

Optometrists Seek to Expand Scope of Practice Privileges

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On February 24, 2005, the New Mexico House approved a bill to allow optometrists to perform some eye surgery procedures. According to an Associated Press article, the measure passed the House on a 61-8 vote and was sent to the Senate for consideration.¹ House Bill 199² amends the definition of the practice of optometry to allow optometrists certified by the optometry board to perform a variety of laser surgical procedures, but does not allow optometrists to perform LASIK procedures for vision correction.³ Other states will be watching this bill closely to see whether New Mexico joins Oklahoma in allowing optometrists to perform some surgical procedures.

Texas is also considering legislation that would expand the scope of practice for optometrists. Senate Bill 1025⁴ divides the definition of surgery in the existing statute and creates a laundry list of “minor surgical procedures”⁵ which could be performed by therapeutic optometrists if the legislation is approved. Section 16 of the bill adds a new § 351.3585 to the Texas Occupations Code and provides a list of twenty-three procedures including a “catch all” provision that allows properly certified therapeutic optometrists to perform “any of the surgical procedures for which the therapeutic optometrist has been certified by the board. . . .”⁶ Another section of the bill requires therapeutic optometrists who perform certain surgical procedures to be certified by the optometry board to perform the procedures. Surgical procedures requiring certification include photo-refractive keratectomy (PRK) and laser-assisted in situ keratomileusis (LASIK).⁷

Oklahoma enacted legislation in 2004 allowing optometrists to perform some laser surgery procedures. The Oklahoma licensing statute defines the practice of optometry to include “laser surgery procedures, excluding retina, laser in-situ keratomileusis (LASIK), and cosmetic lid surgery.”⁸ The statute also allows optometrists to perform “nonlaser surgery procedures as authorized by the Oklahoma Board of Examiners in Optometry”⁹ Relying on the Oklahoma legislation, a VA (Veterans Affairs) hospital in Kansas authorized an optometrist licensed in Oklahoma to perform laser surgeries. Because of objections raised by the AMA, ophthalmologists, and veterans’ groups, the Department of Veterans Affairs rescinded the authorization.

¹ See Barry Massey, Free NewMexican, *House approves bill to allow eye surgery by optometrists* (Feb. 24, 2005) available at <http://www.freewmexican.com/news/10926.html#> (visited Feb. 25, 2005).

² H. B. 199 (Committee Substitute), 47th Leg. Reg. Sess (N.M. 2005) available at <http://legis.state.nm.us/Sessions/05%20Regular/bills/house/HB0199BIS.html> (visited Feb. 25, 2005).

³ *Id.* § 1.

⁴ S. B. 1025, 79th Leg. Reg. Sess. (Tex. 2005).

⁵ *Id.* § 16.

⁶ *Id.*

⁷ *Id.*

⁸ OKLA. STAT. ANN. Tit. 59, § 581 (A) (West, WESTLAW through 2004 2d. Legis. Sess.).

⁹ *Id.*

In contrast to Oklahoma, most states specifically prohibit optometrists from performing surgery. Some of these statutes also define surgery within the context of optometry. In Alabama, optometrists are prohibited from performing “injections into the eyeball, cataract surgery, muscle surgery, retinal surgery, radial keratotomy, laser surgery, cryosurgery, or any other invasive surgery.”¹⁰ The California licensing statute provides that “[n]otwithstanding any other provision of law, the practice of optometry does not include performing surgery.”¹¹ The statute defines “surgery” as “any procedure in which human tissue is cut, altered, or otherwise infiltrated by mechanical or laser means in a manner not specifically authorized by this act.”¹² However, the statute does allow optometrists to utilize “diagnostic laser and ultrasound technology.”¹³

Colorado provides that optometrists may not perform “surgery” or “invasive laser surgery.”¹⁴ Colorado does allow optometrists who meet certain requirements established by the optometry board to treat anterior uveitis¹⁵ and glaucoma.¹⁶ The Colorado statute contains an interesting provision making clear that the optometry board should not use its rulemaking authority to expand the scope of practice of optometrists. The enabling statute provides that the board may prescribe rules “authorizing optometrists to utilize therapeutic procedures and therapeutic techniques in the practice of optometry”¹⁷ However, the statute also provides that such rules “shall in no way expand the practice of optometry as defined in . . . nor shall such rules include the use of therapeutic or cosmetic lasers.”¹⁸

Georgia’s licensing statute does not itself define surgery, but it provides in pertinent part that “nothing in this chapter shall be construed to . . . authorize any registered optometrist to . . . practice medicine or surgery in any manner as defined by the laws of this state.”¹⁹ Louisiana defines optometry as “that practice in which a person employs primary eyecare procedures or applies any means other than surgery”²⁰ Michigan provides that the practice of optometry “does not include the performance of invasive procedures.”²¹ The statute defines “invasive procedures” to include the use of lasers other than for observation and procedures that include an incision.²²

¹⁰ ALA. CODE § 34-22-1 (4) (West, WESTLAW through 2004 Reg. Legis. Sess.).

¹¹ CAL. BUS. & PROF. CODE § 3041(i) (West, WESTLAW through Ch. 1 of 2005 Reg. Legis. Sess.).

¹² *Id.*

¹³ *Id.*

¹⁴ COLO. REV. STAT. ANN. § 12-40-102 (1) (West, WESTLAW through 2004 2d Reg. Legis. Sess.).

¹⁵ Anterior uveitis is inflammation in the front area of the eye. See Patient Information, *Glossary of Terms*, available at <http://www.uveitis.org> (visited Feb. 21, 2005).

¹⁶ COLO. REV. STAT. ANN. § 12-40-102 (7) (a) (West, WESTLAW through 2004 2d Reg. Legis. Sess.).

¹⁷ *Id.* § 12-40-107 (n).

¹⁸ *Id.*

¹⁹ GA. CODE ANN. § 43-30-13 (a) (West, WESTLAW through 2004 1st Spec. Legis. Sess.).

²⁰ LA. REV. STAT. ANN. § 37:1041 (4) (West, WESTLAW through 2004 Legis. Sess.).

²¹ MICH. COMP. LAWS ANN. § 333.17401 (1) (b) (West, WESTLAW through P.A.2004, No. 1-596, 2004 Legis. Sess.).

²² *Id.* § 333.17401 (h).

Nebraska excludes “the use of surgery” from its definition of the practice of optometry.²³ New Jersey provides that “nothing in this [optometry licensing] act shall be construed to permit the practice of medicine and surgery as defined in R.S. 45:9-5.1.”²⁴ However, the definition of the practice of medicine or surgery is not very helpful. With several exceptions, the statute provides that “the practice of medicine or surgery . . . shall include the practice of any branch of medicine and/or surgery, and any method of treatment of human ailment, disease, pain, injury, deformity, mental or physical condition”²⁵

North Carolina defines the practice of optometry to include “[t]he examination of the human eye by any method, other than surgery, to diagnose, to treat, or to refer for consultation or treatment any abnormal condition of the human eye”²⁶ Utah provides that “an optometrist may not perform surgery, including laser surgery”²⁷ and defines laser surgery as “surgery in which human tissue is cut, burned, or vaporized by means of laser or ionizing radiation.”²⁸ Virginia allows therapeutic pharmaceutical agents (TPA) certified optometrists to prescribe certain drugs to treat eye diseases. The statute further provides that “[s]uch certification shall not, however, permit treatment through surgery, including, but not limited to, laser surgery or other invasive modalities, except for treatment of emergency cases of anaphylactic shock with intramuscular epinephrine.”²⁹

The Oklahoma Attorney General issued an opinion addressing an optometry board’s authority in 2004.³⁰ The Oklahoma statute appeared to give the optometry board some power in determining the scope of practice of optometry. It provided that “nothing in this title shall be construed as allowing any agency, board, or other entity in this state other than the Board of Examiners of Optometry to determine what constitutes the practice of optometry.”³¹ In 1998, Oklahoma amended the definition of optometry practice to include some forms of laser surgery. The question presented to the attorney general was whether the optometry board could authorize optometrists to perform *nonlaser* surgical procedures, i.e. with scalpels, needles, etc. The opinion concluded that the board lacked authority pursuant to the enabling statute to authorize performance of nonlaser surgical procedures.³² The statute provided that the practice of optometry is defined to be “correcting and relief of ocular abnormalities by means including but not limited to . . . laser surgery procedures”³³ In spite of the language “included but not limited to” the opinion found the board lacked authority to authorize nonlaser surgery. However, the statute was subsequently amended to allow such surgery. As noted above,

²³ NEB. REV. ST. ANN. § 71-1,133 (West, WESTLAW through 2004 2d Reg. Legis. Sess.).

²⁴ N.J. STAT. ANN. § 45:12-9.7 (West, WESTLAW through c. 1 to 186, 2004 Legis. Sess.).

²⁵ *Id.* § 45:9-5.1.

²⁶ N.C. GEN. STAT. § 90-114 (1) (West, WESTLAW through 2004 Reg. & Extra Legis. Sess.).

²⁷ UTAH CODE ANN. § 58-16a-601 (2)(a) (West, WESTLAW through 2004 4th Spec. Legis. Sess.).

²⁸ *Id.* § 58-16a-102 (7).

²⁹ VA. CODE ANN. § 54.1-3200 (West, WESTLAW through 2004 Spec. Legis. Sess. II).

³⁰ OKLA. ATTY. GEN. OP. 04-009 (Apr. 6, 2004).

³¹ *Id.*, citing OKLA. STAT. ANN. Tit. 59, § 581 (2001).

³² *Id.*

³³ *Id.*

the statute now specifically allows optometrists to perform “nonlaser surgery procedures as authorized by the Oklahoma Board of Examiners in Optometry”³⁴

Texas law on the subject of licensing board authority is evolving. The authority of an optometry licensing board was addressed in a Texas Attorney General’s opinion issued November 22, 1996.³⁵ At the time of the opinion, the Texas optometry act did not define surgery. The Texas Optometry Board authorized therapeutic optometrists to perform a number of procedures that the Texas Ophthalmologist Association objected to on the grounds that such procedures were “surgery” for purposes of the Texas Medical Practice Act.³⁶ The opinion rejected such argument, and instead defined surgery based on its “ordinary meaning” and found that surgery embraces “only cutting operations.”³⁷ Therefore, the opinion concluded that the “Optometry Board has the authority to determine whether the procedures constitute surgery, but the board’s determination is subject to judicial review.”³⁸ Texas subsequently defined surgery in its optometry act, so the definition of surgery in Texas is now based on the statute rather than the “ordinary meaning” of surgery.³⁹ The statute defines surgery as follows:

“Surgery” means a procedure using instruments, including lasers, scalpels, or needles, in which human tissue is cut, burned, vaporized, or otherwise altered by any mechanical means, laser, or ionizing radiation. The term includes procedures using instruments that require closing by suturing, clamping, or another device. The term does not include a noninvasive procedure to remove a superficial foreign body in the conjunctiva, eyelid, or corneal epithelium that has not perforated the Bowman's membrane.⁴⁰

The Texas board should still have the authority to determine whether a particular procedure constitutes “surgery” under the statute, but any such determination remains subject to judicial review.⁴¹

A 2004 year-end report by the National Conference of State Legislators’ Health Policy Tracking Service summarized scope of practice legislation from 1999 through 2004 for nonphysician health care providers.⁴² According to the report, legislation has

³⁴ OKLA. STAT. ANN. Tit. 59, § 581 (A) (West, WESTLAW through 2004 2d. Legis. Sess.).

³⁵ TEX. ATTY. GEN. OP. DM-425 (Nov. 22, 1996).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* The standard of review is set forth in TEX. GOVT. CODE ANN. § 2001.174 (West, WESTLAW through 2004 4th called Legis. Sess.) The statute provides in part that “a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion” A court may affirm the agency decision and must reverse or remand for certain stated reasons including decisions in excess of the agency’s statutory authority, decisions made through unlawful procedure, not supported by substantial evidence or arbitrary or capricious decisions characterized by abuse of discretion or unwarranted exercise of discretion. *Id.*

³⁹ TEX. OCC. CODE ANN. § 351.002 (8) (West, WESTLAW through 2004 4th called Legis. Sess.).

⁴⁰ *Id.*

⁴¹ TEX. ATTY. GEN. OP. JC-0097 (Aug. 23, 1999).

⁴² Andrew McKinley, NCSL Health Policy Tracking Service, *Issue Brief: Scope of Practice and Prescriptive Authority* (Year End Report, 2004).

focused or expansion of prescriptive authority for optometrists. The report only identified one state (Oklahoma) that enacted legislation to allow optometrists to perform some forms of laser surgery.⁴³ Physician groups are fighting hard to prevent optometrists from expanding their scope of practice to include surgery and give injections. According to the American Academy of Ophthalmology, “[s]ince 1997 [there have been] 46[] attempt[s] in 21 states by organized optometry to legislate surgical privileges and the authority to perform injection procedures.”⁴⁴ In Puerto Rico during 2004, “[o]phthalmologists blocked legislation that would have allowed the broadest optometric scope of practice in the United States.”⁴⁵

⁴³ *Id.* at 10.

⁴⁴ *Academy and Puerto Rican Eye M.D.s Block Broadest O.D. Scope-of-Practice Legislation in the Country* (08/26/2004), available at <http://www.aao.org/aao/news/release/20040826.cfm> (visited Feb. 18, 2005).

⁴⁵ *Id.*