November 6, 2017

OPINION MEMORANDUM

TO: Chair, Guam Board of Allied Health Examiners

FROM: Attorney General

SUBJECT: Request for Legal Opinion Regarding Whether Guam Law Authorizes “Tele-Practice” of Professions Licensed by the Guam Board of Allied Health Examiners.

This Office is in receipt of your request for a legal opinion on the question whether Guam law authorizes “tele-practice” of professions licensed by the Guam Board of Allied Health Examiners (GBAHE).

Discussion

With advancements in telecommunications technology more and more health professions around the nation are offering their services remotely, that is, outside the actual presence of the patient, whereas traditionally the patient and practitioner are in immediate physical proximity to one another. The Guam Board of Allied Health Examiners has requested a legal opinion from our Office on the question whether the “tele-practice” of any of the health professions regulated by the Board is authorized by law, and if so, whether the Board is authorized to promulgate rules and regulations governing the “tele-practice” of any of the professions subject to its jurisdiction. The question assumes that the practitioner is licensed by the Board, but is not on-island to render professional services face-to-face.

In its request the GBAHE notes two places in Title 10 Chapter 12, Guam Code Annotated that specifically mention tele-practice of a health profession. First, the Physicians Practice Act specifically excepts the practice of telemedicine from the requirements of licensure if the off-island physician is “providing consultation to a Guam licensed physician through the use of telemedicine technology,” and provided certain conditions are met, see 10 GCA § 12202(b)(8). Second, the Guam Board of Examiners for Pharmacy’s enabling legislation addresses the practice of telepharmacy, see 10 GCA § 12621. However, there is no profession regulated by the Guam Board of Allied Health Examiners under Article 8, Chapter 12, Title 10 where licensees are expressly authorized to engage with patients at a distance via telecommunications and information technologies. We believe that the presence of two express references to “tele-practice” in Title 10 Chapter 12 involving two discrete professions, and its absence from the rest of Chapter 12 influences the analysis.
Applying the maxim *expressio unius est exclusio alterius* – the expression of one is the exclusion of all others – the question here is whether in the absence of specific statutory authorization for “tele-practice” of any profession regulated by the Board in Article 8, Title 10 Chapter 12, Guam Code Annotated, it is nonetheless permitted under Guam law.

The Supreme Court has “often noted that when ‘Congress includes particular language in one section of a statute but omits it in another’ [the Court presumes] that Congress intended a difference in meaning.” *Loughrin v. United States*, 573 U.S. ___, ___, 134 S.Ct. 2384, 2390 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); accord, *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (“We have long held that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quotation marks and citation omitted); and *Henson v. Santander Consumer USA, Inc.*, 582 U.S. ___, 137 S.Ct. 1718, 1723 (2017) (“And, usually at least, when we’re engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning.”). *Compare, Rinehart v. Rinehart*, 2000 Guam 14 ¶ 12 (“The fact that some Guam laws provide for telephonic testimony implies that Guam lawmakers would have included it in the testimonial rules if they truly desired it.”). The references to telemedicine and telepharmacy in the articles governing physicians and pharmacists, and its absence elsewhere in any statutes regulating other health professionals, suggests that the Legislature did not intend to authorize “tele-practice” in the Allied Health professions.

On the other hand, Guam law provides that “[a] practitioner located in another state practicing within the state by electronic or other means without a license issued by the Board shall be deemed guilty of a felonious offense.” 10 GCA § 12823(d). That suggests at least by negative implication that the Legislature was more than well aware of the practice of an allied health profession by electronic or other means, and that it did intend to authorize the tele-practice of allied health professions. Although we question the use of the second “state” in the part that reads “within the state” above where the phrase “within Guam” would have been more appropriate it nonetheless appears that the Legislature was cognizant of tele-practice of allied health professions, and the only limitation on it was that practitioners who engaged in the practice by electronic or other means from another jurisdiction must be licensed, else they are guilty of a felony.

Section 12823(d) was part of an overhaul of the Guam Allied Health Practice Act of 1998, P.L. 24-329 (Bill No. 695) (Dec. 31, 1998), which Governor Carl Gutierrez originally vetoed but whose veto was overridden by the Guam Legislature. There is no other legislative history readily available on P.L. 24-329. Nevertheless, subsections 12823(a)-(d) of the Allied Health Practice Act appear to be copied from the Physicians Practice Act, P.L. 24-208 (May 13, 1998), for they are nearly identical to 10 GCA § 12214(a)-(d). Whereas the Allied Health Practice Act substitutes “practice of an allied health profession” for “practice of medicine,” § 12214(d) of the Physicians Practice Act is only slightly different. It states: “A physician located in another state practicing within the state by electronic or other means without a license, full, special purpose or otherwise, issued by the Board shall be deemed guilty of a felonious offense.” *Id.* (italics added).
As noted, although there is no legislative history explaining what precisely the Legislature was thinking when it amended the Physician’s Practice Act, other than that it was updating and modernizing it in keeping with recommendations from national organizations, the language of both acts compels us to conclude that the Legislature did, in fact, consider tele-medicine and the tele-practice of the allied health professions in May and December of 1998, and that telemedicine and tele-practice of the allied health professions are, in fact, recognized if not expressly authorized by Guam law.

That does not, however, end the inquiry. We note by way of further illustration that whereas tele-practice of allied health professions may be authorized, the terms “direct supervision” and “indirect supervision” in the definitions section of Article 8 Chapter 12 of Title 10 Guam Code Annotated limit supervision of allied health professional to that which is either “on the premises” or “on island.”

Supervision shall be one of the following:

(A) Direct supervision shall mean supervision whereby a licensee diagnoses the condition to be treated, approves the work to be performed and remains on the premises while the procedures are being performed.

(B) Indirect supervision shall mean supervision whereby a licensee authorizes the procedures which are being carried out, but need not be present on the premises when the authorized procedures are being performed. The licensee must be available on Island by telecommunications.

10 GCA 10 GCA § 12802(b)(11) (emphasis in italics added).*

We note also that physicians assistants are specifically required to be supervised by physicians who in turn must be either physically available on the premises or available on island by telecommunications. See, 10 GCA § 121601(d) (“Supervision means providing guidance of the services performed by the physician assistant. A supervising physician may be physically on the premises where the physician assistant is practicing, or be available on Island by telecommunication.”).

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*The Code appears to provide an exception to the definitions of direct and indirect supervision for “those fully licensed to practice allied health in another jurisdiction of the United States who briefly render emergency treatment, or briefly provide critical services at the specific lawful direction of an institution or Federal agency that assumes full responsibility for that treatment or service.” 10 GCA § 12802(b)(11)(C)(vi).” However, although that sentence does appear in the original bill as a subsection (C) to the definitions of supervision under § 12802(b)(11), we believe that to be a scrivener’s error, and that what was intended was for that sentence to be a standalone subsection (12) under § 12802(b).
And just recently in the field of speech-language pathology the Legislature has defined direct (initial) supervision to mean “supervision whereby a licensed Speech-language Pathologist diagnoses the condition to be treated, disseminates the therapy information to the SLPA-B [bachelor level speech-language pathology assistant], and remains on the premises while the procedures are being performed by an SLPA-B.” Public Law 34-48, § 2 (Oct. 13, 2017), to be codified at 10 GCA § 121801(f) (emphasis added). Indirect supervision is defined to mean “supervision whereby a licensed SLP [speech-language pathologist] authorizes the procedures that are being carried out, but need not be present on the premises when the authorized procedures are being performed by a SLPA-M. The licensee must be available on island by telecommunications.” Id. (emphasis added). It is clear then that whereas off-island tele-practice by a licensed speech-language pathologist may be authorized, supervision of a bachelor level speech-language assistant must be on-island.

It thus appears to us that if direct supervision means physically “on the premises” where the procedures or services are to be performed, and indirect supervision requires that the licensee “must be available on island by telecommunications,” then the law does not authorize off-island supervision via tele-practice of any of the allied health professions. While tele-practice of the various allied health professions may be recognized by the Legislature, off-island supervision is not, even if the off-island practitioner is licensed by the Board. This is so because under any definition of the term, whether direct or indirect, supervision must be on-island.

**Conclusion**

While it appears that the Guam Legislature intended to permit the “tele-practice” of the various health professions licensed and regulated by the Guam Board of Allied Health Examiners pursuant to Article 8, Chapter 12, Title 10 of Guam Code Annotated, it also appears that supervision of any persons engaged in any of the health professions regulated by the GBAHE must be by persons physically located on-island.

We trust we have sufficiently addressed your inquiry. For further information concerning this matter, please use the reference number shown above.

Sincerely,

ELIZABETH BARRETT-ANDERSON
Attorney General

cc: Superintendent, GDOE
Chairperson, GEB
Senator Joe S. San Agustin