Lessons from the 2005 California Practice Rights Case David Prescott, M.A, JD, DC

Part 5 – Who's in Charge? – "Practice Chiropractic As Taught in Chiropractic Schools"

In part 3 of this series we pointed out that society has three basic choices for regulating "medical" practice: "1) Put the "medical" schools in charge (by requiring graduation from a "legally chartered school"), 2) Grant private "medical" societies/associations the power to approve licensees (with or without examination), or 3) Reserve the primary authority to the Executive (administrative) Branch of the state government itself."

We previously demonstrated California tried putting the schools and/or the associations in charge between the first Medical Practice Act (MPA) of 1876 and 1913. In 1913 the format that still exists today was established. The state licensing boards (California BCE) are primarily in charge and the Governor exercises indirect control through his power to appoint members to the state boards. (The BCE's power is derived from its authority to initially interpret the Chiropractic Act and to apply and fill-in the specifics of that law. This power is subject to judicial review.) In addition, the state legislatures ordinarily play a basic role by adopting and amending the licensing laws. However, the California voters adopted the present chiropractic law and the California Legislature cannot presently amend that law. Therefore, the regulatory power of the BCE becomes even more important.

The 1913 MPA based the practice rights of all licensees upon completion of **prescribed education and training** and related examinations. Indeed, this **prescribed training-practice rights principle** is now applied to virtually all license categories from acupuncturists and private investigators to x-ray technicians. Unfortunately, the Attorney General's Office, the California courts and the BCE have all failed to apply this "**principle**" to the practice rights of chiropractors. In part, this is because the California Chiropractic Act provides that chiropractors are authorized to "practice chiropractic as taught in chiropractic schools or colleges". What does this mean?

As Taught Question

Many chiropractors have gone to court and argued that the authority to "practice chiropractic as taught in chiropractic schools or colleges" means that they are entitled to practice anything they are taught in school. Obviously, that sounds reasonable. Indeed the first two courts to address this question seemed to agree.

The question was first addressed in *Evans v. McGranaghan* (1935). The *Evans* court concluded that the "as taught" expression is ambiguous but that it is part of the definition of the chiropractic scope of practice. It held, however, that it was not in a position to properly define the intended scope of practice because no evidence had been introduced in the trial court as to what was **actually** taught in chiropractic colleges. This gave chiropractors the false hope that all they had to do was show that they had been taught some form of practice in school and they would then be recognized as having the right to do it.

If the *Evans* trail court had been presented with the actual 1922 Ballot measure it would have seen that what was to be taught in chiropractic colleges was specifically prescribed in Section 5 of the

act which is just a couple of inches above the "as taught" language. It becomes obvious when you look at this relationship that the "as taught" language means **as prescribed to be taught**.

The "as taught" question was next raised in the case of *In Re Hartman* (1935). There, a chiropractor had been convicted of practicing medicine without a license but again he failed to introduce any evidence that he had been actually taught to do what he had been practicing. The *Hartman* court once again held that it could not decide what the "as taught" expression meant without evidence as to what was **actually** taught. Once again, the ballot was not introduced into evidence and was not inspected by the court.

The *Hartman* court did, however, raise a very serious point by stating that the as taught language "cannot be taken as authorizing a license to do anything and everything that might be taught in such a school. A short course in surgery or one in law might be given, incidentally, and it would not follow that the section would then authorize a licensed chiropractor to engage in such other professions." The *Tain* plaintiffs agreed this is a serious issue. But, the answer is simple. To repeat, the provision means as prescribed to be taught and the prescribed curriculum does not include either "surgery" or "law".

So what does it mean to say that chiropractors may practice based upon completion of the prescribed curriculum? The *Tain* plaintiffs argued that to understand this concept it is necessary to compare the prescribed curriculum for chiropractors under the 1922 act with the prescribed curriculum for drugless practitioners under the 1913 MPA and related evidence, including the 1922 ballot measure itself, the fact that many chiropractors were, in 1922, already practicing as "drugless practitioners" under the 1913 MPA and additional evidence about the different "schools of chiropractic" that existed in 1922, etc. As discussed in Part 2, the *Tain* court dodged this evidence and adopted the definition of the chiropractic scope of practice from the *Fowler* and *Crees* cases which, in effect, held that there is **no** connection between what chiropractors are taught and their practice rights. (The *Fowler* and *Crees* plaintiffs did not attempt to introduce into evidence the 1922 ballot measure itself or any of the other evidence necessary to properly interpret the original intent of the 1922 act.)

This is not the time or place to go through all the evidence necessary to properly understand the originally intended scope of practice under the 1922 act. (See www.prescott-law.com → Site Map → BCE materials, 5-3-06 "Position Statement", p. 11.) There are two analytically separate points relative to scope of practice: 1) WHAT are chiropractors authorized to diagnose and treat? 2) HOW are they entitled to treat? The WHAT: California drugless practitioners and chiropractors were both intended to be authorized to diagnose and "treat diseases, injuries, deformities, or other physical or mental conditions". But, the HOW was expressly limited as to both drugless practitioners and chiropractors. In essence, chiropractors were limited to treating by means other than the use of allopathic drugs or operative surgery.

Electives

The curriculum prescribed by the 1922 act required the completion of 2400 hours of specified coursework. In 1948 the California Legislature placed an amendment on the ballot to increase the curriculum to 4000 hours and to allow for up to 17% of the 4000 hours to be electives. The amendment was approved by the voters, but was never implemented by the BCE or the chiropractic colleges.

In 1976/78 the Legislature placed amendments on the ballots that resulted in the elective hours being changed to 15% of the prescribed curriculum. The *Tain* plaintiffs argued, and the *Tain* court agreed, that it is mandatory for 15% of chiropractic education for practice in California to be in electives. Obviously, this places a potential burden on the schools, the CCE, the NBCE and perhaps the professional associations. But, it may also generate a benefit to the chiropractic community as a whole. This issue deserves careful analysis and I will make a contribution to that process in the next article.

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