STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG - 1 - 01

January 30, 2001

Ms. Marlene A. Cummings
Secretary
Department of Regulation and Licensing
1400 East Washington Avenue
Madison, WI 53702

Dear Ms. Cummings:

At the request of the Chiropractic Examining Board ("Board"), you ask my opinion whether a person certified as a physical therapist or registered as a massage therapist and bodyworker, and who is not licensed as a chiropractor, may perform procedures identified in your letter as "chiropractic adjustment," "spinal manipulation," "chiropractic manipulation" or "spinal adjustment," and used interchangeably. Unfortunately, the generality of your questions and the lack of definitional guidance in the statutes and administrative rules that pertain to the professionals in question limits the conclusions I am able to draw. Although neither a physical therapist nor a massage therapist may lawfully perform a chiropractic adjustment unless licensed as a chiropractor, not every form of therapeutic touch involving the neck, back, joints or connective tissues constitutes a chiropractic adjustment.

Although the practice of chiropractic is defined in the statutes and the administrative code, the essential terms in your inquiry are not defined by statute or rule. Section 446.01(2) of the Wisconsin Statutes provides that the "[p]ractice of chiropractic" means:

> (a) To examine into the fact, condition, or cause of departure from complete health and proper condition of the human; to treat without the use of drugs as defined in s. 450.01(10) or surgery; to counsel; to advise for the same for the restoration and preservation of health or to undertake, offer, advertise, announce or hold out in any manner to do any of the aforementioned acts, for compensation, direct or indirect or in expectation thereof; and
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> (b) To employ or apply chiropractic adjustments and the principles or techniques of chiropractic science in the diagnosis, treatment or prevention of any of the conditions described in s. 448.01(10).

The conditions described in section 448.01(10) are "the fact, condition or cause of human health or disease."

Wisconsin Administrative Code § Chir 4.03 amplifies the statutory definition of the "practice of chiropractic," and provides:

> The practice of chiropractic is the application of chiropractic science in the adjustment of the spinal column, skeletal articulations and adjacent tissue which includes diagnosis and analysis to determine the existence of spinal subluxations and associated nerve energy expression and the use of procedures and instruments preparatory and complementary to treatment of the spinal column, skeletal articulations and adjacent tissue. Diagnosis and analysis may include physical examination, specimen analysis, drawing of blood, blood-analysis and the use of x-ray and other instruments.

Wisconsin Administrative Code § Chir 4.02 defines "chiropractic science":

> (1) "Chiropractic science" means that body of systematic and organized knowledge relating primarily to the identification, location, removal or reduction of any interference to nervous system integrity or nerve energy expression and the resulting change in biomechanical or physiological homeostasis. It is based on the major premise that disease or abnormal function may be caused by abnormal nerve impulse transmission or expression due to biochemical factors, compression, traction, pressure or irritation upon nerves as a result of bony segments, especially of the spine or contiguous structures, either deviating from normal juxtaposition or function which irritates nerves, their receptors or effectors.

The administrative code definition of the practice of chiropractic is expansive, in that it permits "adjustments" (an undefined term) not only of the spinal column, but also the adjustment of other "skeletal articulations" (*i.e.*, "joints," in the common parlance), and the adjustment of tissue adjacent to the spinal column and other skeletal articulations. Some of the "adjustments" performed by chiropractors may be "spinal adjustments," but the adjustment of other skeletal articulations, and the adjustment of the tissues adjacent to skeletal articulations (presumably "soft tissue," in the common parlance) are not adjustments of the spine, even though they may be chiropractic adjustments within the administrative code definition of the "practice of chiropractic" and also "chiropractic adjustments" as your inquiry appears to use the term.

The difficulty in answering your question is increased by including "the use of procedures . . . preparatory and complementary to treatment of the spinal column, skeletal articulations and adjacent tissue," all undefined, within the administrative code definition of the practice of chiropractic.

If the operative terms in the administrative code definition of the practice of chiropractic are given their common meaning,[1] it is clear that chiropractic practice, physical therapy practice and massage therapy practice may overlap under some circumstances. "Physical therapy" is defined by section 448.50(4) to be, in relevant part, "that branch or system of treating the sick which is limited to therapeutic exercises with or without assistive devices, and physical measures including heat and cold, air, water, light, sound, electricity and massage; and physical testing and evaluation." "Physical therapy" is not further defined by administrative rule. "Massage therapy" is defined by section 440.98(4)(a) to be, in relevant part "the science and healing art that uses manual actions to palpate and manipulate the soft tissue of the human body." Wisconsin Administrative Code § RL 90.02(7) repeats the statutory definition of "massage therapy." "Manual action" is defined to include "holding, positioning, rocking, kneading, compressing, decompressing, gliding or percussing the soft tissue of the human body and applying friction to soft tissue." Wis. Stat. § 440.98(2); Wis. Admin. Code § RL 90.02(5).

One area of apparent intersection among the three disciplines is in their attention to the soft tissues of the body. For example, to the extent that a physical therapist or massage therapist provides hand massage to the soft tissue adjacent to a skeletal joint, the physical therapist or massage therapist makes an "adjustment" to that tissue – an action that is potentially also within the scope of chiropractic practice. Physical therapy and chiropractic also intersect in that both may address the alignment of the body. To the extent that a physical therapist teaches a therapeutic exercise by, *e.g.*, aligning the patient's pelvic girdle to change the patient's balance point, or straightens the patient's spine to demonstrate proper lifting technique, the physical therapist engages in an adjustment of the patient's joints, within the common meaning of that term, and therefore performs an activity which may be within the definition of the practice of chiropractic.

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[1]Your letter includes a number of definitions of the terms "chiropractic adjustment," "chiropractic manipulation," "spinal manipulation" and "spinal adjustment." Some come from the opinions of attorneys general in different states, or from administrative regulations in other states. One appears to be based on an uncodified distinction made by the Chiropractic Examining Board between "manipulation" and "mobilization," based on the lever length, velocity and amplitude of the respective procedures. Another comes from a Wisconsin Court of Appeals' decision in *Kerkman v. Hintz,* 138 Wis. 2d 131, 134 n.2, 406 N.W.2d 156 (Ct. App. 1987), *aff'd in part and rev'd in part*, 142 Wis. 2d 404, 418 N.W.2d 795 (1988) (both courts holding that a chiropractor should be held to a "reasonable chiropractor" standard, and not a "reasonable physician" standard in chiropractic negligence cases). The definitions from other states, and the attorney generals' opinions interpreting the laws of other states are of only limited utility in interpreting the differently worded laws of Wisconsin. The Board's uncodified distinction is unhelpful precisely because it is uncodified. The definition of chiropractic "adjustment" in the *Kerkman* case is completely nonessential to the holding in the case, because the issue involved only the standard of care to which chiropractors should be held, and not the substantive content of chiropractic, physical therapy or massage therapy practice.

Despite the apparent expansiveness of the procedures included within the definition of chiropractic practice, the intersections among chiropractic practice, physical therapy and massage therapy are limited in one crucial respect. Each of the activities within the definition of chiropractic practice must involve "the application of chiropractic science" in order to be part of the practice of chiropractic. The current definition of chiropractic practice recognizes that chiropractors do not have a monopoly on the application of therapeutic touch to the neck, back and joints, and recognizes that it is the application of chiropractic science which distinguishes chiropractic from other healing arts and sciences involving therapeutic touch. Thus, for example, if a specific type of therapeutic touch were administered by a physical therapist applying the principles of physical therapy science, or by a massage therapist applying the principles of therapeutic massage, those procedures would not be within the definition of chiropractic science, because neither would involve the application of chiropractic science, even if nearly identical physical motions were performed by a chiropractor. Terms such as "adjustment" and "manipulation" have a variety of appropriate meanings to various healing disciplines as the examples above demonstrate. Further efforts by the Chiropractic Examining Board to define the particular procedures described in your inquiry should focus on the unique, specific features of the discipline of chiropractic science.

The Legislature has recognized the possibility that chiropractic practice and physical therapy practice may overlap. Sections 446.02(10)(a) and 448.525(1) both provide that the Chiropractic Examining Board and the Physical Therapists Credentialing Board "shall jointly promulgate rules that establish the circumstances under which and the extent to which a chiropractor . . . may claim to render physical therapy or physiotherapy services within the scope of the practice of chiropractic." Moreover, sections 446.02(10)(b) and 448.525(2) prevent either board from unilaterally promulgating rules defining the physical therapy practice of chiropractors. At the time this opinion is written, no joint rules have been promulgated.

The courts and this office have also recognized that the disciplines of various health care professionals may overlap. In *Kerkman*, 142 Wis. 2d at 416, the court recognized that "[a]lthough chiropractors are permitted to use some medical tools when analyzing and treating a patient, this overlap does not transform the practice of chiropractic into the practice of medicine." In 68 Op. Att'y Gen. 316 (1979), my predecessor concluded that a physician could advise a patient whether continued chiropractic care was necessary without engaging in the unauthorized practice of chiropractic, even though that advice may technically fall within the definition of chiropractic practice. That opinion considered the general law on litigated disputes between engineers and architects over the scope of their respective practices, quoting 5 Am. Jur. 2d *Architects* § 3 (68 Op. Att'y Gen. at 319-30):

> [W]here either a licensed architect or a licensed engineer performed services which could properly be regarded as within the reach of the statute licensing his profession and also within the statute licensing the other profession, he performed

> such services under the statute under which he was licensed and was not affected by the fact that they came incidentally within the purview of the other licensing statute.

The opinion further stated (68 Op. Att'y Gen. at 320):

> It is my opinion that a similar line of reasoning must be applied to chiropractors and physicians. In giving advice to patients, there is an overlap between what may properly be done by a chiropractor and a physician under their respective grants of statutory authority. In my view, a physician is given the latitude to perform services within his or her authority, whether those services overlap with professional services properly performed by a chiropractor, or other health care professional.
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> To find otherwise would be to place unreasonable restraints on the practice of medicine. As summarized by the court in *Smith v. American Packing & Provision Co.*, 102 Utah 351, 130 P.2d 951, 955 (1942), "the mere fact that a licensed profession extends in some degree into the field of some other licensed occupation, does not require the licensee to have a license in each of the fields into which his profession may overlap, unless the statutes impose such requirement." Our statutes impose no such requirement. It is therefore my opinion that physicians may advise their patients whether or not continued chiropractic care is necessary. By so doing, physicians are not engaging in the unauthorized practice of chiropractic.

In the absence of a more specific explication of the operative phrases of the practice statutes involved – particularly, sections 446.01(2), 448.50(4) and 440.98(4)(a) – by the administrative rules each of the respective examining or credentialing boards or department is authorized to promulgate, my opinion is limited to the general proposition that physical therapists and massage therapists are not prohibited from performing the activities that are within their respective scopes of practice, even if those activities extend in some degree into the field of chiropractic practice.

Consistent with sections 446.02(10)(a) and 448.525(1), I urge the Chiropractic Examining Board to begin the legislatively-mandated process of promulgating joint rules with the Physical Therapists Affiliated Credentialing Board. I encourage both boards to sharpen the definitions of their respective practice areas, in order to give both chiropractors and physical therapists adequate guidance about the permissible scope of their respective practices.

Sincerely,

James E. Doyle
Attorney General

JED:BAO:mmp

CAPTION: Discussion of overlapping areas of practice of chiropractors, physical therapists and massage therapists. License in each discipline not required where overlap exists.

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OAG - 2 - 01

February 14, 2001

Ms. N. L. Bergstrom
Corporation Counsel
Lincoln County
Health & Human Services Center
607 North Sales Street
Merrill, WI 54452

Dear Ms. Bergstrom:

You have requested my opinion on three questions related to the permissibility of the practice, by county highway departments, of selling certain winter road maintenance supplies at cost to local municipalities or to private parties. Your first question is:

1. Is it permissible for a county highway department to sell sand/salt to municipalities for their own use?

In answering this question, I first must consider whether a county highway department has statutory authority to sell sand/salt to municipalities. You have stated the opinion that such a sale is authorized by Wis. Stat. § 83.035 as a contract for road maintenance. I disagree. That statute says that a county board may authorize its county highway committee to enter into contracts with municipalities "to enable *the county* to construct and maintain streets and highways in such municipalities." Wis. Stat. § 83.035. The sale of sand/salt by a county to a municipality for *the municipality's* own use is not a way of enabling the county to maintain streets and highways in the municipality. Such sales are therefore not authorized by Wis. Stat. § 83.035.

Direct statutory support for the sale of sand/salt to municipalities can, however, be found in Wis. Stat. § 83.018, which specifically authorizes county highway committees to sell road maintenance supplies to any city, village, town or school district within the county. This statute specifically authorizes county highway departments to sell sand/salt and other road maintenance supplies to municipalities and, on its face, places no limits on how those supplies may be used.

Even where statutory authority exists, however, it is also necessary, as you have noted, to determine whether the sales in question would violate the public purpose doctrine, which prohibits the use of public funds, public equipment or public supplies to provide a benefit that is primarily private, rather than public, in nature. *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973); *Heimerl v. Ozaukee County*, 256 Wis. 151, 155, 40 N.W.2d 564 (1949); 76 Op. Att'y Gen. 69 (1987); 61 Op. Att'y Gen. 304, 305 (1972). Because the

public purpose doctrine is a constitutional rule, it limits the authority conferred on counties and other municipalities by statute. *See State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683 (1967); 76 Op. Att'y Gen. at 70. Even where statutory authority for a county's action exists, the county must be cautious not to exercise that authority in a way that contradicts the public purpose doctrine. *See* 76 Op. Att'y Gen. at 70; *Bowman*, 34 Wis. 2d at 69.

Whether the sale of sand/salt by a county highway committee to a municipality for the municipality's own use would violate the public purpose doctrine depends on the use to which the sand/salt would be put by the municipality. Use of the sand/salt to provide safe winter passage on public roads would be a valid public purpose and sale for that purpose, or for some other public purpose, would be permissible. If, however, the municipality were to use the salt for a private purpose – such as to provide winter passage on a private road, private driveway or private parking lot – then the sale would violate the public purpose doctrine. *See* 76 Op. Att'y Gen. at 72; 67 Op. Att'y Gen. 304 (1978); 50 Op. Att'y Gen. 98, 100-01 (1961). Counties may not enter into contractual arrangements with municipalities to provide services where the benefit to be provided is primarily private in nature. *See Heimerl*, 256 Wis. 151 *passim*.

A mere possibility that public funds may be used to promote a public purpose is not enough to validate an expenditure, if the possibility of the public benefit is too remote and uncertain. *See Bowman*, 34 Wis. 2d at 71-72. The public purpose doctrine therefore imposes control and accountability requirements on government-funded activities. *See Jackson v. Benson*, 218 Wis. 2d 835, 897, 578 N.W.2d 602 (1998). There must be some type of limitation or control to insure that the materials in question will be used for a public purpose. *See State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 176, 277 N.W. 278, 280 N.W. 698 (1938). The amount of control and accountability required is such as is reasonably necessary under the circumstances to attain the public purpose. *See Jackson*, 218 Wis. 2d at 897.

Local municipalities, like counties, are subject to the public purpose doctrine. Any municipality purchasing sand/salt from a county highway department for its own use thus has an independent constitutional obligation to use the sand/salt only for a public purpose. I believe that this legal duty of the purchasing municipality constitutes a reasonable regulation for control and accountability that sufficiently safeguards against use of the sand/salt for a private purpose. A county selling sand/salt to a municipality is entitled to assume, in good faith, that the purchasing municipality will itself satisfy its own obligations under the public purpose doctrine.

My answer to your first question, therefore, is that it is permissible for a county highway committee to sell sand/salt to a municipality for its own use, as long as the county officials believe, in good faith, that the purchasing municipality does not intend to unlawfully use the sand/salt for a private purpose. It would be desirable, nonetheless, for the county to include in the terms of sale of the sand/salt a clause expressly prohibiting use of the materials for private purposes. While such a "public purpose" clause is probably not legally required for sales to

municipalities, it would perform the useful function of reminding the purchasing municipalities that they, too, are subject to the public purpose doctrine.

Your second question is:

2. Is it permissible for a county highway department to sell sand/salt to municipalities acting as middle-men for private contractors?

As already noted, Wis. Stat. § 83.018 authorizes county highway departments to sell sand/salt to municipalities and there is no statutory limit on how such supplies may be used. The answer to your second question therefore depends on whether the sale of sand/salt to municipalities acting as middle-men for private contractors would violate the public purpose doctrine. This office has, in the past, repeatedly stated the opinion that statutes authorizing counties and local municipalities to provide road maintenance services or materials to private parties must be narrowly construed to include implicit restrictions that prohibit any application that would violate the public purpose doctrine. *See* 76 Op. Att'y Gen. at 70; 67 Op. Att'y Gen. at 305.

As with your first question, then, the answer to your second question again depends on whether there are sufficient limitations or controls to make it reasonably probable that the sand/salt will be used for a public purpose. A private contractor who purchases sand/salt from a municipality might use the sand/salt to provide safe winter passage on public roads (or for some comparable public purpose), or might use it for a private purpose, such as clearing private roads, driveways or parking lots. The terms of such a sale, therefore, must include reasonable regulations for control and accountability under the public purpose doctrine. It is obvious, however, that the municipality that sells sand/salt to a private party is in the best position to control the terms of that sale. It would be unreasonable to require a county that sells sand/salt to a municipality to also exercise supervision over any subsequent re-sale of the sand/salt by the municipality. Rather, as previously noted, the county is entitled to assume, in good faith, that local municipalities will meet their own obligations under the public purpose doctrine.

The answer to your second question, therefore, is that it is permissible for a county highway committee to sell sand/salt to municipalities acting as middle-men for private contractors, as long as the county believes, in good faith, that the purchasing municipality does not intend to unlawfully resell the sand/salt for a private, rather than a public, purpose. Again, however, it would be desirable for the terms of such a sale to include a clause prohibiting resale of the sand/salt for private purposes.

Your third question is:

3. Is it permissible for a county highway department to sell sand/salt to private vendors?

In answering this question, I first must consider whether a county highway department has statutory authority to sell sand/salt to private parties. You have not cited any statute that specifically authorizes such sales. Sales to private parties are not authorized by Wis. Stat. § 83.018, which authorizes county highway committees to sell road maintenance supplies to municipalities, but not to private parties. My review of the statutes has found no provision specifically authorizing a county highway department to sell supplies to private parties. A county board, however, may "[d]irect the clerk to lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on terms that the board approves." Wis. Stat. § 59.52(6)(c). I conclude from this that the county board may itself direct the sale of sand/salt to private parties or may, by ordinance, authorize the county highway department to make such sales. In the absence of such an ordinance, however, a county highway department lacks power to sell supplies to private parties.

Of course, even where a county board authorizes the county highway department to sell sand/salt to private parties, those sales still must satisfy the public purpose doctrine. The concerns in this regard are the same as the concerns already discussed under your first and second questions. The mere possibility that a private party buying sand/salt from a county might use the materials for a public purpose is not enough to satisfy the public purpose doctrine. Rather, there must be "reasonable regulations for control and accountability to secure public interests." *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, 235 Wis. 443, 453, 293 N.W. 161 (1940).

Because a private party buying sand/salt from a county, unlike a local municipality, is not itself subject to the public purpose doctrine, I believe that the public interest is adequately secured only if the private party is under a contract that requires the use of the sand/salt for a specific public purpose, such as the sanding/salting of public roads. Before selling sand/salt to a private buyer, therefore, the county should require the buyer to document the existence of such a contract. In addition, the terms of the sale of the sand/salt to the private party must include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. *See Hermann v. Lake Mills*, 275 Wis. 537, 542-43, 82 N.W.2d 167 (1957) (sale of municipal parking lot to private corporation invalid where there was no binding commitment requiring the corporation to continue to devote the lot to a public purpose). Such an agreement could be given teeth by the use of liquidated damages or by making future sales contingent on compliance. The general notion that the public would benefit from other uses of sand/salt – such as to provide safe winter passage on a private road, private driveway or private parking lot – is insufficient, in my view, to satisfy the public purpose doctrine. In addition, I believe that, under

ordinary circumstances, the public purpose doctrine prohibits a county from selling road maintenance supplies to a private party that intends to resell the supplies on the private market.

The answer to your third question, therefore, is that it is permissible for a county highway department to sell sand/salt to private vendors if the county board has approved such sales by ordinance, if the private vendor shows that it is subject to a contract that requires it to use the sand/salt for a specific public purpose and if the terms of sale include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. Purchases by private vendors only for the purpose of resale on the private market, however, ordinarily do not satisfy the public purpose doctrine.

Your letter also raises an additional issue. You have suggested that the practice, by a county highway department, of wholesaling sand/salt to private parties, either directly or through a middle man, itself serves the public purpose of providing safe winter passage for all taxpayers because the strict storage regulations for sand/salt make it infeasible for private vendors to stockpile enough sand/salt to meet local needs throughout the long winter. In your view, county intervention in the sand/salt market is justifiable because of this alleged inability of the private market to meet local needs on its own.

Assuming that the costs of complying with sand/salt storage requirements are as onerous as you suggest, I do not believe that the burden thereby imposed on the private sand/salt market is, in itself, sufficient to justify county intervention in that market. Under the public purpose doctrine, a county may stockpile sand/salt only to promote a public purpose, not to promote private interests. If county intervention in the sand/salt market is necessary to provide safe winter passage on public roads, or to secure a comparable public interest, then such intervention is permissible, if accompanied by adequate safeguards. The county may not, however, act as a wholesaler of sand/salt where that activity would only reduce the cost to private contractors of meeting private needs.

Sincerely,

James E. Doyle
Attorney General

JED:TCB:mmp

CAPTION: It is permissible for a county highway department to sell road sand/salt to municipalities, either for their own use or for resale, as long as the county officials believe, in good faith, that the purchasing municipality does not intend to use or resell the sand/salt for a

private, rather than a public, purpose. It is permissible for a county highway department to sell sand/salt to private parties only if the county board has approved such sales, if the purchasing private party shows that it is subject to a contract that requires it to use the sand/salt for a specific public purpose and if the terms of sale include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. Under ordinary circumstances, a county may not sell road maintenance supplies to a private party that intends to resell the supplies on the private market.