

## **Opinion No. 74-21**

May 30, 1974

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Joseph M. Peterson, D.O. Secretary of the New Mexico Board of Osteopathic Examination and Registration 3800 Wyoming, N.E. Albuquerque, New Mexico 87111

### **QUESTIONS**

#### **FACTS**

The Albuquerque Telephone Directory Yellow Pages contain two separate listings for "Physicians & Surgeons, M.D." and "Physicians & Surgeons-Osteopathic." The telephone company has listed five osteopathic physicians under both headings at the request of the physicians. In their listings under the "Physicians & Surgeons, M.D." heading, two of the osteopathic physicians have either indicated that they are osteopathic physicians or used their appropriate degree designation, "D.O." The other three osteopathic physicians listing themselves as "Physicians & Surgeons, M.D." have used no degree designation and made no indication that they are osteopathic physicians.

#### **QUESTIONS**

1. Are any of these physicians in violation of any New Mexico statute or any rule or regulation of a New Mexico professional board which would endanger their licenses or subject them to reprimand?
2. If so, is the statute, rule or regulation involved valid?

#### **CONCLUSIONS**

1. Yes.
2. See Analysis.

### **OPINION**

#### **{\*41} ANALYSIS**

Subsection 67-8-13(5), N.M.S.A., 1953 Comp. states that the Board of Osteopathic Examiners may suspend or revoke any license for "advertising by any means of knowingly false or deceptive statements." Article VIII, Section 1, subsection (1)(a) of the rules of the New Mexico Board of Osteopathic Examiners states that "unprofessional conduct," for which the Board may suspend or revoke a license, shall be deemed to

include "the failure to clearly designate the school of medicine by which he is licensed to practice, that is, Osteopathy, on all . . . telephone and business directories . . . either by use of the words 'osteopathic physician' or 'osteopathic physician and surgeon' or 'D.O.'" Subsection (2)(h) of the same rule states that "dishonorable conduct," for which the Board may also suspend or revoke a license, shall be deemed to include "the use of the name 'doctor of medicine' or its initials . . . either orally or otherwise, without first having obtained a license from the State Board of Medicine of the State of New Mexico."

The three osteopathic physicians who have listed themselves under the "physicians & Surgeons, M.D." heading without using a degree designation and without giving an indication that they are osteopathic physicians are violating subsection 67-8-13(5) of the New Mexico {42} Statutes and are also violating subsections (1)(a) and (2)(h) in Article VIII, Section 1 of your Board's rules. The two osteopathic physicians who have taken the trouble to indicate specifically that they are osteopathic physicians by using either those words or a "D.O." degree designation after their names are violating only subsection (2)(h) in Article VIII, Section 1 of your rules.

Your question as to whether the statute and rules involved here are valid is controlled by the case of **Oliver v. Martin**, 361 F. Supp. 1262 (N.D. Ga. 1973) where a three-judge court held as follows:

"While (this) court has held that the State can validly require a physician to hold himself out under the degree which he has been awarded, and no other, the State cannot differentiate between two qualified physicians who have **not** earned an M.D. degree and allow one to parade under an unearned M.D. degree while refusing to allow the other to do so. The State has failed to show the court any reasonable basis for its differing treatment of **foreign-** trained physicians and D.O.'s. The two are similarly situated; without a rational basis for the distinction, the State's differing treatment of foreign-trained physicians and D.O.'s is arbitrary and in violation of the Equal Protection Clause."

The holding in the **Oliver** case was two-fold. The State has a valid interest to requiring any licensed physician to hold himself out under the degree which he has been awarded and no other, which means that such a statute or regulation can legally be enacted. However, the Georgia board allowed foreign-trained physicians who had not earned an M.D. degree to be licensed as physicians by the board which in turn allowed those physicians to hold themselves out to the public as M.D.'s" The court held this to be a violation of the equal protection rights of osteopathic physicians who likewise had not earned an M.D. degree, but who were prohibited from holding themselves out to the public as M.D.'s by Georgia law.

In New Mexico, foreign-trained physicians who have not earned an M.D. degree can be licensed by the New Mexico Board of Medical Examiners pursuant to subsection 67-5-4C, and such licensed physicians may list themselves under the heading "Physicians & Surgeons, M.D." in the telephone directory. No statute or regulation requires them to do

otherwise. Therefore, the Board of Osteopathic Examiners would be violating the equal protection rights of the five osteopathic physicians who have listed themselves under the heading "Physicians & Surgeons, M.D." in the telephone directory insofar as it would attempt to enforce subsection 67-8-13(5) of the New Mexico Statutes or Article VIII, Section 1, subsections (1)(a) or (2)(h) of the Board's rules against any of them; and the statute and rules are unconstitutional insofar as they would prohibit the five osteopathic physicians from listing themselves under the heading "Physicians & Surgeons, M.D." in the telephone directory. However, this constitutional problem would be completely eliminated if and when the New Mexico Board of Medical Examiners enacted a regulation requiring each of its licensees to use his appropriate degree designation with his name in all advertising or prohibiting each of its licensees not having an M.D. degree from advertising with an "M.D." degree designation.

By: F. Scott MacGillivray

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