

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 12-27

Authority of Physical Therapy Board

QUESTIONS

1. Does the Physical Therapy Board have authority under Tenn. Code Ann. § 63-13-315(c) to apply for injunctive relief in any court of competent jurisdiction to enjoin a chiropractor from advertising that the chiropractor offers “physical therapy,” in violation of Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310, where the services offered by the chiropractor are not performed by or under the direction of a licensed physical therapist?

2. Does the Physical Therapy Board have authority under Tenn. Code Ann. § 63-13-313(8) to impose civil penalties against a chiropractor based on his or her use of the term “physical therapy” in the chiropractor’s advertisements, in violation of Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310?

OPINIONS

1. Tenn. Code Ann. § 63-13-315(c) provides that the Physical Therapy Board may, through the Office of the Attorney General and Reporter, apply for injunctive relief in any court of competent jurisdiction to enjoin any person from committing an act in violation of the “Occupational and Physical Therapy Practice Act,” codified at Tenn. Code Ann. §§ 63-13-101 to -318. Tenn. Code Ann. § 63-13-301(b) provides that “[n]o person shall practice or in any manner claim to be engaging in the practice of physical therapy or designate as being a physical therapist unless duly licensed as a physical therapist” in accordance with the Act, while § 63-13-310 prohibits the use of the term “physical therapy,” “physical therapist” and related terms unless such services are provided by or under the direction of a physical therapist licensed in accordance with the Act.

2. Upon proof of violation of any provision of the Act, the Physical Therapy Board has authority under Tenn. Code Ann. § 63-13-313(8) to impose civil penalties pursuant to Tenn. Code Ann. § 63-1-134. Tenn. Code Ann. § 63-1-134 permits the Board to impose civil penalties against any person required to be licensed, permitted or authorized by the Board in an amount not to exceed one thousand dollars (\$1,000) for each separate violation of a statute, rule or order pertaining to the Board.

ANALYSIS

1. Tenn. Code Ann. § 63-13-301(b) provides that “[n]o person shall practice or in any manner claim to be engaging in the practice of physical therapy or designate as being a physical therapist unless duly licensed as a physical therapist” in accordance with the Occupational and Physical Therapy Practice Act, codified at Tenn. Code Ann. §§ 63-13-101 to -318. Further, Tenn. Code Ann. § 63-13-310, which concerns unlawful use of titles or designations indicating licensure, provides in pertinent part as follows:

(b) It is unlawful for any person or for any business entity, its employees, agents or representatives to use in connection with such person’s name or the name or activity of the business the words “physical therapy,” “physical therapist,” “physiotherapy,” “physiotherapist,” “registered physical therapist,” “licensed physical therapist,” or the letters “PT,” “LPT,” or “RPT” or any other words, abbreviations or insignia indicating or implying directly or indirectly that physical therapy is provided or supplied, including the billing of services labeled as physical therapy, unless such services are provided by or under the direction of a physical therapist licensed in accordance with this part.

(c) Nothing in this chapter shall be construed as restricting a person licensed or certified under any other law of this state from engaging in the profession or practice for which the person is licensed or certified; *provided, that the person does not claim to be a physical therapist, a physical therapist assistant or a provider of physical therapy.*

Tenn. Code Ann. § 63-13-310(b) & (c) (emphasis added).¹

Tenn. Code Ann. § 63-13-315(c) provides that the Physical Therapy Board may, through the Office of the Attorney General and Reporter, apply for injunctive relief in any court of competent jurisdiction to enjoin any person from committing an act in violation of the Act. That subsection further states “injunctive proceedings are in addition to, and not in lieu of, all penalties and other remedies prescribed in this chapter.”

2. Tenn. Code Ann. § 63-13-313(8) provides in pertinent part that the Board may, upon proof of violation of any provision of the Act, “[i]mpose civil penalties for violation of this chapter pursuant to § 63-1-134.” Specifically, the Physical Therapy Board has authority under Tenn. Code Ann. § 63-1-134 to impose civil penalties against any person required to be licensed, permitted or authorized by the Board in an amount not to exceed one thousand dollars (\$1,000) for each separate violation of a statute, rule or order pertaining to the Board. This statute provides:

¹ Tenn. Code Ann. § 63-13-103 sets out the definitions used in the Act, including “physical therapist” in Tenn. Code Ann. § 63-13-103(11) as “a person who is licensed pursuant to this chapter to practice physical therapy,” and “physical therapy” under Tenn. Code Ann. § 63-13-103(13) as “the care and services provided by or under the direction and supervision of a physical therapist who is licensed pursuant to this chapter.”

With respect to any person required to be licensed, permitted or authorized by any board, commission or agency attached to the division of health related boards, each respective board, commission or agency attached to the division of health related boards, each respective board, commission or agency may assess a civil penalty against such person in an amount not to exceed one thousand dollars (\$1,000) for each separate violation of a statute, rule or order pertaining to such board, commission or agency. Each day of continued violation constitutes a separate violation.

Tenn. Code Ann. § 63-1-134(a). Tenn. Code Ann. § 63-1-134(b) allows each board, commission or agency to establish by rule a schedule designating the minimum and maximum civil penalties that may be assessed under that section, and also includes several statutory factors that may be considered in establishing civil penalties. These factors, along with a schedule of civil penalties, are set forth in the Rules Governing the Practice of Physical Therapy. Tenn. Comp. R. & Regs. 1150-01-15(5). Under this authority, the Physical Therapy Board possesses the requisite authority to assess a civil penalty against a chiropractor who inappropriately uses the term “physical therapy” in the chiropractor’s advertisements. Any action by the Board to impose such a penalty must be taken in conformity with the Tennessee Uniform Administrative Procedures Act, codified at Tenn. Code Ann. §§ 4-5-101 to -404.

A chiropractor’s inappropriate use of the term “physical therapy” in advertisements may also violate certain other Tennessee laws. Specifically, Tenn. Code Ann. § 63-13-315(a) states that any person who engages in an activity requiring a license issued under the Act, and who fails to obtain the required license, who violates any other provision of the Act, or who uses any word, title or representation implying that the person is licensed to engage in the practice of physical therapy, commits a Class B misdemeanor. That subsection clarifies that “[a] person claims to be a physical therapist when using a title, letters or any description of services that incorporates one (1) or more of the terms, designations or abbreviations specifically restricted under §§ 63-13-103 and 63-13-310.” Tenn. Code Ann. § 63-13-315(a).²

In this respect, as we discussed in a prior opinion of this Office concerning advertising and treatment by massage therapists using therapeutic massage, Op. Tenn. Att’y. Gen. No. 95-033 (April 6, 1995), the Consumer Protection Act of 1977 makes it unlawful for a person to engage in unfair or deceptive acts or practices affecting the conduct of any trade or commerce. Tenn. Code Ann. § 47-18-104(a) and (b)(27). (Similar to the penalty for violation of Tenn. Code Ann. § 63-13-315(a), such unfair or deceptive acts or practices also are Class B misdemeanors and can be subject to a \$1,000.00 civil penalty for each violation of the Tennessee Consumer Protection Act pursuant to Tenn. Code Ann. §§ 47-18-104(a) and 47-18-108(b)(3))³. In our

² Tenn. Comp. R. & Regs. 1150-01-.03(2) provides that “[i]t is unlawful for any person who is not licensed in the manner prescribed in Title 63, Chapter 13 of the Tennessee Code Annotated to represent himself as a physical therapist or physical therapy assistant or to hold himself out to the public as being licensed by means of using a title on, including but not limited to, signs, mailboxes, address plates, stationery, announcements, advertising, the internet, telephone listings, calling cards, or other means of professional identification.”

³ Tenn. Code Ann. § 63-1-123(a) provides further: “Any person, except those expressly exempted from the provisions of this chapter by § 63-1-110 or § 63-1-111 who practices the healing arts as defined in this chapter, or

earlier opinion, we wrote that advertisement by a massage therapist that he or she can “treat conditions” is deceptive because a massage therapist is not statutorily qualified to do so, and further that it was unlawful for a massage therapist to advertise the “treating” of a “condition” if that individual had not met the licensure requirements for physical therapy, or was not otherwise appropriately licensed or exempted under the law that then was in effect. Likewise, if a chiropractor were to advertise that he or she offers “physical therapy” where such services are not performed by or under the direction of a licensed physical therapist, then in our opinion such chiropractor would violate both Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310 and would likely also violate the Consumer Protection Act of 1977. Learned professionals are not exempt from claims related to their business practices brought under the Tennessee Consumer Protection Act of 1977. *Proctor v. Chattanooga Orthopaedic Group, P.C.*, 270 S.W.3d 56, 61 (Tenn. Ct. App. 2008).

Finally, the Chiropractic Examiners Board has promulgated rules pursuant to Tenn. Code Ann. § 63-4-122 to regulate the nature, manner, content and extent of advertising by practitioners who are under the jurisdiction of that Board. Tenn. Comp. R. & Regs. 0260-02-.20. Acts or omissions by a licensed chiropractor in the context of advertisements that violate this rule shall constitute unethical and unprofessional conduct and subject the licensee to disciplinary action by the Chiropractic Examiners Board under Tenn. Code Ann. § 63-4-114.⁴ The proscribed conduct includes “[p]romotion of a professional service which the licensee knows or should know is beyond the licensee’s ability to perform,” “[a]ny misrepresentation of a material fact,” and “[m]isrepresentation of a licensee’s credentials, training, experience or ability.” Tenn. Comp. R. & Regs. 0260-02-.20(4)(c), (j) and (p). Therefore, if the Chiropractic Examiners Board, based on proof presented to that Board during a disciplinary contested case hearing, were to find that a chiropractor had advertised “physical therapy” services in violation of Tenn. Code Ann. §§ 63-13-301(b) and 63-13-310, the Board could reasonably conclude that such chiropractor had violated the above advertising rule and impose appropriate disciplinary action.

any branch thereof, without first complying with all the provisions of this chapter, including the provisions of all laws now in force regulating the practice of the various branches of the healing arts, and any person who violates any of the provisions of this chapter commits a Class B misdemeanor.”

⁴ Tenn. Code Ann. § 63-4-114(4) permits the Chiropractic Examiners Board to suspend, revoke or otherwise discipline a chiropractor’s license if the chiropractor is found guilty of “[i]mmoral, unethical, unprofessional or dishonorable conduct,” while § 63-4-114(13) permits such discipline where the chiropractor is found guilty of “[t]he advertising of chiropractic business in which untrue or misleading statements are made or causing the publication or circulation of fraudulent advertising relative to any disease, human ailment or condition.”

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