

MEMORANDUM



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FROM: Patrick Shannon

RE: Legal Authority for Doctors of
Chiropractic to Perform Manipulation as
Part of an MUA Procedure

QUESTION PRESENTED

Are doctors of chiropractic legally authorized under California law to perform manipulation as part of a manipulation under anesthesia procedure?

SHORT ANSWER

Yes. An analysis of the Chiropractic Initiative Act (“the Act”) and various authorities interpreting its meaning and effect demonstrates that doctors of chiropractic are authorized to perform manipulation as part of a manipulation under anesthesia (“MUA”) procedure.

Under MUA, a doctor of chiropractic performs the manipulation and a qualified anesthesia provider is exclusively responsible for the use of the drugs. Manipulation as part of an MUA procedure satisfies each of the three elements of the chiropractic scope of practice test and is therefore authorized as part of chiropractic practice. Proper statutory construction of the Act reveals that the provision prohibiting the use of drugs precludes a doctor of chiropractic from prescribing or administering drugs but pertains only to the activities by a doctor of chiropractic and does not preclude a doctor of chiropractic from participating in a procedure where a qualified anesthesia provider is responsible for the drugs.

Moreover, the California Board of Chiropractic Examiners (“Board”) has determined that doctors of chiropractic are authorized to perform manipulation as part of an MUA procedure. As the agency responsible for enforcing the chiropractic scope of practice rules, the Board’s determination controls since it is not unreasonable or contrary to law. Any editorial comments questioning the authority for MUA offered by the Office of Administrative Law (“OAL”) in its 2005 decision disapproving a proposed MUA regulation on other grounds are not entitled to any weight because, by OAL’s own admission, they were offered without any examination of the legal issues involved and without an adequate factual record.

ANALYSIS

I. Analysis of the chiropractic scope of practice law demonstrates that doctors of chiropractic are authorized to perform manipulation as part of an MUA procedure.

In an MUA procedure, the doctor of chiropractic is responsible for and performs the manipulation and a qualified anesthesia provider is responsible for and administers the anesthesia and monitors the patient’s response thereto.

Section 7 of the Act sets forth the legal standard for determining the chiropractic scope of practice. In pertinent part, Section 7 of the Act provides that a chiropractic license “shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry, or optometry, nor the use of any drug or medicine now or hereafter included in the materia medica.”¹

While the Act authorizes manipulation, it also prohibits the holder of a license from using drugs and practicing medicine. Therefore, whether manipulation as part of MUA is authorized is an issue of statutory construction to be determined by appropriate application of the Act in consideration of the overall body of law of which the Act is a part as well as other relevant authority. Such an analysis leads to a finding that manipulation as part of MUA is authorized under California law.

Decisional law has interpreted Section 7 to create a three-part test to determine if a particular act is within chiropractic scope of practice. According to these authorities, in order to be considered chiropractic, a function or procedure must be (1) understood as chiropractic in its ordinary and general sense, (2) taught in the chiropractic schools, and (3) not uniquely constitute the practice of medicine. As explained more fully below, manipulation as part of an MUA procedure satisfies each of the three elements of the test and is therefore authorized as part of chiropractic practice.

¹ The Chiropractic Initiative Act, Section 7, as approved November 7, 1922 and effective December 21, 1922.

The three-part test was first set forth in *Hartman v. Court of Appeal*, 10 Cal.App.2d 213 (1935). First, a particular function must be part of the practice of chiropractic. Second, it must be taught in chiropractic schools or colleges. And, third, it must not constitute the practice of medicine. “It is not sufficient that a particular practice is taught in such a school. Under the terms of the statute, it must meet the further test that it is a part of chiropractic, whatever that philosophy or method may be, and further that it shall not violate the provision which expressly forbids the practice of medicine.”²

Hartman denied the habeas petition of a licensed chiropractor to set aside his conviction for practicing medicine without a license in violation of the Medical Practice Act for treating cancer patients by injecting anti-toxins into them with a hypodermic needle. The doctor of chiropractic argued that injecting anti-toxins was taught in chiropractic schools and was therefore authorized under Section 7 of the Act. The court found that a practice was not authorized as part of the chiropractic scope of practice just because it was taught in the chiropractic schools; rather, the practice must also be shown by the taking of evidence to be part of the practice of chiropractic and not uniquely the practice of medicine. The court found that there was not sufficient evidence in the record to support a finding that injecting anti-toxins by hypodermic needles was either the practice of chiropractic or not uniquely the practice of medicine. The court discharged the writ.

Applying the three-part scope of practice test developed in *Hartman* and refined in subsequent rulings shows that the activities undertaken by a doctor of chiropractic as part of an MUA procedure are authorized by the Act.

A. Manipulation as part of an MUA procedure is chiropractic in nature.

1. Manipulation is chiropractic in nature.

The Act does not list specific functions in its definition of chiropractic. Rather, case law and the regulations of the Board have interpreted the Act to define manipulation as part of chiropractic.

In *Fowler v. Appellate District, Superior Court of Los Angeles, County of Los Angeles*, 32 Cal.App.2d 737 (1938), the court further expounded on how the three-part test of scope of practice is applied. In applying the three-part test, the court found that a doctor of chiropractic had engaged in the illegal practice of medicine by performing abortion services. While the court interpreted the Act to exclude abortion services, it did declare that manipulation was part of the well-known definition of chiropractic. According to *Fowler*, a particular function is considered chiropractic in nature if it is commonly understood as such in its ordinary and general sense. “Words of common use, when found in a statute, are to be taken in their ordinary and general sense.”³ *Fowler* suggests that the understanding of chiropractic was set at or before the Act was adopted – the words must be taken in the sense in which they were understood at the time the statute was adopted. *Fowler* asserted that chiropractic had a “quite definite” meaning in 1922 as

² *Hartman*, 10 Cal. App. 2d. at 217.

³ *Fowler*, 32 Cal. App. 2d. at 747.

a “drugless method of treating disease chiefly by manipulation of the spinal column,” according to Webster’s New Standard Dictionary, 1913 edition and case law from several different state jurisdictions around the country citing the Webster’s definition.⁴

In *Crees v. California State Board of Medical Examiners*, 213 Cal.App.2d 195 (1963), the court described chiropractic scope of practice to include “treatment by manipulation of the joints of the human body by manipulation of anatomical displacements, articulation of the spinal column, including its vertebrae and cord.”⁵

In light of these and other cases, the Board promulgated a regulation defining chiropractic scope of practice to include and, indeed, feature manipulation: “A duly licensed chiropractor may manipulate and adjust the spinal column and other joints of the human body and in the process thereof a chiropractor may manipulate the muscle and connective tissue related thereto.”⁶

It is beyond question that the Act authorizes doctors of chiropractic to perform manipulation.

2. Manipulation as part of MUA is still authorized even though MUA was not prevalent in 1922.

Manipulation is not a fixed concept. Manipulation as understood in 1922 does not set in stone the acceptable techniques and modes of treatment. The Act authorizes doctors of chiropractic to manipulate. That is (part) of what it meant to practice chiropractic in 1922. That does not mean that doctors of chiropractic are limited to the specific manipulation techniques and modes of treatment used in 1922. That would be an absurd interpretation – it would prevent the profession from taking advantage of scientific advances.⁷

The trial court in *Crees* recognized this very point: “It is true that chiropractic is not a static system of healing and that it may advance and change in technique, teaching, learning, and mode of treatment within the limits of chiropractic as set forth in paragraph H above. It may not advance into the fields of medicine, surgery, osteopathy, dentistry, or optometry.”⁸

Manipulation as part of an MUA procedure is still manipulation. MUA is just another mode of treatment. The fact that this mode of treatment was not prevalent in 1922 does not invalidate the fact that manipulation is chiropractic in nature.

⁴ *Fowler*, 32 Cal.App.2d at 747.

⁵ *Crees*, 213 Cal.App.2d at 202.

⁶ 16 CCR 302(a)(4).

⁷ A construction which results in absurd consequences is normally avoided. (See 2A Singer, *Statutes and Statutory Construction*, Section 45.12 at 87-90 (West 2000).)

⁸ *Crees*, 213 Cal.App.2d at 202.

Thus, manipulation as a part of MUA is chiropractic in nature and accordingly satisfies the first prong of the scope of practice test.

B. Manipulation as part of an MUA procedure is taught in chiropractic schools or colleges.

Fowler clarified that a separate showing needs to be made that the Act is “chiropractic” on the one hand and is taught in the colleges on the other. “The practice authorized must be ‘chiropractic,’ and it must also be ‘as taught in chiropractic schools or colleges.’ Neither of these expressions can rule the meaning of the statute, to the exclusion of the other.”⁹

To be sure, doctors of chiropractic are not authorized to practice whatever is taught in chiropractic schools. *Crees*, quoting *Fowler*, stands for the proposition that scope of practice is set by the Act and the schools cannot exceed or enlarge it. “The scope of chiropractic being well-known, the schools and colleges, so far as the authorization of the chiropractor’s license is concerned, must stay within its boundaries: they cannot exceed or enlarge them.”¹⁰ *Crees* found that the practices at issue in that case - administering narcotics and practicing obstetrics – did not fall within the definition of chiropractic at all so it was unnecessary to consider the question of whether those practices were taught in chiropractic schools.

While the schools cannot enlarge the definition of chiropractic practice, they can teach and thus authorize methods and techniques consistent with the scope. “The matter left to them [the schools and colleges] is merely the ascertainment and selection of such among the possible modes of doing what is comprehended within that term, as may seem to them best and most desirable, and so the fixing of the standards of action in that respect to be followed by chiropractic licensees.”¹¹

In contrast to *Fowler* (involving abortions) and *Crees* (administering narcotics and practicing obstetrics), the chiropractic procedure here is manipulation, which is the mainstay of chiropractic practice, taught in every chiropractic college. The most common manipulative technique used in MUA is the diversified technique, which is one of the primary manipulative techniques.

The second prong of the chiropractic scope of practice test is easily met by the fact that manipulation is taught in the chiropractic colleges.

C. Manipulation as part of an MUA procedure is not the practice of medicine.

To be sure, the Act places limits on the chiropractic scope of practice by prohibiting doctors of chiropractic from using drugs and practicing medicine in the course of

⁹ *Fowler*, 32 Cal.App.2d at 745.

¹⁰ *Crees*, 213 Cal.App.2d at 204.

¹¹ *Crees*, 213 Cal.App.2d at 204 quoting *Fowler*.

chiropractic treatment. However, these inhibitions do not legally curtail the authority of a doctor of chiropractic to perform manipulation as part of an MUA procedure because in this context the doctor of chiropractic is neither using drugs nor practicing medicine as the terms have been interpreted by applicable case law.

1. The doctor of chiropractic is not using drugs, the anesthesia provider is, so the doctor of chiropractic is not practicing medicine.

Fowler makes the point that the ban on doctors of chiropractic using drugs stems from the prohibition on doctors of chiropractic practicing medicine. “The statute declares that persons licensed under it shall not practice medicine, a practice which certainly includes the use and prescribing of medicines in whatever form or combination they may be prepared or sold.”¹²

The interpretation of the word “use” in the Act is a matter of statutory construction. The plain meaning of the language suggests that the prohibition against the use of drugs only pertains to the actions by the holder of a chiropractic license, as it does not mention or contemplate the ban applying to doctors of chiropractic if another practitioner is using the drugs. If the Act were intended to prohibit doctors of chiropractic from participating in any procedure in which drugs were being used by another practitioner, it could have stated so in express and unambiguous terms. It did not, and by the plain meaning rule of statutory construction,¹³ it would be improper to read any such proscription into the Act as it now stands.

If a provision is ambiguous, then rules of statutory construction require reference to agency interpretations, legislative history, and other extrinsic aids to elucidate the intent of the statute.¹⁴

The Act’s inhibition against the use of drugs has been interpreted by the Board to prohibit the *holder* of a chiropractic license from using drugs. The Board promulgated Section 302(a) to define chiropractic scope of practice, specifying that the prohibition against the use of drugs contained in the Act constrains the actions by the *holder* of the chiropractic license: “A chiropractic license issued in the State of California does not authorize the *holder* thereof: . . . (E) to use any drug or medicine included in the materia medica.”¹⁵

¹² *Fowler*, 32 Cal.App.2d at 751.

¹³ The “plain meaning” rule provides that words in a statute should be given “the meaning they bear in ordinary use.” *Lungren v. Deukmejian*, 45 Cal.3d 727, at 735 (1988).

¹⁴ “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. [. . .] If the language permits more than one reasonable interpretation, however, the court looks to ‘a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’ [. . .] After considering these extrinsic aids, we ‘must select the construction that most closely comports with the apparent intent of the legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.’” *Vera Blue v. Diana Bonta*, 99 Cal. App. 4th 980, at 988 (2002), citing *Wilcox v. Birtwhistle*, 21 Cal. 4th 973, at 977-978 (1999), citations omitted.

¹⁵ 16 CCR 302(a)(4) - (E). (emphasis added)

The Board did not interpret the ban to constrain doctors of chiropractic for the actions performed by the holder of *another* license.

In fact, the Board has never taken the position that the ban on the use of drugs prohibits a doctor of chiropractic from being involved in a procedure where a qualified anesthesia provider administers the drug. On the contrary, the Board has reached the exact opposite conclusion that manipulation as part of an MUA procedure is authorized under the Act, and the Board has consistently maintained its position since it was first expressed in 1990, and has reiterated this view in multiple different pronouncements over the years.

In a formal Board meeting on September 13, 1990, after extensive discussion the Board voted in favor of adopting a policy statement confirming that manipulation as part of an MUA procedure is “within the scope of chiropractic” and “not made illegal simply because the patient is under anesthesia.”¹⁶

On April 13, 1993, the Board’s then-Executive Director Vivian Davis issued an advice letter on behalf of the Board in response to a specific inquiry as to the legality of manipulation as part of an MUA procedure. The advice letter confirmed the accuracy of the 1990 policy statement by the Board, specifically repeating that manipulation “is not made illegal simply because the patient is under anesthesia.”¹⁷

In the 2002-2003 time frame, the Board’s then-Chiropractic Consultant Dr. Raymond Ursillo issued yet another advice letter on behalf of the board confirming its position that manipulation as part of an MUA procedure is an authorized part of chiropractic scope of practice, as follows: “Manipulation under anesthesia (MUA) is within the scope of a California licensed chiropractor. Title 16, Division 4, Section 302 provides that a duly licensed chiropractor may manipulate and adjust the spinal column and other joints of the body. This is applicable whether the patient is awake or sedated.”¹⁸

Furthermore, the Board has, on numerous occasions, approved MUA for continuing education credit. For example, in the Board meeting of September 28, 2000, the Board approved a course sponsored by the National College of Chiropractic entitled “Manipulation Under Anesthesia” for 32 hours of credit, including 7 hours of technique.¹⁹ As recent as November of 2004, the Board approved the continuing education program submitted by the California Academy for MUA entitled Manipulative Techniques Used During Manipulation Under Anesthesia for 12 hours of credit including 4 hours of technique.²⁰

¹⁶ *Minutes of the Public Meeting of the Board of Chiropractic Examiners*, September 13, 1990, agenda item 11, at page 13.

¹⁷ Advice letter from the Board of Chiropractic Examiners, signed by Executive Director Vivian Davis, to Garrett F. Cuneo, Executive Director, California Chiropractic Association, dated April 13, 1993.

¹⁸ Advice letter from the Board of Chiropractic Examiners, signed by Dr. Raymond Ursillo, undated.

¹⁹ *Minutes of the Public Meeting of the Board of Chiropractic Examiners*, September 28, 2000, agenda item 9 (B) subsection 10(E), at page 5.

²⁰ Letter from the Board of Chiropractic Examiners, signed by Genie Mitsuahara, Continuing Education Coordinator, to Ms. Marianne Martin, M.A., dated November 18, 2004.

Lastly, in 2005, the Board reaffirmed its view that MUA is authorized under the Act in its final statement of reasons in support of the Board’s proposed Regulation 361 which was intended to establish protocols for MUA: “The Chiropractic Initiative Act authorizes chiropractors within their scope of practice to perform spinal manipulation, stretching, and mobilization procedures. The Act does not imply that these procedures are prohibited under the use of anesthesia.”²¹ The Board also expressed its view that manipulation as part of MUA is consistent with Section 302, its own scope of practice regulation: “Section 302, Practice of Chiropractic, clearly defines the scope of practice and does not imply that manipulation is prohibited under anesthesia.”²²

The Board’s interpretation that Section 7 authorizes manipulation and the ban on drugs only proscribes doctors of chiropractic from using drugs by their own hand as part of their individual treatment activities is consistent with the plain meaning of the Act.

The legislative history of the Act also supports the plain meaning interpretation. *Fowler* suggests that the Act was intended to apply the same limits to doctors of chiropractic as were applicable to all drugless practitioners at the time. The court concluded that the ban on performing medical acts was “limited” and only precluded chiropractors from using drugs, medicines, and severing tissues, just as drugless practitioners were so limited. “We conclude that the words ‘medicine’ and ‘surgery,’ as used in section 7 of the Chiropractic Act, were intended to continue as to chiropractors the limitations imposed on drugless practitioners by the Medical Practice Act, that is, to deny them the use of drugs and medical preparations and the severing or penetrating of the tissues of human beings. This accords with the common use of the two words in ordinary conversation.”²³

The limitations on drugless practitioners were against prescribing or administering drugs, not against using drugs in the broadest sense of the word. *J. Lane Kendall v. Board of Osteopathic Examiners*, 105 Cal.App.2d 239 (1951) supports this view. In *Kendall*, the court upheld the lower court ruling which revoked the drugless practitioner license of an osteopath who administered drugs to a woman to prevent sepsis a few days after she aborted herself. The osteopath was charged with violating Business and Professions Code Section 2394 which prohibited the “use of drugs.”²⁴ The court described the prohibition on the use of drugs as “the inhibition against a drugless practitioner

²¹ *Proposed Regulation 361, Final Statement of Reasons*, submitted by Board of Chiropractic Examiners, August 26, 2005.

²² *Proposed Regulation 361, Final Statement of Reasons*, submitted by Board of Chiropractic Examiners, August 26, 2005.

²³ *Fowler*, 32 Cal.App.2d at 750.

²⁴ “The use of drugs or what are known as medicinal preparations by the holder of a drugless practitioner’s certificate in or upon any human being or the severing or penetrating of the tissues of any human being by the holder of a drugless practitioner’s certificate in the treatment of any disease, injury, or deformity, or other physical or mental condition of the human being, except the severing of the umbilical cord, constitutes unprofessional conduct within the meaning of this chapter.” California Business and Professions Code Section 2394, repealed stats. 1974, Ch. 1044, Section 19, effective September 23, 1974.

administering or prescribing drugs.”²⁵ Other case law suggests that the terms “use” and “administer” were used interchangeably with reference to drugs.²⁶

Case law describing the limitation as to doctors of chiropractic in particular, as opposed to drugless practitioners generally, suggests that the “use” that is prohibited is prescribing and administering drugs. For example, *People v. Nunn*, 65 Cal.App.2d 188 (1944) interprets use to mean administer. (“He may not invade the field of medicine or surgery or administer drugs or medicines included within material medica.”) The view that the Act bans all procedures involving the use of drugs is contradicted by *Hartman*. In *Hartman*, the court relied upon expert testimony to determine that using a hypodermic needle to inject cancer patients with anti-toxins was not part of chiropractic. But if Section 7 of the Act banned all procedures involving the use of drugs, then the injection of drugs would have been per se invalid as a matter of law and the court would not have needed to resort to taking and considering expert testimony on the question.

Furthermore, the rationale for the ban on the use of drugs in the Act is consistent with the plain meaning interpretation. The rationale is to prevent doctors of chiropractic from invading the field of medicine. *Crees* supplies a statement of the rationale directly along these lines: “[T]he Chiropractic Act does not authorize chiropractors to use drugs or medicines, or to practice obstetrics, sever an umbilical cord, or to perform an episiotomy because ‘these procedures all fall in the medical-surgical field . . . which chiropractors cannot invade’.”²⁷

But with MUA as contemplated herein there is no threat of a doctor of chiropractic invading the field of medicine – a qualified anesthesia provider is completely handling the use of drugs; the doctor of chiropractic is not involved. A doctor of chiropractic cannot invade the field of medicine if the anesthesia provider is exclusively responsible for the drugs. The chiropractor is simply practicing alongside the anesthesia provider. A chiropractic practitioner can work – and often does - in tandem with a medical doctor without the medical acts being attributed to the practitioner.

Last, policy reasons support the plain meaning interpretation. So-called alternative health care practitioners and medical doctors are collaborating more and more these days. MUA is just such an example of a procedure where chiropractic and the field of medicine are shown to be complementary practices. Collaboration among health care providers should be encouraged, not discouraged, in this modern era.

Overall, employing the principles of statutory construction to the Act’s inhibition against the use of drugs demonstrates that a doctor of chiropractic is not considered to be using

²⁵ *Kendall*, 105 Cal.App.2d at 246.

²⁶ See *People v. Chong*, 28 Cal. App. 121 (1915) (“The holders of these certificates are drugless practitioners, and they may not prescribe or use drugs . . .”) and *William F. Harlan v. Harry Alderson*, 55 Cal. App. 263 (1921) (“The well-settled definitions of osteopathy, both in the decisions and in the dictionaries, uniformly hold that the system of osteopathy ‘uses no drugs.’ ‘It administers no drugs; it uses no knife.’” Citing *Nelson v. State of Health*, 108 Ky. 769, at p. 777.)

²⁷ *Crees*, 213 Cal.App.2d at 211-212.

drugs if he/she is not prescribing or administering same, which is precisely the case with MUA where a qualified anesthesia provider is exclusively responsible for the drugs.

2. The ban on doctors of chiropractic using drugs and practicing medicine is to be narrowly construed.

The *Fowler* court concluded that the clause in the Chiropractic Act clarifying that the chiropractic license does not authorize the practice of medicine, has little, if any, effect on the definition of chiropractic scope of practice. The court clarified that the proviso “does not mean to prohibit what has just been expressly authorized, that is, the practice of chiropractic.”²⁸ The ban on “medicine and surgery” is to be construed narrowly in order to give effect to the provisions of the chiropractic act. “Chiropractic, as above defined, would not be within the terms “medicine” and “surgery” unless they are used in their broadest and most general sense as including all the healing arts. In order to give effect to the whole statute, we must conclude that they are not so used here.”²⁹ The court went on to emphasize that the effect of the ban on chiropractors performing medical acts was extremely limited on the permissible scope of chiropractic: “So limited in meaning, the proviso may, as far as the term ‘chiropractic’ is concerned, have been unnecessary and inserted merely out of an abundance of caution, or to afford an obvious foundation for the argument submitted to the voters.”³⁰

That the ban on medicine -- and inferentially the ban on the use of drugs -- is to be narrowly construed lends strong support to the plain meaning interpretation. It is to take the broadest possible view of the ban on the use of drugs to conclude that it prohibits a doctor of chiropractic from participating in a procedure where he/she undertakes no activities related to the drugs, and the drugs are prescribed and administered by a qualified anesthesia provider who is exclusively responsible for the drugs. Rather, a narrow construction of the ban compels the conclusion that manipulation as a part of MUA is authorized so long as the doctor of chiropractic does not prescribe or administer the drugs by his/her own hand.

II. The Board’s opinion that chiropractors are authorized to perform MUA controls because it is reasonable and is not clearly contrary to the Act.

A. As the regulatory body responsible for enforcing the Act, the Board’s determination controls since it is reasonable and is not clearly contrary to the Act.

As described above, the Board has determined that MUA is an authorized part of chiropractic scope of practice.

The Act gives the Board exclusive authority to regulate chiropractors. Section 4 of the Act gives the Board authority to “adopt from time to time such rules and regulations as

²⁸ *Fowler*, 32 Cal.App.2d at 749.

²⁹ *Fowler*, 32 Cal.App.2d at 749.

³⁰ *Fowler*, 32 Cal.App.2d at 750.

the board may deem proper and necessary for the performance of its work, the effective enforcement and administration of this act, the establishment of educational requirements for license renewal, and the protection of public health.”³¹

State law holds that the interpretation of the state agency charged with enforcing and administering the Act is entitled to great deference and controls unless it is unreasonable or contrary to law.

For example, in a directly analogous situation, the California Attorney General upheld a construction of the Nurse Practice Act by the Board of Registered Nursing in deference to the Nursing Board as the agency responsible for enforcing the Act and in recognition of the fact that the interpretation was longstanding.³² The Attorney General cited case law in support of its view declaring “unless unreasonable or clearly contrary to the statutory language or purpose, the consistent construction of a statute by an agency charged with responsibility for its implementation is entitled to great deference. [Citation].”³³

Thus, as the Board is responsible for enforcing and administering the pertinent scope of practice provision of the Act, its determination that chiropractors are authorized to perform MUA controls since it is not unreasonable or contrary to law.

B. The Office of Administrative Law’s off-hand comments questioning the authority for MUA are entitled to no weight whatsoever.

The Office of Administrative Law issued an opinion on October 11, 2005, rejecting Regulation 361 which was advanced by the Board to regulate the practice of MUA.³⁴ In dicta, OAL raised the question of whether manipulation as part of MUA was within the scope of chiropractic. OAL’s comments are entitled to absolutely no weight for both procedural and substantive reasons.

Procedurally, OAL acknowledged that its decision to disapprove the regulation was not based on its interpretation of scope of practice. “OAL disapproval of the regulation is based exclusively upon the failure of the regulation to conform to the requirements of the APA and should not be interpreted otherwise. Specifically, OAL did not examine the basic question of whether MUA is within the lawful scope of the practice of chiropractic and OAL did not examine or evaluate any issues involving the Medical Practice Act (Business and Professions Code, Division 2, Chapter 5, beginning at section 2000).”³⁵

Moreover, OAL stated that the information in the file was inadequate and OAL could not therefore evaluate whether the regulation “improperly authorizes the practice of

³¹ The Chiropractic Initiative Act, Section 4, as approved November 7, 1922, effective December 21, 1922.

³² 85 Ops.Cal.Atty.Gen 134 (2002).

³³ 85 Ops.Cal.Atty.Gen 134, at fn 8 (2002) citing *Dix v. Superior Court*, 53 Cal.3d 442, 460 (1991); see *Rivera v. City of Fresno*, 6 Cal.3d 132, 140 (1971); *West v. State of California*, 181 Cal.App.3d 753, 763 (1986).

³⁴ Office of Administrative Law, Decision of Disapproval of Regulatory Action, OAL File No. 05-0826-03 S, October 11, 2005.

³⁵ Office of Administrative Law, Decision of Disapproval of Regulatory Action, at 7.

medicine” or “is inconsistent with the provision of section 7 of the Act providing that a license to practice chiropractic does not authorize ‘the use of any drug or medicine’ in the practice of chiropractic.”³⁶

Substantively, the deficiencies in OAL’s musings questioning the authority of MUA are readily apparent. OAL exclaims that it is “highly questionable” whether MUA is consistent with the Act’s prohibition on the “use of drugs” contained in Section 7. Without any review of the Act itself or any of the authorities interpreting its provisions, OAL incorrectly postulates that the ban prohibits doctors of chiropractic from participating in any procedures where drugs are integral to the procedure. “The rulemaking record demonstrates clearly that the regulation does not authorize a chiropractor to administer anesthesia. The Act, however, is broader than this. It prohibits the *use* of any drug or medicine in the practice of chiropractic. If the use of anesthesia is integral to the performance of MUA, and if the anesthesia is a ‘drug,’ it is highly questionable whether the regulation is consistent with the Act’s prohibition on the ‘use of any drug or medicine’.”³⁷

OAL’s line of thinking mistakenly relies on the premise that a doctor of chiropractic is considered to be using the drug even if an anesthesia provider acting within his/her own scope of practice is exclusively responsible for its administration and use in connection with the MUA procedure. As demonstrated above, this premise is flatly contradicted by the authorities interpreting the scope of practice of doctors of chiropractic. To be sure, doctors of chiropractic are drugless practitioners, and their license does not authorize them to use drugs. But applicable case authority has interpreted “use” to mean prescribe or administer. It does not mean, and no case has so held, that they cannot be involved in a procedure where another qualified practitioner uses drugs, regardless of whether the use is integral or not.

By OAL’s own acknowledgment, its comments on whether MUA is authorized under the Act are essentially off-the-cuff, offered without any examination of the legal issues involved and on the basis of an admittedly inadequate record. As such, OAL’s comments are entitled to no weight whatsoever and should be summarily disregarded.

CONCLUSION

For the foregoing reasons, doctors of chiropractic are legally authorized under California law to perform manipulation as part of a manipulation under anesthesia procedure.

³⁶ Office of Administrative Law, Decision of Disapproval of Regulatory Action, at 7.

³⁷ Office of Administrative Law, Decision of Disapproval of Regulatory Action, at 7.