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June 29, 2010

The Honorable Anthony J. Portantino
Assemblymember, 44th District
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0044

RE: Indexed Letter Opinion No. 09-0504

Dear Assemblymember Portantino:

You have asked the Attorney General to provide you with a legal opinion on the following questions:

1. Does Business and Professions Code section 2472 grant podiatrists the right to perform an admitting history and physical in an acute care hospital?

2. If so, is the history and physical limited solely to their defined scope of practice?

Because your questions address an issue that we believe is unlikely to have broad application, our office has determined that this letter opinion, rather than a formal published opinion, would provide the best vehicle for response. This opinion will not be disseminated in the same manner as our published opinions, and is not citable in the same manner as our published opinions. It is provided to you in consideration of our duties and authority under Government Code section 12519. It is not provided in the context of a confidential attorney-client relationship and does not constitute confidential legal advice.

The scope of practice of podiatric medicine is prescribed in Business and Professions Code section 2472:

> (a) The certificate to practice podiatric medicine authorizes the holder to practice podiatric medicine.
>
> (b) As used in this chapter, "podiatric medicine" means the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the ankle and tendons that insert into the foot and the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot.

(c) A doctor of podiatric medicine may not administer an anesthetic other than local. If an anesthetic other than local is required for any procedure, the anesthetic shall be administered by another licensed health care practitioner who is authorized to administer the required anesthetic within the scope of his or her practice.

(d) (1) A doctor of podiatric medicine who is ankle certified by the board on and after January 1, 1984, may do the following:

(A) Perform surgical treatment of the ankle and tendons at the level of the ankle pursuant to subdivision (e).

(B) Perform services under the direct supervision of a physician and surgeon, as an assistant at surgery, in surgical procedures that are otherwise beyond the scope of practice of a doctor of podiatric medicine.

(C) Perform a partial amputation of the foot no further proximal than the Chopart's joint.

(2) Nothing in this subdivision shall be construed to permit a doctor of podiatric medicine to function as a primary surgeon for any procedure beyond his or her scope of practice.

(e) A doctor of podiatric medicine may perform surgical treatment of the ankle and tendons at the level of the ankle only in the following locations:

(1) A licensed general acute care hospital, as defined in Section 1250 of the Health and Safety Code.

(2) A licensed surgical clinic, as defined in Section 1204 of the Health and Safety Code, if the doctor of podiatric medicine has surgical privileges, including the privilege to perform surgery on the ankle, in a general acute care hospital described in paragraph (1) and meets all the protocols of the surgical clinic.

(3) An ambulatory surgical center that is certified to participate in the Medicare Program under Title XVIII (42 U.S.C. Sec. 1395 et seq.) of the federal Social Security Act, if the doctor of podiatric medicine has surgical privileges, including the privilege to perform surgery on the ankle, in a general acute care hospital described in paragraph (1) and meets all the protocols of the surgical center.

> (4) A freestanding physical plant housing outpatient services of a licensed general acute care hospital, as defined in Section 1250 of the Health and Safety Code, if the doctor of podiatric medicine has surgical privileges, including the privilege to perform surgery on the ankle, in a general acute care hospital described in paragraph (1). For purposes of this section, a "freestanding physical plant" means any building that is not physically attached to a building where inpatient services are provided.
>
> (5) An outpatient setting accredited pursuant to subdivision (g) of Section 1248.1 of the Health and Safety Code.
>
> *(f) A doctor of podiatric medicine shall not perform an admitting history and physical examination of a patient in an acute care hospital where doing so would violate the regulations governing the Medicare program.*
>
> (g) A doctor of podiatric medicine licensed under this chapter is a licentiate for purposes of paragraph (2) of subdivision (a) of Section 805, and thus is a health care practitioner subject to the provisions of Section 2290.5 pursuant to subdivision (b) of that section.[1]

Although subdivision (f) prohibits a podiatrist from performing an admitting history and physical ("H&P") "where doing so would violate the regulations governing the Medicare program," the provision is not actually a substantive restriction of a podiatrist's scope of practice. The language of this subdivision was placed in the statute in response to a former federal rule, which imposed restrictions upon federal reimbursement for podiatric services performed pursuant to the Medicare program. That rule has since been superseded. Current federal regulations at 42 C.F.R. § 410.25 provide: "Medicare Part B pays for the services of a doctor of podiatric medicine, acting within the scope of his or her license, if the services would be covered as physicians' services when performed by a doctor of medicine or osteopathy."[2]

We believe that a licensed podiatrist may perform an admitting H&P in an acute care hospital. This is so because, unlike a medical professional's legally authorized scope of practice, which is prescribed by statute, an H&P is not a statutorily regulated matter. It is, instead, a matter within a practitioner's standard of care, which can be broadly defined as "that degree of

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[1] Emphasis added.

[2] We are not aware of any federal statute or regulation that prohibits a podiatrist from performing an H&P. Even if federal law continued to refuse reimbusement for the services provided by a podiatrist when taking an H&P, we doubt that providing such services in the absence of reimbursement would "violate the regulations governing the Medicare program" within the meaning of section 2472.

learning and skill ordinarily possessed by [practictioners] of good standing, practicing in the same or a similar locality and under similar circumstances."[3] Whether a provider has met the applicable standard on a given occasion depends upon the nature of the discipline involved and the circumstances unique to that occasion. In a medical malpractice action, for example, "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts."[4] Failure to meet the standard by one who owes a duty of care exposes the actor to liability for negligence.

Section 2472 introduces an element of confusion by imposing an anomalous contingent restriction on an aspect of a podiatrist's professional *standard of care* in a statute that in all other respects confines itself to the *scope of a podiatrist's practice*. Confusing matters further, the restriction does not address itself to the propriety of a particular medical procedure, or to a podiatrist's competence to perform it, but concerns itself solely with the presence or absence of limiting language in federal Medicare reimbursement regulations.

Notwithstanding the confusing language of section 2472(f), however, the legal issue presented by your question is a straightforward one: that is, whether a podiatrist may legally perform an admitting H&P in an acute care hospital.[5] The answer is that California law does not restrict a podiatrist from performing an admitting H&P, except where that procedure is prohibited under federal law—which, as we have noted, is not the case. This answer, however, appears to beg a second question, that is, whether an admitting H&P is within the standard of care of podiatry.

Although issues regarding the applicable standard of care are ultimnately questions of fact requiring expert testimony, we are informed that taking an H&P is unquestionably within that standard for podiatrists. "A complete history and physical exam is the cornerstone of good patient care."[6] Further, "[m]any of the problems encountered by podiatrists could be avoided by an adequate examination."[7] Obtaining a patient's medical history and conducting a physical examination is essential to meeting the applicable standard of professional care. In the normal course of practice a podiatrist should obtain a detailed medical history, which should include any systemic diseases, such as heart, kidney, high blood pressure, broken bones, numbness, cramps, anemia, varicose veins, cancer, epilepsy, liver, and vascular problems. It should also include any medications the patient is on or has been on, as well as those medications to which the patient is allergic or sensitive. The history should, among other things, address the duration and onset of the current symptomatology, the patient's family history and any physicians the patient is

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[3] *Pedesky v. Bleiberg,* 251 Cal. App. 2d 119, 122 (1967).

[4] *Alef v. Alta Bates Hosp.,* 5 Cal. App. 4th 208, 215 (1992).

[5] Health & Safety Code section 1316 prohibits health facilities from discriminating against or denying staff privileges to podiatrists acting within the scope of their licensure.

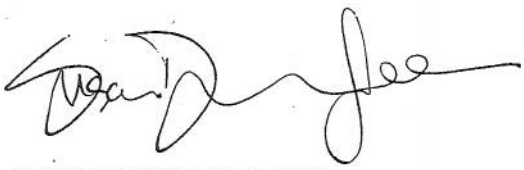
[6] *Medical Malpractice: Guide to Medical Issues* § 40.100 (Matthew Bender & Co., Inc., 2010).

[7] Louisell & Williams, *Medical Malpractice* § 17C.12 (Matthew Bender & Co., Inc., 2010).

currently seeing. Depending upon what is revealed by the patient's history, the podiatrist may also need to contact other medical professionals who have provided treatment. The physical examination should include laboratory values, among other factors, that bear on the patient's condition as suggested by the history.[8]

In performing an H&P, podiatrists are guided both by their statutory scope of practice and the standards of professionalism to which they are required to adhere. We conclude that, not only is a podiatrist not precluded from performing an admitting H&P by Business and Professions Code section 2472, but failing to do so may fall below the standard of care expected of podiatrists generally.

Sincerely,



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[8] *Id.* at § 17C.17.