

J. Y. Interpretation No.404 (May 24, 1996) *

ISSUE: Does a disciplinary action under Article 25 of the Physician Act taken against a Chinese herbal doctor who does not have a medical doctor's license but treats patients with prescription drugs violate the right of work guaranteed by Article 15 of the Constitution, thus being null and void?

RELEVANT LAWS:

Articles 15 and 23 of the Constitution (憲法第十五條、第二十三條) ; Article 41 of the Medical Service Act (醫療法第四十一條) ; Articles 3 and 25 of the Physician Act (醫師法第三條、第二十五條) ; Article 15 of the Pharmacist Act (藥師法第十五條) ; Article 9 of the Pharmaceutical Affairs Act (藥事法第九條) .

KEYWORDS:

work right (工作權) , principle of specialization (專業原則) , Chinese herbal doctor (中醫師) , Chinese medicine (中藥) , medical service (醫療服務) , prescription drugs (西藥處方) , over-the-counter medicine (限醫師指示使用) , western medicine (西藥) .**

HOLDING: Article 15 of the Constitution provides that the people's right of work should be protected so that

解釋文：憲法第十五條規定人民之工作權應予保障，故人民得自由選擇工作及職業，以維持生計。惟人民

* Translated by Li-Chih Lin, Esq., J.D.

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people can freely choose their work and professions to maintain their livelihood. Because people's work is closely related to the public welfare, and is necessary to improve the public interest, work engaged in and qualifications or other requirements possessed by people should be properly restricted by law. This is evident in Article 23 of the Constitution. To strengthen specialization and task sharing, protect patients' rights and improve the nationals' health, the Physician's Act provides for three categories of physicians-- doctors, Chinese herbal doctors, and dentists--so that physicians from different areas of medicine can provide medical services to patients in accordance with their medical specialties. Article 41 of the Medical Service Act provides that physicians who are in charge of a medical institution should supervise the institution's medical personnel in the performance of medical services in accordance with the specific law governing their areas of medicine. Both regulations are necessary to improve the public interest. Chinese herbal doctors should provide treatments according to traditional Chinese medical methods. If a

之工作與公共福祉有密切關係，為增進公共利益之必要，對於人民從事工作之方法及應具備之資格或其他要件，得以法律為適當之限制，此觀憲法第二十三條規定自明。醫師法為強化專業分工、保障病人權益及增進國民健康，使不同醫術領域之醫師提供專精之醫療服務，將醫師區分為醫師、中醫師及牙醫師。醫療法第四十一條規定醫療機構之負責醫師應督導所屬醫事人員依各該醫事專門職業法規規定執行業務，均屬增進公共利益所必要。中醫師之醫療行為應依中國傳統之醫術為之，若中醫師以「限醫師指示使用」之西藥製劑或西藥成藥處方，為人治病，顯非以中國傳統醫術為醫療方法，有違醫師專業分類之原則及病人對中醫師之信賴。行政院衛生署七十一年三月十八日衛署醫字第三七〇一六七號函釋：「三、中醫師如使用『限醫師指示使用』之西藥製劑，核為醫師業務上之不正當行為，應依醫師法第二十五條規定論處。四、西藥成藥依藥物藥商管理法之規定，其不待醫師指示，即可供治療疾病。故使用西藥成藥為人治病，核非中醫師之業務範圍。」要在闡釋中醫師之業務範圍，符合醫師法及醫療法之立法意旨，與憲法保障工作權之規定，尚無牴觸。

Chinese herbal doctor does not have a medical doctor's license but treats patients with prescription drugs or over-the-counter medicines, he obviously is not providing medical treatment according to traditional Chinese medical methods, and thus violates the principle of specialization and task sharing and the trust patients have in him. Directive No. 370167 issued by the Department of Health in the Executive Yuan stated: "(3) If a Chinese herbal doctor without a medical doctor's license treats patients with prescription drugs, it is deemed to be improper conduct within the scope of medical service, and he thus should be disciplined based upon Article 25 of the Physician Act. (4) Pursuant to the Drugs and Pharmacists Management Act (now the Pharmaceutical Affairs Act), over-the-counter medicines can be dispensed for the treatment of illness by those without a physician's license. Therefore, the dispensing of over-the-counter medicines for patients is not within the scope of a Chinese herbal doctor's medical service." The interpretation of a Chinese herbal doctor's scope of medical service provided by the Depart-

ment of Health in the Executive Yuan complies with the legislative intent of the Physician Act and the Medical Service Act, and is consistent with the right of work guaranteed by the Constitution.

REASONING: Article 15 of the Constitution provides that the right of work of the people should be protected so that people can freely choose their work and professions to maintain their livelihood. Because people's work is closely related to the public welfare, and is necessary to improve the public interest, thus Article 23 of the Constitution explicitly provides that work engaged in and qualifications or other requirements possessed by people should be properly restricted by law. Medical doctors provide medical services for the purpose of maintaining patients' lives and health. To strengthen specialization and task sharing, protect patients' rights and improve the nationals' health, the Physician Act provides for three categories of physicians-- doctors, Chinese herbal doctors, and dentists--so that physicians from different areas of medicine can provide medical services to

解釋理由書：憲法第十五條規定人民之工作權應予保障，故人民得自由選擇工作及職業，以維持生計。惟人民之工作與公共福祉有密切關係，為增進公共利益之必要，對於人民從事工作之方法及應具備之資格或其他要件，得以法律為適當之限制，為憲法第二十三條所明定。醫師執行醫療業務，以維護病人之生命、身體、健康為目的，醫師法為強化專業分工、保障病人權益及增進國民健康，使不同醫術領域之醫師提供其專精之醫療服務，將醫師區分為醫師、中醫師及牙醫師，其資格之取得要件各有不同。醫療法第四十一條亦規定醫療機構之負責醫師應督導所屬醫事人員依各該醫事專門職業法規規定執行業務，均屬增進公共利益所必要。中醫師執行業務，自應依中國傳統醫術，為病人診治，以符病人信賴。倘中醫師兼具醫師資格，為診治疾病需要，併用醫學及中國傳統醫學之醫療方法，為病人診斷及處方者，既在各該專業範圍，自為

patients in accordance with their medical specialties. Under the Physician Act, respective qualifications for doctors, Chinese herbal doctors, and dentists are different. Article 41 of the Medical Service Act also provides that physicians who are in charge of a medical institution should supervise the institution's medical personnel in the performance of medical services in accordance with the specific law governing their areas of medicine. Both regulations are necessary to improve the public interest. To merit patients' trust, Chinese herbal doctors should provide treatments according to traditional Chinese medical methods. If a Chinese herbal doctor, who also has a medical doctor's license, in the treatment of a disease or illness, applies methods of western medicine and traditional Chinese medicine, it is within the scope of his expertise and is thus a proper conduct of medical service. It is clearly evident by Article 3, Paragraph 1, Subparagraph 2, of the Physician Act which provides that a person who has graduated from a medical school, and has taken required courses in Chinese medicine, and has passed the Chinese herbal

業務上之正當行為。此觀醫師法第三條第一項第二款後段規定醫學系科畢業，並修習中醫必要學科者，得應中醫師檢覈，是同一人得兼具醫師及中醫師雙重資格，法意至明。除此情形外，中醫師若以「限醫師指示使用」之西藥製劑或西藥成藥處方，為人治病，即違背醫師專業分類之原則及病人對中醫師基於傳統醫術診治疾病之信賴。縱中醫師兼具藥師資格，亦同。藥師業務依藥師法第十五條第一項規定為「一、藥品販賣或管理。二、藥品調劑。三、藥品鑑定。四、藥品製造之監製。五、藥品儲藏、供應與分裝之監督。六、含藥化粧品製造之監製。七、依法律應由藥師執行之業務。」準此，藥師不得自行調劑藥品為病人診治。至於西藥製劑「限醫師指示使用」者，所稱「醫師」不包括中醫師，自非中醫師於處方上所得指示使用。又所謂成藥，依藥事法第九條規定，係指原料藥經加工調製，不用其原名稱，其摻入之麻醉藥品、毒劇藥品不超過中央衛生主管機關所規定之限量，作用緩和，無積蓄性，耐久儲存，使用簡便，並明示其效能、用量、用法、標明成藥許可證字號，其使用不待醫師指示，即供治療疾病之用之藥品。中醫師如以西藥成藥處方為病人治療疾病，顯

doctor's qualification exam, is a person who possesses both a medical doctor's and Chinese herbal doctor's licenses. Except for the abovementioned situation, if a Chinese herbal doctor treats patients with prescription drugs, or over-the-counter medicines which should not be given to patients by those without a medical doctor's license, he violates the principle of specialization and task sharing and the trust patients have in him for treatments in accordance with traditional Chinese medical methods. This restriction is applicable to a Chinese herbal doctor who also has a pharmacist's license. Article 15 of the Pharmacist Act states: "Services provided by pharmacists are: (1) sales or administration of pharmaceutical products, (2) prescription and preparation of pharmaceutical products, (3) appraisal of pharmaceutical products, (4) supervision of the manufacture of pharmaceutical products, (5) supervision of the storage, supply, and packaging of pharmaceutical products, (6) supervision of the manufacture of cosmetics containing medicine, and (7) those which should be performed by pharmacists under the law." Therefore,

非以擅長之傳統醫術施醫。行政院衛生署七十一年三月十八日衛署醫字第三七〇一六七號函釋：「三、中醫師如使用『限醫師指示使用』之西藥製劑，核為醫師業務上之不正當行為，應依醫師法第二十五條規定論處。四、西藥成藥依藥物藥商管理法（已修正為藥事法）之規定，其不待醫師指示，即可供治療疾病。故使用西藥成藥為人治病，核非中醫師之業務範圍。」要在闡釋中醫師之業務範圍，符合醫師法及醫療法之立法意旨，與憲法保障工作權之規定，尚無牴觸。

a pharmacist should not treat patients with pharmaceutical products he himself prescribes. As to some prescription drugs which should not be given to patients by those without a medical doctor's license, the "doctor" therein does not include the Chinese herbal doctor. Thus, Chinese herbal doctors should not treat patients with prescription drugs. In addition, Article 9 of the Pharmaceutical Affairs Act provides that over-the-counter medicines should be processed and produced from raw herbs. However, the original names of the raw herbs should not be used for labeling purposes. Below restrictive amount of anesthetic or poison regulated by the central health authority is added to over-the-counter medicines. Thus, their treatment effects are mild and without residue. They can be stored for a long period of time and are easy to use. Their treatment effects, dosage, usage, and permit numbers should all be clearly labeled. They can be taken by patients to treat diseases/illnesses without the requirement of a medical doctor's prescription. If a Chinese herbal doctor treats patients with over-the-counter medicines, he obviously does not treat patients with

traditional Chinese medical methods. Directive No. 370167 issued by the Department of Health in the Executive Yuan stated: “(3) If a Chinese herbal doctor without a medical doctor’s license treats patients with prescription drugs, his conduct is deemed to be improper within the scope of medical service, and he thus should be disciplined under Article 25 of the Physician Act. (4) Pursuant to the Drugs and Pharmacists Management Act (now the Pharmaceutical Affairs Act), over-the-counter medicines can be used to treat illnesses without the requirement of a medical doctor’s prescription. Therefore, treating patients with over-the-counter medicines is not within the scope of a Chinese herbal doctor’s medical service.” The interpretation of a Chinese herbal doctor’s scope of medical service provided by the Department of Health in the Executive Yuan complies with the legislative intent of the Physician Act and the Medical Service Act, and is consistent with the right of work guaranteed by the Constitution.

Justice Geng Wu filed dissenting opinion.

本號解釋吳大法官庚提出不同意見書。