STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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

Scope of Practice Committee

May 7, 2008
9:30 a.m.
2525 Natomas Park Drive, Suite 100
Sacramento, CA 95833

AGENDA

CALL TO ORDER

Approval of Minutes
- March 27, 2008

Public Comment

Discussion and Possible Action
- Recognition of Chiropractic Specialties

Discussion and Possible Action
- Update on Meeting with California Department of Public Health Radiologic Health Branch

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

Public Comment

Future Agenda Items

ADJOURNMENT

SCOPE OF PRACTICE COMMITTEE
Hugh Lubkin, D.C., Chair
Frederick Lerner, D.C.

The Board of Chiropractic Examiners' paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

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) Committee
March 27, 2008
400 R Street, Room 101
Sacramento, CA 95814

Committee Members Present
Frederick Lerner, D.C., Chair
Hugh Lubkin, D.C.

Staff Present
Brian Stiger, Executive Officer
LaVonne Powell, Senior Legal Counsel
Thomas Rinaldi, Deputy Attorney General
Marlene Valencia, Staff Services Analyst

Call to Order

Dr. Lerner called the meeting to order at 9:14 a.m.

Roll Call

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

MUA Standard of Care Draft Regulations

Dr. Lerner thanks Dr. Edward Cremata and Dr. Lubkin for their work on drafting the proposed regulatory language.

Dr. Lubkin voiced his support in moving the language to the full Board for adoption.

Public Comment:
Dr. Charles Davis, International Chiropractic Association of California provided a handout of information he compiled from other states on MUA.

Kathleen Creason, Osteopathic Physicians & Surgeons of California, (OPSC) expressed concerns about the proposed language and opposes the regulations.

Roger Calton, Attorney at Law, recommended that the facility requirements be expanded and defined in California law.

Ms. Powell said she would review Dr. Davis' handout and provide the proper legal citation regarding the facilities where MUA be performed.

MOTION: DR. LUBKIN MOVED THAT THE COMMITTEE ADOPT THE PROPOSED MUA LANGUAGE AND FORWARD TO THE FULL BOARD FOR ADOPTION.
MOTION SECONDED: DR. LERNER SECONDED THE MOTION
VOTE: 2-0
MOTION CARRIED

Public Comment

None

New Business

None

ADJOURNMENT:

Dr. Lerner adjourned the meeting at 9:23 a.m.

Steven G. Becker, D.C.

Diplomate, American Chiropractic Academy of Neurology
Eligible, American Board of Chiropractic Orthopedics
Allied Medical Staff, Cedars-Sinai Medical Center
Certified, Manipulation Under Anesthesia
Qualified Medical Evaluator

April 20, 2008

Mr. Brian Stiger,
Executive Director
Dr. Fred Lerner, Chair
Board of Chiropractic Examiners
2525 Natomas Park Dr., # 260
Sacramento, CA 95833

Re: Scope of Practice Committee/Chiropractic Subspecialties

Dear Mr. Stiger and Dr. Lerner:

I understand that during the course of the last Board meeting, there was some discussion or direction related to chiropractic subspecialties. If I am correct, I just wanted to take the opportunity to provide the Board with some information it may not already have in its possession, but that might go along way in clarifying some issues before the Board. Specifically, I am enclosing a copy of the Legislative Counsel of California's 11/16/99 opinion paper. As you are undoubtedly aware, the Legislative Counsel are the attorneys for the State Legislature. As such, I found their opinions regarding chiropractic subspecialties to be significant. I am also enclosing a copy of recent legal comments prepared in response to the DWC's proposed QME regulations for your review.

If you have any questions, or if I may be of further assistance, please do not hesitate to contact me anytime.

Respectfully,

Steven G. Becker, D.C.

1180 South Beverly Drive, Suite 410 *Los Angeles, CA 90035* *T: 310.277.8822* *F: 310.277.0110* *E: SGBeckDC@sbcglobal.net*

Diane F. Boyer-Vine
Jeffrey A. DeLand
Chief Deputies

James L. Ashford
C. David Dickerson
John T. Studebaker
Daniel A. Weitzman

David D. Alvarado
Frances S. Dorbin
Robert D. Gronke
Michael R. Kelly
Michael J. Kersten
Jennifer A. Marsala
Robert G. Miller
Tracy O. Powell II
Marguerite Roth
William K. Stark
Michael H. Upson
Christopher Zirkle
Principal Deputies

State Capitol, Suite 3021
Sacramento, CA 95814-4996
(916) 445-3057
Telecopier: (916) 322-0789

Legislative Counsel of California

BION M. GREGORY

Paul Antilla
Charles C. Asbill
Joe J. Ayala
Lara K. Bierman
Marie L. Bondonno
Ann M. Burastero
Eileen J. Burdon
Cindy M. Cardullo
Edward Ned Cohen
Emilia Cutler
Ben E. Dale
Byron D. Damiani, Jr.
J. Christopher Dawson
Clinton J. deWitt
Linda Doeder
Maureen S. Dunn
Sharon R. Fisher
Clay Fuller
Patricia R. Gates
Debra Zidich Gibbons
Shira K. Gilbert
Sonya Anne Grant
Alvin D. Grass
Elizabeth M. Grebe
Marie Hilaire Henke
Jana T. Harrington
Baldev S. Holt
Thomas R. Heuer
Lori Ann Joseph
David B. Judson
Michael Robert Kerr
Eve B. Krotinger
Aubrey LaBrie
L. Erik Lange
Felicia A. Lee
Diana G. Lim
Kirk S. Louie
Mariann Marin
Anthony P. Marquez
Francisco A. Martin
JudyAnne McGinley
Peter Melnicoe
Abel Muñoz
Donna L. Neville
Willard L. Pope, Jr.
Sharon Reilly
Tara Ruiz
Michael B. Salerno
Jessica L. Sloan
Christopher H. Stevens
Ellen Sward
Mark Franklin Terry
Jeff Thom
Richard B. Weisberg
Karen L. Zickind
Jack G. Zolman

Deputies

Honorable Martin Gallegos
6005 State Capitol

Qualified Medical Examiners: Chiropractors: Specialties - #24401

Dear Mr. Gallegos:

QUESTION

May the Industrial Medical Council, pursuant to Section 139.2 of the Labor Code, appoint doctors of chiropractic as qualified medical evaluators in their respective chiropractic specialties?

OPINION

The Industrial Medical Council may, pursuant to Section 139.2 of the Labor Code, appoint doctors of chiropractic or qualified medical evaluators in their respective chiropractic specialties.

ANALYSIS

The Industrial Medical Council (hereafter IMC) is required to appoint physicians as qualified medical evaluators (hereafter QMEs) "in each of the respective specialties as required for the evaluation of medical issues" in workers' compensation cases (subds. (a) and (b), Sec. 139.2, Lab. C.). Section 139.2 of the Labor Code[1] reads, in pertinent part, as follows:

[1] All further section references are to the Labor Code unless otherwise stated.

"139.2. (a) The Industrial Medical Council shall appoint qualified medical evaluators in each of the respective specialties as required for the evaluation of medical issues. The appointments shall be for two-year terms.

"(b) The council shall appoint as qualified medical evaluators physicians, as defined in Section 3209.3, who are licensed to practice in this state and who demonstrate that they meet each of the following requirements:

"(1) Pass an examination written and administered by the Industrial Medical Council for the purpose of demonstrating competence in evaluating medical issues in the workers' compensation system. . . .

"(2) Devote at least one-third of total practice time to providing direct medical treatment, or has served as an agreed medical evaluator on eight or more occasions in the 12 months prior to applying to be a qualified medical evaluator.

"(3) Meet one of the following requirements:

* * *

"(C) Declares under penalty of perjury to the council that he or she wrote 100 or more ratable comprehensive medical-legal evaluation reports and served as an agreed medical evaluator on 25 or more occasions during each calendar year between January 1, 1990, and December 31, 1994.

* * *

"(E) If a chiropractor, has either: (i) completed a chiropractic postgraduate specialty program of a minimum of 300 hours taught by a school or college recognized by the council, the Board of Chiropractic Examiners and the Council on Chiropractic Education; or, (ii) been certified in California workers' compensation evaluation by an appropriate California professional chiropractic association or accredited California college recognized by the council.

* * *

"(G) Served as an agreed medical evaluator on eight or more occasions prior to January 1, 1970.

"(4) Does not have a conflict of interest as determined under the regulations promulgated by the administrative director pursuant to subdivision (o).

"(5) Meets any additional medical or professional standards adopted pursuant to paragraph (6) of subdivision (j).

* * *

"(h) When the injured worker is not represented by an attorney, the medical director ... shall assign three-member panels of qualified medical evaluators ... . The medical director shall select evaluators who are specialists of the type selected by the employee. The medical director shall advise the employee that he or she should consult with his or her treating physician prior to deciding which type of specialist to request. The Industrial Medical Council shall promulgate a form which shall notify the employee of the physicians selected for his or her panel. The form shall include, for each physician on the panel, the physician's name, address, telephone number, specialty, number of years in practice, and a brief description of his or her education and training ... . When compiling the list of evaluators from which to select randomly, the medical director shall include all qualified medical evaluators who: (1) do not have a conflict of interest in the case, as defined by regulations adopted pursuant to subdivision (o); (2) are certified by the council to evaluate in an appropriate specialty and at locations within the general geographic area of the employee's residence; and, (3) have not been suspended or terminated as a qualified medical evaluator for failure to pay the fee required by the council pursuant to subdivision (n) or for any other reason. When the medical director determines that an employee has requested an evaluation by a type of specialist which is appropriate for the employee's injury, but there are not enough qualified medical evaluators of that type within the general geographic area of the employee's residence to establish a three-member panel, the

> medical director shall include sufficient qualified medical evaluators from other geographic areas ... .
>
> * * *
>
> "(n) Each qualified medical evaluator shall pay a fee, as determined by the Industrial Medical Council, for appointment or reappointment. . . .
>
> * * *"

Section 3209.3 specifies the various categories of healing arts practitioners who are deemed "physicians" for purposes of appointment as QMEs in workers' compensation cases. More specifically, subdivision (a) of Section 3209.3 reads as follows:

> "3209.3. (a) 'Physician' includes physicians and surgeons holding an M.D. or D.O. degree, psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law.
>
> * * *"

Thus, chiropractic practitioners licensed by California state law and within the scope of their practice as defined by California state law are "physicians" for purposes of appointment as QMEs (subd. (b), Sec. 139.2; subd. (a), Sec. 3209.3). However, as indicated above, Section 139.2 provides that to be appointed as a QME a licensed chiropractic practitioner in general must meet all of the following requirements:

1. Pass an examination written and administered by the IMC (para. (1), subd. (b), Sec. 139.2).

2. Devote at least one-third of total practice time to providing direct medical treatment, or has served as an agreed medical evaluator on eight or more occasions in the 12 months prior to applying to be a QME (para. (2), subd.(b), Sec. 139.2).

3. Complete a chiropractic postgraduate specialty program of a minimum of 300 hours taught by a school or college recognized by the IMC, the Board of Chiropractic Examiners and the Council of on Chiropractic Education; or, been certified by an appropriate California professional chiropractic association or

accredited California college recognized by the IMC (subpara (E), para. (3), subd. (b), Sec. 139.2).[2]

4. Not have a conflict of interest as determined under the regulations promulgated by the Administrative Director of the Division of Workers' Compensation (para. (4), subd. (b), Sec. 139.2).

5. Meet any additional medical or professional standards adopted by the IMC (para. (5), subd. (b), Sec. 139.2).

6. Pay the fee required by the IMC (subd. (n), Sec. 139.2).

The IMC has adopted regulations for the appointment of QMEs and, pursuant to subdivision (a) of Section 139.2, has adopted specialties for QMEs (see 8 Cal. Code Regs. 10.1). For licensed chiropractic practitioners there are four specialty codes:

"Non-MD/DO Specialty Codes

"DCH - Chiropractic

"DCN - Chiropractic - Neurology

"DCO - Chiropractic - Orthopaedic

"DCR - Chiropractic - Radiology

* * *"

The IMC recognizes chiropractic diplomate boards whose programs are taught by the Council on Chiropractic Education accredited colleges (8 Cal. Code Regs. 11 and 12).

It is fundamental that a regulation must be within the scope of authority conferred by the enabling statute and must not alter, amend, enlarge, or impair that statute or scope (Secs. 11342.1 and 11342.2, Gov. C.; Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 391). Generally, the construction of a statute by the officials charged with its enforcement is entitled to great weight (Naismith Dental

---

[2] Certain chiropractic practitioners who have previously served as agreed medical evaluators are excepted from the requirement contained in subparagraph (E) of paragraph (3) of subdivision (b) of Section 139.2 (see subparas. (C) and (G), para. (3), subd. (b), Sec. 139.2).

Corp. v. Board of Dental Examiners (1977) 68 Cal.App.3d 253, 260), unless it is clearly erroneous or unauthorized (Rivera v. City of Fresno (1971) 6 Cal.3d 132, 140). In accordance with these principles, we do not find the regulations adopted by the IMC relating to specialties to be erroneous or unauthorized.

As indicated above, subdivision (a) of Section 139.2 requires the IMC to "appoint qualified medical evaluators in each of the respective specialties as required for the evaluation of medical issues." Sections 11, 12, and 13 of Title 8 of the California Code of Regulations implement this requirement. Although the term "specialties," as used in Section 139.2, is not defined in statute or regulation, it is a general rule of statutory construction that statutory terms should be construed in accordance with the usual, ordinary import of the language employed (IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal.4th 81, 98). "Specialty" means "something in which one specializes or of which one has special knowledge as ... a branch of knowledge, science, art or business to which one devotes oneself whether as an avocation or a profession and usu. [usually] to the partial or total exclusion of related matters" (Webster's Third New International Dictionary (1986), at pp. 2186-2187). Thus, subdivision (a) of Section 139.2 requires in our opinion that the IMC recognize the specialties of all "physicians" listed in Section 3209.3 as needed to evaluate medical issues for workers' compensation cases.

Subdivision (b) of Section 139.2 requires that "physicians," which includes practitioners of chiropractic, be licensed. The only restriction on the IMC in the assignment of a QME is that the scope of practice of the QME's license not be exceeded. In this regard, Section 7 of the Chiropractic Act, an initiative statute adopted by the voters on November 7, 1922, to regulate the practice of chiropractic, reads as follows:

> "§7. 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 not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in material medica."

Thus, Section 7 of the Chiropractic Act authorizes holders of the license issued thereunder to "practice chiropractic," but does not define or describe "chiropractic." In People v. Fowler (1938) 32 Cal.App.2d (Supp.) 737 (hereafter Fowler) the court at page 745, stated that Section 7 provides for authorization in two parts, "1st, 'practice chiropractic ... as taught in chiropractic schools or colleges,' and 2d, 'to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body.'" As to the first part of the authorization, the court stated that the courts in this state have concluded that "chiropractic" means all of the following:

> "A system of therapeutic treatment for various diseases, through the adjusting of articulations of the human body, particularly those of the spine, with the object of relieving pressure or tension upon nerve filaments. The operations are performed with the hands, no drugs being administered ... . A system of manipulation which aims to cure disease by the mechanical restoration of displaced or subluxated bones, especially the vertebrae, to their normal relation." (Fowler, supra, at p. 746.)

As to the second part of the authorization, the court found it not to be "a definition, but an addition to, chiropractic as used in the previous part of section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses" (Fowler, supra, at p. 747). The court further concluded that "the chiropractor is limited to the practice of chiropractic and the use of mechanical, hygienic and sanitary measures incident to the care of the body, which do not invade the field of medicine and surgery, irrespective of whether or not additional phases of the healing art, including medicine and surgery or the use of drugs, may have been taught in chiropractic schools or colleges" (Fowler, supra, at p. 748).

As to the titles to be used by licensed chiropractor practitioners, Section 15 of the Chiropractic Act specifies the titles, prefixes, and suffixes which may and may not be used, and reads as follows:

> "§15. Illegal Practice of Chiropractic—Use of Title Indicating Practice of Profession—Penalty
>
> "Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title 'chiropractor' or 'D.C.' or any word or title to induce, or tending to induce belief

> that he or she is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word 'doctor' or the prefix 'Dr.' without the word 'chiropractor,' or 'D.C.' immediately following his or her name, or the use of the letters 'M.D.' or the words 'doctor of medicine,' or the term 'surgeon,' or the term 'physician,' or the word 'osteopath,' or the letters 'D.O.' or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he or she held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) and not more than seven hundred fifty dollars ($750), or by imprisonment in the county jail for not more than six months, or by both fine and imprisonment."

Thus, in recognizing physician specialties for chiropractors, both Section 7 of the Chiropractic Act and subdivision (a) of Section 3209.3 prohibit the IMC from permitting a chiropractor to practice outside the scope of his or her license. In this regard, we have been informed by a council member of the IMC that the specialty codes adopted by the IMC in Section 10.1 of Title 8 of the California Code of Regulations for chiropractors are those of the chiropractic diplomate boards and do not expand the scope of the license for chiropractic practitioners. Further, the specialty codes do not authorize a licensed chiropractic practitioner to use with his or her name any titles, letters, prefixes, or suffixes in violation of Section 15 of the Chiropractic Act. The specialty codes adopted by the IMC are only for identifying chiropractic specialties recognized by chiropractic diplomate boards for the QME application forms and the "Request for Qualified Medical Evaluator Forms" (see 8 Cal. Code Regs. 10.1, 10.1A and 30.1) that the IMC, pursuant to its authority under subdivision (a) of Section 139.2, has determined to be needed for the evaluation of medical issues in workers' compensation cases. Therefore, based on the above, the Industrial Medical Council has not acted erroneously or without authorization in adopting the specialty codes for chiropractors.

Accordingly, we conclude that the Industrial Medical Council may, pursuant to Section 139.2 of the Labor Code, appoint

doctors of chiropractic as qualified medical evaluators in their respective chiropractic specialties.

Very truly yours,

Bion M. Gregory
Legislative Counsel

Edward Cohen

By
Edward Ned Cohen
Deputy Legislative Counsel

NC:sjm

GOVERNMENT RELATIONS COUNSEL

January 14, 2008

Government Relations Counsel
1215 K Street, 17th Floor
Sacramento, CA 95814

Patrick Shannon
Tel (916) 503-1530
Fax (916) 209-9428
pshannon@grcounsel.com

BY ELECTRONIC MAIL

Ms. Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142

Re: Comments on Sections 12 & 13 of DWC's Proposed QME Regulations

Dear Ms. Gray:

Thank you for the opportunity to comment on the proposed regulations setting forth the conditions for the Administrative Director to recognize specialty designations of a QME as proposed by the Division of Workers' Compensation ("DWC").

The comments provided in this letter are offered on behalf of the California Chiropractic Association ("CCA"). It is the position of CCA that DWC lacks authority to promulgate the regulation as proposed.

Background

The Department of Industrial Relations, Division of Workers' Compensation ("DWC"), proposes amendments to Title 8, Division 1, Article 2, Sections 12 and 13 to preclude a physician, as defined in Labor Code Section 3209.3, from being listed as a QME in a particular specialty area unless the physician's licensing board recognizes the board that conferred the specialty designation on the physician. To wit, the amendments provide that the "Administrative Director shall recognize only those specialty boards recognized by the respective California licensing boards for physicians." In its Initial Statement of Reasons in support of the proposed amendments, DWC maintains that this change is necessary "to make the criteria for being listed as a QME in a particular specialty transparent and consistent with the jurisdiction exercised by the respective California physician licensing boards."

Issue

Does the DWC have authority to adopt a regulation to preclude a physician, as defined in Labor Code Section 3209.3, from being listed as a QME in a particular specialty area unless the physician's licensing board recognizes the board that conferred the specialty designation on the physician?

Conclusion

No. While the proposed amendment may be consistent with the jurisdiction exercised by the licensing boards for medical doctors and other health care practitioners, it is not consistent with the jurisdiction exercised by the Board of Chiropractic Examiners ("BCE") for doctors of chiropractic.

California Business and Professions Code Section 651(h)(5)(A) pointedly authorizes licensed health care professionals, including doctors of chiropractic, to advertise specialty designations. (All statutory references herein are to the California Business and Professions Code, unless otherwise stated.) In fact, the statute imposes no qualifications or restrictions on a doctor of chiropractic's authority to so advertise, unlike the way the statute operates with respect to other health care professionals such as medical doctors, optometrists, dentists, and podiatrists whose ability to use designations is circumscribed by special statutory restrictions.

The BCE does not have authority to limit on a categorical basis which boards the BCE will recognize. The BCE has no authority to restrict the use of specialty designations. Any effort to do so would be inconsistent with the statutory provisions which do not impose any restrictions on the use of designations pertinent to doctors of chiropractic. The BCE has no authority to enlarge or restrict the statutes. Rather, it is the province of the Legislature to govern the use of specialty designations.

Moreover, a doctor of chiropractic's right to advertise specialty designations is constitutionally protected commercial speech. Even the Legislature, much less the DWC, could not restrict the use of specialty designations unless it shows a substantial state interest lest it would violate the United States Constitution.

To be sure, the BCE itself does not restrict a chiropractor's use of specialty designations by policy in any way. Still, the BCE may pursue an enforcement action to restrict the use of a particular designation that the BCE deems actually misleading as applied in a specific case, but such an action must comport with the constitutional protections and the statutory authority. However, even the BCE itself has no authority to restrict the use of a particular designation unless the BCE provides a strong evidentiary case that the use of the particular designation is misleading to the public.

It follows that DWC does not have the authority to impose a condition which the BCE itself cannot impose. The proposed regulation thus fails for lack of authority.

Discussion

I. Doctors of chiropractic are authorized under California law to advertise specialty designations without conditions.

Section 651(h)(5)(A) authorizes doctors of chiropractic to advertise specialty designations. Section 651 governs permissible advertising by health care professionals licensed under Division 2 of the Healing Arts or "under any initiative act referred to in this division." Section 651(a). Doctors of chiropractic are authorized under the Act referred to in the division and under Division 2 of the Healing Arts, Chapter 2.

Section 651(h)(5)(A) provides authority for doctors of chiropractic to advertise specialty designations, as follows:

> "(h) Advertising by any person so licensed may include the following: . . .
>
> (5) (A) *A statement that the practitioner is certified by a private or a public board or agency* or a statement that the practitioner limits his or her practice to specific fields." (emphasis added.)

The authority for doctors of chiropractic to advertise designations is not conditional. By contrast, the authority for dentists, optometrists, medical doctors, and podiatrists is conditioned to varying degrees on whether the practitioner's licensing board recognizes the private or public board or agency that has conferred the certification. See Section 651(h)(5)(A)(i-iii) for dentists; Section 651(h)(5)(A)(iv) for optometrists; Section 651(h)(5)(B) for physicians and surgeons; and 651(h)(5)(C) for podiatrists.

II. The BCE, much less the DWC, has no authority to adopt a regulation that restricts the use of designations.

Any effort on behalf of the DWC to adopt a regulation to restrict the use of designations would be inconsistent with the governing statutory provisions which do not impose any restrictions on the use of designations pertinent to doctors of chiropractic.

As explained above, Section 651 authorizes doctors of chiropractic to advertise designations without conditions whereas the Legislature elected to impose conditions on the authority for other certain practitioners. The difference in treatment in the statute between doctors of chiropractic and the specified practitioners is strong evidence of legislative intent to authorize doctors of chiropractic to use designations without further restrictions by its licensing board, the BCE, much less by any other state agency that lacks jurisdiction to regulate chiropractors in the first place. Just as with the other practitioners, it is the Legislature's prerogative with respect to doctors of chiropractic to decide whether to impose conditions on the use of designations.

The BCE has no authority to enlarge or restrict the statutes. *Crees v. California State Board of Medical Examiners*, 213 Cal.App.2d 195 (1963) stood, in part, for this proposition when it affirmed the trial court judgment that an earlier version of BCE's 16 CCR 302 regulation was "invalid insofar as it purported to alter or enlarge the scope of practice of practice of chiropractors under the Chiropractic Act." *Crees* at 209-210 citing *People v. Mangiagli*, 97 Cal.App.2d.Supp. 935, at 943 "An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative [or initiative] enactment" and *Duskin v. State Board of Dry Cleaners*, 58 Cal.2d 155, at 165 "Thus the regulation, . . . insofar as it attempted to enlarge the terms of the enabling statute, . . . is invalid." Rather, it is the Legislature's province to alter the statute.

A parallel case, *College of Psychological and Social Studies v. Board of Behavioral Science Examiners*, 41 Cal.App.3d 367 (1974), is instructive in this regard. The court of appeal, second appellate district, found invalid a board of behavioral science regulation which prevented marriage and family counselors from advertising licenses obtained from unaccredited educational institutions. The court held that the regulation impermissibly expanded California's false advertising law, Section 17500, beyond the terms of the statute. "The cases dealing with section 17500 have dealt with what is improper advertising. Under Section 17500 a board is powerless to prohibit or restrict advertising which is not untrue or misleading. (*Cozad v. Chiropractic Board of Examiners*, (1957) 153 Cal.App.2d 249, 255 . . .". *College of Psychological and Social Studies* at 373.

The court framed the question as whether the regulation was an invalid attempt to prohibit advertising that is not misleading or a valid attempt to prevent statements that are misleading. *College of Psychological and Social Studies* at 373. The court found that the former was the case as "none of the Attorney General's opinions cited by the board tend to show that the granting of a Ph.D. from an unaccredited school to persons who are licensed and who have Master's degrees from accredited schools is misleading as defined in the statutes." *Id.* at 374. The court concluded that "the board may not restrict advertising which does not violate existing code sections. The Legislature is free to deal with unaccredited schools, but the administrative board may not enlarge on legislative efforts in that area." *Id.* at 374.

In the same vein, the BCE, much less the DWC, may not enlarge on the legislative efforts to set the standards for the use of designations by health care practitioners. The BCE, and certainly the DWC, may not restrict the right of a doctor of chiropractic to advertise designations which do not violate Section 651. Rather, the Legislature is free to deal with the issue.

III. Even the Legislature cannot restrict the use of specialty designations absent a substantial state interest lest it would violate the Constitution.

A doctor of chiropractic's right to advertise specialty designations is constitutionally protected commercial speech. While a state may "prohibit commercial speech that is false, deceptive, or misleading" as California has done, where speech is not deceptive, the "state may restrict it 'only if the state shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.' *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. Of Accountancy*, 512 U.S. 136, 142 (1994) citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)." *Michael Potts, D.D.S. and the American Academy of Implant Dentistry, v. Kathleen Hamilton, Director, California Department of Consumer Affairs, et. al.*, 334 F.Supp. 2d 1206, 1212 (2004).

If an advertisement is inherently misleading or actually misleading in practice it is not protected by the First Amendment and may be banned. *Potts* at 1212. If an advertisement is only potentially misleading, and could be modified as with a disclaimer, then it is protected by the First Amendment and may not be banned. *Potts* at 1212-13. "The determination as to whether an advertisement or credential is inherently or potentially misleading is necessarily fact intensive and case-specific." *Potts* at 1213 citing *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101-102 (1990).

A. Designations under 651(h)(5)(A) have not been held "inherently misleading" and are unlikely to be held so as against doctors of chiropractic.

Potts held that designations like "fellow" and "diplomate" were not inherently misleading as to dentists and therefore found unconstitutional the restrictions in 651(h)(5)(A) that required dentists to take an advanced education program before they could advertise such credentials. This ruling stands in contrast to the court in *American Academy of Pain Management v. Ronald Joseph, Executive Director of the Medical Board of California*, 353 F.3d 1099 (2004) where the court held that an advertisement by a medical doctor using the term "board certified" with respect to a credential not conferred by the American Board of Medical Specialties is inherently misleading because the public associates the term with certification by a member of ABMS in one of the 23 areas of medical specialization recognized by ABMS. *Pain Management* at 1104-1105. *Potts* distinguished the circumstances pertinent to the dentists by pointing out that dental specialty credentials, or even terms such as "diplomate" or "specialist," do not connote certification by a member of the American Dental Association in an ADA-recognized dental specialty. *Potts* at 1215.

Along the same lines as dentists, specialty credentials for doctors of chiropractic do not have a fixed meaning within the minds of the public and terms such as "diplomate" and "board-certified" do not connote certification by a member of the American Chiropractic Association in an ACA-recognized chiropractic specialty. Thus specialty designations for doctors of chiropractic are not seen to be inherently misleading.

Designations such as "diplomate," "specialist," and "board-certified" do not suggest that doctors of chiropractic are licensed by the state to practice another profession, especially because as to doctors of chiropractic those designations are typically further specified to be "chiropractic" in nature. The acronyms for doctors of chiropractic are not similar to the acronyms for the other professions so the use of specialty designations by doctors of chiropractic does not mislead.

To be sure, the BCE can take enforcement action against a doctor of chiropractic for the use of a particular designation that the DWC deems actually misleading as applied in a specific case. The BCE has adopted regulations to establish penalties for deceptive advertising (16 CCR 311) and for false advertising (16 CCR 317(p)) so it has these tools at its disposal for this purpose.

But those regulations do not set the standards for what is considered misleading – they just set the penalties for the use of misleading statements. 16 CCR 311 has been upheld on this basis as not enlarging the Act: "Actually, rule 311 specifies the disciplinary penalties to be imposed by respondent board upon chiropractors for advertising misstatements, falsehoods, misrepresentations, (all of which are untrue) or distorted, sensational or fabulous statements, or any statements intended to or having a tendency to deceive the public or impose upon credulous or ignorant persons (all of which are misleading). The respondent board, in enacting rule 311 was performing its duty to enforce the Chiropractic Act and 'to promote the spirit and purpose' thereof." *Cozad v. Board of Chiropractic Examiners*, 153 Cal.App.2d 249, 256 (1957).

However, the BCE has no authority to restrict the use of a particular designation unless the BCE provides a strong evidentiary case that the use of the particular designation is misleading to the public. To wit, "respondent board is powerless to prohibit or restrict advertising which is not untrue or misleading." *Cozad* at 255.

IV. The effect of the proposed regulation is to exclude doctors of chiropractic from serving as QMEs, which the DWC has no authority to do.

The DWC has no authority to impose conditions on doctors of chiropractic that would effectively preclude them from serving as QMEs. The authority to establish the conditions for eligibility rests with the Legislature. As Section 11 provides, the "Administrative Director shall appoint as QMEs all applicants who meet the requirements set forth in Labor Code Section 139.2(b)." The DWC's role is to implement the legislative intent, which clearly contemplates doctors of chiropractic serving as QMEs.

By imposing a condition precedent that is legally impossible for doctors of chiropractic to satisfy, the DWC is prohibiting doctors of chiropractic from serving as QMEs. In so doing, the DWC is flouting the legislative intent and is usurping the legislative prerogative to determine which health care practitioners can serve as QMEs.

Conclusion

For the foregoing reasons, the DWC does not have the authority to adopt a regulation to preclude a doctor of chiropractic from serving as a QME unless the BCE recognizes the board that conferred the specialty designation.

However, there is another way to craft the language that would at the same time relieve DWC from making determinations about the validity of specialty boards and be consistent with the jurisdiction of the respective licensing boards. Section 12 (and Section 13 with conforming changes) could be revised as follows:

"The Administrative Director shall recognize all specialty boards either accredited or considered equivalent to ABMS-recognized boards by the Medical Board, the Osteopathic Medical Board and the Board of Psychology of the State of California. The Administrative Director shall recognize chiropractic diplomate boards unless specifically rejected by the Board of Chiropractic Examiners."

DAVID PRESCOTT, Esq.
29305 Modjeska Canyon. Rd.
Silverado, Calif. 92676
(714)649-0661

Attorney for Petitioners

CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS

LAWRENCE TAIN, DC; STEPHANIE HIGASHI, DC; ERIC SPRATT, DC; LORI PRESCOTT, DC; GAYLE WALSH, DC. and ALEXIS M. RAMER, PhD.	)	SUBMITTED IN SUPPORT OF PETITION FILED PURSUANT TO GOVERNMENT CODE §§ 11340.6 & 11340.6; PETITION FILED ON OR ABOUT 4-2-07 BY PETITIONERS
Petitioners.	)	

SPECIFIC SCOPE OF PRACTICE RULE

PROPOSED and REQUESTED

by

PETITIONERS

Petitioners propose the following chiropractic scope of practice rule and specifically hereby request that the State Board of Chiropractic Examiners repeal the present section 302 of Title 16 of the California Code of Regulation and adopt in its place the following:

§ 302 Scope of Chiropractic Practice.

(1) Except as otherwise hereafter provided by amendment to California Code of Regulations, Title 16, section 331.12.2(d), or by other duly adopted regulation establishing standards to perform particular forms of practice otherwise within the hereafter stated scope of practice, a duly licensed chiropractor is authorized to diagnose and treat diseases, injuries, deformities or other physical or mental conditions except by the use of any drug or medicine in materia medica in 1922 and thereafter, or by the performance of surgery.

(2) The limitations on the scope of chiropractic practice stated in the chiropractic act as amended, including the limitation related to the "use of any drug or medicine now or hereafter included in materia medica", did not in 1922, and do not now, preclude chiropractors from using, dispensing, administering, ordering or prescribing for the diagnosis and treatment of diseases, injuries, deformities, or other physical or mental conditions, any of the following:

Food, including extracts of food, nutraceuticals, vitamins, amino acids, minerals, and enzymes; homeopathic medicines; botanicals and their extracts, botanical medicines; other substances derived from botanical, mineral or animal sources or whose molecular structure is the same as found in nature; air, water, clay, heat, sound, light, electricity, energy, therapeutic exercise, suggestive therapeutics, and rest; and joint and/or soft tissue massage, manipulation and/or adjustment for biomechanical, physiological, reflex or other therapeutic purposes.

(3) In 1922 the term surgery meant, and it still means, the severing of human tissue with a knife or equivalent cutting device, and did not, and does not, include, or prevent chiropractors from: a) puncturing or penetrating human tissues with needles or other instruments for imaging or other diagnostic purposes, or b) utilizing needles or other instruments for the transdermal, intradermal, subcutaneous, intravenous, intramuscular, oral, nasal, auricular, ocular, rectal, vaginal delivery or administration of those substances and treatment forms, methods, means and instrumentalities referred to in paragraph (2) hereof.

(4) A chiropractor may not hold himself or herself out as being licensed to practice anything other than as a chiropractor and may not hold himself or herself out as practicing under any other healing arts license, including medicine, osteopathy, dentistry, optometry, physical therapy, naturopathy, or acupuncture, unless he or she holds another, separate license authorizing such practice.