

Opinion No. 2012-012

April 3, 2012

The Honorable Homer Lenderman
State Representative
195 County Road 953
Brookland, Arkansas 72417-8602

Dear Representative Lenderman:

You have asked for my opinion about the scope of the Arkansas Veterinarian Medical Examining Board's ("the Board") authority over the regulation of equine teeth floating (ETF)¹ and equine message therapy (EMT). Specifically, you ask four questions, some of which I have paraphrased:

1. Beginning on July 1, 2013, may a person who is neither a licensed veterinarian nor a licensed veterinarian technician legally practice ETF/EMT?
2. May the Board promulgate regulations establishing a licensing scheme, effective July 1, 2013, for persons practicing ETF/EMT, regardless of whether the person [performing that service] is a licensed veterinarian or veterinarian technician? If so, must that licensing scheme conform to the requirements stated in A.C.A. § 17-101-315(b), or may other requirements be established by regulation?
3. If A.C.A. § 17-101-307(b) exempts a particular activity or service from the licensing requirement in A.C.A. § 17-101-307(a), does the Board still have the authority to regulate the activity if the activity

¹ The term "equine teeth floating" is not defined in your opinion request or in the statutes. It is my understanding that the term refers to the process by which one holds open a horse's mouth and files down its teeth. Given that a horse's teeth continually grow, the horse can develop certain problems if the teeth are not periodically maintained.

would otherwise constitute the practice of veterinary medicine under A.C.A. §§ 17-101-101 *et seq.*?

RESPONSE

In response to your first question, unless one of the exemptions found at A.C.A. § 17-101-307(b) applies, the answer is “no,” in my opinion, because on July 1, 2013, we revert to prior law under which persons can practice ETF/EMT only if they are licensed veterinarians (or specifically exempted from licensure). As explained more fully below, your second question mistakenly presupposes that subsection 17-101-315(b) continues to apply on and after July 1, 2013. With that presupposition removed, the question is moot. The answer to your third question is “no.”

DISCUSSION

Because the answers to your questions turn on the resolution of two common, underlying questions, it will be helpful to first address the latter. These common questions are (a) whether ETF/EMT qualifies as (what the legislature has called) “the practice of veterinary medicine” and, if so, (b) whether only certain persons can engage in ETF/EMT. The answer to the latter question is slightly complicated by Act 1031 of 2011—which was passed last April—which adds a provision to the Arkansas Code regarding ETF/EMT. Because of this Act, and for reasons that will become clear below, the best way to address these underlying questions is with reference to the following three different timeframes: before April 2011, between April 2011 and July 2013, and after July 2013.

Before April 2011

Act 1031 of 2011 slightly altered the *enforceability* of the law, but not the *substance* of the law itself. Accordingly, in order to clearly answer your specific questions, it will help to understand the law as it was in April 2011. At that time, a critical question was whether an activity fell within the definition of “the practice of veterinary medicine,” which was defined to mean:

(A) The **diagnosis, treatment, correction, change, relief**, or prevention of animal disease, deformity, defect, injury, or other physical or mental condition, **including the** prescribing or **administration of any** prescription drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic

substance or **technique on any animal, including**, but not limited to, acupuncture, **dentistry**, animal psychology, animal chiropractic, theriogenology, surgery, including cosmetic surgery, any manual, mechanical, biological, or chemical procedure for testing for pregnancy or for correcting sterility or infertility or to tender service or recommendations with regard to any of the above;

(B) To represent, directly or indirectly, publicly or privately, an ability and willingness to do any act described in subdivision (9)(A) of this section[.]²

If an activity fell within the scope of that definition, then only a licensed veterinarian could engage in it. There were, however, several exceptions—which could be found at A.C.A. § 17-101-307(b)—to this licensing requirement. Therefore, if an activity qualified as “the practice of veterinary medicine,” then only two kinds of people could legally engage in it: licensed veterinarians or a person specifically exempted from licensure.

As of April 2011, ETF/EMT was not specifically mentioned as one of the many activities that qualify as the “practice of veterinary medicine.” Nevertheless, the two activities referred to by the terms probably fell within the scope of the “practice of veterinary medicine.” This seems evident because the statute specifically refers to “dentistry” and the use of “any technique on any animal” to give the animal “treatment” or “relief.”

Between April 2011 and July 1, 2013

In April 2011, the legislature enacted Act 1031. This Act added, among other things, A.C.A. § 17-101-315, which states:

(a) The [Board] is prohibited from enforcing board policy regarding [ETF] and [EMT] by either investigating or prosecuting an individual practitioner engaged in [ETF] or an individual practitioner practicing [EMT] until July 1, 2013.

(b)(1) Prior to engaging in the practice of [ETF/EMT] in the state, an individual practitioner shall present to the board signed letters of recommendation from two (2) clients who have previously

² A.C.A. § 17-101-102(9)(A)–(B) (Repl. 2010) (emphasis added).

employed the individual practitioner and who bear witness to the individual practitioner's ability to perform ETF/EMT].

(2) The letters of recommendation shall be presented to the board prior to providing service to a client or performing any procedure on any animal.³

For our purposes, Act 1031 accomplishes three things. First, the statute gives an additional reason to think that ETF/EMT qualifies as the "practice of veterinary medicine." The Act presupposes that the pre-April 2011 law *already* applied to ETF/EMT. If the law did not already apply, there would seemingly be no need to suspend the law's enforceability with respect to ETF/EMT.

Second, the Act temporarily prohibits the Board from enforcing the pre-April 2011 law as it relates to ETF/EMT. It is important to see that the *substance* of that law was largely unaltered. What was the illegal practice of veterinary medicine before April 2011 remains the illegal practice of veterinary medicine after April 2011. The Board simply cannot enforce that law as it pertains to ETF/EMT.

The third change wrought by Act 1031 was alluded to above when I said the substance of the pre-April 2011 law was "largely" unaltered. I say "largely," because, for the timeframe between April 2011 and July 2013, the legislature has established a method by which a person who is neither a licensed veterinarian nor a person exempted from licensure under subsection 17-101-307(b) may practice ETF/EMT. Such a person can practice ETF/EMT if that person provides the Board with two letters of recommendation from former clients. This third change alters the pre-April 2011 law by, for all practical purposes, adding an additional exception to the general rule requiring that only a licensed veterinarian engage in an activity that qualifies as the "practice of veterinary medicine."

On and after July 1, 2013

Act 1031 made it clear that, on July 1, 2013, the second and third changes described above would expire. That is, on that date, the Board would again be allowed to enforce the pre-April 2011 law and the ETF/EMT exception would expire, such that merely having letters of recommendation would no longer suffice to permit a non-exempt person to engage in ETF/EMT.

³ A.C.A. § 17-101-315 (Supp. 2011).

While subsection 17-101-315(a) obviously makes the law enforceable once again, it is less clear whether the legislature also intended the letters-of-recommendation to expire. Nevertheless, in my opinion, the legislature probably intended the recommendation-letter requirement to also expire. This requirement, contained in 315(b), was created alongside the suspension of the law, contained in 315(a). The letters-of-recommendation requirement was apparently intended as a kind of gap-filling measure until the general law becomes effective again. Since both 315(a) and 315(b) only apply to ETF/EMT, there is good reason to believe, based on the structure of 315 as a whole, that the legislature also intended the requirement for recommendation letters to expire.

We can summarize all of the foregoing in three propositions. First, before April 2011, ETF/EMT probably qualified as “the practice of veterinary medicine,” which meant that a person could engage in those activities only if that person was a licensed veterinarian or a person specifically exempted from licensure under subsection 17-101-307(b). Second, between April 2011 and July 2013, the older law has changed as it applies to a person who is neither a veterinarian nor an exempted person. For such a person, and during this timeframe, having two letters of recommendation filed with the Board is a necessary and sufficient condition to practice ETF/EMT. Third, on July 1, 2013, we revert to the pre-April 2011 law.

With this framework in mind, we can concisely respond to your specific questions.

Question 1: Beginning on July 1, 2013, may a person who is neither a licensed veterinarian nor a licensed veterinarian technician legally practice ETF/EMT?

As noted above, on July 1, 2013, we revert to the pre-April 2011 law. That means that only a licensed veterinarian (or an exempted person) can practice ETM/ETF. Thus, the answer to your question is: No, unless the person is specifically exempted under subsection 17-101-307(b).

Question 2: May the Board promulgate regulations establishing a licensing scheme, effective July 1, 2013, for persons practicing equine teeth floating or equine message therapy, regardless of whether the person [performing that service] is a licensed veterinarian or veterinarian technician? If so, must that licensing scheme conform to the requirements stated in A.C.A. § 17-101-315(b), or may other requirements be established by regulation?

This question seems to presuppose that, on July 1, 2013, a person can still practice ETF/EMT if that person has filed the recommendation letters with the Board. As explained above, this presumption is mistaken, in my opinion. On July 1, 2013, we revert to the pre-April 2011 law under which only licensed veterinarians or specifically exempted persons can practice ETF/EMT. The Board cannot adopt a licensing scheme contrary to this statutory law.

Question 3: If A.C.A. § 17-101-307(b) exempts a particular activity or service from the licensing requirement in A.C.A. § 17-101-307(a), does the Board still have the authority to regulate the activity if the activity would otherwise constitute the practice of veterinary medicine under A.C.A. §§ 17-101-101 et seq.?

No. The Board lacks authority to regulate an activity that, under subsection 17-101-307(b), is specifically exempt from regulation.

Assistant Attorney General Ryan Owsley prepared this opinion, which I hereby approve.

Sincerely,

Dustin McDaniel
Attorney General

DM/RO:cyh