

At the California Chiropractic Board of Examiners meeting on January 10, 2008, the Board members voted to release to the public the following legal opinion. The opinion will be used as underlying data when the Board notices its proposed regulations setting forth the standard of care when a chiropractor performs MUA.

STATE OF CALIFORNIA

STATE AND CONSUMER SERVICES AGENCY

Memorandum

To: **BRIAN STIGER**
Executive Officer
Board of Chiropractic Examiners

Date: December 13, 2007

From: **Division of Legal Affairs**
Department of Consumer Affairs

Telephone: (916) 574-8220
Fax: (916) 574-8623

Subject: Manipulation Under Anesthesia Chiropractic Scope of Practice

The Board of Chiropractic Examiners ("Board") Manipulation Under Anesthesia ("MUA") Committee has been directed by the Board to draft regulations setting forth the standard of care to be met when a chiropractor is performing MUA. As part of that process, the Committee has requested a legal opinion from the Legal Affairs Division of the Department of Consumer Affairs as to whether the performance of MUA is within the scope of practice of a licensed chiropractor. For purposes of this memorandum, MUA is defined as the manipulation¹ of a patient who is sedated by the administration of anesthesia by a physician and surgeon or other health care provider who is legally authorized to administer anesthesia.

Question:

Is the performance of MUA on a patient who is sedated by the administration of anesthesia by a licensed physician and surgeon or other health care provider within the scope of practice of a chiropractor?

Answer:

The performance of MUA on a patient who is sedated by the administration of anesthesia by a licensed physician and surgeon or other health care provider who is legally authorized to administer anesthesia is within the scope of practice of a chiropractor.

¹ For purposes of this opinion, "manipulation" means the manipulation of the joints of the human body by manipulation of anatomical displacements, articulation of the spinal column, including its vertebrae and cord.

DISCUSSION

BACKGROUND

Board records show that as of 1990, the Board's position has been that MUA is within the scope of practice of a chiropractor.² On July 23, 1992, the Board held an informational hearing in San Diego, California on MUA. Shortly after the hearing started, a member of the public asked the Board "[W]hat up until this day is our Board's opinion on manipulation under anesthesia?" The Board Chairman at this time, Dr. Louis E. Newman, D.C., responded, "[T]he opinion of the Board has been that a chiropractic adjustment performed properly is a chiropractic adjustment, whether it is performed under anesthesia or not. And that's been the Board's position...."³ The issue has arisen several times since 1990 due to changes in Workers Compensation laws, inquiries from other healing arts practitioners, and law enforcement agency actions.

ANALYSIS

The historical context of the Chiropractic Initiative Act of 1922 ("Chiropractic Act") was set out in *People v. Schuster*, (1932) 122 Cal.App.Supp. 790, 792. "When the Medical Practice Act was adopted in 1913, it was the only act regulating the practice of the healing arts. It applied to chiropractors, and required them to have certificates issued by the board of medical examiners. But in 1922 an act regulating the practice of chiropractor was adopted as an initiative measure. (Stats. 1923, p.lxxxviii.)" The passage of the Chiropractic Act did not repeal or amend any part of the 1913 Medical Practices Act ("MPA"). Instead, it provided an exception to the 1913 MPA by allowing the practice of chiropractic as authorized by the Chiropractic Act. (*People v. Mangiagli*, (1950) 97 Cal.App.2d Supp. 935, 938.)

Section 7 of the Chiropractic Initiative Act of California reads:

One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic 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.)

² *Minutes of the Public Meeting of the Board of Chiropractic Examiners*, September 13, 1990, agenda item 11, at page 13.

³ Transcription from Informational Hearing, Manipulation Under Anesthesia, July 23, 1992, San Diego, California.

California courts have interpreted Section 7 to create a three-part test to determine if an act or procedure is within the chiropractic scope of practice. According to the holdings in these cases the following three prongs must be satisfied. (*Fowler v. Appellate District, Superior Court of Los Angeles, County of Los Angeles*, (1938) 32 Cal.App.2d 737, *Hartman v. Court of Appeal*, (1935) 10 Cal.App.2d 213, and *Tain v. State Board of Chiropractic Examiners*, (2005)130 Ca.App.4th 609.)

- (1) an act or procedure must be understood as chiropractic in its ordinary and general sense
- (2) it must have been taught in the chiropractic schools in 1922, and
- (3) it does not constitute the practice of medicine.

It is well established that "manipulation" is within the scope of practice of a chiropractor. In *Crees v. California State Board of Medical Examiners* (1963) 213 Cal.App.2d 195, 205, the court described the chiropractic scope of practice to include the "treatment by manipulation of the joints of the human body by manipulation of anatomical displacements, articulation of the spinal column, including its vertebrae and cord." The Board later adopted a regulation that codified the holding in *Crees*, the California Code of Regulations reads: "A duly licensed chiropractor may manipulate and adjust the spinal column and other joints of the human body and in the process thereof a chiropractor may manipulate the muscle and connective tissue related thereof." (Section 302(a)(1).) Consequently, the first prong that a procedure must be understood as chiropractic in its ordinary and general sense has been met.

An argument has been raised that MUA was not taught in chiropractic schools in 1922 and therefore it is not within the scope of practice. However, the courts have made it clear that the chiropractic profession is not frozen in time. The trial court in *Crees* discussed this very point. "It is true that chiropractic is not a static system of healing and that it may advance and change in technique, teaching, learning, and mode of treatment within the limits of chiropractic as set forth in paragraph H above. It may not advance into the fields of medicine, surgery, osteopathy, dentistry, or optometry." (p. 202) This dynamic interpretation of the practice of chiropractic is not without limitation. The *Hartman* case made the point that the Chiropractic Act must be read as whole and "cannot be taken as authorizing a license to do anything and everything that might be taught in a school. A short course on surgery or one in law might be given, incidentally, and it would not follow that the section would authorize a licensed chiropractor to engage in such other professions."⁴ However, since manipulation was taught in the schools in 1922, the second prong of the three-part test has been met.

⁴ *Hartman*, at p. 218.

The last prong that must be met is that the practice does not constitute the practice of medicine. The prohibition against chiropractors using drugs derives from the prohibition against chiropractors practicing medicine. The court in *Fowler* stated: "The statute declares that persons licensed under it shall not practice medicine, a practice which certainly includes the use and prescribing of medicines in whatever form or combination they may be prepared or sold."⁵ It is common knowledge and not controversial that chiropractors have been treating patients who have been prescribed drugs by other healing arts practitioners authorized to prescribe drugs. For example, a patient may be prescribed pain medication by a physician and surgeon after incurring a back injury and seek treatment from a chiropractor. Any other interpretation of the term "use drugs" would lead to the absurd result that a chiropractor could never treat a patient who is taking any drug for any type of ailment. This would include a drug related to the injury for which the patient is seeking treatment from a chiropractor as well as unrelated ailments such as high blood pressure.

Some have put forth the argument that the term "use" should be given its broadest application. For example, if the only way a chiropractor would be able to manipulate a patient is if the patient is sedated, the chiropractor is "using" drugs to accomplish the procedure. This interpretation is not supported by case law and would not be practical in its application. A chiropractor is not authorized to direct a patient to either take a drug or discontinue using a drug. If a patient came in who was using pain medication, the chiropractor would have to decide either to not provide any treatment or to provide treatment and later be accused of using drugs because a determination was later made that the chiropractor could not have performed the procedure unless the patient was drugged. This interpretation would also lead to an impractical situation for the Board's enforcement program. It would have to be proven at an administrative hearing that a patient at the time a patient received treatment would not have been able to receive that treatment without benefit of drugs. How much pain must a patient tolerate before it is determined that a treatment cannot be performed without using drugs? This would put both the patient and the chiropractor in an untenable situation.

Oftentimes, patients of other healing arts practitioners are medicated in order to ease discomfort related to treatments. For example, many patients are medicated before receiving physical therapy. The medication is necessary not only to ease the pain associated with the treatment but also to allow greater benefit to the patient. MUA is no different.

Consequently, the third prong of the test has been met since MUA does not constitute the practice of medicine as the chiropractor is not using, administering or dispensing drugs to a patient.

⁵ *Fowler*, 32 Cal.App.2d at 751.

CONCLUSION

The performance of MUA by a chiropractor on a patient who is sedated by the administration of anesthesia by a licensed physician and surgeon or other health care provider who is legally authorized to administer anesthesia is within the scope of practice of a chiropractor.

DOREATHEA JOHNSON
Deputy Director
Legal Affairs


By LaVONNE POWELL
Senior Staff Counsel

Board of Chiropractic Examiners

2525 Natomas Park Drive, Suite 260
Sacramento, California 95833-2931
Telephone (916) 263-5355 FAX (916) 263-5369
CA Relay Service TT/TDD (800) 735-2929
Consumer Complaint Hotline (866) 543-1311
<http://www.chiro.ca.gov>

**NOTICE OF PUBLIC MEETING**

Notice is hereby given that a meeting of the **Manipulation Under Anesthesia (MUA) Committee** of the **Board of Chiropractic Examiners** will be held as follows:

January 10, 2008

Upon Conclusion of the Enforcement Committee Meeting
which is scheduled to start at 9:00 a.m.

Hearing Room
400 R Street, Room 101
Sacramento, CA 95814

AGENDA

CALL TO ORDER

Approval of Minutes

July 17, 2007
November 8, 2007

Discussion and Possible Action

- Draft Regulations re Manipulation Under Anesthesia Chiropractic Standard Care

PUBLIC COMMENT

NEW BUSINESS – Future Agenda Items

ADJOURNMENT

MUA COMMITTEE

Frederick Lerner, D.C., Chair
Hugh Lubkin, D.C.

A quorum of the Board may be present at the Committee meeting. However, Board members who are not on the committee may observe, but may not participate or vote. Public comments will be taken on agenda items at the time the specific item is raised. The Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at www.chiro.ca.gov.

The meeting is accessible to individuals with physically disabilities. If a person needs disability-related accommodations or modifications in order to participate in the meeting, please make a request no later than five working days before the meeting to the Board by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or sending a written request to that person at the Board of Chiropractic Examiners, 2525 Natomas Park Drive, Suite 260, Sacramento, CA 95833. Requests for further information should be directed to Ms. Valencia at the same address and telephone number.

Board of Chiropractic Examiners

2525 Natomas Park Drive, Suite 260
Sacramento, California 95833-2931
Telephone (916) 263-5355 FAX (916) 263-5369
CA Relay Service TT/TDD (800) 735-2929
Consumer Complaint Hotline (866) 543-1311
www.chiro.ca.gov

**BOARD OF CHIROPRACTIC EXAMINERS
MEETING MINUTES****Manipulation Under Anesthesia (MUA)****Tuesday, July 17, 2007****12:30 p.m.****Department of Consumer Affairs
1625 N. Market Blvd., Ste. S102
Sacramento, CA 95834****COMMITTEE MEMBERS PRESENT**

Frederick Lerner, D.C., Chair
Hugh Lubkin, D.C.

STAFF PRESENT

Brian J. Stiger, Executive Officer
LaVonne Powell, DCA Senior Legal Counsel
Marlene Valencia, Staff Services Analyst

Call to Order

Dr. Lerner called the meeting to order at 12:35 p.m.

Roll Call

Dr. Lubkin called the roll. Both committee members were present.

Discussion and Possible Action re Issues in "Petition to Define Practice Rights and to Amend, Repeal and/or Adopt of Practice Regulations as Needed," Submitted by David Prescott, Attorney

Mr. Prescott petitioned the Board to define the practice rights of chiropractors. Mr. Prescott explained that under the statute in which the petition was filed, the Board must schedule a public meeting to hear the petition.

Mr. Prescott's stated his position is that the basic fundamental practice right of chiropractors was intended to be the same as it was for drugless practitioners. Physicians and surgeons under the 1913 Act may treat injuries, diseases, deformities or other physical or mental conditions – so can drugless practitioners.

Mr. Prescott states the intent of the 1922 Chiropractic Act was to grant to chiropractors that same basic practice right and then the exceptions need to be considered.

Mr. Prescott states he has volumes of information to support his position that he would like to present to the Board, which will take up to a day and a half to present. Mr. Prescott wants the evidence be entered into the public record so that the evidence can be examined.

Dr. Lubkin asked Mr. Prescott how much information he had to get an idea of how much time board members would need to devote to this subject.

Mr. Prescott offered to scan the information on a DVD and provide to the Board. Ms. Powell raised concerns about copyright laws with regards to Mr. Prescott's evidence.

Mr. Prescott offered a three step process in moving forward.

Phase One: Determine the scope of practice intended by the 1922 Act.

Phase Two: Determine if the Board has the authority to adopt a new scope of practice.

Phase Three: Adopt regulations to define the new scope of practice.

Mr. Prescott requests the opportunity to present the information to the Board. Ms. Powell explained that even if the Board agreed with Mr. Prescott's legal argument, the Board has discretion on moving forward with regulations.

Dr. Learner recognized and thanked Mr. Prescott for his presentation and acknowledged the significance of Mr. Prescott's argument.

The committee agreed to place this topic on the next committee meeting and allow Mr. Prescott 1 ½ hours to make his presentation.

Discussion and Possible Action re September 9, 2004 MUA Regulation that was Disapproved by the Office of Administrative Law

Dr. Learner explained that the Board promulgated regulations in 2005, which were rejected by the Office of Administrative Law. Dr. Learner informed the public that Drs Learner and Lubkin, Ms. Powell, and Mr. Stiger met with representatives from OAL earlier this morning to discuss the issues with the previous regulation package. OAL representatives explained that the Board needed a legal opinion supporting its position that MUA is within the scope of practice of a chiropractor before submitting new regulations. Dr. Learner asked Ms. Powell to provide a written opinion and submit it to the MUA committee. Ms. Powell stated that she would hope to have the opinion to the Committee by the end of October. Ms. Powell also told the Committee members that the opinion would be confidential unless the Committee members agreed to release it to the public.

Meeting Adjourned

Dr. Learner adjourned the meeting at 1:10 p.m.

Board of Chiropractic Examiners

2525 Natomas Park Drive, Suite 260
Sacramento, California 95833-2931
Telephone (916) 263-5355 FAX (916) 263-5369
CA Relay Service TT/TDD (800) 735-2929
Consumer Complaint Hotline (866) 543-1311
www.chiro.ca.gov

**BOARD OF CHIROPRACTIC EXAMINERS
MEETING MINUTES****Manipulation Under Anesthesia (MUA)****Thursday, November 8, 2007****12:30 p.m.****2525 Natomas Park Drive, Suite 100
Sacramento, CA 95834****COMMITTEE MEMBERS PRESENT**

Frederick Lerner, D.C., Chair
Hugh Lubkin, D.C.

STAFF PRESENT

Brian J. Stiger, Executive Officer
LaVonne Powell, DCA Senior Legal Counsel
Marlene Valencia, Staff Services Analyst

Call to Order

Dr. Lerner called the meeting to order at 12:38 p.m.

Roll Call

Dr. Lubkin called the roll. Both committee members were present.

Discussion and Possible Action re Issues in "Petition to Define Practice Rights and to Amend, Repeal and/or Adopt of Practice Regulations as Needed," Submitted by David Prescott, Attorney

Mr. Prescott began by introducing the materials that he planned to discuss. Ms. Powell, expressed her concerns about copyrighted material being reproduced. Mr. Prescott committed to providing the Board the written authorization he received to use his information.

Mr. Prescott states that since 1923 the Board has the 20 sections of the Chiropractic Act, 19 original sections plus one amendment. However, he states that not only did the people vote in 1922 for the original 19 sections, but an additional section, which is longer than the 19 original sections. Mr. Prescott says the original ballot measure contains important revisions, deletions, and amendments as identified by black faced type, italics, and asterisks.

Mr. Prescott states that the 1922 Chiropractic Act cannot be fully understood unless one reviews the missing second half of the statute and the 1913 Medical Practices Act. Mr. Prescott says that the 1913 Medical Practice Act and the 1922 Chiropractic Act have an intimate connection.

Mr. Prescott discusses the history of legal decisions including, Crees, Fowler, and Tain, and educational requirements framing the practice of Chiropractic in California. He further reviews the original ballot measures and highlights scope of practice and educational requirements. Mr. Prescott compares and contrasts the practice rights and educational curriculum of drugless practitioners and chiropractors.

Mr. Prescott petitioned the Board to define the practice rights of chiropractors. Mr. Prescott explained that under the statute in which the petition was filed, the Board must schedule a public meeting to hear the petition.

Mr. Prescott's stated his position is that the basic fundamental practice right of chiropractors was intended to be the same as it was for drugless practitioners. Physicians and surgeons under the 1913 Act may treat injuries, diseases, deformities or other physical or mental conditions -- so can drugless practitioners. Mr. Prescott states the intent of the 1922 Chiropractic Act was to grant to chiropractors that same basic practice right as drugless practitioners and then the exceptions need to be considered.

Mr. Prescott explained that section 302 of the Board's regulations prohibit chiropractors from using homeopathic remedies for any purpose. Mr. Prescott discussed a study conducted by the National Board of Chiropractic Examiners in 1993 that concluded that between 36.5% and 49.3% of chiropractors in the state of California use homeopathic remedies. Mr. Prescott asked is section 302 correct?

Mr. Prescott explains that the Act cannot perform surgery and section 302 says chiropractors cannot perform surgery, sever or penetrate tissues. Mr. Prescott references the Chong case in which Chong argues that the law is unconstitutional because when a chiropractor performs a manipulation, tissues are being severed or penetrated. Mr. Prescott explained that, according to the 1913 Medical Practice Act, sever means performed by cutting with a knife.

Mr. Prescott states that the AG's office has written 26 opinions without ever addressing the entire ballot.

Dr. Lerner thanked Mr. Prescott for his presentation and research. Dr. Lubkin asked if the materials would be placed on the web site. Mr. Stiger said the materials would be posted once the board received the copyright information from Mr. Prescott.

Discussion and Possible Action re Promulgation of Regulations re MUA

Dr. Lerner explained the history of a regulatory package submitted to the Office of Administrative Law in 2005, which were rejected. Ms. Powell explained that rejections from the Office of Administrative Law are not unusual and should not be reflective negatively upon the board.

Dr. Lerner stated that the Board has held since 1990 that MUA is within the chiropractic scope of practice. Dr. Lerner asked Ms. Powell about the status of the legal opinion and she explained that after it's completed it still needs to be approved by her supervisor.

Ms. Powell explained that the Board has only one license, which entitles the licensee to perform the full scope of practice. Ms. Powell stated the Board has clear authority to set standards of care. Ms. Powell recommended that the Board review the standard of care from the national organization and identify how the procedure is being performed and in what type of facility.

Mr. Stiger stated that the Board is interested in making sure that consumers are being protected in those instances when the procedure is being performed. It is important to receive input from the profession on these standards.

Ms. Powell recommended that the Board include language that discusses if a chiropractor is performing MUA that a physician surgeon or other authorized health care provider is solely in charge of the sedation and the chiropractor cannot direct them. Ms. Powell recommends that chiropractors clearly understand their limited role during MUA.

Dr. Lerner reiterated that we can define what MUA is and what it is not, we can designate the type facility it is performed in, we cannot require chiropractors to take certain classes. Ms. Powell recommends that the board define sedation and every aspect of the procedure, including emergency procedures, monitoring, and follow up procedures to protect any patient under going the procedure.

Dr. Charles Davis offered suggestions on what not to put into the standard of care to avoid potential litigation.

Mr. Prescott suggested that MUA instruction be provided in chiropractic schools.

Dr. Lubkin stated that in his opinion that all duly licensed chiropractors in California are qualified to perform manipulation while the patient is under anesthesia.

A member of the public stated that if a chiropractor could not perform a manipulation without the patient being under anesthesia raises a concern.

New Business:

Dr. Lubkin asked that the committee meet again by the end of the year or early next year. Ms. Powell suggested that we don't meet until we have a working document.

Meeting Adjourned

Dr. Lerner adjourned the meeting at 3:57 p.m.