

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO

2nd Judicial District
Denver City and County Building
1437 Bannock St
Denver, CO 80202
(720) 865-8301

Plaintiffs:

COLORADO MEDICAL SOCIETY, COLORADO
SOCIETY OF OSTEOPATHIC MEDICINE, CLEAR
CREEK VALLEY MEDICAL SOCIETY, WELD
COUNTY MEDICAL SOCIETY, AURORA-ADAMS
COUNTY MEDICAL SOCIETY, DENVER MEDICAL
SOCIETY, MESA COUNTY MEDICAL SOCIETY,
COLORADO CHAPTER OF AMERICAN COLLEGE
OF EMERGENCY PHYSICIANS, COLORADO
RADIOLOGICAL SOCIETY, BOULDER COUNTY
MEDICAL SOCIETY, LARIMER COUNTY MEDICAL
SOCIETY, COLORADO ORTHOPAEDIC SOCIETY,
COLORADO SOCIETY OF ANESTHESIOLOGISTS

v.

Defendant:

COLORADO BOARD OF CHIROPRACTIC
EXAMINERS

Attorneys for All Plaintiffs:

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◆ COURT USE ONLY ◆

Case Number:

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**PLAINTIFFS' MOTION FOR IMMEDIATE INJUNCTIVE RELIEF TO PREVENT
IRREPARABLE INJURY PURSUANT TO C.R.S. § 24-4-106(5), (8)**

Plaintiffs Colorado Medical Society (“CMS”), Colorado Society of Osteopathic Medicine (“CSOM”), Clear Creek Valley Medical Society (“CCVMS”), Weld County Medical Society (“WCMS”), Aurora-Adams County Medical Society (“AACMS”), Denver Medical Society (“DMS”), Mesa County Medical Society (“MCMS”), Colorado Radiological Society (“CRS”), Colorado Chapter of American College of Emergency Physicians (“CC of ACEP”), Boulder County Medical Society (“BCMS”), Larimer County Medical Society (“LCMS”), Colorado Orthopedic Society (“COS”) and Colorado Society of Anesthesiologists (“CSA”), by and through their counsel, Martin Conklin, P.C. and Susan G. Koontz, J.D., general counsel for the Colorado Medical Society, and pursuant to C.R.S. § 24-4-106(5), (8) *et. seq.*, submit this Motion for Immediate Injunctive Relief To Prevent Irreparable Injury Pursuant to C.R.S. § 24-4-106(5), (8) as follows:

MOTION

1. The following factual allegations are set forth in Plaintiffs’ *Verified Complaint for Enjoinment of Agency Action to Prevent Irreparable Injury and for Judicial Review of Agency Action* filed with this Motion:

a. This is an action for injunctive relief and judicial review and declaratory judgment regarding a rulemaking by the Board of Chiropractic Examiners. The Board of Chiropractic Examiners has exceeded its statutory authority to regulate the practice of chiropractic by seeking to authorize chiropractors to administer drugs through topical, oral, inhalation and injection. Plaintiffs ask the Court to enjoin the enactment of Rule 7(c) to protect the public welfare and prevent irreparable injury to the members of CMS CSOM, CCVMS, WCMS, AACMS, DMS, MCMS, CRS, CC of ACEP, BCMS, LCMS, COS, CSA, and the patients they serve.

b. The Colorado General Assembly has delegated the limited rule-making authority to Defendant to: “[a]dopt, promulgate, and from time to time revise such rules and regulations not inconsistent with the law as may be necessary to enable it to carry out the provisions of this article.” *See* C.R.S. § 12-33-107(1)(a).

c. The General Assembly has not provided Defendant with the authority to authorize the administration of drugs or the use of intramuscular, intravertebral and

subcutaneous injections by chiropractors. *See* Article 33 of Title 12, C.R.S. § 12-33-101 *et. seq.*

d. The administration of drugs or the use of intramuscular, intravertebral and subcutaneous injections by chiropractors are not within the scope of chiropractic practice as defined in C.R.S. § 12-33-102(1.7).

e. The General Assembly has also specifically limited the practice of chiropractic to not infringe on the practice of medicine: “Such license shall not confer upon the licensee the right to practice surgery or obstetrics or to prescribe, compound or administer drugs, or to administer anesthetics.” *See* C.R.S. § 12-33-118.

f. The General Assembly has further statutorily delegated to the Colorado Medical Board the sole authority to adopt rules interpreting the Colorado Medical Practice Act. C.R.S. 12-26-101 *et. seq.* Defendant is without the statutory authority to adopt rules defining the practice of medicine, either by affirmative statement as to what the practice of medicine includes or does not include.

g. Article III of the Colorado Constitution provides that the “powers of the government of this state are divided into three distinct departments,-the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others.” As a state agency, the Defendant is constitutionally constrained to its administrative function on behalf of the executive branch. Defendant has violated the separation of powers embodied in the Colorado Constitution and assumed a legislative role by attempting to enact law via the administrative rulemaking process.

h. Defendant held a rulemaking hearing for Rule 7(c) on August 9, 2012. CMS participated in this rule making hearing, including the submission of written comments and oral testimony on the proposed rule. CMS further submitted, with Defendants written authorization, supplemental written comments on the proposed rule. CMS’s comments included the assertion that the adoption of Rule 7(c) exceeds the Board of Chiropractic Examiner’s statutory authority, conflicts with the Medical Practice Act, and seriously compromises patient safety and jeopardizes the public welfare.

i. Defendant adopted Rule 7(c) on November 15, 2012. A copy of 3 CCR 707-1, Chiropractic Board Rule 7(c) is attached as **Exhibit A**.

j. On December 5, 2012, the Attorney General issued his opinion that Rule 7(c) exceeds the legislative scope of authority granted to the Board of Chiropractic Examiners. A copy of the Attorney General’s Opinion is attached as **Exhibit B**.

k. Rule 7(c) was published in the Colorado Register on December 25, 2012 and is set to become effective on January 14, 2013.

1. Should Rule 7(c) take effect, the members of CMS CSOM, CCVMS, WCMS, AACMS, DMS, MCMS, CRS, CC of ACEP, BCMS, LCMS, COS, CSA and the patients they serve will suffer irreparable harm.

2. Attached hereto as **Exhibit C** and **Exhibit D** are the affidavits of Ken Spresser, D.C. and Ranee Shenoi, M.D. As more fully set forth in the affidavit of Doctor of Chiropractic Spresser and Dr. Shenoi, the enactment of Board Rule 7(c) threatens irreparable injury to the public welfare, Plaintiffs' professionally licensed members and the patient's they serve.

3. The Colorado Administrative Procedure Act provides this court with authority to enjoin the enactment of 3 CCR 707-1, Chiropractic Board Rule 7(c):

Upon a finding that irreparable injury would otherwise result... the reviewing court, upon application therefor and regardless of whether such an application previously has been made to or denied by any agency, and upon such terms and upon such security, if any, as the court shall find necessary and order, shall issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceedings.

C.R.S. § 24-4-106(5) (2012).

Upon a showing of irreparable injury, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff in such proceeding costs and a reasonable sum for attorney fees (or an equivalent sum in lieu thereof) incurred by other parties, including the state.

C.R.S. § 24-2-106(8) (2012).

4. In this case, Plaintiffs have alleged specific facts, supported by the affidavits Ken Spresser, D.C. and Ranee Shenoi, M.D., that demonstrate that immediate and irreparable injury or damage will result if the enactment of Rule 7(c) is not immediately enjoined. Plaintiff CMS participated in the rulemaking process and expressed its concerns and opposition to Rule 7(c), however, the Board of Chiropractic Examiners adopted Rule 7(c) on November 15, 2012. The enactment of Rule 7(c) is set to take effect on January 14, 2012. Plaintiffs are serving this Motion on the Board of Chiropractic Examiners to give notice of Plaintiffs request for an injunction so that the Board of Chiropractic Examiners can be heard in opposition.

5. The purpose of authorizing a court to enjoin improper and unlawful agency action is to protect parties from suffering irreparable harm. *Colorado Health Facilities Review Council v. District Court*, 689 P.2d 617, 622 (Colo. 1984). An order enjoining the enactment of Rule 7(c) is proper because Rule 7(c) is (1) clearly beyond the statutory authority of Board of Chiropractic Examiners and (2) will cause Plaintiffs to suffer “irreparable injury.” *Envirotest Systems, Corp. v. Colorado Dept. of Revenue*, 109 P.3d 142, 144 (Colo. 2005).

6. First, as set forth in the Complaint, the enactment of CCR 707-1, Chiropractic Board Rule 7(c) clearly exceeds the statutory authority of the Board of Chiropractic Examiners. The General Assembly has specifically limited the Board of Chiropractic Examiner’s rulemaking authority to that which is “not inconsistent with the law” and “necessary to enable it to carry out the provisions of” C.R.S. 12-22-101 et seq, the Colorado Chiropractic Act. See C.R.S. § 12-33-107(1)(a).

7. The General Assembly has not provided Defendant with the authority to authorize the administration of drugs or the use of intramuscular, intravertebral and subcutaneous injections by chiropractors. See Article 33 of Title 12, C.R.S. § 12-33-101 et. seq. Furthermore, the General Assembly has specifically limited the practice of chiropractic to not infringe on the practice of medicine and dentistry: “Such license shall not confer upon the licensee the right to practice surgery or obstetrics or to prescribe, compound or administer drugs, or to administer anesthetics.” See C.R.S. § 12-33-118. Yet this is precisely what Rule (7) purports to accomplish: to confer on chiropractors the authority to administer drugs and perform invasive procedures such as intramuscular, intravertebral and subcutaneous injections that Colorado statute only permits licensed physicians to perform.

8. The General Assembly has statutorily delegated to the Colorado Medical Board the sole authority to adopt rules interpreting the Colorado Medical Practice Act. C.R.S. 12-26-101 et. seq. Defendant is without the statutory authority to adopt rules defining the practice of medicine, either by affirmative statement as to what the practice of medicine includes or does not include. Yet Rule 7(c) purports to interpret to Colorado Medical Practice Act to define the practice of medicine as not including the administration of drugs or the use of intramuscular, intravertebral and subcutaneous injections. In doing so, Defendant has violated the separation of powers embodied in Article III of the Colorado Constitution and assumed a legislative role by attempting to enact law via the administrative rulemaking process.

9. The Attorney General agreed, finding in his review of Rule 7(c) pursuant to C.R.S. s 24-4-103(8) that Rule 7(c) exceeds the legislative scope of authority granted to the Board of Chiropractic Examiners. See **Exhibit B**.

10. Second, there exists a real, immediate and irreparable injury to Plaintiffs which can only be prevented if this Court enjoins the enactment of Rule 7(c). The enactment of Rule 7(c) exceeds the statutory authority of Defendant set forth in the Chiropractors Practice Act, in C.R.S. § 12-33-101 et. seq., and impermissibly intrudes on the practice of medicine, threatening irreparable injury to the members of CMS CSOM, CCVMS, WCMS, AACMS, DMS, MCMS, CRS, CC of

ACEP, BCMS, LCMS, COS, CSA who are professionally licensed under the Medical Practice Act, see C.R.S. § 12-36-101 *et. seq.* Moreover, authorizing chiropractors to administer drugs and perform intramuscular, intravertebral and subcutaneous injections threatens irreparable injury to the public welfare and the safety of the patients Plaintiffs' members serve to protect.

11. Should Rule 7(c) be enacted, the professional licenses of Plaintiffs' members and the health and welfare of the patients they serve will be irremediably impacted. There is no other plain, speedy, or adequate remedy at law to remedy the grave and unjustified public health risk presented by the enactment of Rule 7(c). See *Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd.*, 553 P.2d 800, 808 (Colo. 1976) (granting injunction pursuant to C.R.S. § 25-7-118 where public health concern was "imbued with great public importance").

12. The availability of judicial review of final agency action under C.R.S. § 24-4-106(7) is insufficient to rectify the injury to the professional licenses of Plaintiffs' members and the grave and unjust risk to the public at large and the patients they serve. The Medical Practice Act was enacted by the General Assembly to control "the practice of the healing arts to the end that the people shall be properly protected against unauthorized, unqualified, and improper practice of the healing arts in this state." C.R.S. § 12-36-102. The unlawful, improper and dangerous use of intramuscular, intravertebral and subcutaneous injections and the administration of drugs by unqualified Chiropractors authorized by Rule 7(c) poses an irreparable threat to the public health and welfare that the General Assembly specifically sought to protect in enacting the Medical Practice Act and the Dental Practice Law.

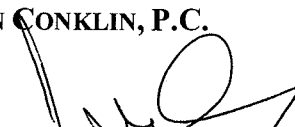
13. Finally, an injunction will preserve the *staus quo* pending judicial review on the merits. The injunction will stay the enactment of Rule 7(c) pending judicial review of the issues set forth in the *Verified Complaint for Enjoinment of Agency Action to Prevent Irreparable Injury and for Judicial Review of Agency Action*, thereby affording judicial review of the propriety of the Board of Chiropractic Examiners rulemaking while preventing real, immediate and irreparable injury to Plaintiffs' professionally licensed members, the patients they serve and the public at large.

WHEREFORE, Plaintiffs respectfully request that this Court enter a temporary injunction enjoining the enactment of 3 CCR 707-1, Chiropractic Board Rule 7(c); that the Court set a hearing for more complete injunctive relief; that the Court enter a permanent injunction enjoining the enactment of 3 CCR 707-1, Chiropractic Board Rule 7(c) pursuant to C.R.S. 24-4-106(5) and (8) to prevent irreparable injury to Plaintiffs and the patients the serve; and enter any other relief as the Court deems just and proper under the circumstances.

Respectfully submitted December 28, 2012.

MARTIN CONKLIN, P.C.

By:



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Attorneys for Plaintiffs

