



Antitrust Referral Analysis Submission by Board or Commission

Board or Commission: State Medical Board of Ohio

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Referral Topic: Podiatric Scope of Practice

ORC 107.56 provides a mechanism through which boards or commissions, or someone affected by a board or commission action, may refer to the Common Sense Initiative Office an action that may be subject to state or federal antitrust law. Please send this completed form, a complete copy of action or proposed action, and any other appropriate documentation for evaluation to CSIReferrals@governor.ohio.gov.

Referral Information

1. What is the action/proposed action being taken?

In June 2019, the State Medical Board of Ohio responded to five questions from a podiatrist regarding podiatric scope of practice. The Board clarified that the scope of practice of podiatry as set forth in Section 4731.51, Ohio Revised Code and Rules 4731-20-01 and 4731-20-02, Ohio Administrative Code permitted a podiatrist to perform four of the five procedures.

The questions were as follows:

1. Is it permissible for a podiatrist in Ohio to perform a supramalleolar osteotomy of the tibia or fibula to correct a deformity?
2. Is it permissible for a podiatrist in Ohio to harvest a bone graft from the proximal tibia to be used for foot and ankle surgery?
3. Is it permissible for a podiatrist in Ohio to harvest bone marrow aspirate from the proximal tibia?
4. Is it permissible in Ohio for a podiatrist to surgically remove ingrown nails from the hands?
5. Is it permissible in Ohio for a podiatrist to surgically excise warts from the hands?

The Board clarified that the scope of practice of podiatry as set forth in Section 4731.51, Ohio Revised Code and Rules 4731-20-01 and 4731-20-02, Ohio Administrative Code permitted a podiatrist to perform four of the five procedures (1,3,4,5).

2. In a brief statement explain the factual background, nature, purpose and rationale of the action/proposed action pertaining to this referral.

On March 25, 2019, the Medical Board received an inquiry from Daniel Logan, DPM, requesting responses to five questions regarding podiatric scope of practice. On June 12, 2019, the Licensure Committee voted to approve Questions 1, 3, 4, and 5 through the rule-making process. The Medical Board considered the Licensure Committee recommendation at its meeting later that day. The agenda materials and the minutes are attached. The Board discussed the draft response and that there were concerns with proceeding via the rule-making process. After a thorough discussion, the Board voted to send the draft response via a letter to Dr. Logan. This was approved by all Board members present at the June 12, 2019 meeting. A copy of the letter sent to Dr. Logan is attached.

The Board has received letters from several associations: American Orthopaedic Foot & Ankle Society, American Academy of Orthopaedic Surgeons, Ohio State Medical Association, Ohio Orthopaedic Society, and the Ohio Foot and Ankle Medical Association. Four of the letters expressed concerns that the Board's decision with respect to questions 1 and 3 of Dr. Logan's letter has the potential to expand the podiatrist's scope of practice beyond what is permitted under Ohio law and that allowing podiatrists to perform a supramalleolar osteotomy of the tibia or fibula to correct a deformity or to harvest bone marrow aspirate from the proximal tibia could pose risk to Ohio's patients. The four associations requested that the Board reconsider the matter or stay the effectiveness of its opinion pending additional investigation and public comment. The Ohio Foot and Ankle Medical Association, representing podiatric physicians in Ohio, expresses support for the Board's decision and indicates that reconsideration or a stay of that decision will cause severe disruption to podiatrists across the state. The Ohio Foot and Ankle Medicine Association also contests the assertion that allowing podiatrists to

perform the two procedures creates an increased risk of harm to patients, stating that podiatric physicians have been treating ankles for over twenty years with no reported incidents of patient harm.

The State Medical Board considered this matter again at its September 11, 2019 meeting. After a full discussion, the Board voted to not reconsider its June 12, 2019 decision. However, since it is possible that anti-trust concerns could be raised by the impacted parties, the Board voted to refer this matter to the Common Sense Initiative for an anti-trust review pursuant to Section 107.56, Ohio Revised Code.

3. Please check all of the following that apply as reasons the action/proposed action is subject to review? (ORC 107.56(B)(1))?

- Fixes prices or limits price competition;
- Divides, allocates or assigns customers or potential customers or geographic markets in this state among members of the occupation regulated by the boards;
- Excludes present or potential competitors from the occupation regulated by the board;
- Limits output or supply in this state of any good or service provided by the members of the regulated occupation;
- Prohibits offering a particular quality-level of a product or service;
- Restricts advertising or makes it more expensive or less effective;
- Substantially reduces the number of firms or providers that can serve a particular set of customers; or
- Any other activity that could be subject to state or federal antitrust law if undertaken by private persons.

4. Is the action/proposed action explicitly compelled or specifically authorized by statute? If so, please list the statute(s).

Section 4731.51, Ohio Revised Code and Rules 4731-20-01 and 4731-20-02, Ohio Administrative Code set forth the scope of practice of podiatrists in Ohio.

5. Is the action/proposed action within the scope of the board or commission's statutorily-delegated general authority to regulate in a given occupation or industry? If so, please describe how it is within scope and reference the statute.

It is within the State Medical Board's authority to determine whether specific procedures or tasks fit with the scope of practice of one of the Board's regulated professions. In this instance, the State Medical Board licenses both podiatrists and physicians specializing in orthopedic surgery.

6. Please identify the clearly articulated state policy (e.g., health and safety, or consumer protection) in state statute or rule, or any supporting evidence of the harm the action/proposed action is intended to protect against?

The Board is charged with protecting the health and safety of patients, and this focus on patient protection was the key consideration of the Board in making that decision. Increased access to properly trained practitioners was also a consideration.

- 6a. How does the action/proposed action address the harm or advance the articulated state policy?

The Board's action allows properly trained podiatrists to continue performing four of the five procedures mentioned in the request from Daniel Logan, DPM. The Board received information that podiatrists currently hold privileges in Ohio hospitals to perform the procedures in requests 1 and 3 (performance of a supramalleolar osteotomy of the tibia or fibula to correct a deformity and the harvesting of bone marrow aspirate from the proximal tibia).

8. If appropriate, explain the action/proposed action's alleged consistency with state or federal antitrust law, which may include a description of how the action or proposed action may affect the number of competitors and those competitors incentive to compete in amount, quality, variety or other aspects of the good or service offered.

The Board's action clarifies that podiatrists may perform four of the five procedures in the request. This permits more practitioners to provide these services to patients. The Board's decision does restrict podiatrists from performing a bone graft from the proximal tibia for foot and ankle surgery.

In general, the Board's decision allows more practitioners to complete the procedures which can lead to more competition.

9. What process did the board or commission follow to arrive at its decision to take action/proposed action including public hearings held, public comments invited, studies conducted, data collected interviews conducted, etc.?

The Board reviewed journal articles, statements and materials from an orthopedic surgeon Board member and a podiatrist Board member, and information submitted by the Ohio State Medical Association, the American Orthopaedic Foot & Ankle Society, American Academy of Orthopaedic Surgeons, Ohio Orthopaedic Society, and the Ohio Foot and Ankle Medical Association. The Board discussed this matter in the June 12,

2019 Licensure Committee meeting and the Board meeting on that same day. The Board also discussed this matter at length at its September 11, 2019 Board meeting.

10. Does the action/ proposed action relate to or depend upon a question that is the subject of a formal opinion request pending before the Ohio Attorney General?

No.

11. Provide any other information the board or commission deems appropriate for the Office's review of the action/proposed action.

None at this time.