

**CHIROPRACTOR PROSECUTED FOR RECOMMENDING VITAMINS
WHY? WHAT TO DO?**

The long, confused and, in my opinion, largely mishandled law of California chiropractic scope of practice came home to roost for one chiropractor recently in Santa Clara County when he was charged with having practiced medicine without a license for, among other things, recommending the use of Vitamin A. A long line of California cases have ruled that a chiropractor cannot be guilty of practicing medicine without a license so long as what was done falls within his/her scope of practice. Thus, the question of whether, and under what circumstances, a chiropractor may recommend the use of vitamins was clearly raised in this Santa Clara case.

In an article (Dissent 7) written towards the end of last year and published in this paper January 26, 1998, I suggested somebody might be prosecuted for recommending the use of vitamins unrelated to an adjustment. I did not, however, expect to see it happen quite so soon. I took this position because Rule 302 has, essentially, established "straight" chiropractic for California.

I was asked to file an Amicus Curiae (friend of the court) brief in the Santa Clara County "vitamin case". The criminal defense attorney and Mr. Michael Schroeder, the attorney for the California Chiropractic Association (CCA), presented a trial brief to the court addressing the California scope of practice issues. They did not, however, attack the validity of the chiropractic "Boards" scope of practice rule (Rule 302). In my opinion, the rule itself should have been directly attacked as unlawfully limiting our scope of practice to straight chiropractic. I intended to attack Rule 302 in the Amicus Curiae brief.¹ I did not, however, get a chance to present the arguments I will outline here because the case was settled by plea bargain before I filed the Amicus brief.

However, some other chiropractor may face a similar charge in the future and I therefore feel compelled to more fully express my legal opinions on the California scope of practice issues.² I will argue that prior chiropractic cases have all reflected a fatal flaw - they have taken the position that Section 7 of the chiropractic act is the only section which defines the scope of practice. That is not correct. Section 5, which spells out the required curriculum, must be read together with Section 7. The Chiropractic Board's present scope of practice rule (Rule 302) is founded on only Section 7 and is, therefore, not an appropriate expression of the chiropractic scope of practice. [TAKE NOTE, HOWEVER: RULE 302 (STRAIGHT PRACTICE) SHOULD BE OBEYED UNLESS AND UNTIL APPROPRIATELY CHALLENGED AND CHANGED.]

CHIROPRACTIC ACT - SECTION 7

Section 7 of the chiropractic act is a central, (but, to repeat, not exclusive) factor in attempting to understand the California chiropractic scope of practice and an appropriate starting point for our analysis. Section 7 states:

"One form of certificate shall be issued by the board of chiropractic examiners, which such certificate shall be designated 'License to practice chiropractic,' which license shall authorize the holder thereof to practice chiropractic AS TAUGHT in chiropractic schools or colleges; and,

also, to use all necessary MECHANICAL, and HYGIENE AND SANITARY measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in materia medica." (Emphasis added.)

Obviously, this language is problematic: What does "AS TAUGHT" mean? What is MECHANOTHERAPY? why the language HYGIENE and SANITARY measures?

The primary focus of attention in previously litigated cases has been the language "AS TAUGHT IN CHIROPRACTIC SCHOOLS & COLLEGES". In a long line of cases, chiropractors have gone to court and argued that the language "as taught" means they can do anything and everything they are actually taught in school. Only one court (Evans v. McGranaghan (1935) - San Francisco) has accepted this approach. A long line of cases, culminating in the infamous CREES case (1963), have rejected this line of reasoning.

Both Mr. Schroeder and I agree that the language "as taught" does not mean that one can do something just because you take a course in that subject in chiropractic school. The California courts have repeatedly addressed this point by stating such things as - a chiropractor cannot successfully claim the right to do brain surgery just because he/she has a course in that subject. This is obviously correct. But then, what does the language "as taught" really mean? This is where Mr. Schroeder and I part company. I will present my analysis after a brief look at the CREES case and the present Rule 302.

CREES CASE

In CREES, the chiropractors argued they had a right to 1) Use all types of diagnostic procedures, 2) Use drugs, except for treatment, 3) practice obstetrics, 4) use analgesics, germicides etc., 5) Use hypodermics, 6) sever tissues, and 7) do anything known as a medical office procedure. They argued that they were entitled to do these things because 1) they were actually taught them in school (not because they were part of the curriculum prescribed in Section 5 of the Act. See below) and 2) because the language from Section 7 of the Act which states that the Act "shall not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in materia medica" is surplusage and should just be ignored by the court. No way was the court going to just write that language out of the statute. The CREES chiropractors did not, however, raise any argument based upon the 1948 amendment to the chiropractic act as I discussed in my prior article (Dissent 7) and which I will address again briefly towards the end of this article.

The chiropractors in CREES should have expected the ruling they received. That is, in effect, a chiropractor cannot do anything except adjust and may only utilize other forms of treatment as a direct adjunct to an adjustment.

HISTORY OF RULE 302

The CCA proposed the original form of what is now Rule 302 to the Board of Chiropractic Examiners (Board) in 1986. In my opinion, the CCA's proposed rule grossly underestimated the chiropractic scope of Even so, the Medical Board, the California Medical Association and others brought a legal action in 1987 to have the new Rule declared invalid as having unlawfully extended the chiropractic scope of

practice. The litigation was settled in 1990 when the financial cost of the litigation became too burdensome.

Mr. Schroeder represented the Board of Chiropractic Examiners in the "Rule 302" case after the California Attorney General conflicted off the case due to the fact that his office represents both the Chiropractic Board and the Medical Board. Although Mr. Schroeder's arguments in the Rule 302 case (repeated in the "vitamin case") deserve extended analysis, space does not permit that here. Suffice it to say, he basically argued that Section 7 of the Act (quoted above) provides the exclusive definition of the chiropractic scope of practice. He did not rely, in any way, on the provisions of the 1948 amendment to the Act. He was, therefore, unable to avoid application of the CREES case to our scope of practice and in the Judge's Order approving the 1990 settlement of the Rule 302 case it is specifically stated:

"The provisions of the "Amended Section 302" (that produced by the settlement and which is the present rule) is consistent with and supported by the holdings and judgments of the trial court and appellate court in CREES v. CALIFORNIA STATE BOARD OF MEDICAL EXAMINERS(citation omitted)."

In my opinion, a different analysis from that offered to the court in both the Rule 302 and vitamin cases was available and should have been presented. (See fn. 2) Perhaps, however, it is better in the long run that the argument I present below has not been previously raised. The times are clearly more "ripe" for such arguments than at any time in the past. (See "CONCLUSIONS" and my prior articles.)

A DIFFERENT ANALYSIS

The case law between 1913 and 1922, together with the 1922 ballot pamphlet itself and related statutes, clarify the intent of the voters who 'enacted' the 1992 ballot initiative into law. More specifically, these factors clarify the language of Section 7 about "as taught in chiropractic school" and also the references about "mechanical" and "hygiene and sanitary" measures (Also, the obstetrics issue).

Several chiropractic cases went to the California Supreme Court in the years 1915 to 1917. I will, due to the space limitations of this article, only address one argument raised in these cases.

In 1916, T.F. Ratledge (the former owner of what is now Cleveland Chiropractic College and a leader of the "straights") was convicted of having practiced medicine without a license. He took his case to the California Supreme Court. His primary argument was, as stated by the court itself:

"The argument is made that because the law includes such subjects as histology, elementary chemistry, toxicology, physiology, elementary bacteriology, and pathology in the examinations to be taken by applicants for certificates to practice as drugless healers, it is unfair, because these are standard courses of study in the preparation of physicians and surgeons, but are not needed in the art of those who intend to alleviate human suffering by manual and **mechanical** means only." (emphasis added.)

The court, in upholding his conviction, gave this argument short shrift:

"WE CONCLUDE THAT THERE IS NOTHING UNREASONABLE IN THE CURRICULUM PRESCRIBED BY THE MEDICAL PRACTICE ACT FOR THOSE WISHING TO SECURE LICENSES TO PRACTICE THE ART OF DRUGLESS HEALING."

The handwriting was on the wall - get the **PRESCRIBED** education or quit your practice and go to jail. But, it was also clear that straights, and also mixers (eclectics - those using herbs/homeopathics, etc.) and naturopaths, did not want to be under the medical board. Therefore, in 1922, these three groups went to the people with a ballot measure to create a new board to regulate the three groups as one profession. But, a debate arose as to what to call the new profession and new license.

IMAGINARY 1922 DIALOGUE

DR. "MIXER": Let's call the new board - Board of Drugless Physicians.

DR. "NATUROPATH": No, how about Naturopathic Board of Examiners.

DR. RATLEDGE: No way. The straights have been the one's discriminated against. It must be "Board of Chiropractic Examiners" and the license must be to practice "chiropractic" (The straights had the other groups outnumbered.)

"MIXER/NATUROPATH" CHORUS: We have a problem with that. But, we are going to have basically the same curriculum under the new board as under the drugless practitioner statute so let's say not just "Chiropractic", but "chiropractic as taught in chiropractic school". Further, we need a strong provision specifically prohibiting discrimination against any of us by the new board (The prohibition was, and still is, stated in Section 16 of the 1922 Act: the chiropractic act shall not be "construed so as to discriminate against any particular school of chiropractic, or any other treatment.")

"STRAIGHTS": We can live with that. You've got a deal.

This compromise agreement shouts forth from a careful inspection of the actual 1922 ballot pamphlet, the Act itself and the related history.

THE 1922 BALLOT PAMPHLET

"chiropractic as taught. . ."

If one looks at the actual 1922 Ballot pamphlet the meaning of the expression "as taught" (Section 7) becomes abundantly clear. In the "pamphlet", the new (**prescribed**) chiropractic curriculum (Section 5 - see below.) is on the same page as Section 7 and about 3 inches above it. The two would have been quite obviously interrelated in the eyes and minds of the voters. Two pages further on in the ballot pamphlet the prescribed curriculum for the drugless practitioner certificate (under the 1913 Act - see below.) is laid out for comparison by the voters in 1922. "As taught in chiropractic schools and colleges" refers to

the curriculum prescribed in Section 5. But why? That only becomes clear from a comparison of the 1922 chiropractic curriculum with the 1913 drugless practitioner curriculum.

1913 Drugless Practitioner Curriculum (from 1922 chiropractic ballot pamphlet)

ANATOMY	485 HOURS
HISTOLOGY	115 HOURS
ELEMENTARY CHEMISTRY & TOXICOLOGY	70 HOURS
PHYSIOLOGY	200 HOURS
ELEMENTARY BACTERIOLOGY	40 HOURS
<u>HYGIENE</u>	45 HOURS
PATHOLOGY	150 HOURS
DIAGNOSIS	370 HOURS
MANIPULATIVE & <u>MECHANICAL THERAPY</u>	260 HOURS
<u>GYNECOLOGY</u>	100 HOURS
<u>OBSTETRICS</u>	165 HOURS
TOTAL -----	2000 HOURS

(Emphasis added.)

1922 chiropractic Curriculum (Section 5 - 1922 ballot)

ANATOMY	600 HOURS
HISTOLOGY	100 HOURS
ELEMENTARY CHEMISTRY & TOXICOLOGY	100 HOURS
PHYSIOLOGY	200 HOURS
BACTERIOLOGY	100 HOURS
<u>HYGIENE & SANITATION</u>	100 HOURS
PATHOLOGY	200 HOURS
DIAGNOSIS OR ANALYSIS	400 HOURS
<u>CHIROPRACTIC THEORY & PRACTICE</u>	500 HOURS
<u>OBSTETRICS & GYNECOLOGY</u>	100 HOURS
TOTAL-----	2400 HOURS

(Emphasis added.)

In 1924, the California Supreme Court compared these two curricula. (People v. La Barre - this case has been overlooked in every chiropractic case since 1924.) and stated:

"It will be observed that a license issued under the initiative or chiropractic act confers a higher mark of learning and efficiency upon its holder than does a drugless practitioner's certificate issued under the Medical Practice Act. The minimum educational requirements of the chiropractic or initiative act call for a course of study embracing the same subjects as the Medical Act, but it extends over a period of two thousand four hundred hours as against two thousand hours for the drugless practitioner. This of itself, from a professional or business

standpoint, would give an advantage in public favor to the licentiates under the chiropractic act over the drugless practitioners...."

Obviously, the advantage of the chiropractic license would be illusory (to mixers & naturopths) if the practice rights of "chiropractors" were to be less than those of the drugless practitioner.

Three differences between the two curricula (in addition to the extra 400 hours) must be noted in order to fully understand the meaning of the language used in Section 7 of the chiropractic act.

"Mechanical Therapy"

"Mechanical therapy" was a prescribed course under the drugless practitioner curriculum but was not specifically listed under the chiropractic curriculum. Thus, the clarification in Section 7 that the chiropractic license was to allow the "use of all mechanical . . . measures incident to the care of the body." It should also be noted that Dr. Ratledge argued before the Supreme Court in 1916 that straight chiropractic included mechanical therapy. (See above.)

It is also worth noting that by 1920 a license for "chiropody" had been established under the Medical Practice Act and the curriculum prescribed for that license included "mechanical therapy".

"Hygiene and sanitation"

The drugless practitioner curriculum included a course in only "Hygiene" whereas the chiropractic curriculum included a course in "Hygiene **AND** sanitation". Thus, the clarification in Section 7 that the chiropractic license included the "use of . . . hygienic and sanitary measures incident to the care of the body." (See above relative to the number of hours for "hygiene" v. the requirement relative to "hygiene and sanitation".)

"Obstetrics"

The subject of chiropractors and obstetrics has been a major bone of contention since the outset of chiropractic. D.D. Palmer contended that childbirthing was a natural event and within the scope of chiropractic. Many others have disagreed. Obstetrics is specifically excluded under the present California chiropractic scope of practice rule (Rule 302).

Under the 1913 Medical Practice Act, both the drugless practitioner and the physicians and surgeons certificates required completion of **265** hours of **obstetrics and gynecology** and both groups were entitled to do obstetrics. The 1913 Medical Practice Act did not include a separate certificate for midwifery. But, by 1920, a separate license for midwifery had been established. The midwifery certificate required **165 hours of obstetrics**. However, the chiropractic act of 1922 required the completion of a total of **only 100 hours for both obstetrics and gynecology**.

The 1922 ballot arguments informed the voters that chiropractors would not be permitted to perform obstetrics. The reason for this is now obvious: they did not have enough education in the subject of obstetrics to justify their practicing childbirthing. BUT, WHAT WOULD BE A REASONABLE ARGUMENT IF AN OPPORTUNITY TO INCREASE THE EDUCATION IN THESE AND OTHER

AREAS WAS GRANTED? I will address this question further (See 1948 AMENDMENT section.) after a brief digression into a related question.

I realize the conservatives are concerned about the issue of malpractice. Scope of practice relates to the profession as a whole, whereas malpractice relates to the individual practitioner. Lawyers, M.D.'s and others face the same questions and the law is well developed to handle such issues. Each practitioner already has a duty to refer a patient if that patient's problems do not fall within his area of expertise. In addition, if one holds oneself out as competent to practice a broad scope of practice you (not another chiropractor down the street) have a duty to have the education and training needed to make such a claim. In addition, malpractice premiums in other professions are rated according to what a particular practitioner does in his/her practice. That is, an obstetrician pays more than a ear, nose and throat practitioner and a trial lawyer pays more than somebody who just does wills. The same principles could be readily applied in the "chiropractic" arena. In any event, concern over this issue obviously cannot override the non-discrimination clause of Section 16 of the chiropractic act.

1948 AMENDMENT TO SECTION 5

Earlier in the century, the "progressives" felt the need to clarify and expand their education and practice rights. In 1944, they induced the chiropractic board to increase the requirements for a license from 2400 to 4000 hours. Dr. Ratledge sprang to the attack once again and went to court arguing the board did not have the power to increase the requirements. He won in the trial court. But, in 1948 his case was reversed and the appellate court stated that not only did the board have the right to increase the number of hours for licensure, it probably had a duty to do so as knowledge in the "healing arts" had increased significantly since 1922.

Before the reversal of Dr. Ratledge's case in 1948, the legislature itself stepped in to resolve the matter and put a measure on the 1948 Ballot to amend SECTION 5 of the Act to increase the number of hours to 4000 (with 600 hours of electives). Opponents (chiropractors) of this amendment argued that if the people voted in favor of the amendment (with the electives), chiropractors would be able to increase their scope of practice to include "medicine, surgery, and/or obstetrics." The proponents did not disagree. The people voted the amendment into law. The most reasonable inference of reading the electives together with the "as taught" language of Section 7 is that A WINDOW OF OPPORTUNITY WAS CREATED TO CLARIFY AND EXPAND THE SCOPE OF CHIROPRACTIC PRACTICE. However, the expanded right would only extend to those things as to which reasonable competence could be achieved within the 600 to 700 hours. Also, existing practitioners wishing to avail themselves of the opportunity thus created would have to complete additional needed education.

CONCLUSIONS

When Sections 7 and 5 are read together and compared with the drugless practitioner statute it becomes clear that although the new profession created in 1922 was called "chiropractic", the scope of practice for this new profession was intended to be the same as under the drugless practitioners provisions of the 1913 Medical Practice Act. Any doubts about such a perspective on scope of practice were further clarified by the 1948 amendment to the chiropractic act and my analysis is further supported by the Oosterveen case addressed in my article, Dissent 7. Space does not permit a further discussion of this point here.

The drugless practitioner's scope of practice was much broader than that presently provided for by Rule 302 and would, if acknowledged, allow chiropractors to dominate the alternative care market. It would also have been an effective defense against a charge of practicing medicine without a license for recommending the use of vitamins in the Santa Clara case.

However, even under my analysis, the reasoning of the CREES court would still have limited application and would preclude the use of drugs and the broad assertion to "do anything known as a medical office procedure". However, **with the appropriate training (and assuming such training could be completed within 600 to 700 hours)**, the use of hypodermics, minor surgery, most diagnostic procedures and even natural childbirthing would be potentially within the scope of a "chiropractor's" practice. A similar conclusion should be drawn with respect to such things as meridian therapy, herbal and homeopathic medicine and other modes of treatment presently dominating the arena of alternative, drugless practice.

The foregoing arguments are reasonable and logical and would justify a court ruling in favor thereof. However, there is more to the law than logic, there is the signs of the times. I suggest that the **TIME IS RIPE FOR PRESENTATION OF SUCH ARGUMENTS** to the courts of this state. The court's may not have been ready in the 1980's, they are now; alternative (drugless) medicine is on the tip of everybody's tongue as are the problems of antibiotics and "superbugs". What do you think and want for your profession and your own particular practice?