

1981 WL 169436 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 3, 1981

*1 Ms. Lyn H. Hensel
Associate Legal Counsel
University of South Carolina
Legal Affairs and Legislation Columbia, South Carolina
29208

Dear Ms. Hensel:

In response to your request for an opinion from this Office regarding whether or not the performance of a needle muscle biopsy procedure by a non-physician violates [Section 40-47-40, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, my opinion is that it most probably does violate that provision.

[Section 40-47-40](#) provides as follows:

Any person shall be regarded as practicing medicine within the meaning of this article who (a) shall as a business treat, operate on or prescribe for any physical ailment of another, (b) shall engage in any branch or specialty of the healing art or (c) shall diagnose, cure, relieve in any degree or profess or attempt to diagnose, cure or relieve any human disease, ailment, defect, abnormality or complaint, whether of physical or mental origin, by attendance or advice, by prescribing, using or furnishing any drug, appliance, manipulation, adjustment or method or by any therapeutic agent whatsoever.

With that language in mind, I am of the opinion that four separate steps described in the research procedure protocol would constitute a medical/surgical operation within the purview of [Section 40-47-40\(a\)](#). First, an incision of the skin with a scalpel blade was found to be a medical operation in the proceeding before the State Board of Medical Examiners entitled In the Matter of Joseph Serannage, P.A. (filed August 21, 1980). There, a physician's assistant in effect practiced medicine by removing a small cyst from the back of a patient's neck with a scalpel while his supervising physician was not present.

Second, several jurisdictions have long held the "penetration of the skin" to be a surgical operation. Some courts have noted that such language is specifically provided in their statutes [[State v. Houck](#), (Wash.) 203 P.2d 693 (1949); [State v. Wilson](#), (Wash.) 528 P.2d 279 (1974)], while other courts have interpreted statutes similar to [Section 40-47-40](#) to include penetration of the skin within their broad statutory provisions. [Kelley v. Raguckas](#), (Mich.) 270 N.W.2d 665 (1978); [People v. Bovee](#), (Mich.) 285 N.W.2d 53 (1980). Therefore, the scalpel incision plus three other procedures - the insertion into the skin of the biopsy needle, the syringe containing xylocain and possibly the use of the syringe for blood samples - would constitute the practice of medicine under the "penetration of the skin" definition. See, [People v. Bovee](#), *supra* (drawing blood is a surgical operation).

Furthermore, the administering of a prescription drug - the one percent (1%) dose of injectable xylocaine - to an individual would be the relieving of an ailment by the use of a drug and, accordingly, would be included within the practice of medicine as defined in [Section 40-47-40\(c\)](#) and as found by at least one court which has considered the issue. [International Traveler's Ass'n. v. Yates](#), (Tex.) 29 S.W.2d 980 (1930); [McKinney v. Tromley](#) (Tex.) 386, S. W. 2d 564 (1965). The court in [People v. Bovee](#), *supra*, held that even the application of topical medicine to a patient's arm constituted the practice of medicine.

*2 Finally, John L. Ivey, Ph.D., may wish to make application to the State Board of Medical Examiners pursuant to Rule 81-100 of its Rules and Regulations and request that he be allowed to perform the procedure as a physician's assistant under the direct and personal supervision of a licensed physician.

With kind regards,

Karen LeCraft Henderson
Senior Assistant Attorney General

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