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CONTROL OR CARTE BLANCHE? MISSISSIPPI LICENSES CHIROPRACTIC

Daniel David Palmer, grocer and fish peddler, established chiropractic in 1895, in Davenport, Iowa, after allegedly restoring hearing to Harvey Lillard, deaf 17 years, by means of a spinal adjustment.¹ In a second case, Palmer allegedly cured a heart ailment by means of a spinal adjustment.² As a result of these two cases, Palmer claimed to have discovered the cause of all disease: nerves impinged by misaligned spinal vertebrae cause disease.³ Mr. Palmer hypothesized that disease could be cured by adjustment of misaligned vertebrae through the exertion of direct manual pressure, forcing the vertebrae back into place.⁴ The same year, D.D. Palmer established the Palmer School to teach his method in a 3-month course.⁵ But it was not until his son and disciple, Bartlett Joshua Palmer, took over the school that chiropractic became a nationwide commercial success.⁶

Today, chiropractic is the second largest health-care profession with over 15,000⁷ estimated full-time practitioners netting an average of \$30,882 annually.⁸ Chiropractic is split into two branches: the "straights," or conservative school, represented by the International

¹ This story is probably spurious. R. SMITH, *AT YOUR OWN RISK, THE CASE AGAINST CHIROPRACTIC* 1-4 (1969). Evidently Palmer's lack of a basic science education left him unaware that the acoustic (eighth cranial) nerve does not communicate with the spinal cord. See H. GRAY, *ANATOMY OF THE HUMAN BODY* 903 (1930).

² R. SMITH, *supra* note 1, at 3-4.

³ *Id.* Chiropractors speak alternatively of "misaligned vertebrae" and "subluxations of the vertebrae." A subluxation is an incomplete dislocation or disturbance in the normal alignment of bone ends. Dislocation usually results from trauma, but there are also congenital and pathological dislocations. Traumatic dislocations and subluxations seldom, if ever, occur without simultaneous injury to supporting structures, because a force of between 3,000 and 10,000 pounds, exerted through adjacent soft tissue, would be necessary to separate the vertebrae. Changes in the alignment of vertebrae occur as normal physiological changes consequent to routine living. J. BROOKE, *BACK COMPLAINTS AND THE MEDICAL WITNESS* 22-25 (1964).

⁴ R. SMITH, *supra* note 1, at 5. See generally *Joyner v. State*, 101 Miss. 245, 251, 179 So. 573, 575 (1938); MISS. CODE ANN. § 73-6-1 (Supp. 1974); *Hearings Before the Subcomm. on Frauds and Misrepresentations Affecting the Elderly of the Senate Special Comm. on Aging*, 88th Cong., 2d Sess., pt. 2, at 249 (1964) [hereinafter cited as *1964 Hearings*].

⁵ R. SMITH, *supra* note 1, at 5.

⁶ See Note, *Medical Jurisprudence—Chiropractic—Its Status Under Limited State Licenses*, 34 NOTRE DAME LAW. 562, 567 (1958). "Chiropractic is not a profession but a business. This is evidenced by its historical development." And from a former pupil quoting B. J. Palmer: "There are just two main issues in Chiropractic business—results and health to the patient, and satisfaction in those results and profits to the doctor." P. REMIER, *MODERN X-RAY PRACTICE AND CHIROPRACTIC SPINOGRAPHY* 46 (1938).

⁷ Note, *Malpractice and the Healing Arts—Naturopathy, Osteopathy, Chiropractic*, 9 UTAH L. REV. 705, 714 (1965).

⁸ Vogl, *It's Time to Take Chiropractors Seriously*, MED. ECON., Dec. 9, 1974, at 78.

Chiropractic Association, which believes the scope of chiropractic is limited to analysis of spinal subluxation and treatment by manual adjustment of the spine; and the "mixers," or liberal school, represented by the American Chiropractic Association, which has adopted the use of nutritional therapy, physical therapy equipment, vitamins, electricity, water, colonic irrigation, and other "modalities" of therapy, in addition to manipulation of the spine.⁹ Chiropractic no longer denies the validity of other health-care systems but argues instead that chiropractic is an effective approach to some, though not all forms of disease, and should be accepted as a supplement to the practice of medicine.¹⁰

Chiropractic is taught in less than two dozen schools accredited by the National Chiropractic Association.¹¹ Since 1968, these schools have required 2 years of preprofessional college work including at least 12-30 hours in sciences and 30-48 hours in the humanities. A minimum of 4,200 classroom hours in 4 years is required for a "Doctor of Chiropractic" or "D.C." degree.¹² Chiropractic education is regarded as inadequate to prepare graduates to diagnose disease, let alone treat disease by spinal manipulation.¹³ Although basic sciences are taught in chiropractic schools, chiropractic students have no clinical experience with disease to prepare them to recognize it in their practices¹⁴ and are

⁹ *Id.* See also AMA, Data Sheet on Chiropractic 1 (1968); Note, *supra* note 7, at 713. The "mixer" approach includes the following:

1. Adjustments which correct the "disrelationship" existing in the musculo-skeletal system.
2. Nutrition and dietary advice for restoration of chemical balances and correction of malfunctions resulting from an unbalanced diet.
3. Physical therapy with light, heat, etc. for restoration of normal physiological functioning.
4. Counseling to establish balance between mental and physiological factors.

Miss. Legislative Services Office, PROBLEM ONE: THE PROPOSITION OF LICENSING CHIROPRACTORS IN THE STATE OF MISSISSIPPI 4 (Sept. 12, 1972) (footnote omitted) [hereinafter cited as LICENSING PROPOSITION].

¹⁰ See Vogl, *supra* note 8, at 78. Acceptance by the medical profession cannot be a serious objective of chiropractic. The official position of both the American Medical Association and the Mississippi State Medical Association is that chiropractic is a cult based on a hypothesis repudiated by the established facts of medical science, and whose practitioners are unqualified and incompetent to diagnose disease. See *Hearings on S. 1710 and S. 2078 Before the Subcomm. on Federal Employers' Compensation of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 2d Sess., at 69 (1964); Lotterhos & Long, *MSMA's Testimony on House Bill 344*, 3 J. MISS. STATE MED. ASS'N 151 (1962).

¹¹ Note, *supra* note 7, at 714.

¹² COUNCIL ON CHIROPRACTIC EDUCATION, EDUCATIONAL STANDARDS FOR CHIROPRACTIC COLLEGES 5, 15-16 (9th rev. ed. 1970); LICENSING PROPOSITION, *supra* note 9, at 4.

¹³ It was not until August 1974 that the Council on Chiropractic Education (jointly representing both national chiropractic associations) was recognized by the U.S. Office of Education as a national accrediting agency for chiropractic schools. Vogl, *supra* note 8, at 83.

¹⁴ Note, *supra* note 7, at 714-15.

not taught a scientific approach to understanding its causes.¹⁵

Chiropractic theory has never been endorsed by any creditable scientific or medical research,¹⁶ but rather, its obvious fallacies and more subtle hazards have been recognized and divulged by the medical profession, government health committees,¹⁷ and special interest groups.¹⁸ Despite seemingly overwhelming refutation by all competent sources, and without any scientific demonstration of effectiveness, both state and federal legislation have elevated chiropractic to the legal status of a licensed health-care profession.¹⁹ Today, chiropractic is licensed in all 50 states.²⁰ Chiropractic services are covered by Medicaid,²¹ Medicare,²² workmen's compensation laws in many states,²³ and policies of many private insurance companies;²⁴ recent acceptance by the United States

¹⁵ For this reason, chiropractic education is an utter waste of time and a hoax on chiropractic students who may actually believe they are being prepared to cure disease by spinal manipulation. *See also* WIS. GOVERNOR'S HEALTH PLANNING AND POLICY TASK FORCE, REPORT OF THE CHIROPRACTIC STUDY COMM. 23, 24 (1972) [hereinafter cited as GOVERNOR'S TASK FORCE].

¹⁶ *Cf. id.* at 17-19, 40.

¹⁷ *See 1964 Hearings, supra* note 4, at 233; LICENSING PROPOSITION, *supra* note 9; GOVERNOR'S TASK FORCE, *supra* note 15.

¹⁸ *See, e.g.*, American Public Health Association, Chiropractic and Naturopathy (Nov. 13, 1969); Maisel, *Should Chiropractors Be Paid With Your Tax Dollars?*, READERS DIGEST, July 1971, at 76; AFL-CIO Fact Sheet on Chiropractic, 214 J.A.M.A. 1095 (1970) (documenting the opposition of the AFL-CIO to the inclusion of chiropractic in the Medicare program); Senior Citizens News, Jan. 1969, vol. 2, no. 88 (reprint).

¹⁹ There are many explanations for the belief some people have in chiropractic efficacy. Of course credulous or desperate persons are psychologically vulnerable to testimonials to chiropractic. Then too, the treatments themselves, usually involving massage as well as joint popping and spinal manipulation, have inherently beneficial psychological effects, since the patient leaves the chiropractor "feeling good," temporarily. The rapport between chiropractor and patient is the "bed-side manner" at its best. Once the chiropractor has the patient psychologically convinced something is being done to improve his condition, the battle is usually won, since the majority of patient complaints are either psychosomatic, self-limiting, or self-remitting. Persons with psychosomatic complaints may already have been alienated from the medical profession by a lack of interest or attention from a physician with "serious" sickness in his waiting room. Another group who may be alienated are the untreatable minor orthopedic cases, whose physicians may fail to prescribe physical therapy. A further consideration is that the average chiropractic fee for an office visit is less than that charged by a physician. The most serious consequences for a patient substituting a chiropractor for a physician occur in those cases which may become aggravated or irreversible if medical treatment is delayed. *See* GOVERNOR'S TASK FORCE, *supra* note 15, at 39; R. SMITH, *supra* note 1, at 123-41. *See also* Vogl, *supra* note 8, at 76-85.

²⁰ LICENSING PROPOSITION, *supra* note 9. Louisiana followed Mississippi to become the 50th state licensing chiropractic. LA. REV. STAT. ANN. §§ 2801-18 (West Supp. 1975).

²¹ 42 U.S.C. § 1395x(r)(5) (Supp. III, 1973).

²² *Id.* § 1396d(g).

²³ Vogl, *supra* note 8, at 77.

²⁴ 10 U. KAN. L. REV. 622, 623 (1962).

Office of Education of a national accrediting agency for chiropractic schools will make qualifying schools eligible for federal grants.²⁵ In terms of legal status and public image, chiropractic has come a long way.

I. MISSISSIPPI'S CHIROPRACTIC LICENSURE ACT

Mississippi became the 49th state to license the practice of chiropractic when the 1973 legislative session passed the "Chiropractic Licensure Act."²⁶ With the passage of this law, the medical profession's politically impotent campaign to ban chiropractic as a dangerous "cult" passed into oblivion: chiropractic can no longer be ignored. The approach taken by chiropractic's opponents was to produce a law which would at least upgrade and control chiropractors in order to protect the public.²⁷ Now that chiropractic is licensed, it is necessary to assess the law by examining its legal and practical effects, conflicts arising under it, and problems of interpretation and enforcement.

Section 73-6-1 defines the practice of chiropractic:

The practice of chiropractic involves the analysis of any interference with normal nerve transmission and expression, and the procedure preparatory to and complementary to the correction thereof, by an adjustment of the articulations of the vertebral column and its immediate articulations for the restoration and maintenance of health without the use of drugs or surgery.²⁸

While this definition would seem to limit the practice of chiropractic to the scope of spinal adjustment for impinged nerves and apparently exclude chiropractors from the province of medicine through the phrase "without the use of drugs or surgery," it may actually expand the scope of chiropractic. Certainly more is involved in the practice of medicine than the use of drugs and surgery,²⁹ and the phrase "for the restoration and maintenance of health" is extremely broad—perhaps broad enough to reach beyond sprains and strains (which are within the province of the medical specialty of orthopedics)³⁰ to conditions which require early detection and medical treatment to avoid irreversible harm.³¹

²⁵ See Vogl, *supra* note 8, at 83.

²⁶ MISS. CODE ANN. §§ 73-6-1 to -31 (Supp. 1974).

²⁷ See, e.g., LICENSING PROPOSITION, *supra* note 9.

²⁸ MISS. CODE ANN. § 73-6-1 (Supp. 1974).

²⁹ See *id.* § 73-25-33 (1972), which defines the practice of medicine in Mississippi. See also *Redmond v. State ex rel. Attorney-Gen.*, 152 Miss. 54, 118 So. 360 (1928).

³⁰ STEADMAN'S MEDICAL DICTIONARY 891 (22d ed. 1973) defines orthopedics as: "[T]he medical specialty concerned with the preservation, restoration, and development of form and function of the extremities, spine, and associated structures by medical, surgical, and physical methods."

³¹ A 1963 survey for the American Chiropractic Association indicated that a high

Modern chiropractors profess to have evolved beyond a belief in a single cause of all disease to a recognition of their own limitations.³² However, neither the Chiropractic Licensure Act nor the rules and regulations adopted by the Mississippi State Board of Chiropractic Examiners³³ compel any chiropractor to refer cases beyond his capability to qualified medical doctors.³⁴ The wording in the definition, "procedure preparatory to and complementary to the correction thereof," elated the proponents of "wide-scope" chiropractic in the State of Washington, when similar wording was incorporated in their licensure act.³⁵ A recent decision in the Court of Appeals of the State of Washington interpreting this wording found no difference apparent in the statute between diagnosis and treatment, and held that surgical methods of diagnosis (drawing blood) were prohibited from use by chiropractors.³⁶ The Mississippi State Board of Chiropractic Examiners has also arrived at this interpretation, reflected in rule 17 of its rules and regulations:

No skin puncture shall be allowed for any type treatment or diagnostic purposes or for the collection of any specimen or for administration of any medication under the chiropractic licensure. There shall also be no GYN examinations performed.³⁷

This rule, however, does not define the scope of the practice of chiropractic in Mississippi. Section 73-6-23 of the Act is helpful:

Nothing in this chapter shall be construed as conferring upon the holder of such certificate the right to practice medicine and surgery as

percentage of chiropractors claim to treat nearly every type of illness. GOVERNOR'S TASK FORCE, *supra* note 15, at 19.

³² See Report of the Comm. for Peer Review to the ACA House of Delegates, June 1972, at 11; Vogl, *supra* note 8, at 81.

³³ MISS. STATE BD. OF CHIROPRACTIC EXAMINERS, RULES AND REGULATIONS, (July 13, 1974).

³⁴ A physician is generally considered to be obligated to refer a patient to a specialist or person qualified in a technique of treatment in which the physician is not qualified, when he knows or should know that he is not qualified or that his method of treatment is ineffective. 61 AM. JUR. 2d *Physicians, Surgeons, and Other Healers* § 138 (1967); Annot., 58 A.L.R.3d 590-91 (1970). Some courts have held chiropractors to the same standard in negligence cases. *E.g.*, Salazan v. Ehmann, 505 P.2d 387 (Colo. Ct. App. 1972); Ison v. McFall, 55 Tenn. App. 326, 400 S.W.2d 243 (1964).

³⁵ WASH. REV. CODE ANN. § 18.25.30 (1961); Letter from C. G. Haynes, D.C., to T. O. Morgan, D.C., Nov. 30, 1974, on file with the *Mississippi Law Journal*, wherein C. G. Haynes candidly remarks:

It might be almost amusing to you to know that the state attorney general's office subsequently asked the chiropractic disciplinary board members, "What does this mean?" Well, according to the wide-scope D.C. it could mean *anything all inclusive!* In fact, they were elated with the phraseology!

³⁶ State v. Wilson, 11 Wash. App. 916, 528 P.2d 279 (1974).

³⁷ RULES AND REGULATIONS, *supra* note 33, rule 17.

a physician or osteopathic physician as defined by statute, to engage in the practice of physical therapy as defined by statute, to advise or prescribe the use of drugs by his patients, or to advise a patient not to use a drug prescribed by a licensed physician or dentist.

Since the Chiropractic Licensure Act does not extend the scope of chiropractic into the fields of medicine, surgery, or physical therapy, as defined by statute, these areas are excluded from the practice of chiropractic.³⁸

Mississippi courts have strictly limited the scope of the practice of chiropractic to the treatment of human ailments by manipulation of the spine with the hands. In *Joyner v. State*,³⁹ the earliest appeal by a chiropractor from a conviction for practicing medicine without a license, the evidence showed that the chiropractor had attempted to remove a patient's tonsil by means of inserting a needle into the infected tonsil and then applying electric current. Excluding evidence that the chiropractor had been trained in this technique at a chiropractic school, the court held that the use of electric machines for therapeutic purposes pertained to the practice of medicine by physicians and surgeons. Far from unfriendly to chiropractic, the court noted in its affirmance of the conviction that most chiropractors were

enjoying the respect and confidence of the public in their efforts to administer to human illness in their particular line of endeavor . . . [and] are content not to depart from their own profession of treating disease by manipulation of the spinal column by hand, or at least not to invade the field of medicine and surgery.⁴⁰

In *Hayden v. State*,⁴¹ distinguishable on its facts from *Joyner*, the Mississippi Supreme Court held that an unlicensed osteopath who treated disease by manipulation of the spine did not exceed the scope of his field and was not guilty of practicing medicine without a license. There, the prosecution argued unsuccessfully that a practitioner who treats by manipulation should be required, as a matter of common sense, to possess the same diagnostic ability as a physician, regardless of the method of treatment he uses, and that osteopathy was within the true definition of the practice of medicine. The court concluded, reversing for the defendant, that an osteopath's treatments were not "an appliance or agency . . . for the cure, relief or palliation of any ailment or disease of mind or body"⁴² so as to be regulated by the Medical

³⁸ MISS. CODE ANN. § 73-6-23 (Supp. 1974).

³⁹ 181 Miss. 245, 179 So. 573 (1938).

⁴⁰ *Id.* at 254, 179 So. at 576.

⁴¹ 81 Miss. 291, 33 So. 653 (1902).

⁴² *Id.* at 291, 33 So. at 654.

Practice Act. This decision carved an early exception for osteopathy but has not been followed in cases involving chiropractors.⁴³ More recently, *Harris v. State*⁴⁴ held that the administration of vitamins by a chiropractor to correct a vitamin deficiency constituted the unlicensed practice of medicine.

Though the courts may be expected to follow the precedents of *Joyner* and *Harris*, the practical fact remains that rather than control the scope of the practice of chiropractic, the statutory definition of chiropractic provides opportunities for expansion if the State Board of Chiropractic Examiners is sympathetic with the "wide-scope" branch of chiropractic.⁴⁵ A majority of the present board advocates acts constituting the practice of medicine under Mississippi case law and have rejected disciplinary rules prohibiting such acts. Predictably, the board has also rejected disciplinary rules which would preclude chiropractors from using physical therapy equipment. Although this is an unsettled area in Mississippi, a Minnesota court has held the use of this equipment to constitute the unlicensed practice of physical therapy.⁴⁶ Clearly, the Chiropractic Licensure Act has provided no effective means of preventing unlicensed encroachment on the fields of medicine and physical therapy. Because the Act does not codify Mississippi case law restricting the practice of chiropractic to spinal manipulation, the scope of chiropractic is only specifically precluded from surgery and the prescription of drugs, remaining open conceptually to any breadth the Chiropractic Board's own interpretation may provide. From the standpoint of diagnosis, the chiropractor remains able to determine for himself what affliction a patient has and whether he can treat it, although he must make the diagnosis without the benefit of such procedures as blood tests, which constitute the practice of surgery. However severely a chiropractor may be handicapped by restrictions on technique or by the inadequacy of his training, he is not legally responsible to the patient for failing to diagnose a disease or refer the patient to someone who can diagnose disease, even though such a failure might constitute gross

⁴³ Today the Medical Practice Act treats both osteopaths and medical doctors as physicians. Licensing of osteopathic medicine is regulated by MISS. CODE ANN. § 73-25-25 (Supp. 1974), which requires applicants to pass the same examination as that required for medical licenses.

⁴⁴ 229 Miss. 755, 92 So. 2d 217 (1957).

⁴⁵ According to a chiropractic member of the State Board of Chiropractic Examiners, the majority of board members favor a "wide-scope" interpretation of the practice of chiropractic; these board members both treat patients with physical therapy equipment and prescribe vitamins. Letter from T. O. Morgan, D.C., to J. T. Gilbert, P.T., Nov. 1, 1974, on file with the *Mississippi Law Journal*.

⁴⁶ State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), on remand from 295 Minn. 379, 206 N.W.2d 12 (1973).

neglect under the standards applicable to physicians. While the public is vulnerable, the chiropractor is cloaked with the immunity of the customary chiropractic standard of care. Therefore, the scope of chiropractic remains under essentially the same degree of control as before the passage of the Chiropractic Licensure Act.

A. *State Board of Chiropractic Examiners*

Sections 73-6-3 to -21, creating the State Board of Chiropractic Examiners, empower the board to adopt rules and regulations necessary to carry out the provisions of the Act, and prescribe licensing qualifications, examinations, procedures, fees, reciprocity, and grounds and procedures for discretionary license refusal, cancellation, or suspension.⁴⁷

Section 73-6-3 provides for a six-member State Board of Chiropractic Examiners with one member being the executive director of the State Board of Health⁴⁸ or his designee. Appointments of the other five members are made by the Governor, with advice and consent of the Senate, for 5-year terms. This section also provides that no more than three members of the board shall be members of either the Mississippi Society of Chiropractors ("straights") or the Mississippi Chiropractic Association ("mixers").⁴⁹ The reason for mandating participation by members of both of these organizations was probably to assure that the board was not completely controlled by either branch of chiropractic. In spite of this, however, the present board is dominated by "mixer" chiropractors who use "modalities" in their own practices.⁵⁰

⁴⁷ MISS. CODE ANN. §§ 73-6-3 to -21 (Supp. 1974).

⁴⁸ *Id.* § 73-6-3.

⁴⁹ *Id.*

⁵⁰ Letter, *supra* note 45. Addressing the executive secretary of the State Physical Therapy Board, the writer states:

Our chiropractic board was established in April of 1973. One of our first duties according to law was to establish rules and regulations. I brought up the subject of chiropractic scope of practice, and found that only one other chiropractor on the board besides myself was practicing spinal adjusting only. The other board members indicated that they were also using physical therapy machines and dispensing vitamins along with the adjustment. I then made the motion that we begin at once to stick to the letter of our new law (which does not examine in physical therapy subjects or vitamin therapy, and defines chiropractic as "the analysis of any interference to normal nerve transmission . . . and by adjustment of the articulations of the vertebral column . . . for the restoration and maintenance of health), by ruling out all physical therapy machines and vitamin therapy for use by chiropractors. This motion was defeated four to two.

[The] executive director of the state board of health is also a member of our board and voted with me. Discussion followed to no avail and it was then made evident that I must go to the Attorney General to seek a ruling regarding the scope of practice for chiropractors. I was disappointed with my interview as

Section 73-6-13 sets license qualification standards, mandates the State Board of Health to prescribe rules and regulations for the operation and use of X-ray machines, and prescribes the content and procedure for approval of a proposed licensing examination.⁵¹ The examination must test in

practical, theoretical and physiological chiropractic analysis, theoretical and practical chiropractic, nerve tracing, spinal analysis, the operation of X-ray machines and interpretation of X-rays as applied to chiropractic use, and basic science knowledge of the subjects of anatomy, physiology and pathology.⁵²

However, section 73-6-27, the Act's "grandfather clause," exempts persons from the licensure examination requirement who were engaged in the full-time practice of chiropractic prior to January 1, 1970, or in the full-time practice of chiropractic in Mississippi for a period of 8 years prior to the Act's passage, if they are graduates of a school approved by the International Chiropractors Association or American Chiropractic Association and apply within 90 days of the initial appointment of the Mississippi State Board of Chiropractic Examiners.⁵³ The Act, therefore, has no immediate effect on the qualifications of most chiropractors practicing in the state.⁵⁴ In addition to setting out the general licensing procedure, section 73-6-15 specifies that a certificate of licensure to practice chiropractic does not qualify a chiropractor to apply for practice on the medical staffs of hospitals licensed by the Mississippi Commission on Hospital Care, does not confer expert witness status, and does not make the chiropractor eligible for payment under workmen's compensation insurance or Medicaid benefits.⁵⁵

Despite the apparent intent of these provisions to specify areas of

it seemed he would not rule, and later I received a letter saying that the board must make its own rules and regulations.

. . . .
It is my desire . . . that your board would appeal to the attorney general or the courts to keep the chiropractors from infringing upon the profession of physical therapy in which only you are educated and licensed to practice in the state of Mississippi. I am sure that you will agree that chiropractors should practice spinal adjusting or manipulation and procedures directly related to same only, rather than infringing on other professions, in which they are not necessarily qualified or even knowledgeable. I also feel that this would uphold the legislative intent and would protect the health of the people in Mississippi.

⁵¹ MISS. CODE ANN. § 73-6-13 (Supp. 1974).

⁵² *Id.*

⁵³ *Id.* § 73-6-27.

⁵⁴ There are approximately 150 chiropractors practicing in Mississippi. LICENSING PROPOSITION, *supra* note 9.

⁵⁵ MISS. CODE ANN. § 73-6-15 (Supp. 1974).

disqualification, the statutory language is ineffective because it does not positively prohibit chiropractic eligibility in these areas. Rather than controlling or limiting chiropractic, these provisions simply maintain the status quo.

The State Board of Chiropractic, under section 73-6-19, must refuse to license an applicant if any of nine specified grounds exist.⁵⁶ Where the grounds are found to apply to a licensed practitioner, however, the Act uses the permissive "may," allowing the board to cancel, revoke, or suspend the license.⁵⁷ Therefore, where licensed chiropractors are concerned, enforcement of the Act by withholding the privilege to practice is a matter of discretion with the board. The grounds for revocation are similar to and, in some instances, duplicate the grounds for revocation of a physician's license to practice medicine.⁵⁸ Whether the Chiropractic Licensure Act succeeds in controlling the practice of chiropractic will depend on the manner in which the board exercises its discretion.

B. Eligibility Under Medicaid

Presently, chiropractic is not eligible for compensation under Medicaid. Sixteen services are enumerated under Mississippi's Medical As-

⁵⁶ *Id.* § 73-6-19.

⁵⁷ *Id.*

⁵⁸ *See id.* § 73-25-29 (1972). The grounds for adverse action against a chiropractic licensee or applicant are:

- (1) failure to comply with the rules and regulations adopted by the state board of chiropractic examiners;
- (2) violation of any of the provisions of this chapter or any of the rules and regulations of the state board of health pursuant to this chapter with regard to the operation and use of X-rays;
- (3) fraud or deceit in obtaining a license;
- (4) addiction to the use of alcohol, narcotic drugs, or anything which would seriously interfere with the competent performance of his professional duties;
- (5) conviction by a court of competent jurisdiction of a felony, other than manslaughter or any violation of the United States Revenue Code;
- (6) unprofessional and unethical conduct;
- (7) contraction of a contagious disease which may be carried for a prolonged period;
- (8) failure to report to the welfare department or the county attorney any case wherein there are reasonable grounds to believe that a child has been abused by its parent or person responsible for such child's welfare;
- (9) advising a patient to use drugs, prescribing, or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist.

Id. § 73-6-19 (Supp. 1974).

sistance for the Aged Act;⁵⁹ chiropractic is not among them.⁶⁰ Considering the potential economic stake involved in obtaining the inclusion of chiropractic under Medicaid,⁶¹ it is not surprising that legislation for that purpose was prefiled for the 1975 regular session of the legislature.⁶² The proposed legislation, entitled "An Act to Amend Section 73-6-15, Mississippi Code of 1972, to Provide That Chiropractors Shall Be Eligible for Payments Under Medicaid Benefits," would delete the phrase "or Medicaid benefits" from the last sentence of the section.⁶³ This bill appears to be both unnecessary and insufficient to change the eligibility of chiropractors for compensation under Medicaid. It appears unnecessary, because section 73-6-15 also states that nothing in the chapter will be construed to make a licensed chiropractor eligible for payment under workmen's compensation insurance,⁶⁴ yet both prior to and following passage of the Chiropractic Licensure Act, chiropractic treatments were compensable under workmen's compensation insurance on a case-by-case basis.⁶⁵ The amendment seems insufficient because the addition of categories of authorized services is controlled by the last paragraph of section 43-13-117 (Medical Assistance for the Aged Act):

Notwithstanding any provision of this article, no new groups or categories of recipients and new types of care and services may be added without enabling legislation from the Mississippi legislature, except that the commission may authorize such changes without enabling

⁵⁹ *Id.* § 43-13-117.

⁶⁰ *See id.*

⁶¹ During fiscal year 1974, 275,314 persons in Mississippi received medical assistance through Medicaid at a total program cost of \$89,702,656. Total medical expenditures increased 44.5 percent over the figure for fiscal year 1973. Of this total, \$18,880,249 was state money. The monthly average number of medical assistance recipients was 127,206, and the average amount spent per eligible person was \$273.10. (This figure would be even higher per recipient, since not all eligibles received assistance.) Physicians' services accounted for \$14,277,985 or 16.8 percent of total expenditures (down from 17.2 percent in fiscal year 1973); 72.3 percent of expenditures for physicians' services went to the over-21 age group, with the over-64 group accounting for 32.3 percent of the total. MISS. MEDICAID COMM., FIFTH ANNUAL REPORT 5, 8, 12, 17, 18, 23 (1974).

⁶² S. 2093, Miss. Legislature, Regular Sess. (1975) (prefiled by Sen. Theodore Smith).

⁶³ *See id.*

⁶⁴ MISS. CODE ANN. § 73-6-15 (Supp. 1974).

⁶⁵ Interview with Jim Anderson, Claims Supervisor, Mississippi Workmen's Compensation Commission, in Jackson, Mississippi, January 6, 1975. Calls were also made to the claims department of Aetna and Traveler's insurance companies in Jackson. The companies indicated that no general rule of interpretation specifically qualified chiropractic treatment for reimbursement, but the standard of reasonableness, tempered by economic expediency, called for compensation for chiropractic treatments on a case-by-case basis, especially where the injury was minor, within the scope of physiotherapy, and the claimant returned to work promptly. Neither carrier, however, referred claimants to chiropractors, and both indicated that claims for compensation for chiropractic treatments were few in number and monetarily insignificant.

legislation through a majority vote of its members when such addition of recipients or services is ordered by a court of proper authority.⁶⁶

The state attorney general is of the opinion that section 43-13-117 would have to be amended in order for chiropractic services to be compensable under Medicaid.⁶⁷

C. Eligibility for Practice on Hospital Staffs

Eligibility for practice on hospital staffs is probably not a future possibility for the chiropractor, but inclusion of such prohibition is important. Hospital staffs do occasionally include licensed physical therapists, and it is not inconceivable that a chiropractor using physical therapy equipment under a "modality-inclusive" concept of chiropractic might seek a hospital position as a lucrative avenue to prestige and professional status. But under the Chiropractic Licensure Act, a chiropractor, regardless of qualifications, cannot give the designation "physical therapy" to any form of treatment.⁶⁸ The specific prohibition is found in section 73-6-23, which prohibits a licensed chiropractor from engaging "in the practice of physical therapy as defined by statute."⁶⁹ Though sounding final, it is important to note that physical therapy is not defined by statute.⁷⁰ Further, the physical therapy licensing act specifically states that nothing in that act is to be construed as prohibiting the use of physical therapy equipment by other professions,⁷¹ in spite of the fact that use of the equipment is dangerous.⁷²

⁶⁶ MISS. CODE ANN. § 43-13-117 (Supp. 1974).

⁶⁷ Letter from Attorney General A.F. Summer to State Senator Ray H. Montgomery, May 3, 1973, on file with the *Mississippi Law Journal*.

⁶⁸ MISS. CODE ANN. § 73-23-5 (1972).

⁶⁹ *Id.* § 73-6-23 (Supp. 1974).

⁷⁰ *Id.* § 73-23-5 (1972) limits the use of the title "physical therapist" without defining the term and also specifically excludes the regulation of "physical therapy modalities" from its scope.

⁷¹ *But see* State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), *on remand from* 295 Minn. 379, 206 N.W.2d 12 (1973).

⁷² It is uncontroverted that ultrasonic, diathermy and electric muscle stimulator devices are inherently dangerous unless properly used and constitute a potential hazard to the patient on whom they are used. For that reason, they bear on their label a warning legend that: "Federal law restricts to sale by or . . ." on prescription of a qualified physician . . . and "Caution, this equipment is sold only for use by or under the direction of a qualified physician"

It is uncontroverted that before using ultrasound, diathermy or electric muscle stimulators in the treatment of human ailments, a careful medical diagnosis is necessary to determine whether any complications are present which may contraindicate their use.

Ultrasound and diathermy should not be used during pregnancy or applied

D. *Eligibility Under Medicare*

Compensation for chiropractic treatments under Medicare was effected automatically upon enactment of the Chiropractic Licensure Act, without specific reference, because the federal guidelines for eligible services are controlling.⁷³ The federal guidelines set up two hurdles for chiropractic qualification: First, that the chiropractor be licensed by the state in which he practices; and second, that compensation only apply to treatment to correct "by means of manual manipulation of the spine . . . a subluxation demonstrated by X-ray to exist."⁷⁴ The Act provides no compensation for the X-ray. This provision could cause unnecessary X-radiation as a prerequisite to compensation for the chiropractor, but the economic burden of the noncompensated X-ray may provide an offsetting negative incentive to treat subluxations except where traumatic injury, or history of traumatic injury, to supporting tissues indicates the diagnosis.⁷⁵

E. *Eligibility Under Workmen's Compensation Insurance*

Chiropractors are eligible for compensation for services performed under workmen's compensation insurance on a case-by-case basis.⁷⁶ The jurisdiction and authority for determining eligibility are vested in the Workmen's Compensation Commission,⁷⁷ which makes a determination according to the particular facts and circumstances of each case.⁷⁸ Although the word "physician" appears throughout the act, and there are specific sections applying to other practitioners, chiropractors are not mentioned. One phrase in section 71-3-15 has been broadly interpreted by insurance carriers and the Workmen's Compensation Commission sometimes to include chiropractors:

The employer shall furnish such medical, surgical, *and other atten-*

to areas of the body where there is acute infection, benign or malignant tumor, inadequate circulation, impaired sensation, metallic implants, peripheral vascular disease, osteoporosis, thrombophlebitis, nor on patients suffering from ischemia, coronary or other cardiac disease, vascular occlusion of any kind, or hemorrhagic tendencies.

State Bd. of Medical Examiners v. Olson, No. 38,217 at 7-8 (Minn. 7th Dist. Ct., Sept. 27, 1974) (citations and paragraph numbers omitted).

⁷³ Chiropractic was included under Medicare by 42 U.S.C. § 1395x(r)(5) (Supp. III, 1973).

⁷⁴ *Id.* "The diagnosis of a subluxation can occasionally be confirmed and graphically recorded by stress X-ray films in which X-rays are taken during one or more phases of movement." J. BROOKE, *supra* note 3, at 26.

⁷⁵ See J. BROOKE, *supra* note 3, at 22-28.

⁷⁶ See note 65 and accompanying text *supra*.

⁷⁷ See Letter from attorney general, *supra* note 67.

⁷⁸ See note 65 *supra*.

*dance or treatment, nurse and hospital service, medicine, crutches, artificial members, and other apparatus for such period as the nature of the injury or the process of recovery may require.*⁷⁹

Although compensable medical services are not limited to those of medical doctors,⁸⁰ one view is that chiropractic treatments are excluded,⁸¹ since they are not "medical treatment." There is, however, a line of cases in which compensation for chiropractic treatment is discussed, but compensation has not been excluded on the specific grounds of not being the kind of medical treatment authorized by statute.⁸²

F. Chiropractor's Status as an Expert Witness

Licensing did not change the status of chiropractors as expert witnesses in Mississippi.⁸³ The qualification of a witness as an expert is not amenable to specific rules but is left to the trial judge's discretion, subject to review for abuse.⁸⁴ Although a search has not produced any reported Mississippi case on the capacity of a chiropractor to testify as an expert, other jurisdictions and legal authorities are in agreement that a qualified chiropractor is generally competent to testify as an expert on matters within the scope of chiropractic.⁸⁵ The difficulty is in determining which areas are included within the scope of a limited practitioner.⁸⁶ Although this is not a frequently litigated area, one au-

⁷⁹ MISS. CODE ANN. § 71-3-15 (1972) (emphasis added).

⁸⁰ 2 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 61.13, at 10-468 n.78.1 (1975).

⁸¹ *E.g.*, Ingebritson v. Tjernlund Mfg. Co., 289 Minn. 232, 183 N.W.2d 552 (1971) (employer not liable for payment of bills for chiropractic treatment incurred in a case of compensable injury, because the treatment was not "medical treatment").

⁸² *See, e.g.*, Divito v. Fuller Brush Co., 217 So. 2d 313 (Fla. 1969); Stich v. Independent Life & Accident Ins. Co., 139 So. 2d 398 (Fla. 1962); Tom Still Transfer Co. v. Way, 482 S.W.2d 775 (Tenn. 1972); Olivarez v. Texas Employers' Ins. Ass'n, 486 S.W.2d 884 (Tex. Civ. App. 1972).

⁸³ *See* Letter from attorney general, *supra* note 67. *See also* MISS. CODE ANN. § 73-6-15 (Supp. 1974).

⁸⁴ C. McCORMICK, EVIDENCE § 13, at 30 (2d ed. 1972). *See also* Illinois Cent. R.R. v. Benoit Gin Co., 248 So. 2d 426 (Miss. 1971).

⁸⁵ *See* 31 AM. JUR. 2d Chiropractors § 107 (1967); Annot., 52 A.L.R.2d 1384 (1957); 32 C.J.S. Evidence 546(93) (1964); Comment, Chiropractors as Expert Medical Witnesses, 20 CLEV. ST. L. REV. 53, 57 (1971). "It is quite significant that no reported case decision has held that a chiropractor is not competent to testify within the scope of his profession." *Id.* at 59.

⁸⁶ *See* Chalupa v. Industrial Comm'n, 109 Ariz. 340, 509 P.2d 610 (1973) (since a chiropractor is not a medical doctor, he is not competent to testify on occupational diseases such as silicosis); Cavell v. Winn, 154 So. 2d 788 (La. Ct. App. 1963) (chiropractic testimony excluded as to the medical connection between spinal injury and tonsillitis, vaginal bleeding, burning of the eyes, and stomach trouble); Suris v. Government Employees Ins. Co., 53 Misc. 2d 454, 278 N.Y.S.2d 708 (App. T. 1967) (chiropractor not

thor sees the admissibility of chiropractic testimony increasingly contested and closer attention being paid by the courts to the specialized nature of chiropractic in determining admissibility.⁸⁷ In qualifying medical experts, Mississippi courts have tended to use their discretion, looking beyond mere physician status to determine special competency in the issue area.⁸⁸ Chiropractic testimony interpreting X-rays is generally admissible when the X-ray photographs are properly identified and the subject matter is considered to be within the purview of chiropractic.⁸⁹ Some courts in early cases even admitted chiropractic testimony interpreting X-rays in malpractice cases against physicians.⁹⁰ In Mississippi, it is not necessary to be a physician to testify as to the interpretation of X-ray photographs, so long as the witness is demonstrated to possess the necessary skill and experience.⁹¹ Because chiropractic is limited by statute to a narrow area, courts are likely to construe the definition of chiropractic narrowly in determining the competency of chiropractic testimony regarding future medical requirements and the extent and permanence of personal injuries.

G. Control of X-Radiation

The passage of the Chiropractic Licensure Act effected no additional controls over the use of X-radiation equipment by chiropractors, because the State Board of Health began inspecting chiropractic X-ray

qualified to testify that in his opinion his treatment was a necessary medical expense resulting from an accident); *Allen v. Hinson*, 12 N.C. App. 515, 183 S.E.2d 852 (1971) (chiropractor qualified without objection to testify within scope of "chiropractory," should not have been allowed over objection to express expert opinion as to diagnosis, treatment, disability, and permanence of a back injury). *Contra*, *Line v. Nourie*, 215 N.W.2d 52 (Minn. 1974) (chiropractor held competent to testify as to "reasonable chiropractic certainty" of probable effects, permanence, and future medical requirements of an injury when properly qualified).

⁸⁷ See Comment, *The Chiropractor as an Expert Witness*, 15 MERCER L. REV. 431, 436 (1964); Annot., *supra* note 85.

⁸⁸ *J.W. Sanders Cotton Mill, Inc. v. Moody*, 189 Miss. 284, 195 So. 683 (1940) (chiropractor held competent to testify as to personal injuries); *Aponaug Mfg. Co. v. Carroll*, 183 Miss. 793, 184 So. 63 (1938) (X-ray technician with 15-years experience reading and interpreting X-rays, competent to state that pictures disclosed fractures of the vertebrae); *Russell v. State*, 53 Miss. 367 (1876) (M.D. with 20 years in practice was not expert in psychological medicine, and held incompetent as an expert on the question of insanity). See also *Early-Gary, Inc. v. Walters*, 294 So. 2d 181 (Miss. 1974) (to qualify as an expert in a field, a proffered expert must be shown to have acquired a special knowledge of the matter about which he is to testify; the knowledge may be obtained either by study of recognized authorities, or through practical experience).

⁸⁹ See Annot., *supra* note 85.

⁹⁰ See, e.g., *Dorr v. Headstream*, 173 Ark. 1104, 295 S.W. 16 (1927); *Ness v. Yeomans*, 60 N.D. 368, 234 N.W. 75 (1931).

⁹¹ See, e.g., *Aponaug Mfg. Co. v. Carroll*, 183 Miss. 793, 184 So. 63 (1938).

devices in 1970, pursuant to a directive from State Senator Hayden Campbell.⁹² Prior to that time, the policy of the State Board of Health's Radiological Control Agency had been to interpret enabling legislation as authorizing only inspection of equipment used by licensed practitioners.⁹³ There was no control of nonionizing sources of radiation in the state prior to 1960, when the Radiological Health Division of the State Board of Health was developed.⁹⁴ In a July 1962 agreement between the state and the Atomic Energy Commission, Mississippi adopted AEC rules and regulations and complied with national standards.⁹⁵ Today, the State Board of Health does not license users of X-radiation; it simply inspects emissions and registers devices.⁹⁶ The language of the second paragraph of section 73-6-13: "The state board of health shall prescribe rules and regulations for the operation and use of X-ray machines,"⁹⁷ seems to extend the State Board of Health's authority beyond the inspection of emissions to the area of "technique." Although the State Board of Health has an interest in regulating technique, it has never done so.⁹⁸ It is reluctant to do so now because it believes that its rules and regulations would have to apply to all practitioners and yet be fashioned so as not to interfere with the legitimate scope of one practitioner's practice while reaching for greater control over another. Since the mission of the Radiological Health Division is to eliminate unnecessary nonionizing radiation exposure,⁹⁹ the control of "techniques" which result in unnecessary radiation exposure would seem to be within its statutory responsibility.

H. Prohibited Conduct

Section 73-6-25, entitled "Prohibited conduct," deals with abuse of titles, advertising, offers of discounts, free services, guarantees, violation of rules regulating the use and operation of X-rays, permissible telephone directory listings, and letters to clients. Together with practicing outside the scope of chiropractic,¹⁰⁰ conduct in violation of this section

⁹² Interview with Eddie Fuente, Director of Radiological Health, Mississippi State Board of Health, in Jackson, Mississippi, Jan. 3, 1975.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ MISS. CODE ANN. § 73-6-13 (Supp. 1974).

⁹⁸ See Interview with Eddie Fuente, *supra* note 92.

⁹⁹ *Id.*

¹⁰⁰ See GOVERNOR'S TASK FORCE, *supra* note 15, at 19.

constitutes the area of chiropractic activity of greatest concern to the medical profession.¹⁰¹

Section 73-6-25(a)(1) prohibits chiropractors, licensed or unlicensed, from misleading the public regarding chiropractic services¹⁰² and from using "any other professional designation other than the term 'chiropractor.'" ¹⁰³ A patient assumes the risks inherent in the treatment used by a "drugless" practitioner when he seeks treatment from a chiropractor.¹⁰⁴ Consequently, the patient should be given notice by means of the practitioner's professional designation as to which branch of the healing arts he is a member.¹⁰⁵ Although section 73-6-25 rather clearly stipulates that chiropractors shall not mislead the public or use any professional designation other than "chiropractor," rule 9, adopted by the Mississippi State Board of Chiropractic Examiners, authorizes the use of the title "Dr."¹⁰⁶

The attorney general's office refuses to express an opinion as to whether the title "Dr." before a name followed by the term "chiropractor" after the name is a professional designation.¹⁰⁷ Although the title

¹⁰¹ Interview with William F. Roberts, Executive Assistant, Mississippi State Medical Association, in Jackson, Mississippi, Dec. 19, 1974.

¹⁰² MISS. CODE ANN. § 73-6-25(a)(1) (Supp. 1974).

¹⁰³ *Id.*

¹⁰⁴ See *Bryant v. Biggs*, 331 Mich. 64, 49 N.W.2d 63 (1951); *Nicodeme v. Bailey*, 243 S.W.2d 397 (Tex. Civ. App. 1951) (chiropractor's manipulation of neck found to be immediate cause of injury to patient, but judgment for defendant since his actions were within the standards of that profession). *Contra*, *Edkins v. Edwards*, 235 So. 2d 200 (La. Ct. App. 1970) (medical testimony was used to establish standard of treatment where chiropractic manipulation caused cervical disc rupture; at that time, Louisiana law required a medical license in order to practice chiropractic). See also 61 AM. JUR. 2d *Physicians and Surgeons* § 108 (1972); Annot., 19 A.L.R.2d 1188, 1219 (1951).

¹⁰⁵ 1964 Hearings, *supra* note 4, at 233. See also *Harris v. State*, 229 Miss. 755, 762, 92 So. 2d 217, 220 (1957) (patient went to chiropractor using title "Dr. Harris" because she thought he was a medical doctor).

¹⁰⁶ RULES AND REGULATIONS, *supra* note 33, rule 9:

USE OF THE TITLE "DR." - A chiropractor may use the title "Dr." only if the word "Chiropractor" appears after his last name. He may also use the title "D.C." after his last name and eliminate the title "Dr.". The words "Chiropractic physician" or "Physician" shall not be used.

¹⁰⁷ Whether or not the term "Dr." constitutes a professional designation is a judicial determination which must be made initially by the State Board of Chiropractic [*sic*] Examiners from whose decision appeal may be had to the courts. This is not the type of matter that can be settled by opinion from the Attorney General's Office.

Letter from attorney general, *supra* note 67. Despite the opinion of the attorney general's office, MISS. CODE ANN. § 73-6-29(b) (Supp. 1974) specifically provides authority for involvement by the attorney general: "[T]he attorney general of Mississippi may institute legal action as provided by law against any person violating the provisions of this chapter"

"Dr." has been held in some jurisdictions to represent a professional designation for medical doctors,¹⁰⁸ others have allowed chiropractors to use the title "doctor,"¹⁰⁹ further confusing the public as to the distinctions between chiropractic and the medical profession.¹¹⁰

Subsections 2 through 6 of section 73-6-25(a) prohibit chiropractors from engaging in virtually all forms of advertising except announcements of clinic openings or movings, and prohibit offers of free professional services, free examination, discounts, guarantees, or painless treatment.¹¹¹ Since the passage of the Chiropractic Licensure Act, the Mississippi State Medical Association has noted a reduction in advertising by chiropractors.¹¹² Instances of chiropractic advertising have continued, however, and some advertisements have appeared in north Mississippi which were ostensibly placed by the "Mississippi Society of Chiropractic, Northern District,"¹¹³ to "educate" the public. Rule 10, adopted by the Mississippi State Board of Chiropractic Examiners, construes the prohibition of advertising as follows:

ADVERTISING - (That material that solicits patronage to a specific doctor or clinic for a specific service.) Individual advertising is prohibited by law. The only advertising that is allowed must comply with Section 13(3) pertaining to the new clinics, and this is for general circulation.¹¹⁴

Although this rule construes the statutory prohibition of advertising to apply to "individual advertising," the attorney general has construed it as prohibiting advertising at the instance of a chiropractor,¹¹⁵ which clearly would include "foundation" advertising on behalf of or at the instance of any chiropractor or group of chiropractors. The last sentence of section 73-6-25(b) provides: "Nothing herein shall be construed to prohibit a licensed practitioner from mailing letters to his clients, but such letters shall otherwise be subject to the provisions of this section."¹¹⁶ Rule 10, adopted by the State Board of Chiropractic Examiners, interprets this sentence and the general advertising prohibitions of sec-

¹⁰⁸ See, e.g., *State v. Bain*, 130 Mont. 90, 295 P.2d 241 (1956); *Reeves v. State*, 36 Okla. Crim. 186, 253 P. 510 (1927); *State v. Yegge*, 19 S.D. 234, 103 N.W. 17 (1905).

¹⁰⁹ See, e.g., *Martin v. Commonwealth*, 121 Va. 808, 93 S.E. 623 (1917) (the designation "Dr." applied broadly to medical practice and its branches, including nonphysicians).

¹¹⁰ See Comment, *California Cancer Quack Laws: The Best Is None Too Good*, 40 S. CAL. L. REV. 384, 388 (1967).

¹¹¹ MISS. CODE ANN. §§ 73-6-25(a)(2) to (6) (Supp. 1974).

¹¹² Interview with William F. Roberts, *supra* note 101.

¹¹³ *Id.*

¹¹⁴ RULES AND REGULATIONS, *supra* note 33, rule 10.

¹¹⁵ Letter from attorney general, *supra* note 67.

¹¹⁶ MISS. CODE ANN. § 73-6-25(b) (Supp. 1974).

tion 73-6-25(a) as not prohibiting the general mail-out of educational material "(that material that educates a person to chiropractic, but does not solicit) . . . as long as it is identified with and/or paid for by a district, state or national organization," and does not castigate any other profession.¹¹⁷ This interpretation is not supported by the intent or the clear statement of the law in section 73-6-25 which sanctions only "letters to clients," not general mail-outs, and makes no distinction between "advertising" and "educational materials."¹¹⁸ Whatever term is used, the intent to place chiropractic before the public is a form of advertising, and the message is subject to review for its tendency to deceive or mislead the public.¹¹⁹

II. ENFORCEMENT

While the licensing process is intended to protect the public by preventing incompetent or unscrupulous persons from entering chiropractic, this screening process does not affect the entry of persons qualifying under the "grandfather clause."¹²⁰ Additionally, since conduct prior to licensing was virtually unregulated, it would not be surprising if a few practitioners continue to engage in activities now prohibited by law or beyond the statutory scope of chiropractic. The statutory definition of chiropractic, prohibitions, and grounds for license revocation should be sufficient notice to inform licensed chiropractors of their limits. Even so, persons who intentionally disregard the law must be dealt with. The three methods for enforcement contained within the Licensure Act are license cancellation, revocation, or suspension; criminal prosecution; and injunction. Methods of enforcement available outside the Act are writs of mandamus, suits to enjoin violation of other laws as nuisances, criminal prosecution for criminal acts not covered by the Act, and civil suits for tort liability.

A. *Cancellation, Revocation, or Suspension of License*

The Chiropractic Licensure Act provides grounds for cancellation, revocation, or suspension of license by the State Board of Chiropractic

¹¹⁷ RULES AND REGULATIONS, *supra* note 33, rule 10.

¹¹⁸ See MISS. CODE ANN. § 73-6-25(b) (Supp. 1974).

¹¹⁹ See generally *Sassone v. Board of Chiropractic Examiners*, 201 Cal. App. 2d 165, 20 Cal. Rptr. 231 (1962) (hearing officer's finding that advertisement of chiropractor concerning cancer of the bowels and rectum constituted "invitation" to general public that chiropractor could detect and cure cancer and was "advertising" in violation of administrative rule of the Board of Chiropractic Examiners).

¹²⁰ MISS. CODE ANN. § 73-6-27 (Supp. 1974).

Examiners.¹²¹ In addition to conviction of a crime, grounds for censure include unprofessional conduct; incapacity; failure to comply with rules and regulations adopted by the State Board of Chiropractic Examiners; and advising a patient to use drugs, prescribing or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist.¹²² Violation of the section on prohibited conduct¹²³ is not grounds for license revocation, except for violation of rules and regulations regarding the operation and use of X-rays which appear in both places. There are no grounds, therefore, for revoking a chiropractic license for false or misleading advertising, except as a violation of the rules and regulations of the Board of Chiropractic Examiners.

The Act does not state who may bring charges against a chiropractor. When charges are brought, a copy is given to the accused chiropractor, and formal hearings are held before the board in Jackson, Mississippi.¹²⁴ The accused chiropractor may be represented by counsel, and he may examine witnesses.¹²⁵ There is no provision for notice of a time and place of hearing. It is unclear whether the right to examine witnesses includes the right to call witnesses on the chiropractor's behalf. The statute speaks of "the finding of the following facts," and contains no other reference to the type of deliberation.¹²⁶ It is not clear whether the board sits only as a trier of facts or whether it can also decide questions of law as they arise. The burden of proof rests on the person making the charge, and the standard applied is "substantial evidence."¹²⁷

The practitioner whose license is revoked or suspended has the right to de novo review in the circuit court and further appeal to the supreme court.¹²⁸ This procedure is likely to be ineffective, since a majority of the members of the State Board of Chiropractic favor the widespread use of "modalities," use of the title "Dr.," and advertising in the form of "educational materials."

B. Criminal Prosecution

Although criminal prosecution may serve as grounds for license revocation, it is also an alternative to such a proceeding. Conviction of

¹²¹ *Id.* § 73-6-19.

¹²² *Id.*

¹²³ *Id.* § 73-6-25.

¹²⁴ *Id.* § 73-6-19.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See, e.g., *Mississippi State Bd. of Dental Examiners v. Mandell*, 198 Miss. 49, 21 So. 2d 405 (1945) (evidence before state board insufficient to establish that a statement by a dentist regarding his education was wilfully false rather than mistaken).

¹²⁸ MISS. CODE ANN. § 73-6-19 (Supp. 1974).

a serious crime is a terrible blow to the reputation of any reputable practitioner, regardless of the action taken against his license. The difficulty in obtaining a criminal conviction may offer an irresistible temptation to unscrupulous practitioners, however, who may regard license revocation as the more serious consequence of illicit activity.

Section 73-6-29(a) makes violation of the provisions of the Chiropractic Licensure Act a misdemeanor, punishable upon conviction by a fine of not less than \$100 or more than \$500 and/or imprisonment in the county jail for not less than 30 days or more than 1 year.¹²⁹ Since this section applies to the entire Act, the prohibited conduct enumerated under section 73-6-25, primarily abuse of professional titles and use of advertising, is subject to criminal sanctions. The more serious conduct enumerated under section 73-6-19 as grounds for license revocation is not made subject to the criminal sanctions of section 73-6-29(a) since they are mentioned only with reference to proceedings against a license. Some grounds for license revocation, however, are also criminal violations, such as subsection (9), "advising a patient to use drugs, prescribing or providing drugs for a patient, or advising a patient not to use a drug prescribed by a licensed physician or dentist."¹³⁰ This type of activity would be in violation of the Medical Practice Act,¹³¹ as would the conduct prohibited by rule 17, adopted by the State Board of Chiropractic Examiners:

ACUPUNCTURE, VENA PUNCTURE, GYN - No skin puncture shall be allowed for any type treatment or diagnostic purposes or for the collection of any specimen or for administration of any medication under the chiropractic licensure. There shall also be no GYN examinations performed.¹³²

Conviction for violation of the Medical Practice Act,¹³³ or Physical Therapist Licensing Act,¹³⁴ would depend on very strict construction of the definition of chiropractic.¹³⁵ If a chiropractor's treatment outside the scope of chiropractic led to damage or injury, he could be subject to criminal prosecution for practicing medicine without a license,¹³⁶ man-

¹²⁹ *Id.* § 73-6-29(a).

¹³⁰ *Id.* § 73-6-19(9).

¹³¹ *See id.* § 73-25-33 (1972).

¹³² RULES AND REGULATIONS, *supra* note 33, rule 17.

¹³³ MISS. CODE ANN. § 73-25-33 (1972).

¹³⁴ *Id.* §§ 73-23-1 to -25.

¹³⁵ *See, e.g.,* State Bd. of Medical Examiners v. Olson, No. 38,217 (Minn. 7th Dist. Ct., Sept. 27, 1974), *on remand from* 295 Minn. 379, 206 N.W.2d 12 (1973); Harris v. State, 229 Miss. 755, 92 So. 2d 217 (1957); Joyner v. State, 181 Miss. 245, 179 So. 573 (1938).

¹³⁶ *See cases cited note 135 supra.*

slaughter,¹³⁷ or murder.¹³⁸ Prosecution for practicing medicine or some other profession without a license is not an effective means of enforcement since misdemeanors, usually punished by fines only, will not prevent recurring violations. Because of the leniency of juries, reluctance of prosecutors to prosecute popular irregular practitioners, and insufficiency of penalties, criminal prosecution is not an effective means of enforcement, except for serious crimes.¹³⁹

C. Injunction

The State Board of Chiropractic Examiners, any district or county attorney, or the attorney general of Mississippi may request an injunction under section 73-6-29(b) in the chancery court against violators of the Licensure Act.¹⁴⁰ It is not clear whether a suit seeking an injunction could be brought under the Act by others, but there is no specific prohibition. This form of proceeding is advantageous because it is heard by a judge, less subject than a jury to sympathy for the practitioner's claim that he is a victim of persecution by organized medicine.¹⁴¹ A second advantage to this type of proceeding is that a convicted defendant is subject to summary fine and imprisonment for contempt if he violates the court's restraining order.¹⁴² The problem with injunctions is that there are limitations on when they may be granted and the proper parties to initiate the proceedings.¹⁴³ Where a criminal remedy is available, this remedy is often viewed as adequate grounds for refusing injunctive

¹³⁷ See Comment, *A New Test for Involuntary Manslaughter in California*, 8 STAN. L. REV. 463 (1956).

¹³⁸ See, e.g., *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966) (chiropractor treated child with fast-growing eye cancer by adjustments, depriving her of surgical treatment until case became hopeless).

¹³⁹ B. SHARTEL & M. PLANT, *LAW OF MEDICAL PRACTICE* 234-36 (1959).

¹⁴⁰ MISS. CODE ANN. § 73-6-29(b) (Supp. 1974).

¹⁴¹ B. SHARTEL & M. PLANT, *supra* note 139, at 237.

¹⁴² *Id.*

¹⁴³ See *New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co.*, 90 N.H. 368, 9 A.2d 513 (1939), stating the general rule that a holder of a statutory license is entitled to injunctive relief only if a defendant's unlawful practice threatens irreparable injury to the right conferred by the license, or common law remedies afford inadequate relief, or the infringement of his license is a public nuisance. In this case, the court held that the intent of the act conferring the right was not to grant a monopoly but to protect the public from incompetent practitioners, and, therefore, the plaintiff had no property right to noncompetition. Compare *People ex rel. Shepardson v. Universal Chiropractors' Ass'n*, 302 Ill. 228, 134 N.E. 4 (1922) (the practice of chiropractic without a license will not be enjoined because it is not a public nuisance, not being a menace to the public health, morals, safety, or welfare), with *Redmond v. State ex rel. Attorney Gen.*, 152 Miss. 54, 118 So. 360 (1928) (quo warranto is the proper remedy where the unlicensed practitioner is in fact incompetent and the remedy at law inadequate as illegal practice of medicine constitutes a public nuisance).

relief.¹⁴⁴ Statutes granting injunctive powers are often construed as charging the attorney general or prosecutor exclusively with initiation of the proceeding.¹⁴⁵ In more recent decisions, however, courts reach beyond these limitations to allow injunctive relief in unlicensed practice proceedings.¹⁴⁶ Since section 73-6-29(b) expressly makes an injunction available to the State Board of Chiropractic Examiners but does not specifically exclude its use by other professional groups,¹⁴⁷ a court could afford individual practitioners or medical societies the same relief.¹⁴⁸

D. Malpractice

Chiropractors, like medical doctors, are subject to liability for damages caused by their negligence. The principal difference between a malpractice suit against a defendant physician and a defendant chiropractor is the professional standard of care by which the practitioner's conduct is evaluated.¹⁴⁹ A practitioner is judged by the standard of care of the school to which he belongs.¹⁵⁰ Once he takes a case, he assumes the duty of possessing the learning and skill of the average practitioner in the same or similar community, and of using that skill and learning with reasonable care and his best judgment.¹⁵¹ A chiropractor is not responsible for reasonable mistakes in judgment, but he is liable for damages proximately caused by his negligent failure to make a proper diagnosis.¹⁵² Usually expert testimony is required to support an action for malpractice in order to establish the standard of care of the school of practice in a locality.¹⁵³ Where two schools use similar theories for

¹⁴⁴ See, e.g., *Redmond v. State ex rel. Attorney Gen.*, 152 Miss. 54, 188 So. 360 (1928).

¹⁴⁵ B. SHARTEL & M. PLANT, *supra* note 139, at 237.

¹⁴⁶ See, e.g., *Darby v. Mississippi Bd. of Bar Admissions*, 185 So. 2d 684 (Miss. 1966) (suit to enjoin alleged practice of law by a chancery court clerk); *Conway v. Mississippi State Bd. of Health*, 252 Miss. 315, 173 So. 2d 412 (1965) (suit to enjoin practice of medicine by licensee whose license was invalid because of failure to rerecord license within 60 days of change of county of residence); *Busch Jewelry Co. v. State Bd. of Optometry*, 216 Miss. 475, 62 So. 2d 770 (1953) (suit to enjoin practice of optometry by corporation and employee licensed to practice medicine). See generally Annot., 90 A.L.R.2d 77 (1963).

¹⁴⁷ See MISS. CODE ANN. § 73-6-29(b) (Supp. 1974).

¹⁴⁸ A private individual or association usually can only obtain an injunction to protect a private interest, such as property, from infringement. Some cases have held that the individual physician or medical association has no property right to defend against unlicensed practitioners. See, e.g., *New Hampshire Bd. of Registration in Optometry v. Scott Jewelry Co.*, 90 N.H. 368, 9 A.2d 513 (1939). *Contra*, *Busch Jewelry Co. v. State Bd. of Optometry*, 216 Miss. 475, 62 So. 2d 770 (1953).

¹⁴⁹ See Comment, *The Standard of Care of the Drugless Healer*, 27 WASH. L. REV. 38 (1952).

¹⁵⁰ 24 AM. JUR. PROOF OF FACTS *Chiropractic Malpractice* § 21 (1970).

¹⁵¹ *Id.*

¹⁵² *Id.* § 24.

¹⁵³ Annot., 81 A.L.R.2d 597 (1962).

diagnosis and treatment, courts have allowed testimony from a different school to ascertain the applicable standard of care.¹⁵⁴ The requirement of evidence to establish the standard of care has been found unnecessary where the lack of care was so extreme as to be apparent to laymen that it was not reasonably within the profession's standard of care.¹⁵⁵ Where the practitioner diagnoses or treats outside the scope of his field, however, his treatment is subject to evaluation according to the standards of the field to which the treatment relates.¹⁵⁶ Crucial, then, to any malpractice case involving a defendant chiropractor is a determination of the scope of chiropractic. If chiropractic is held to be limited to diagnosis of a condition as a misaligned vertebrae for which manipulation is the accepted chiropractic treatment, a duty should be imposed on chiropractors to refer any diagnosis or treatment beyond this limited area of competence to qualified practitioners.¹⁵⁷ In this way, the risks taken by ignorant, credulous persons who believe chiropractic can cure major illnesses will be minimized, and they will not be isolated from the mainstream of medical science. Furthermore, malpractice litigation can provide a means of enforcing the existing law limiting the practice of chiropractic to its strictly confined area of competence.

CONCLUSION

Does the present Chiropractic Licensure Act upgrade the chiropractic profession and protect the public? Certainly, licensure itself raises the professionalism of chiropractic and tends to lend chiropractic greater credibility through the implication of official endorsement. The Act gives chiropractic a vested interest in the reputation of the profession as a whole, and through the State Board of Chiropractic Examiners, provides a vehicle for protecting it from ill repute attributable to the conduct of incompetent or otherwise objectionable practitioners. The Act's education and examination requirements do not affect the qualifications of chiropractors now in practice but may serve to eliminate unqualified persons seeking to practice here in the future. The passage of the Act has been followed by a reduction in advertising by chiropractors, which reduces the appearance of quackery.¹⁵⁸ But even

¹⁵⁴ See, e.g., *James v. Falk*, 226 Ore. 535, 360 P.2d 546 (1961); *Porter v. Puryear*, 258 S.W.2d 182 (Tex. Civ. App. 1953). See also *Annot.*, 85 A.L.R.2d 1022 (1962).

¹⁵⁵ *Malmstrom v. Olsen*, 16 Utah 2d 316, 400 P.2d 209 (1965). See Note, *supra* note 7, at 721.

¹⁵⁶ *Correll v. Goodfellow*, 255 Iowa 1237, 125 N.W.2d 745 (1964); *Dowell v. Mossberg*, 226 Ore. 173, 355 P.2d 624 (1960).

¹⁵⁷ *Carney v. Lydon*, 36 Wash. 2d 878, 220 P.2d 894 (1950); *Kelly v. Carroll*, 36 Wash. 2d 482, 219 P.2d 79 (1950).

¹⁵⁸ FOOD & DRUG ADMINISTRATION, DEP'T OF HEW, FDA PUB. NO. 19-A, YOUR MONEY AND YOUR LIFE 26 (1964).

when a reduction of misleading or intentionally deceptive advertising, the uninformed and unsophisticated elements of the general public are likely to remain confused as to a chiropractor's calling, because the State Board of Chiropractic Examiners sanctioned the use of the title "Dr."¹⁵⁹ The Act's inclusion of requirements for regulation of the use and operation of X-rays is without any present impact but does afford an approach for future regulation of technique and, hopefully, unnecessary X-radiation exposure. While the Act has had no effect on the compensation of chiropractic treatment (on a case-by-case basis) under workmen's compensation insurance, it immediately qualified chiropractors to perform services under Medicare and opened the way for future legislative inclusion under Medicaid. The desirability of including an ineffective system for treating disease in costly tax-supported health maintenance programs is elusive, logically, if not politically. The worst aspect of the Act, and most dangerous consequence to the public, is the lack of a clear definition, specifically circumscribing the practice of chiropractic to the diagnosis of misaligned vertebrae, and the treatment thereof by manipulation. The present vague and unfortunately worded definition provides opportunities for evasion of a limited license by gradual encroachment into areas in which chiropractors are uneducated, unqualified, and unlicensed, such as medicine and physical therapy. Although the State Board of Chiropractic Examiners has not yet adopted an interpretation of the statutory definition of chiropractic, the majority of members of the board presently using "modalities" and prescribing vitamins can be expected to adopt a broad interpretation, inclusive of modalities and possibly all-inclusive.

It is not doubted that chiropractic treatments have beneficial short-term effects on patients suffering from certain types of symptomatic pain and discomfort which respond to massage and physical therapy techniques.¹⁶⁰ Evidence of the fact that people believe they are helped is found in numerous testimonials.¹⁶¹ The problem is that many people confuse chiropractic with medicine,¹⁶² or for some other reason are deceived into believing that chiropractors are qualified to diagnose and treat disease.¹⁶³ Although there are therapeutic benefits to proper cases from some chiropractic techniques, these benefits are also available from licensed physical therapists who treat patients only on referral from a physician. Since physical therapists do not diagnose disease, their treatments do not involve the risk of medical neglect, and because

¹⁵⁹ RULES AND REGULATIONS, *supra* note 33, rule 9.

¹⁶⁰ GOVERNOR'S TASK FORCE, *supra* note 15, at 38-39.

¹⁶¹ *Id.*

¹⁶² See, e.g., *Harris v. State*, 229 Miss. 755, 762, 92 So. 2d 217, 220 (1957).

¹⁶³ GOVERNOR'S TASK FORCE, *supra* note 15, at 38-39.

they see only patients referred by licensed physicians, their therapy is not applied where it would be ineffective or would aggravate a preexisting condition.

Future legislation should be sought to clarify the scope of chiropractic. Enforcement of the Act should be strengthened by broadening the provision for injunctive relief to allow professional associations and individual practitioners to initiate proceedings. If the State Board of Chiropractic Examiners fails to enforce the Act, the board should be dissolved legislatively, with its function consolidated with the State Medical Board. But unfortunately, the shortcomings of the Chiropractic Licensure Act are basic and far reaching; it is not realistic to look for the needed overhaul from the legislature which recently enacted it. The courts are peculiarly well suited to cure the ills of this defective legislation through judicial development of a chiropractic standard of care suited to chiropractic therapeutic techniques, while recognizing the incompetence of chiropractors to diagnose the presence of disease or to prescribe appropriate treatment.¹⁶⁴ To utilize the therapeutic skills of chiropractors, while preventing dangerous quackery, one author has proposed that the standard of care applied to physical therapists be applied to chiropractors:

Physical therapists do not attempt to diagnose disease because they recognize that their limited training does not qualify them to do so. If chiropractors were treated in the same manner as physical therapists for the purpose of establishing the appropriate standard of care, chiropractors would no longer be able to avoid liability merely by showing that every other chiropractor in the locality would have made the same unscientific and often absurd diagnosis. Thus if a chiropractor failed

¹⁶⁴ Judicial adjustment of the standard of care of a profession, for the public protection, in conscious disregard of customary practice, is an established principle which was recently applied in *Helling v. Carey*, 83 Wash. 2d 498, 519 P.2d 981 (1974). This was a malpractice action against two ophthalmologists whose patient claimed to have suffered permanent visual damage due to open-angle glaucoma, as a result of defendants' failure to diagnose and treat the condition. The trial court entered judgment for defendants. The court of appeals affirmed, and the patient petitioned for review. The state supreme court reversed, holding that the defendants were negligent as a matter of law in failing to administer a simple glaucoma test to the patient despite uncontradicted expert testimony that it was the universal practice of ophthalmologists not to administer glaucoma tests to patients under age 40 because the incidence of glaucoma at younger ages was very slight. The court quoted Judge Learned Hand in *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932):

[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. *Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.*

Id. at 740 (emphasis added).

to refer a patient, for whom manipulations would be ineffectual or dangerous, to a more qualified practitioner, he could be held liable in tort for the resulting injury and, in addition, face the loss of his license to practice since the reasonable and prudent physical therapist would have made a proper referral.

There are several advantages in this solution. First, chiropractors could continue practice without having to abandon their basic theory that spinal manipulation will remove the cause of disease. Extensive legislation would not be needed because the change could be implemented by the courts. Further, the chiropractor's limited knowledge of correct diagnosis could be eliminated as a basis for establishing the standard of care by which chiropractors would be judged in a malpractice suit. Finally, it would force the profession to reevaluate its role as a healing art or face virtually strict liability for exceeding the proscribed limits of practice.¹⁶⁵

The proposed solution would place the chiropractic profession under adequate control, with society benefiting from therapeutic skills which some practitioners have developed to a high degree. Concurrent with this solution, the medical profession should reexamine its techniques for obtaining doctor-patient rapport, as well as its awareness of the potential psychological and short-term physical benefits to patient well-being of prescribed physical therapy.

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¹⁶⁵ Note, *supra* note 7, at 728-29.