**STATE OF TENNESSEE**
# OFFICE OF THE ATTORNEY GENERAL

April 24, 2014

Opinion No. 14-51

Use of Botox, Other Neurotoxins, and Dermal Fillers by a General Dentist

## QUESTIONS

1. Are the definitions of dentistry and the practice of dentistry in Tenn. Code Ann. § 63-5-108 broad enough to encompass the injection of Botox, other neurotoxins approved by the federal Food and Drug Administration ("FDA"), and dermal fillers into a patient's oral cavity, maxillofacial area, and/or adjacent and associated structures by a dentist trained to do so—whether for therapeutic or cosmetic purposes—such that the Tennessee Board of Dentistry may so permit by rule?

2. Does the injection of Botox, other FDA-approved neurotoxins, or dermal fillers into a patient's oral cavity, maxillofacial area, and/or adjacent and associated structures—whether for therapeutic or cosmetic purposes—fall within the exclusive purview of the practice of medicine or osteopathic medicine under Chapters 6 or 9 of Title 63 of the Tennessee Code?

## OPINIONS

1. Yes.

2. No.

## ANALYSIS

Tenn. Code Ann. § 63-5-105(7) authorizes the Tennessee Board of Dentistry ("Board") to "make such rules and regulations . . . as are necessary to carry out and make effective the provisions of [the Dental Practice Act]." An administrative agency such as the Board is also authorized to issue declaratory orders with respect to the applicability of a statute, rule, or order within its primary jurisdiction. Tenn. Code Ann. § 4-5-223(a). But an agency is not free to change or expand the definition of statutory terms by regulation or otherwise.

> Of course, an administrative body . . . which is given legislative power to make rules and regulations does not have the power to make a rule or regulation which is *inconsistent with . . . other law on the subject*, and it does not include the authority to enact laws, or to make rules affecting or creating substantive rights.

*Tasco Developing & Bldg. Corp. v. Long*, 368 S.W.2d 65, 67 (Tenn. 1963) (emphasis added).

The Tennessee Court of Appeals has had occasion to apply this principle to invalidate a health-related board's interpretation of the definition of a regulated practice. *See, e.g., Cady v. Tenn. Bd. of Veterinary Med. Exam'rs*, No. M2008-02551-COA-R3-CV, 2009 WL 2707398, at *7 (Tenn. Ct. App. Aug. 27, 2009) (holding board's rule invalid because statutory definition of "practice of veterinary medicine" did not include artificial insemination and pregnancy testing of horses); *Tenn. Med. Ass'n v. Bd. of Registration in Podiatry*, 907 S.W.2d 820, 822 (Tenn. Ct. App. 1995) (affirming reversal of board's declaratory order because definition of "podiatrist" did not include treatment of the ankle). As pertinent here, in *Tenn. Med. Ass'n v. Tenn. Bd. of Dentistry*, No. M1999-02279-COA-R3-CV, 2001 WL 839032 (Tenn. Ct. App. July 25, 2001) ("*Dentistry*"), the court affirmed the reversal of a declaratory order of the Board of Dentistry in which the board determined that "eye lifts, nose jobs, face lifts and similar procedures" could be performed by an oral and maxillofacial surgeon within the scope of his license to practice dentistry. *Id.* at *4, *9. The court held that these cosmetic procedures did not fall within the statutory definition of the practice of dentistry.

> In this case, the statute defines the practice of dentistry as the diagnosis and treatment of "any disease, pain, deformity, deficiency, injury or physical condition of the human teeth or jaws or associated structures." *See* Tenn. Code Ann. § 63-5-108(a)(1). Dr. Hunter's specialty, oral and maxillofacial surgery, is a specialty that must fit within this definition of dentistry.
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> As it is written, the Board's declaratory order appears to be a blanket authorization for Dr. Hunter, a dentist, to advertise and perform in his office eye lifts, nose jobs, face lifts and other such procedures normally performed by a licensed physician specializing in plastic surgery. The *amici* brief rightly notes that oral and maxillofacial surgeons such as Dr. Hunter frequently must participate in treating patients who have suffered facial trauma or other problems that necessitate extensive reconstructive surgery, and that there is not always a "bright line" distinction in the responsibilities of a physician who is a plastic surgeon and a dentist who is an oral and maxillofacial surgeon such as Dr. Hunter. We recognize that this is necessary and that an oral and maxillofacial surgeon may perform some aspects of these cosmetic procedures in some instances. We hold merely that the definition of dentistry contained in Tennessee Code Annotated § 63-5-108(a)(1) does not blanketly authorize a dentist, even an oral and maxillofacial surgeon, to perform cosmetic procedures such as face lifts

> and nose jobs. Consequently, we affirm the Chancery Court's reversal of the decision of the Board of Dentistry. We do not hold that an oral and maxillofacial surgeon such as Dr. Hunter may never perform any aspect of such cosmetic procedures, nor do we address the parameters under which such procedures may be performed. We hold only that the broad authorization contained in the Board's declaratory order is contrary to Tennessee Code Annotated § 63-5-108(a)(1). The remaining issues raised on appeal are pretermitted.

*Id.* at * 8.

Tenn. Code Ann. § 63-5-108 was amended in 2003. *See* 2003 Tenn. Pub. Acts, ch. 237. Dentistry is now defined as:

> the evaluation, diagnosis, prevention and/or treatment, by nonsurgical, surgical or related procedures, of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body, provided by a dentist within the scope of such dentist's education, training, and experience, in accordance with the ethics of the profession and applicable law.

Tenn. Code Ann. § 63-5-108(a). Activities deemed to be within the practice of dentistry likewise include "[d]iagnos[ing], prescrib[ing] for or treat[ing] any disease, pain, deformity, deficiency, injury, disorder and condition of the oral cavity, maxillofacial area and the adjacent and associated structures and their impact on the human body." *Id.* § 63-5-108(b)(1).[1]

The Board of Dentistry's current rules provide that lip augmentation and injections of Botox or future FDA-approved neurotoxins fall within the specialty dental practice of Oral and Maxillofacial Surgery. Tenn. Comp. R. & Regs. 0460-02-.06(8)(c)10-11.[2] As the court observed in *Dentistry*, oral and maxillofacial surgery "is a specialty that must fit within [the] definition of dentistry." 2001 WL 839032, at *8. And indeed, given the 2003 amendment, the statutory definition of dentistry (and the practice of dentistry) is broad enough to encompass the use and injection of Botox, other FDA-approved neurotoxins, and dermal fillers[3] into the oral cavity, maxillofacial area, and/or adjacent and associated structures by a dentist qualified to

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[1] Tenn. Code Ann. § 63-5-112(b) was also enacted in 2003; it provides that oral and maxillofacial surgeons are held to the same standard of care as medical doctors and osteopathic physicians.

[2] Performance of such procedures without the necessary qualifications constitutes unprofessional conduct, and licensees are subject to discipline for doing so. Tenn. Comp. R. & Regs. 0460-02-.06(8)(d), (e).

[3] It is assumed for purposes of this opinion that dermal fillers are used to perform lip augmentation.

do so—whether for therapeutic or cosmetic purposes. No basis can be found on which to conclude that such procedures lie within the exclusive purview of the practice of medicine or osteopathic medicine. The Tennessee Board of Dentistry therefore may, within its discretion, promulgate a rule allowing such procedures to be performed by general dentists; in doing so the board is vested by Tenn. Code Ann. §§ 63-5-105(7) and 63-5-108 with authority to impose educational, training, and experience requirements upon those licensees who would engage in such practice.

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

SUE A. SHELDON
Senior Counsel

Requested by:

The Honorable Bob Ramsey
State Representative
212 War Memorial Building
Nashville, Tennessee 37243