

Part 2 – The Appellate Court Dodged Several Serious Issues – They Remain Open!

This act shall not be “construed so as to discriminate against any particular school of chiropractic, or any other treatment....” (Sec. 16 of the California Chiropractic Act.)

The plaintiffs in the recent California practice rights case sought a revision of the scope of chiropractic practice by having the courts consider the entire original ballot measure, section 16 of the act quoted above and related matters. This article will address the ballot measure and non-discrimination issues but additional issue can be reviewed at www.prescott-law.com.

The Attorney General’s Office (AG) argued on behalf of the Board of Chiropractic Examiners (BCE) that the original ballot measure was irrelevant and that it was also irrelevant that there was more than one school of chiropractic thought prior to 1922. Rather, the AG asserted that the scope of practice had been properly defined in the 1938 *Fowler* case in which Dr. Fowler had been charged with practicing medicine without a license for performing an abortion.

Initially, the trial court, in effect, agreed to hear the evidence briefly discussed below and the related matters. Then, on a second go-round, she made a 180 degree turn and refused to hear any evidence as to the original intent or as to the existence of more than one school of chiropractic thought. The appellate court agreed with this second ruling by simply ignoring portions of the case presented by the plaintiffs.

The non-discrimination issue

In 1912 the United States Supreme Court ruled that states could prescribe minimum education and training requirements for the practice of any of the healing arts. Incredible as it may now seem, prior to 1912 it had been generally thought that any such state prescribed curriculum would violate due process of law. Many states, including California, immediately (1913) repealed their prior medical practice laws and enacted new statutes prescribing the education and training required to practice any of the healing arts. The 1913 Medical Practice Act (MPA) provided for the licensing of physicians and surgeons and drugless practitioners. Drugless practitioners were authorized “to treat diseases, injuries, deformities, or other physical or mental conditions” without the use of drugs or surgery.

Many chiropractors (mixers) became licensed as drugless practitioners but others refused to do so. However, many of these mixers still preferred to be licensed under a separate law. Between 1913 and 1921, 14 bills were introduced to get a chiropractic law passed and 2 attempts were made to obtain an initiative act. (The legislature only met every other year - 16 attempts in 5 legislative years.) These bills demonstrate that each time the mixers proposed a bill the straights proposed a different one, and visa versa. As a result, they all failed. Then, in 1922 and with BJ’s support, a compromise initiative act was presented to the voters and voted into law. The compromise included the provision requiring that the act be construed so as to not discriminate against either side.

No case prior to the *Tain* case (including *Fowler*) had sought enforcement of the non-discrimination provision in section 16 of the act. The *Tain* plaintiffs alleged the existence of at least two “schools of chiropractic” before 1922 and that the scope of practice defined in *Fowler* and in the present BCE scope rule is discriminatory. On page 624 of its opinion, the *Tain* court states that the plaintiffs

“made no showing” that such differences (straights/mixers) existed. Then, in footnote 10 to its opinion the court quotes the plaintiffs’ definition of “mixers” from paragraph 17 of the plaintiffs’ complaint and states that “**The second school is not described in the record**”. The “**second school**” (straights) **was described** in paragraph 16 of the complaint - **immediately next to the paragraph quoted by the court**. This error, (along with 7 other similar distortions of the record and plaintiffs’ position) was brought to the court’s attention on a petition for rehearing, but to no avail. (See www.prescott-law.com.)

Omitted Parts of Act

The Chiropractic Act presented to the voters in 1922 was composed of two parts. The first part (then 19 sections – now 20 – see BCE web site) established the structure and operation of the BCE and the profession. The second part, which is actually longer than the first 19 section part, made provisions of the 1913 MPA applicable to chiropractors but modified specified portions of the 1913 MPA as they were to be applied, or not applied, to chiropractors. It is virtually impossible to properly interpret the first (19/20 section) part without also considering the whole 1913 MPA and the specific changes made as applied to chiropractors by the second part.

The initiative was published in the California statutes in 1923 and the whole second part was simply omitted. (See www.prescott-law.com.) The BCE has never considered the entire act in defining the chiropractic scope of practice and nobody prior to the *Tain* case (including Fowler) brought the entire act to any court’s attention. Reading the entire act with the 1913 MPA and related matters it becomes obvious that chiropractors were intended to have the same basic practice right as did drugless practitioners under the 1913 MPA - “to treat diseases, injuries, deformities, or other physical or mental conditions” except as otherwise limited. The (exceptions) limitations were differently stated as to drugless practitioners and chiropractors but I will not get into those details here.

The appellate court dodged consideration of the entire act by claiming that the plaintiffs did not explain “how the *Fowler* and *Crees* cases should have been decided differently had the courts addressed these unpublished portion (sic) of the Chiropractic Act.” In a sense, the court is partially correct. The second (unpublished) portion would not have authorized *Fowler* to perform an abortion.

But, the unpublished portion would have totally changed the scope of practice as defined in the *Fowler* case and the BCE’s scope rule. (The BCE scope rule is based upon the definition in *Fowler*.) In addition, no chiropractor (including Fowler) was, or is, subject to prosecution for practicing medicine without a license. The section in the 1913 MPA providing for such prosecutions was expressly modified in the second (unpublished) portion of the 1922 act so that a chiropractor who exceeds his or her scope of practice is to be prosecuted under the terms and provisions of the chiropractic act, not for practicing medicine without a license.

The BCE Should Re-Consider The Scope of Practice

Because the *Tain* court(s) did **not** actually consider the entire chiropractic act, or the non-discrimination provision, the impact of these points on the scope of practice remains undecided. The BCE should now reconsider the chiropractic scope of practice in the context of these provisions and related matters. Three of the five plaintiffs in the *Tain* case, along with two additional chiropractors, have filed papers with the BCE to achieve that objective. We will address the BCE’s response elsewhere.

The courts will not pay much heed to chiropractors' practice rights claims until the BCE, and Boards in other states, act to fully define those rights and the chiropractic paradigm(s); including the chiropractic "big idea". We will return to the "big idea" in subsequent articles.

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