioned by the Texas Ophthalmological Association which represents approximately 800 Texas physicians specializing in ophthalmology (Exhibits B and C). The Texas Ophthalmological Association has asserted that the rules of the Optometry Board are an impermissible expansion of the scope of practice for optometrists in contravention of the legislative intent of the Optometry Act.

As a result of the new rule, the Texas Department of Public Safety and the U.S. Drug Enforcement Administration will apparently be required to address this development by issuing controlled substances registration numbers to optometrists. At the request of the Department of Public Safety ("DPS"), the Texas State Board of Medical Examiners provided a response to DPS regarding the Board's perspective on the need for optometrists to have authority to utilize cocaine (Exhibit D).

The following questions require an opinion from the Office of the Attorney General:

Honorable Dan Morales

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1. Does the Texas Optometry Act authorize the use of cocaine by optometrists within the scope of practice delineated by the legislature? If so, to what extent?
2. Does the Texas Optometry Board have the authority to promulgate a valid rule to allow optometrists to possess and administer cocaine for diagnostic purposes?

An opinion on these issues is requested to resolve these questions. Thank you for your assistance.

Respectfully,

Bruce A. Levy M.D., J.D.
Bruce A. Levy, M.D., J.D.
Executive Director

xc: Texas Department of Public Safety
Texas Ophthalmological Association
Texas Optometry Board

(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on December 6, 1995.

TRD-9515948 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: January 15, 1996

For further information, please call: (512) 305-8500

Chapter 280. Therapeutic Optometry

• 22 TAC §280.5

The Texas Optometry Board proposes an amendment to §280.5, concerning therapeutic optometry. The section is being amended to clarify the use of cocaine eye drops for diagnostic purposes by therapeutic optometrists. The rule clearly denotes that the cocaine eye drops may be possessed and administered but not prescribed.

Tracie Svehlak with the Texas Department of Public Safety has determined that for the first five-year period the rule is in effect there will be fiscal implications for state government as a result of enforcing or administering the rule as follows: \$7,902 in fiscal year 1996 and \$6,568 in fiscal years 1997-2000.

Lois Ewald, executive director of the Texas Optometry Board, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for local governments as a result of enforcing or administering the rule.

Mrs. Ewald also has determined that for each of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to obtain good eye health care by the therapeutic optometrist's ability to use the cocaine eye drops as a diagnostic agent. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Lois Ewald, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942.

The amendment is proposed under Texas Civil Statutes, Article 4552 (Texas Optometry Act), §1.03 and §2.14.

The Texas Optometry Board interprets §1.03 of Article 4552, as authorizing therapeutic optometrists to utilize the cocaine eye drops for diagnostic purposes. The Texas Optometry Board interprets §2.14 as authorizing it to promulgate procedural and substantive rules for the regulation of optometry.

§280.5. Prescription and Diagnostic Drugs for Therapeutic Optometry [Prescriptions Written for Pharmaceutical Agents by the Therapeutic Optometrists.]

(a)-(i) (No change.)

(j) A therapeutic optometrist may possess and administer cocaine eye drops for diagnostic purposes. The cocaine eye drops must be no greater than 10% solution in prepackaged liquid form.

(1) A therapeutic optometrist must observe all requirements of the Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, and all requirements of the Texas Department of Public Safety (DPS) Drug Rules in making application and maintaining renewal of a United States Drug Enforcement Agency (DEA) registration number for possession of the cocaine eye drops, a Schedule II controlled substance.

(2) A therapeutic optometrist must obtain a registration number from the DPS for the principal office of practice. Application may be made for a separate registration for the practice of optometry at a satellite office but all requirements of this rule shall apply in all locations.

(3) The therapeutic optometrist must use the required DEA form for the purchase of the cocaine eye drops and shall maintain a complete and accurate record of purchases (to include samples received from pharmaceutical manufacturer representatives) and dispensing of controlled substances. The maximum amount to be purchased and maintained in an office of practice shall be no more than two vials, one opened and one in inventory.

(4) The above recordkeeping shall be subject to inspection at all times by the Texas Department of Public Safety, the U.S. Drug Enforcement Agency, and the Texas Optometry Board and any officer or employee of the governmental agencies shall have the right to inspect and copy records, reports, and other documents, and inspect security controls, inventory and premises where such cocaine eye drops are dispensed.

(5) Minimum security controls shall be established to include but not be limited to:

(A) establishing adequate security to prevent unauthorized access and diversion of the controlled substance,

(B) during the course of business activities, not allowing any individual access to the storage area for con-

trolled substances except those authorized by the therapeutic optometrist,

(C) storing the controlled substance in a securely locked, substantially constructed cabinet or security cabinet which shall meet the requirements under the DPS Drug Rules,

(D) not employ in any manner an individual that would have access to controlled substances who has had a federal or state application for controlled substances denied or revoked, or have been convicted of a felony offense under any state or federal law relating to controlled substances or been convicted of any other felony, or have been a licensee of a health regulatory agency whose license has been revoked, canceled, or suspended.

(6) Failure of the therapeutic optometrist to maintain strict security and proper accountability of controlled substance shall be deemed to be a violation of the Texas Optometry Act, §4.04.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued in Austin, Texas, on December 6, 1995.

TRD-8515952 Lois Ewald
Executive Director
Texas Optometry Board

Earliest possible date of adoption: January 15, 1996

For further information, please call: (512) 305-8500

TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 61. Chronic Diseases Osteoporosis Advisory Committee

• 25 TAC §61.61

The Texas Department of Health (department) proposes new §61.61, concerning the creation of the osteoporosis advisory committee which will provide advice on the strategies for educating the public on the health benefits of the early detection, prevention and treatment of osteoporosis. The creation of the committee is authorized by Health and Safety Code, §90.003. The new section is required by Texas Civil Statutes, Article 6252-33, relating to state agency advisory committees.

Dr. Philip Huang, M.D., Bureau Chief, Bureau of Chronic Disease Prevention and Control,

