Dynamic Chiropractic

CHIROPRACTIC (GENERAL)

Part 4 - Response to Chiropractor's Question - What Defines a Profession?

David Prescott, MA,JD,DC,FIAMA; Edwin Grauke, JD,DC

We had promised to address some of the unfolding research relative to the "internal environment - self-regulation paradigm" in Part 4 of this series, however, Dr. Decken of Georgia asked a critically important question that we are now taking this opportunity to respond to. Dr. Decken's letter is first, followed by the response.

September 17, 2001
Dear Dr. Prescott:
Thank you for allowing me to contact you with regards to your article comparing paradigms. I think you are embarking on a worthwhile venture and feel you will surely ruffle some feathers.
Reading the first article in your series leads me to expect a fair-minded approach as well. It appears that you too see value to the philosophy of chiropractic. I have one question that I hope you will be able to shed light on. What is it that defines a profession? Is it the field of practice? The way things are done? The degree held by the practitioners? What I am getting at is what makes a MD different from a DC? What makes a DC or DDS different from an MD? At Sherman, I was taught - and the school continues to teach - that a profession's objective is what makes it different from another profession. Does the legal profession have an objective, and is that what defines it? Does medicine have an objective, and if so, what is it? I have not been able to verify this approach in writing. I feel like we have determined this by observation. Is that adequate? Is this proper? When chiropractors in the early days were released from jail on the grounds that they were not practicing medicine, what did that mean? Where would I even look to verify what the objectives of the profession are? I do not consider a dictionary to be descriptive of objectives/purposes.
The "physician" terminology discussion is interesting. Your point is well made. How does this term relate to "objective?" Or does it better relate to method? Thanks for your time.
Sincerely,
Bill Decken,
Spartanburg, South Carolina

Dear Dr. Decken:

Thank you for your response to the recent article in *Dynamic Chiropractic.* You have asked an important and interesting question. I will address your questions here, in part. You might also be interested in taking a look at some additional articles on www.promedlaw.com. ("Counsel in Dissent" 2 and 9 are particularly relevant. From the "home page" you may reach the "Counsel in Dissent" articles from the "medical articles" button, or from the "site map.")

Your basic question is: "What is it that defines a profession." The simple and clear answer is the law. However, as so perceptively suggested by your remaining questions, we need to go further. Why should the law recognize and license more than one group of healing arts practitioners? The

short answer is because the various "schools of thought" start from different philosophical assumptions, utilize different pathophysiological models, and have developed different treatment perspectives. That is, they operate from different paradigms. Please note, however, that you have to start with the law.

Of course, history and observation of practices are also relevant. If you are interested in getting into the historical and sociological aspects of your question, let me recommend three books:

1. *The Social Transformation of American Medicine* by Paul Starr

2. *Rockefeller Medicine Men* by E. Richard Brown

3. *Divided Legacy, The Conflict Between Homeopathy and the American Medical Association* (Vol. IV) by Harris Coulter.

One has to be very careful in reading Starr's book. Starr's central premise is that the dominance of allopathy is sort of a natural, benign, outcome of advances in science. That is simply not true. It has been the purse, politics (law) and power that have created allopathic dominance as shown by the works of Brown and Coulter. (Please see "Counsel in Dissent 15" - "Money" on the cited website.)

After World War II, the federal government became the major player in funding and shaping the medical-drug cartel. The federal government simply adopted the perspective and infrastructure developed by the "foundations" prior to WWII. This continued and extended the monopolistic control of mainstream medicine by the allopaths.

English v. European Law

Starr's work is helpful in tracing the history of the medical profession in both England and Europe. That history is relevant to your basic question. To oversimplify, under English law (traditional common law), a person is entitled to do or practice anything unless expressly prohibited from doing so. Under European law, however, the reverse is true. You are only entitled to do something if you are expressly granted the right to do it. This makes a huge difference to one's understanding of the various professions. In general, the law of the various states of the U.S. is based upon English common law. However, the English tradition has not been followed with respect to the regulation of the healing arts in the U.S. I will trace a little of the relevant history.

Most states of the U.S. eliminated all regulations on the practice of medicine in the first half of the 19th century. However, after the formation of the AMA in the mid-1850s, pressure began mounting for regulation. The question arose, which model should be followed: The English or European? The answer to this question unfolded over time. But, all the state case law I have checked is presently clearly based upon the European model. That is, the law defines and regulates all aspects of each of the professions (or trades), including law, medicine, beauticians, etc., and one must look to that law (statute and/or case law - see below) for the definition of a profession or trade. The issue becomes not what do the respective professionals do, but what are they defined as being entitled to do by the law.

Pattern of Professional Definition and Regulation

I will now briefly address the medical practice acts of California and a decision of the U.S. Supreme Court from 1912 to demonstrate how the legal definition of a profession came to be controlling. (I will use the California example, although the principles described also apply to other states. Of course, one has to check the law of each state individually.)

The first Medical Practice Act in California (enacted in 1876) basically followed an English common law model and required membership in one of the state's "medical societies" to practice medicine in any of its forms. The "allopaths" questioned the adequacy of this system. In 1907, the 1876 law was repealed and a new Medical Practice Act was promulgated, which required a license issued by a newly created board. That is, the licensing power was taken from the associations and given to the state board. A critical shift was beginning to take place with respect to the "definition" of the various "schools of medicine."

Prior to the era of 1900 to 1907, one seeking to define a particular group would have looked primarily to either the definition of the "school of practice" contained in, for example, the by-laws of the respective associations, or one would have looked at what the persons using various titles (allopath, osteopath, naturopath, chiropractor) actually did in their practices; or, perhaps, their own defined objectives.

Under the California Act of 1907, three forms of license were available:

1. to practice medicine and surgery;

2. to practice osteopathy;

3. to practice any other system or mode of treating the sick or afflicted.

(Note that all schools of medicine are defined as "treating the sick or afflicted.")

To be licensed under the 1907 Act, one had to graduate from a legally charted college that used a curriculum and standards set by the association or society for the respective categories of license. Pressure was mounting for the states to "prescribe" a basic science curriculum for the practice of any one of the various schools of the healing arts. Based upon English common law, many lawyers thought such a curriculum requirement (and further state control) would violate "due process of law." That issue was resolved by the U.S. Supreme Court in 1912.

The issue of a state's right to require a minimum science curriculum (and to, in effect, fully define and control the professions) went to the U.S. States Supreme Court in 1912. Texas had prescribed a minimum curriculum that had to be met by anybody "practicing medicine" in any of its forms. An osteopath, practicing without having met the curriculum requirement, was charged with practicing "medicine" without a license *(Collins v. Texas).* The osteopath argued that the curriculum requirement was a violation of due process of law. The Supreme Court's description of the practice of osteopathy should be interesting to chiropractors. The court stated:

> "An osteopath professes - the plaintiff in error professes, as we understand it - to help certain ailments by scientific manipulation affecting the nerve centers."

The Supreme Court found such activities to constitute the "practice of medicine" and approved of the states requiring minimum science education for the practice of the healing arts, in any of its forms.

The following year, 1913, California once again adopted a new Medical Practice Act and prescribed the educational requirements for either one of two licenses: "physicians and surgeons" and "drugless practitioners." (You might want to take a look at "Counsel in Dissent 8" on the website.) More importantly, California recognized (as did other states in this era) that the U.S. Supreme Court had granted to the states the right to totally define and regulate the practice of the healing arts. That is, the U.S. Supreme Court abandoned the English model for the regulation of the

professions and authorized the use of the European model. The license under the 1913 Act was issued by the "state medical board" and at this point, the definitional issue had effectively shifted away from the various license groups themselves (what they did, or their objectives) to state law.

It is also important to recognize a "sleight-of-hand trick" used by allopaths that has confused the various state legislatures and various courts around the country about the definition of the term "medicine." During most of the second half of the 19th century, mainstream practitioners were recognized as practicing allopathic medicine. Around the turn of the 20th century, allopaths started calling themselves "scientific practitioners." By the 1910s, the allopaths had dropped all adjectives and just claimed to be practicing "medicine."

Unfortunately, during the early part of the 20th century, and as a result of the allopaths "sleight-of-hand" activity, the language "practicing medicine" was inserted into most states' practice statutes without further definition, or qualification. To repeat this has caused great confusion for the courts and also within the chiropractic community. Some criteria must be sought to distinguish the various groups. That is the basic thrust of the question being addressed. The lack of clarity in a statute is a problem that lawyers deal with every day. The courts will clarify the definitional problems on a case by case basis. Therefore, the ultimate definition of the various schools of the healing arts is, in general, to be found in the case law of the various states. That definition is, in many instances, still open for further clarification and refinement in appropriately litigated cases based, in part, upon the courts being presented with a more complete explanation of the history of the practice of medicine in the U.S. and the differences in medical paradigms.

All healing arts practitioners have been defined by the courts as having the same basic objective to treat (and/or prevent) human ailments, but based upon what biological/medical paradigm? Although Dr. Grauke and I think all of the factors on the chart that prompted your letter are important, it really boils down to pathophysiology and treatment, plus philosophical assumptions. In our opinion, society, the state legislatures and the courts need to be forced/persuaded to recognize that chiropractors practice chiropractic medicine and allopaths practice allopathic medicine.

The term *medicine,* without further definition, is matched in many state laws by the use of the term *chiropractic,* without further definition. The issue then becomes, what does the word "chiropractic" mean in the respective state statutes? Following traditional rules for statutory construction, one has to look at all the concepts and practices (the paradigms) of all chiropractors (or "schools of chiropractic") who practiced before the particular law was passed. You asked about the early prosecution of chiropractors. Let me address one such case.

An Early Prosecution of a Chiropractor - 1907

One of the earliest cases involving a chiropractor charged with practicing medicine without a license related to a Japanese chiropractor (Morikubo) in Wisconsin in 1907. (For more details, please take a look at "Counsel in Dissent 9" on the website.) Tom Morris, his attorney, argued that one practicing as a chiropractor is not practicing medicine because each group of practitioners uses a different paradigm. He framed the paradigm issue by stating: "Chiropractic is a unique art, science and philosophy." After the trial, "B.J." popularized this concept among chiropractors.

A couple of points need to be made about the "unique science and philosophy" contention. This may seem like a minor point, but it is not: the choice of the word "unique" is misleading. Unique means "one of a kind." The emphasis should not be on the uniqueness of chiropractic but on the fact that chiropractic is different from allopathy; it operates from a different paradigm - a different set of philosophical assumptions, a different pathophysiological model and different therapeutics. If you

have a "one-of-a-kind" science and/or philosophy, no common ground can be developed with the mainstream scientific or philosophical communities. More importantly, it is very difficult to explain such a position to a legislator or judge. (Morris won before a jury. Jurors are more sophisticated these days. Also, the ideas related to "paradigms" and "models" have significantly advanced since 1907. We need to get up to date with the philosophy of science. We will address these matters in subsequent articles in the Dynamic Chiropractic.) Again, the key is to clearly identify the differences, not a purported uniqueness.

I will now respond a little more specifically with respect to your point about the objective of chiropractic. As stated previously, the courts have already ruled that the objective of all the healing arts is to treat (or prevent) human ailments. I recognize that some would state that the objective of a chiropractor is to identify and remove ("adjust") subluxations.

What Are Chiropractors Adjusting?

As I understand it, chiropractors call the process an adjustment because they are not "moving bones" to merely correct biomechanical problems, but to affect nerves and thereby "adjust" the body's functional capacity. Take that analysis one step further: the objective is to correct physioregulatory dysfunction in order to treat (or prevent) some ailment (identified, or not). One cannot distinguish a chiropractor's practice from allopathy on the basis of the objectives. The distinction justifying separate licensure has to be on the basis that chiropractors have a different model of health and disease causation, have different philosophical assumptions, and utilize different therapeutic protocols.

Summary and Conclusions

One has to look first to the law (statute and/or case law) in seeking a definition of any profession (at least in the U.S.). The objective of all the healing arts, at least since 1912, has been defined as the same: to treat (and/or prevent) human ailments. However, the justification for the licensing of various healing arts, and their right to equal protection of the law, must be based upon a recognition of differences between the respective schools of thought. That is, in interpreting state laws related to the practice of the healing arts, the courts must be convinced to recognize that the different schools of medicine exist, because there are different paradigms that distinguish the various branches of the healing arts. The most important aspects of these various paradigms are the philosophical (ontological and philosophy of science) assumptions, the pathophysiological model, and the treatment protocols derived from the pathophysiological model.

Thank you, Dr. Decken, for your great question. It would have been answered differently prior to the *Collins v. Texas* case in 1912. Prior to 1912, it would have been appropriate to look primarily to a group's own definition of their practice perspective. To repeat, presently one has to start with the legal definitions. One can, however, seek to clarify and refine the definitions to fit the emerging needs of the various healing arts practitioners and new scientific evidence supporting their respective schools of thought. This type of process is something that takes place on an ongoing basis within many areas of the law and is something with which lawyers and the courts are readily familiar. Times change, societal needs and desires change, and scientific understanding grows. So should grow the definition of the practice rights and responsibilities of the various professions as defined by the legislature, or as interpreted by the courts.

No California court has ever addressed the significance of the history of the development of the allopathic monopoly alluded to herein, because no attorney has ever brought the facts to the attention of the court. The courts do not go out and dig up such information themselves. This evidence needs to be presented to the California courts and elsewhere. The times are also ripe for

the courts to recognize the emerging understanding of the "internal environment, self-regulation paradigm." We will address some of the growing scientific evidence supporting this paradigm in a future article (Part 5) in *Dynamic Chiropractic.* Following that, we will address certain issues related to philosophy.

David Prescott MA,JD,DC,FIAMA
Silverado, California

Hon. Edwin Grauke,JD,DC
Lakewood, Colorado

APRIL 2002