

TO BE FILED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION

of

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No. 81-509

AUGUST 28, 1981

THE HONORABLE HERSCHEL ROSENTHAL, MEMBER OF THE ASSEMBLY (FORTY-FIFTH DISTRICT), has requested our opinion on the following question:

Does current law permit a student who is regularly matriculated in an approved osteopathic school to engage in the practice of medicine as part of his or her prescribed course of study?

CONCLUSION

Under current law a student who is regularly matriculated in an approved osteopathic school may engage in the practice of medicine whenever and wherever prescribed as part of his or her course of study.

ANALYSIS

Section 2052 (formerly § 2141) of the Business and Professions Code¹ makes it illegal generally for anyone to engage in the practice of medicine”² without proper credential. Section 2064 excepts from that general prohibition, however, the engaging in the practice of medicine by a “regularly matriculated student undertaking a course of professional instruction in an approved *medical school* . . . whenever and wherever prescribed as part of his or her course of study.” The question presented is whether a student who is regularly matriculated in an approved osteopathic school may similarly engage in the “practice of medicine” without a license. We conclude that he or she may.

Osteopathy is one of several approaches to the practice of medicine.³ As was

¹All unidentified statutory references herein are to the Business and Professions Code unless otherwise stated.

²The term “practice of medicine” is presently defined, as it has been at least since 1937, by section 2052 (formerly § 2141) of the State Medical Practice Act (div. 2, ch. 5, § 2000 *et seq.*) as follows:

“Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, *any system or mode of treating the sick or afflicted* in this state, or *who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person*, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is guilty of a misdemeanor.” (Emphases added.) (Stats. 1937, ch. 414, p. 1377, as amended by Stats. 1967, ch. 1103, p. 2741, § 1 and renumbered by Stats. 1980, ch. 1313, pp.4445, 4449, § 2.)

(See *Bowland v. Municipal Court* (1976) 18 Cal. 3d 479, *passim*.)

³These approaches or “schools” have been referred to as the allopathic, the homeopathic, the osteopathic, the eclectic, the naturopathic, etc. As the court in *Board of Osteopathic Examiners v. Board of Medical Examiners* (1975) 53 Cal. App. 3d 78, 81, fns. 2, 3, 4, chose to describe the first three:

“ ‘Allopathy is an erroneous designation for the regular system of medicine and surgery. The term really means the curing of diseased action by inducing a different kind of action in the body.’ (Dorland, *The American Illustrated Medical Dict.* (21st ed. 1947) p. 75.)

“ ‘Homeopathy is a system of therapy developed by Samuel Hahnemann on the theory that large doses of a certain drug given to a healthy person will produce certain conditions which, when occurring spontaneously as symptoms of a disease, are relieved by the same drug in small doses . . . a sort of “fighting fire with fire” therapy The real value of homeopathy was to demonstrate the healing powers of nature and the therapeutic value of placebos.’ (Stedman’s *Medical Dict.* (22nd ed. 1972) p. 583.)

“ ‘Osteopathy is a school of medicine based upon the idea that the normal body when in “correct adjustment” is a vital machine capable of making its own remedies against infections and other toxic conditions. Practitioners use the diagnostic and therapeutic measures of

explained in *D'Amico v. Board of Medical Examiners* (1970) 6 Cal. App. 3d 716 (hereinafter, "*D'Amico I*"):

“Osteopathy began as a system of healing based on the theory that all diseases were caused by irregularities in the musculoskeletal structure, and that they could be corrected primarily by manipulation without the use of drugs. This original theory has become less important to the practice of osteopathy. Colleges of osteopathy now have curricula more or less identical with those of medical schools, except that the former still teach the technique of manipulative therapy.” (6 Cal. App. 3d at p. 721; see also *Osteopathic Physicians & Surgeons v. Cal. Medical Assn.* (1964) 224 Cal. App. 2d 378, 382.)⁴

The osteopathic medical profession has been arrayed in what has been called a “pitched battle” and “internecine conflict” with the “allopathic medical profession” for over a century (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 8 (hereinafter “*D'Amico II*”); see also *Board of Osteopathic Examiners v. Board of Medical Examiners* (1975) 53 Cal. App. 3d 78, 80–82; *D'Amico I*, *supra*, 6 Cal. App. 3d at pp. 721–723; *Osteopathic Physician's & Surgeons v. Cal. Medical Assn.*, *supra*, 224 Cal. App. 2d at pp. 383–385) the result of which has been to “establish firmly that osteopathy constitutes the practice of medicine.” (*Board of Osteopathic Examiners v. Board of Medical Examiners*, *supra*, at p. 87.) Indeed it has been declared the policy of the state “that holders of M.D. degrees and D.O. degrees shall be accorded equal professional status and privileges as licensed physicians and surgeons.” (§ 2453, subd. (a).) The question is whether students of the osteopathic discipline may, under current law, engage in the practice of medicine without a license.

As noted introductorily, section 2064 exempts from the general prohibition of the unlicensed practice of medicine (*cf.* § 2052) prescribed activity by students who matriculate in *approved medical schools*. As long as a student is enrolled in the professional program of an *approved medical school*, he or she is essentially authorized to practice medicine without a license. The section reads in full as follows:

“Nothing in this chapter [i.e. the State Medical Practice Act] shall be construed to prevent a regularly matriculated student undertaking a course of professional instruction in an approved medical school, or to prevent a

ordinary medicine in addition to manipulative measures.” (*id.*, p. 899.)”

⁴We understand that the modality of manipulation and bio-mechanical physiology “are now being taught within the curricula of allopathic” medical schools.

foreign medical student who is enrolled *in an approved medical school* or clinical training program in this state, or to students enrolled in a program of supervised clinical training under the direction of an approved medical school pursuant to Section 2104, from engaging in the practice of medicine whenever and wherever prescribed as a part of his or her course of study.” (Emphasis added.)

Its reference to “an approved medical school” is amplified by section 2037 which provides:

“Whenever any . . . reference is made to a medical school or hospital, the medical school and hospital shall be the ones *approved by the Division of Licensing.*” (Emphasis added.)

The Division of Licensing is one of the three divisions comprising the Board of Medical Quality Assurance (§ 2003) and is responsible for “*approving* undergraduate and graduate medical education programs” (§ 2005, subd. (a)) and for “[a]pproving clinical clerkship and special programs and hospitals for such programs.” (*Id.*, subd. (b).) While it must “*approve every school* which complies with the requirements of [the State Medical Practice Act] for resident courses of professional instruction” (§ 2084), it may consider the *quality* of those courses required for such certification. (*Ibid.*)

But what of osteopathic medical schools? They are *not* approved by the Division of Licensing, but, as we shall see, by the Board of Osteopathic Examiners. Are they “approved medical schools” within the meaning of section 2064? The answer to the question is found in section 2451, and the current responsibilities of the Osteopathic Board which can only be understood in light of five decades of acrimonious litigation.

Section 2451 provides as follows:

“The words ‘Board of Medical Quality Assurance,’ the term ‘board,’ or any reference to a *division* of the Board of Medical Quality Assurance as used in this chapter shall be deemed to mean the Board of Osteopathic Examiners, *where that board exercises the functions granted to it by the Osteopathic Act.* (Emphases added.)

Thus if the “Osteopathic Act” grants the Board of Osteopathic Examiners the functions of approving osteopathic medical schools as the State Medical Practice Act grants the Division of Licensing, then section 2451 would equate the reference in section 2037 to an “approved medical school” being one approved by the Division of Licensing, to one appropriately approved by the Board of Osteopathic Examiners, and osteopathic students

in such schools would be entitled to the exemption found in section 2064 for students enrolled in “an approved medical school” to engage in the practice of medicine whenever and wherever prescribed as a part of his or her study.

In 1922 the California voters passed an initiative measure, the Osteopathic Initiative Act (Stats. 1923, p. xciii)⁵ establishing the Board of Osteopathic Examiners to administer the practice of osteopathy in California. “The result was that the Medical Board continued to issue the physician’s and surgeon’s certificate to graduates of medical schools with M.D. degrees, and the Osteopathic Board began to issue the identical physician’s and surgeon’s certificate to graduates of osteopathic schools with D.O. degrees, both under identical standards of education and examination.” (*Board of Osteopathic Examiners v. Board of Medical Examiners*, *supra*, 53 Cal. App. 3d at p. 81.) Pursuant to section 2 of the Act, those sections of the Medical Practice Act dealing with approval of osteopathic schools were placed within the charge of the Board of Osteopathic Examiners, thus:

“ . . . *The board of osteopathic examiners in respect to graduates of osteopathic schools, applying for any form of certificate mentioned or provided for in the state medical practice act, approved June 2, 1913, and all acts amendatory thereof, is hereby authorized and directed to carry out the terms and provisions of the state medical practice act . . . and all acts amendatory thereof and all laws hereafter enacted prescribing and regulating the approval of schools, the qualifications of applicants for examination for any form of certificate . . . [and] shall . . . take over, exercise and perform all the functions and duties imposed upon and heretofore exercised or performed by the board of medical examiners.*” (1923 Stats., pp. xclv-xcv, § 2; emphasis added.)

In 1962 the voters passed Proposition 22, a referendum measure “amending” the Osteopathic Act of 1922, as part of an effort to facilitate a complete merger between osteopaths and “allopaths.” (Stats. 1962, First Ex. Sess. 1962, ch. 48, pp. 337–338; *cf. Board of Osteopathic Examiners v. Board of Medical Examiners*, *supra*, 53 Cal. App. 3d at pp. 81–82.) Section 2 of the 1922 initiative, which, *inter alia*, had charged the Osteopathic Board with enforcing vis-a-vis osteopaths those provisions of the Medical Practice Act dealing with approval of medical schools and licensure of their graduates, was repealed (Stats. 1962, 1st Ex. Sess., ch. 48, p. 337, § 1) and, in conjunction with an

⁵“Since the Legislature has no power to codify initiative measures, the and later initiative acts modifying. it are included in different places by the publishers of the codes. It is included as Appendix II to Deering’s Annotated California Business and Professions Code, and as section 3600-1 *et seq.* in West’s Annotated California Business and Professions Codes.” (*Board of Osteopathic Examiners v. Board of Medical Examiners*, *supra*, 53 Cal. App. 3d at p. 81, fn. 5.)

amendment to section 2396 (Stats. 1961, ch. 969, p. 2610, § 1) and the addition of section 2451.3 (Stats. 1962, 1st Ex. Sess., ch. 49, So, all existing “D.O.’s” were invited to convert to “M.D.’s” and come under the jurisdiction of the Medical Board.⁶ The Osteopathic Board was accorded the diminished jurisdiction of enforcing with respect to the unconverted remainder *only* those portions of the Medical Practice Act dealing with discipline of licentiates and their local registration. (Stats. 1962, 1st Ex. sess., ch. 48, *supra*, § 2.) While the measure was silent on the matter, it was contemplated that there would be no new osteopaths licensed in California. (*D’Amico I, supra*, 6 Cal. App. 3d at p. 724.) Indeed, it was specifically anticipated that the Osteopathic Board itself would cease to exist when the number of remaining osteopaths fell below 40. (*Ibid.*; Stats. 1962, 1st Ex. Sess., ch. 48, *supra*, § 3.) The 1962 measure thus effectively forbade the *further* issuance of licenses to osteopaths and perforce the Osteopathic Board’s function of approving osteopathic schools. (*Board of Osteopathic Examiners v. Board of Medical Examiners, supra*, at p. 86; *D’Amico I, supra*, 6 Cal. App. 3d at pp. 723–724.) In 1974 however, the California Supreme Court held that those portions of the 1962 enactments which denied new osteopaths an opportunity for licensure as such violated the equal protection clauses of both the federal and state constitutions since that denial bore no rational relationship to any conceivable legitimate state purpose. (*D’Amico II, supra*, 11 Cal. 3d at pp. 23–24.)⁷ Said the court:

“[T]here exists no rational relationship between the protection of the public health and the exclusion from licensure of all medical practitioners who have received their training in an osteopathic rather than an allopathic college and hold D.O. rather than M.D. degrees.

“

“[W]e hold that the 1962 enactments, insofar as they forbid the licensure of graduates of osteopathic colleges as physicians and surgeons in this state regardless of individual qualifications, deny to plaintiffs the equal protection of the laws guaranteed by our state and federal Constitutions and are therefore to that extent void and of no effect. Accordingly, as the trial court determined, plaintiffs are entitled to be considered for licensure, either

⁶Approximately 2,500 California D.O.’s elected to become “M.D.’s” and came under the jurisdiction of the Medical Board. (*Board of Osteopathic Examiners v. Board of Medical Examiners, supra*, 53 Cal. App. 3d at p. 82.)

⁷*D’Amico II* did not affect the provisions of the 1962 measure which placed osteopaths who chose to become “M.D.’s” under the jurisdiction of the Medical Board or which gave the Legislature power to amend or modify, the Osteopathic Act and they remained “logically operative.” (*Board of Osteopathic Examiners v. Board of Medical Examiners, supra*, 53 Cal. App. 3d at p. 86.)

as ‘new’ physicians and surgeons or on the basis of reciprocity, according to the provisions of the Osteopathic and Medical Practice Acts *which were applicable immediately prior to the 1962 amendments.* (*Ibid.*)

As a consequence of *D’Amico II*, the 1962 attempt to repeal section 2 of the 1922 Initiative Act (which had vested the Osteopathic Board with the authority of carrying out those provisions of the Medical Practice Act with respect to osteopaths, such as approving osteopathic schools and licensing their graduates) was nullified, “thus restoring the [section] to full operative vigor.” (*Board of Osteopathic Examiners v. Board of Medical Examiners, supra*, 53 Cal. App. 3d at p. 86.) The net effect of this restoration was a renewal of the Osteopathic Board’s authority under section 2 to administer those provisions as they related to osteopaths. (*Cf. ibid.*) “[W]ith the filing of the . . . opinion, new osteopaths again began to be licensed by and came under the jurisdiction of the Osteopathic Board.” (*Id.*, at p. 83.) And restored to its “full operative vigor” section 2 once again had the Board of Osteopathic Examiners, “in respect to graduates of osteopathic schools . . . authorized and directed to carry out the terms and provisions of the state medical practice act . . . *prescribing and regulating the approval of schools . . . [and] tak[ing] over, exercis[ing] and perform[ing] all the functions and duties imposed upon and heretofore exercised or performed by the board of medical examiners.*” (Stats. 1923, pp. xclv–xcv, § 2) The Board’s approval of osteopathic schools is therefore a function accorded it by terms of the Osteopathic Act, albeit having suffered a decade of desuetude. Pursuant to section 2451 then we therefore substitute the “Board of Osteopathic Examiners” for the reference to the “Division of Licensing” in sections 2037 and 2084 and conclude accordingly that students attending schools approved by the Board pursuant to those sections are exempt by section 2064 from the liabilities of practicing medicine without a license. In other words a student who is regularly matriculated in a school approved by the Board of Osteopathic Examiners may currently engage in the practice of medicine *whenever and wherever* that activity is prescribed as part of his or her course of study.
