

LAWS AND REGULATIONS GOVERNING CHIROPRACTIC MEDICINE

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SCOPE

Florida strictly governs the practice of chiropractic medicine. The scope of practice for a chiropractic physician and numerous restrictions and limitations are set forth in several different sections of Florida Statutes as well as in different sections of the Florida Administrative Code (F.A.C.). This chapter reviews and discusses the more significant legal requirements affecting chiropractic physicians imposed by Florida's laws and administrative regulations. Additionally, legal issues, which are particularly troublesome to chiropractic physicians, are reviewed and recommendations made to assist in reducing the risk of legal or disciplinary action being initiated against the chiropractic physician.

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§38.01 Introduction

Florida strictly governs the practice of chiropractic medicine. The scope of practice for a chiropractic physician or chiropractor and numerous restrictions and limitations are set forth in several different sections of Florida Statutes as well as in different sections of the Florida Administrative Code (F.A.C.).

The primary laws governing chiropractic medicine are contained in Chapter 460, Florida Statutes, which also includes the “Chiropractic Practice Act.” A copy of this entire law is contained in the Appendix to this book. However, chiropractic physicians, being licensed health care professionals, are also governed by the legal requirements contained in Chapter 456, Florida Statutes, laws applicable to all health care professionals in Florida. Specific regulations or administrative “rules” governing chiropractors, all adopted by the Florida Board of Chiropractic Medicine, are contained in Chapter 64B2, Florida Administrative Code, specifically in Sections 64B2-10 through 64B2-17. These are also provided in the Appendix to this book.

However, in addition to the above, Chiropractic physicians will also find their practice to be impacted by portions of Florida’s Insurance Code, specifically Section 627.736, Florida Statutes, concerning personal injury protection (PIP) benefits and claims procedures; Florida’s Workers Compensation laws, specifically, Section 440.13, Florida Statutes, concerning Workers Compensation Utilization and Peer Review Procedures; and the recent clinic registration requirements contained in Section 456.0375, Florida Statutes, and Section 64-2.001, Florida Administrative Code.¹

This chapter reviews and discusses the more significant legal requirements affecting chiropractic physicians imposed by Florida’s laws and administrative regulations.

§38.02 Scope of Practice of Chiropractic Medicine in Florida

The Chiropractic Medicine Practice Act, set forth in Chapter 460, Florida Statutes, is intended to ensure that every chiropractic physician practicing in Florida meets minimum requirements for safe practice. The Act establishes the Board of Chiropractic Medicine as well as setting forth requirements for obtaining and renewing a chiropractic license in Florida, prohibited procedures, conduct which is forbidden, and limitations on disease that may be treated by chiropractors, among other details.

[1] How the Law Defines Chiropractic Medicine

Section 460.403(9)(a), Florida Statutes, defines the practice of chiropractic medicine to mean:

...a noncombative principle and practice consisting of the science, philosophy, and art of the adjustment, manipulation, and treatment of the human body in which vertebral subluxations and other malpositioned articulations and structures that are interfering with the normal generation, transmission, and expression of nerve impulse between the brain, organs, and tissue cells of the body, thereby causing disease, are adjusted, manipulated, or treated, thus restoring the normal flow of nerve impulse which produces normal function and consequent health by chiropractic physicians using specific chiropractic adjustment or manipulation techniques taught in chiropractic colleges accredited by the Council on Chiropractic Education. No person other than a licensed chiropractic physician may render chiropractic services, chiropractic adjustments, or chiropractic manipulations.

Thus, a chiropractic physician will be expected to treat a patient primarily through the means of adjustments and manipulations of the body, and not by means of prescribing medications, surgery or other techniques considered to be within the exclusive province of medical doctors or osteopathic physicians.

[2] **The Scope of Practice for Chiropractic Physicians**

The scope of practice for a chiropractic physician is set forth in several different laws and regulations. Section 460.403(9)(b), Florida Statutes, allows a chiropractic physician to:

...examine, analyze, and diagnose the human living body and its diseases by the use of any physical, chemical, electrical, or thermal method; use the X ray for diagnosing; phlebotomize; and use any other general method of examination for diagnosis and analysis taught in any school of chiropractic.

Section 460.403(9)(c)1, Florida Statutes, also states that a chiropractic physician may:

...adjust, manipulate, or treat the human body by manual, mechanical, electrical, or natural methods; by the use of physical means or physiotherapy, including light, heat, water, or exercise; by the use of acupuncture; or by the administration of foods, food concentrates, food extracts, and items for which a prescription is not required and may apply first aid and hygiene....

Section 460.403(9)(f), Florida Statutes allows chiropractors to:

- a. Analyze and diagnose abnormal bodily functions and to adjust the physical representative of the primary cause of disease;
- b. As an incident to the care of the sick, to and instruct patients in all matters pertaining to hygiene and sanitary measures as taught and approved by recognized chiropractic schools and colleges;
- c. Use acupuncture, but only if certified to do so by the Board of Chiropractic Medicine.
- d. Chiropractors may treat any and all conditions as outlined in Chapter 460, Florida Statutes, even those which may accompany or be present with diseases which chiropractors are not allowed to treat (see list below) (64B2-17.002, F.A.C.)

Section 460.403(9)(c)(2), Florida Statutes, allows the Board of Chiropractic Medicine to adopt rules that allow chiropractic physicians to:

- a. Order, store, and administer, for emergency purposes only at the chiropractic physician's office or place of business, prescription medical oxygen; and
- b. Order, store, and administer the following topical anesthetics in aerosol form:
 - i. Any solution consisting of twenty-five percent (25 %) ethyl chloride and seventy-five percent (75 %) dichlorodifluoromethane.
 - ii. Any solution consisting of fifteen percent (15 %) dichlorodifluoromethane and eighty-five percent (85%) trichloromonofluoromethane.

[3] **Prohibited Acts, Procedures and Treatments**

Section 460.403(9)(c), Florida Statutes, also sets forth certain prohibitions including that chiropractic physicians are expressly prohibited from:

- a. Prescribing or administering to any person any legend (prescription) drug except as specifically authorized elsewhere in the law (Section 460.403(9)(c)(1));
- b. Performing any surgery except as stated in the law (Section 460.403(9)(c)(1));
- c. Practicing obstetrics (Section 460.403(9)(c)(1));
- d. Prescribing medical oxygen (Section 460.403(9)(c)(2));
- e. Using diagnostic instruments or instruments for treatment of patients, the use of which are not taught in the regular course of instruction in a college recognized by the Florida Board of Chiropractic Medicine. The burden is on the individual physician to make sure that the college from which the instruction is obtained is one which is approved by the Board of Chiropractic Medicine.

Failure to do so will result in disciplinary action taken against the physician.
(F.A.C. 64B2-17.001, F.A.C.)

- f. Treating any of the following diseases or conditions:
 - i. Cancer
 - ii. Leukemia
 - iii. Tuberculosis
 - iv. Syphilis
 - v. Gonorrhea
 - vi. Hepatitis
 - vii. Anthrax
 - viii. Diphtheria
 - ix. Hansen's Disease
 - x. Hookworm Disease
 - xi. Malaria
 - xii. Rabies
 - xiii. Typhoid Fever
 - xiv. AIDS (64B2-17.002, F.A.C.)
- g. Prescribing or administering legend (prescription) drugs. (64B2-17.0025, F.A.C.)
- h. Prescribing or administering to any person any legend drug. A legend drug is defined as a drug required by federal or state law to be dispensed only by prescription. (Section 460.403, Florida Statutes)
- i. Administering any form of injectable substance. (64B2-17.0025(4), F.A.C.)

[4] Use of Acupuncture

Acupuncture is defined as a modality of diagnosing and treating disease, pain or physical conditions by stimulating various points on the body or interruption of the cutaneous (skin's) integrity by insertion of a needle to secure a reflex relief of the symptoms by nerve stimulation.

Acupuncture is recognized as a modality of treatment which is an adjunct to chiropractic, presently taught as part of the curriculum in approved chiropractic colleges. The proper administration of acupuncture requires a thorough knowledge of physiology, anatomy, therapeutics and diagnostic acumen. (64B2-17.003(1), F.A.C.)

Chiropractors are expressly prohibited from using the modality of acupuncture in

- a. Cancer
- b. Leukemia
- c. Tuberculosis
- d. Syphilis
- e. Gonorrhea
- f. Hepatitis
- g. Anthrax
- h. Diphtheria
- i. Hansen's Disease
- j. Hookworm Disease
- k. Malaria
- l. Rabies
- m. Typhoid Fever
- n. AIDS (64B2-17.003, F.A.C.)

Chiropractors performing acupuncture must adhere to the following procedures: 1) Where non-disposable needles are used for acupuncture said needles shall be sterilized, only by generally accepted procedures for sterilization of needles. (2) Needles shall be individually packaged for each patient. (3) The individually packaged needles shall be either destroyed following patient dismissal or put in a permanent file for the future use of the described patient, when non-disposable needles are used. (4) Only non-corrosive needles shall be authorized and used. (5) Generally acceptable cleansing agents shall be used for cleansing the needle insertion area. (64B2-17.003, F.A.C.)

Prior to any chiropractor's use of acupuncture on a patient, he must complete a minimal course of instruction of 100 hours of study in the practice of acupuncture with the courses or seminars being approved by the Board of Chiropractic Medicine. Additionally, prior to engaging in the practice of acupuncture, the chiropractor must present to the Board of Chiropractic Medicine certification that he has taken the examination from an approved college or institution, after having completed the approved minimum course of study.

Note that this training and instruction requirement is far less than that required of a licensed acupuncture physician.

A chiropractic physician may use acupuncture if the Board of Chiropractic Medicine certifies him to do so. Certification is only granted to chiropractors who have satisfactorily completed the required course work in acupuncture passed an examination administered by the Department of Health. A college or university that is recognized by an accrediting agency approved by the United States Department of

Education must provide the required course work. If it is not accredited by the Department of Education, it doesn't count. The burden is on the chiropractor to ensure the course that he takes is from a school, which has been properly accredited.

[5] **Phlebotomy Services**

A chiropractor is allowed to phlebotomize patients, but only if he is competent to do so and has had the proper training and education. (64B2-17.0025 F.A.C.)

[6] **Physiotherapy**

A chiropractor is allowed perform physiotherapy on patients, but only if he is competent to do so and has had the proper training and education. (64B2-17.0025 F.A.C.)

[7] **Administration of Non-legend Drugs**

A chiropractor is allowed to administer medications and "items" for which a prescription is not required, but only if he is competent to do so and has had the proper training and education. (64B2-17.0025, F.A.C.) "Items for which a prescription is not required" include "proprietary drugs" such as patent or over-the-counter drugs in their unbroken, original package and which is not misbranded under the provisions of Chapter 499.001-499.081, Florida Statutes. (64B2-17.0025(2), F.A.C.) "Administration" is defined as the administration of only one dose of any proprietary drug, and the recommendation and direction of dosage levels for the patient's needs).

[8] **Massage Therapy**

Chapter 480, Florida Statutes, regulates the practice of massage therapy in Florida. Pursuant to this law, the facility where massage therapy is administered must be licensed separately as a massage establishment unless it is the residence or office of the client. Under the chiropractic medicine practice act, a chiropractic physician prescribing massage therapy for his or her patient in the chiropractic physician's office does not need to have a massage establishment license. However, the office, does need a massage establishment license if the massage therapist is permitted to bring his or her own clients into the office for massage therapy. It does not matter who applies for the massage establishment license (i.e. the chiropractic physician or the massage therapist) as long as there is one for the facility.

Florida Administrative Code Section 64B2-17.003 regulates the practice of acupuncture by chiropractors. Chiropractors are required to present certification to the Board of examination by an approved college or institution after completion of the approved minimum course of study. This education must include a minimum of 100 hours of study in the practice of acupuncture in courses approved by the Board.

Chiropractors are prohibited from utilizing the modality of acupuncture in treating various diseases and conditions including cancer, AIDS, and leukemia. The regulation also provides restrictions on the use and cleaning of needles in the practice of acupuncture.

The question is often asked “Do I need to have a massage establishment license if my massage therapist also treats his/her own patients?” Chapter 480, Florida Statutes, regulates the practice of massage therapy in Florida. Pursuant to this law, the facility where massage therapy is administered (even a chiropractor’s office) must be licensed separately as a massage establishment unless it is the residence or office of the client.

Under the chiropractic medicine practice act, a chiropractic physician prescribing massage therapy for his or her patient in the chiropractic physician’s office does not need to have a massage establishment license. However, the chiropractor’s office does need a massage establishment license if the massage therapist is permitted to bring his or her own clients into the office for massage therapy not prescribed or supervised by the chiropractor. It does not matter who applies for the massage establishment license (i.e., the chiropractic physician or the massage therapist) as long as there is one for the facility.

If you need further information about this type of facility licensure, please contact the Board of Massage Therapy in Tallahassee, Florida at (850) 488-0595.

[9] Chiropractic Specialties

Chiropractors have certain recognized specialties in which they can become certified. A chiropractic physician should never advertise or insinuate, orally or in print, that he or she has any type of specialty unless it is one of the following and certification has actually been obtained.

A chiropractor may become certified in one of the following specialty areas:

- a. Radiology
- b. Nutrition
- c. Orthopedics
- d. Physiotherapy

Certification in one or more of the specialty classifications may be obtained from the Department of Health, Board of Chiropractic Medicine, upon evidence of successful completion of the education and training program in each specialty classification. Successful completion is deemed to mean obtaining a raw score of 75% on a comprehensive examination covering the entire specialty program which exam is approved by the Board and administered by the program. (64B2-18.004, F.A.C.)

§38.03 Record Keeping Requirements for Chiropractors**[1] Contents of Chiropractic Medical Records**

The Florida Administrative Code, Section 64B2-17.0065, provides minimal record keeping standards for chiropractors. In addition to being legibly maintained and accurately dated, the record must contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately. At a minimum the record must include, where applicable, patient histories, examination results, test results, records of drugs dispensed or administered, reports of consultations and hospitalizations, and copies of records or other documentation obtained from health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

In addition, all chiropractic patient records must include:

- a. Patient history,
- b. Symptomatology and/or wellness care,
- c. Examination findings,
- d. Diagnosis,
- e. Prognosis,
- f. Assessment,
- g. Treatment plan, and
- h. Treatment provided

Once a treatment plan is established, daily records must include:

- a. Subjective complaints
- b. Objective findings,
- c. Assessments,
- d. Treatments provided, and
- e. Periodic reassessments as indicated.

This is the traditional “SOAP note” format that most physicians are instructed to use while in school.

Good, comprehensive, routine record entries are not only vital to minimizing your risk of having problems with insurance companies, attorneys, peer review committees and the Board of Chiropractic Medicine, but they also facilitate good communication with insurance companies and other third party payers.

[2] **Confidentiality of Medical Records**

The legal requirements for confidentiality of the records kept by chiropractors are the same as for other health care providers in Florida. Please see the chapter in this book on medical records for these.

The HIPAA privacy requirements also apply to Chiropractic physicians. Please see the separate chapter in this book on this subject.

[3] **Maintenance of Chiropractic Medical Records**

A chiropractor is required by rules of the Florida Board of Chiropractic Medicine to retain chiropractic records for at least four (4) years from the date of the patient's last appointment with the chiropractor. However, for liability purposes, we recommend that the chiropractic physician maintain the records for at least seven (7) years from the last appointment for adult patients and at least eight (8) years for pediatric patients.

[4] **Notice and Maintenance Requirements for Chiropractors Terminating their Practice and for Records of Deceased Chiropractors**

A chiropractor who terminates his practice or the executor, administrator, personal representative or survivor or succeeding practitioner of a deceased chiropractor shall retain the chiropractic records for at least two years from the date of termination or death. Within one month from the date of termination or death, the Board Office must be notified of the new records owner and where the records can be found. It must also be published in the newspaper of general circulation in the county where the chiropractor resided or practiced on two separate occasions. This publication must indicate to the patients of the chiropractor who has terminated his practice or deceased that their records are available from a specific person at a specific location.

After twenty-two months, it must be published in a newspaper of general circulation in the county where the chiropractor resided or practiced, that the records may be disposed or destroyed to preserve the confidentiality of the information contained therein. This publication must occur for four consecutive weeks

A chiropractor who relocates his or her practice and will no longer be available to his or her former patients shall follow the same procedures.

[5] **Charges for Copies of Chiropractic Medical Records**

Chiropractors are required to release copies of patient medical records upon request of the patient or his legal representative. However, you may charge a photocopying charge and may require payment of the photocopying charge prior to release of the copy of the record. You must release these (after payment, of course) within a reasonable period of time after a proper request is received. A "reasonable" period of time is

usually understood to mean no more than ten (10) days. Failure to release a patient's records when a proper request has been received and the patient has agreed to pay for the copies will result in disciplinary action by the Board of Chiropractic Medicine.

Section 456.057(16), Florida Statutes, states:

A health care practitioner or records owner furnishing copies of reports or records or making the reports or records available for digital scanning pursuant to this section shall charge no more than the actual cost of copying, including reasonable staff time, or the amount specified in administrative rule by the appropriate board, or the department when there is no board.

The rule adopted by the Board of Chiropractic Medicine, 64B2-17.0055, F.A.C., states:

Release of Medical Records; Reasonable Costs of Reproduction.

- a. Any person licensed pursuant to Chapter 460, Florida Statutes, is required to release copies of patient medical records upon request of the patient or his legal representative.
- b. Reasonable costs of reproducing copies of written or typed documents or reports shall not be more than the following:
 - i. For the first 25 pages, the cost shall be \$1.00 per page.
 - ii. For each page in excess of 25 pages, the cost shall be \$.25 per page.
- c. Reasonable costs of reproducing x-rays, and such other special kinds of records shall be the actual costs. The phrase "actual costs" means the cost of the material and supplies used to duplicate the record, as well as the labor costs and overhead costs associated with such duplication.

For a workers compensation case, a chiropractor may charge up to fifty cents (\$.50) per page for the copy of the record. For all other cases, a chiropractor may charge the "reasonable costs of reproducing copies of written or typed documents or reports," but not more than one dollar (\$1.00) per page for the first 25 pages and twenty-five cents (\$.25) per page for each page in excess of 25 pages. Reasonable costs of reproducing x-rays and such other special kinds of records shall be the actual costs of reproducing these.

§38.04 Financial Issues Giving Rise to Legal Problems for Chiropractors**[1] Trust Accounts and Trust Accounting Requirements**

Chiropractors often receive advance payment from patients and their insurers for services before they are rendered. When this happens, the chiropractor is required to keep the funds in trust and follow certain procedures established by rules adopted by the Board of Chiropractic Medicine.

Rule 64B2-14.001, F.A.C., defines "Trust Funds" as: "unearned fees in the form of cash or property other than cash, which are received by a chiropractor prior to the chiropractor rendering his services or his selling of goods and appliances." Any money or property received by a chiropractor in the course of his profession must be kept in accordance with certain procedures.

The minimum trust accounting records, which must be maintained by all chiropractors practicing in Florida who receive or disburse trust money in the course of their professional practice, are:

- a. A separate bank account other than the chiropractor's regular business or personal account designated for the deposit of such funds;
- b. A journal, file or receipts, file of deposit slips, or checkbook stubs listing the source and date of all receipts of trust funds;
- c. A journal that may consist of cancelled checks, showing the date and recipient of all trust funds disbursements;
- d. A file or ledger containing an accounting for each person from whom or for whom trust money has been received; and
- e. All cancelled checks drawn on the trust account whether or not such cancelled checks are used to satisfy the requirements of a journal.

The minimum trust accounting records which must be maintained by a chiropractor, who receives or distributes trust property other than cash are journals, receipts, or files showing receipt or distribution of all trust property other than cash.

The minimum trust accounting procedures, which must be followed by all chiropractors practicing in Florida who receive or disburse trust money or property, are:

- a. The chiropractor reconcile trust account balances at least quarterly and must shall retain a copy of the reconciliation for at least six (6) years.
- b. Those chiropractors practicing in Florida who receive or disburse trust money or property must file with the Department of Health between June 1 and August 15 of each year a certificate stating: "I certify that I have read the provisions of Section 460.413(1)(z), Florida Statutes, and the provisions of Rule 64B2-14.001, Florida Administrative Code, and that I am in substantial com-

pliance with the minimum requirements as to trust accounting records and procedures set forth therein.” It must be signed by the chiropractor.

Failing to maintain trust money or property in compliance with these procedures will lead to disciplinary action by the Board of Chiropractic Medicine.

Section 460.413(1)(y), Florida Statutes, provides as a specific ground for discipline against a chiropractor:

Failing to preserve identity of funds and property of a patient. As provided by rule of the board, money or other property entrusted to a chiropractic physician for a specific purpose, including advances for costs and expenses of examination or treatment, is to be held in trust and must be applied only to that purpose. Money and other property of patients coming into the hands of a chiropractic physician are not subject to counterclaim or setoff for chiropractic physician’s fees, and a refusal to account for and deliver over such money and property upon demand shall be deemed a conversion. This is not to preclude the retention of money or other property upon which the chiropractic physician has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions for examinations or treatments. Controversies as to the amount of the fees are not grounds for disciplinary proceedings unless the amount demanded is clearly excessive or extortionate, or the demand is fraudulent. All funds of patients paid to a chiropractic physician, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the chiropractic physician’s office is situated, and no funds belonging to the chiropractic physician shall be deposited therein except as follows:

1. Funds reasonably sufficient to pay bank charges may be deposited therein.
2. Funds belonging in part to a patient and in part presently or potentially to the physician must be deposited therein, but the portion belonging to the physician may be withdrawn when due unless the right of the physician to receive it is disputed by the patient, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Every chiropractic physician shall maintain complete records of all funds, securities, and other properties of a patient coming into the possession of the physician and ren-

der appropriate accounts to the patient regarding them. In addition, every chiropractic physician shall promptly pay or deliver to the patient, as requested by the patient, the funds, securities, or other properties in the possession of the physician which the patient is entitled to receive.

[2] Exploitation of Patients for Financial Gain

Because of past abuses by a few unscrupulous physicians, Florida strictly prohibits any sort of conduct that may indicate exploitation of a patient for the financial gain of the chiropractor. This is prohibited by Section 460.413(1)(n), Florida Statutes, and by Rule 64B2-17.005, Florida Administrative Code. Rule 64B2-17.005, Florida Administrative Code, states: "The overutilization of chiropractic services or practice by exercising influence on a patient in such a manner as to exploit the patient for financial gain of a licensee or a third party is prohibited...."

Overutilization of chiropractic services or practice is defined as services or practices rendered, or goods or appliances sold by a chiropractic physician to a patient for financial gain of the chiropractic physician or a third party, which are excessive in quality or quantity to the justified needs of the patient. (64B2-17.005(2), F.A.C.) Providing practically any services or equipment for which there is a lack of medical necessity may meet this definition.

More specifically, overutilization occurs when:

- a. The written chiropractic records, required to be kept by a chiropractor do not justify or substantiate the quantity or number of chiropractic services, practices rendered, or goods or appliances sold by a chiropractic physician to a patient; or
- b. A claim or claims for chiropractic services, practice, goods or appliances is submitted to that patient or third party payor representing multiple charges for one specific chiropractic diagnostic service or treatment practice, good or appliance.

Thus it is extremely important for the chiropractic physician to ensure that he maintains good records that comply with the requirements we have discussed elsewhere in this chapter. This will help the chiropractor to defend himself against charges made by insurers seeking to avoid payment for injured patients, investigators seeking to find evidence of criminal acts, or manipulative patients who often file such charges with the Department of Health.

[3] **Financial Responsibility and Insurance Requirements**

Chiropractic physicians are required to maintain a certain minimum level of professional liability insurance, just as other types of physicians are. If the chiropractic physician decides not to sustain the cost of such insurance, or is unable to obtain insurance, then there are other requirements, which he must meet in order to comply with the law. It is extremely important for the chiropractic physician to maintain insurance coverage without allowing any lapses to occur. If it appears that a lapse in insurance coverage will occur, then the chiropractic physician should either place his license in an inactive status or arrange to meet the alternate requirements set forth below.

The Board of Chiropractic Medicine audits licensed chiropractors to ensure they are complying with the insurance requirements, just as they do for continuing education (CE) courses. A lapse in coverage will lead to disciplinary action being taken by the Board of Chiropractic Medicine against the physician.

As a condition of licensure, Rule 64B2-17.009 requires a chiropractor to either maintain professional malpractice insurance or provide proof of his financial responsibility. These requirements include:

- a. Obtaining and maintaining professional liability coverage in an amount not less than \$100,000 per claim, with a minimum annual aggregate amount of coverage of not less than \$300,000. The insurance must be obtained from:
 1. an authorized insurer as defined in the Florida Insurance Code (Sect. 624.09, Fla. Stat.);
 2. a surplus lines insurer (as defined under Sect. 626.914(2), Fla. Stat.);
 3. a risk retention group (as defined under Sect. 627.942, Fla. Stat.);
 4. the Florida Joint Underwriting Association (established under Sect. 627.351(4), Fla. Stat.); or
 5. through a plan of self-insurance (as provided in Sect. 627.357, Fla. Stat.).

As an alternative to the above, the chiropractor may obtain and maintain an unexpired, irrevocable letter of credit, established pursuant to Chapter 675, Florida Statutes, in an amount not less than \$100,000 per claim, with a minimum aggregate availability of credit of not less than \$300,000. The letter of credit shall be payable to the chiropractor as beneficiary upon presentment of a final judgment indicating liability and awarding damages to be paid by the chiropractor or upon presentment of a

settlement agreement signed by all parties to such agreement when such final judgment or settlement is a result of a claim arising out of the rendering of, or the failure to render, chiropractic care and services. The letter of credit is required to be issued by a bank or savings association organized under Florida law or a bank or savings association organized under federal law and having its principal place of business or a branch office in Florida.

There are exceptions from the requirements of insurance and financial responsibility. These include:

- a. Any chiropractor who practices exclusively as an officer, employee or agent of the federal government or the state. Rule 64B2-17.009(3)(a), Florida Administrative Code, defines "an agent of the State of Florida, its agencies or its subdivisions" as:
 1. a person who is eligible for coverage under any self insurance or insurance program authorized by the provisions of Section 768.28(14), Florida Statutes, or
 2. who is a volunteer under Section 110.501(1), Florida Statutes.
- b. Any chiropractor who only practices in conjunction with his teaching duties at an accredited school or in its main teaching hospitals.
- c. Any chiropractor who is not practicing in this state. However, if he initiates or resumes practice in Florida, he is required to notify the Board of Chiropractic Medicine of this.
- d. Any person who can demonstrate to the Board that he has no malpractice exposure in Florida.

[4] False, Misleading or Deceptive Representations Made in the Practice of Chiropractic Medicine

Sections 456.072(1)(a) and 460.413(1)(l), of Florida Statutes and Rule 64B2-16.005, Florida Administrative Code, prohibit a chiropractor from making misleading, deceptive, untrue or fraudulent representations in the practice of chiropractic medicine or employing any trick or scheme which fails to conform to the generally prevailing standards of treatment in the chiropractic community. The applicable Rule also provides that it is a misleading, deceptive, untrue or fraudulent representation in the practice of chiropractic for a chiropractor to advertise or otherwise represent to his patients or to the public that a service he provides (such as x-rays, examinations, etc.) is free or will

cost a specific amount when in fact the chiropractor bills a different charge for the advertised or represented service to an insurer or other third party payor.

These laws and Rule have been used to punish chiropractors for selling medical devices to patients that have no proven medical value. They have also been frequently used to punish chiropractors for advertising or advising patients that there will be only a small office visit charge, but, in fact, the chiropractor bills an insurer for additional diagnostic tests and reports, treatments, evaluations, etc. The chiropractor must make a full and honest disclosure of all charges for all services to the public and to the patient.

[5] **Requirement to Provide Itemized Billing**

Florida law is clear that chiropractic physicians must provide their patients or whoever pays for the care with detailed, itemized bills. Section 460.41, Florida Statutes, states:

Whenever a chiropractic physician licensed under this chapter renders professional services to a patient, the chiropractic physician shall submit to the patient, to the patient's insurer, or to the administrative agency for any federal or state health program under which the patient is entitled to benefits an itemized statement of the specific services rendered and the charge for each, no later than the chiropractic physician's next regular billing cycle which follows the fifth day after the rendering of professional services. A chiropractic physician may not condition the furnishing of an itemized statement upon prior payment of the bill.

This indicates and has been interpreted by the Board of Chiropractic Medicine as requiring all charges to be placed on the itemized bill sent to the patient, even if the patient is not the one paying for the care.

[6] **Insurance Fraud (False Billing, Upcoding, Lack of Medical Necessity, Etc.)**

Section 817.234 of the Florida Statutes sets forth prohibited acts that constitute insurance fraud. Under the is section, it is a felony for an individual to submit a claim for payment pursuant to an insurance policy or a health maintenance organization subscriber or provider contract, if that individual knows the claim contains false, incomplete, or misleading information concerning any fact or thing material to the claim.

The statute also makes it a felony for a chiropractor to knowingly assist, conspire with, or urge any insured party to fraudulently submit a claim for payment pursuant to an insurance policy or HMO contract.

The range of penalties to which an individual may be subjected for violation of this statute are severe. They include fines from \$500 to \$15,000 and confinement for up to life in prison.

[7] **Medicare and Medicaid Fraud and the Stark Law**

Fraud can take many forms — some obvious and some not so obvious. Fraudulent acts include, but are not limited to, practices like:

- a. Billing for services or supplies that were not actually provided or requested.
- b. Billing for non-covered services as if they were covered services.
- c. Misrepresenting a patient's diagnosis.
- d. Submitting false claims.
- e. Paying for referral of patients.
- f. Altering claim forms and records.

In response to the ever-increasing cleverness in which individuals find ways to fraudulently bill the Medicare and Medicaid system, federal legislation has been enacted and in some cases, revitalized, to fight this ongoing problem. Two of the most common statutes utilized by prosecutors are the Antikickback Statute and the Stark laws.

Under the Antikickback Statute, it is impermissible to knowingly or willingly offer or pay any remuneration directly or indirectly, overtly or covertly, in cash or in kind **to any person** in order to induce such person to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, or item for which payment may be made, in whole or in part, under any Federal health care program, including Medicare. Upon conviction for a violation of this law, a person may be fined up to \$25,000 or imprisoned for up to five years for each count.

Section 6204 of the Omnibus Budget Reconciliation Act of 1989 ("Stark I") generally prohibited physicians from making referrals for clinical laboratory services to entities which they (or an immediate family member) have a financial relationship. Stark I applied to the furnishing of clinical laboratory services for which payment would otherwise be payable under the Medicare program.

Section 13562 of the Omnibus Budget Reconciliation Act of 1993 ("Stark II") extends the physician self-referral prohibition to the Medicaid program and for referrals of additional services classified as "Designated Health Services." Stark II applies to referrals made on or after December 31, 1994.

Stark II applies to the following "Designated Health Services:"

- a. Clinical laboratory services
- b. Physical therapy services

- c. Occupational therapy services
- d. Radiology, including MRIs, CAT Scans and ultrasound services
- e. Radiation therapy services and supplies
- f. Durable medical equipment and supplies
- g. Parenteral and enteral nutrients, equipment, and supplies
- h. Prosthetics, orthotics and prosthetic devices
- i. Home health services and supplies
- j. Outpatient prescription drugs
- k. Inpatient and outpatient hospital services

The basic rule under Stark II is as follows:

If a physician (or immediate family member) has a financial relationship with an entity, then:

1. The physicians may not make a referral to the entity for the furnishing of Designated Health Services for which payment otherwise may be made under Medicare or Medicaid (Stark I only applied to Medicare); and
2. The entity may not present or cause to be presented a claim to any individual, third party payor, or other entity for Designated Health Services furnished pursuant to a referral prohibited under paragraph (1).

One of the biggest sources of trouble for chiropractic physicians arises from allegations of Medicare, Medicaid and insurance fraud. Please see the chapter in this book on Medicare and Medicaid fraud and compliance issues for further details on this.

[8] Suspension of License for Failure to Repay Student Loans

Effective May 13, 2002, the Department of Health is mandated to notify licensees who have defaulted on a government guaranteed student loan that they will be subject to an immediate suspension of their professional license unless, within a 45 day period, the licensee notifies the Department of Health with proof that a payment agreement has been reached. Minimum disciplinary action mandated by the new law will also require a fine equal to 10% of the defaulted loan amount.

See Chapter 254-2002, Laws of Florida for complete text of the new law.

§38.05 Chiropractic Practice Act and Other Statutory Requirements for Chiropractic Physicians**[1] Grounds for Discipline under Chapter 456, Florida Statutes**

Section 456 of the Florida Statutes applies to health professionals and entities issued a permit, registration, certificate or license by the Department of Health. This includes chiropractors who are licensed under Section 460 of the Florida Statutes. Section 456 sets forth the Department of Health and sets forth general licensing provisions for the professions under its jurisdiction. The Act also authorizes the Department of Health to compile and maintain the information submitted by practitioner as part of their application for licensure pursuant to the Act.

[A] Patient Records Requirements

The Act sets forth numerous requirements for ownership and control of patient records that apply various individuals licensed by the Department of Health. These requirements are set forth in detail below.

[B] Antikickback Law

Under the Act, it is unlawful for any health care provider to offer, pay, solicit or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients. Kickbacks are defined as a remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise, by a provider of health care services or items, of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items, when the payment is not tax deductible as an ordinary and necessary expense.

[C] No Payment Exclusion Permitted by PPOs

Section 456 also states that a chiropractic physician shall not be denied payment for treatment rendered solely on the basis that the chiropractic physician is not a member of a particular preferred provider organization or exclusive provider organization, which is composed only of physicians under the same chapter.

[D] Sexual Misconduct Prohibited

The statute also addresses sexual misconduct. Sexual misconduct in the practice of any health care profession is prohibited. This occurs when the practitioner utilizes the professional relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care

profession. Further, the statute prohibits the various boards under the Department's jurisdiction from issuing a license to any applicant who has had any license to practice any profession revoked based on a violation of sexual misconduct.

[E] Grounds for Disciplinary Action

Chapter 456, Florida Statutes establishes various grounds for disciplinary action by the Board of Chiropractic Medicine or the Department of Health. These grounds include, but are not limited to:

- a. Attempting to obtain or renew a license to practice by bribery, by fraudulent misrepresentations, or through an error of the department or the board
- b. Having a license to practice health care profession acted against by the licensing authority of another state, territory or country
- c. False, deceptive, or misleading advertising.
- d. Aiding, assisting, procuring or advising any unlicensed person to practice health care contrary to the laws of Florida.
- e. Making misleading, deceptive, untrue, or fraudulent representations in the practice of health care or employing a trick or scheme in the practice of health care when such scheme or trick fails to conform to generally prevailing standards of treatment.
- f. Soliciting patients either personally or through an agent, unless such solicitation falls into the category of solicitations approved by rule of the Department of Health or the Board.
- g. Being unable to practice as a health care professional with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of mental or physical condition.
- h. Delegating professional responsibilities to a person when the licensee delegating such responsibility knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.
- i. Submitting a claim to any third-party payor a claim for a service or treatment which was not actually provided to a patient.

There are a number of other provisions that are contained in this law. Please see the appendix for the complete text of the law.

[2] **Grounds for Discipline under Chapter 460, Florida Statutes**

Chapter 460, Florida Statutes, contains the main body of Florida laws governing the practice of chiropractic medicine in this state. It contains the “Chiropractic Practice Act” and it sets forth in detail a number of grounds that may be cause for disciplinary action against a chiropractic physician. Disciplinary action includes denying a license to an applicant for a chiropractic license. Section 460.413, Florida Statutes, allows the board of Chiropractic Medicine or the Department of Health to take disciplinary action for any of the following:

- a. Obtaining or attempting to obtain a license (or renewal) by bribery, false representations, or a mistake (even by the Board).
- b. Disciplinary action against a license in another state or country.
- c. Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of chiropractic medicine or to the ability to practice chiropractic medicine. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.
- d. False, deceptive, or misleading advertising.
- e. Allowing or causing any type of advertisement which does not clearly identify the physician as a chiropractic physician, including using the name of an institution or clinic without so identifying the chiropractic physician.
- f. Advertising, practicing, or attempting to practice under a name other than one's own.
- g. Failing to report to the department any other who violates professional rules and regulations.
- h. Aiding, assisting, procuring, or advising any unlicensed person to practice chiropractic medicine contrary.
- i. Failing to perform any statutory or legal obligation.
- j. Making or filing a false or negligent report or failing to file a report required by law.
- k. Making false or misleading representations in the practice of chiropractic medicine or employing a trick or scheme.
- l. Soliciting patients either personally or through an agent, unless such solicitation falls into a category of solicitations approved by rule of the board.
- m. Failing to keep legibly written chiropractic medical records that identify clearly by name and credentials the licensed chiropractic physician rendering, ordering, supervising, or billing for each examination or treatment procedure and that justify the course of treatment of the patient, including, but not lim-

ited to, patient histories, examination results, test results, X rays, and diagnosis of a disease, condition, or injury.

- n. Exercising influence on the patient or client in such a manner as to exploit the patient or client for financial gain of the licensee or of a third party which shall include, but not be limited to, the promotion or sale of services, goods or appliances, or drugs.
- o. Performing professional services, which have not been duly authorized by the patient or client or her or his legal representative (with certain exceptions).
- p. Prescribing, dispensing, or administering any medicinal drug except as authorized by Section 460.403(9)(c)2, Florida Statutes, performing any surgery, or practicing obstetrics.
- q. Being unable to practice chiropractic medicine with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition.
- r. Gross or repeated malpractice or the failure to practice chiropractic medicine at a level of care, skill, and treatment that is recognized by chiropractic medicine.
- s. Performing any procedure or prescribing any therapy which, by the prevailing standards of chiropractic medical practice in the community, would constitute experimentation on human subjects, without first obtaining full, informed, and written consent.
- t. Practicing or offering to practice beyond the scope permitted by law or practicing beyond the competence of the physician.
- u. Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.
- v. Violating a lawful order of the Board of Chiropractic Medicine or the Department of Health or failing to comply with a subpoena.
- w. Conspiring with another licensee or with any other person to coerce, intimidate, or preclude another licensee from lawfully advertising her or his services.
- x. Submitting to any third-party payor a claim for a service or treatment not actually provided.
- y. Failing to preserve identity of funds and property of a patient.
- z. Offering to accept or accepting payment for services rendered by third party payors if doing so has the effect of eliminating the need for the patient to pay a required deductible or co-pay.

- aa. Failing to provide the insured a copy of a claim or bill submitted to any third-party payor for service or treatment of the insured.
- bb. Advertising a fee or charge for a service or treatment, which is different from the fee or charge the licensee submits to third-party payors for that service or treatment.
- cc. Advertising any reduced or discounted fees for services or treatments, or advertising any free services or treatments, without prominently stating in the advertisement the usual fee of the licensee for the service or treatment which is the subject of the discount, rebate, or free offering.
- dd. Using acupuncture without being certified pursuant to Section 460.403(9)(f), Florida Statutes.
- ee. Failing to report to the Department of health a doctor of medicine (M.D.) or a doctor of osteopathic medicine (D.O.) who has violated grounds for disciplinary.
- ff. Violating any provision of Chapter 460 or 456, or any rules adopted pursuant thereto.

[3] **Criminal Violations Contained in Chapter 460**

Chapter 460. Florida Statutes does set forth a number of acts which will constitute criminal violations of Florida law and may result in criminal charges being pursued against a chiropractor or anyone else who violates them. Section 460.411, Florida Statutes, makes the following acts either felonies (of the third degree) or misdemeanors (of the first degree) punishable under Florida law:

- a. Practicing or attempting to practice chiropractic medicine without an active license or with a license fraudulently obtained. (Felony of the third degree.)
- b. Using or attempting to use a license to practice chiropractic medicine, which has been suspended or revoked. (Felony of the third degree.)
- c. Selling or fraudulently obtaining or furnishing any chiropractic diploma, license, or record of registration or aiding or abetting in the same. (Misdemeanor of the first degree.)
- d. Making any willfully false oath or affirmation whenever this chapter requires an oath or affirmation. (Misdemeanor of the first degree.)
- e. Using the name or title "chiropractic physician," "doctor of chiropractic," "chiropractic medicine," or any other name or title which would lead the public to believe that such person is engaging in the practice of chiropractic medicine,

unless such person is licensed as a chiropractic physician in this state.
(Misdemeanor of the first degree.)

- f. Knowingly concealing any information relative to violations of this chapter.
(Misdemeanor of the first degree.)

[4] **Other Grounds for Discipline under Chapter 460, Florida Statutes**

[A] **Prohibition on Sexual Misconduct**

Sexual relations with a patient are strictly prohibited. Florida Statutes and the regulations implementing them define sexual relations very broadly and also extend the prohibition to include members of a patient's family.

Section 460.412, Florida Statutes states:

Sexual misconduct in the practice of chiropractic medicine.

— The chiropractic physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of chiropractic medicine means violation of the chiropractic physician-patient relationship through which the chiropractic physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of chiropractic medicine is prohibited.

The regulation or rule adopted by the Board of Chiropractic Medicine that further implements the law goes even further, stating:

[B] **Rationale for the Rule**

The Board of Chiropractic Medicine has stated the following as the purpose of this prohibition:

The chiropractic physician/patient relationship is founded on the trust and confidence that a patient places in the chiropractic physician, and this rule is intended to prevent a chiropractic physician from taking advantage of that trust for the chiropractic physician's own pleasure, satisfaction or benefit.
(Rule 64B2-17.0021, F.A.C.)

[C] Definition of Patient

The Board of Chiropractic Medicine uses a very broad definition of “patient” when interpreting this prohibition:

Rule 64B2-17.0021(8), Florida Administrative Code, states:

Definition of patient. A patient is any person who was being examined or who was under the care or treatment of the chiropractic physician when the incident or incidents of sexual misconduct allegedly occurred, regardless of whether the person was billed by or was paying for chiropractic services from the licensee who is accused of sexual misconduct. A person shall be considered a patient until after one year has elapsed since the last date on which the chiropractic physician examined or treated the person.

[D] Definition of Sexual Misconduct

Sexual misconduct is any direct or indirect physical contact by any person or between persons, which is intended, or which is likely to cause to either person stimulation of a sexual nature. Sexual misconduct includes sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse. Sexual misconduct also includes the activities described in subsections (3) through (8) of Rule 64B2-17.0021, which are discussed further below (e.g., touching a patient’s breast or genital areas or examining the patient without consent). (Rule 64B2-17.0021(2), F.A.C.)

A licensee who fails to inform a patient when the licensee must touch the patient’s breasts or genitalia for diagnostic or therapeutic purposes, or a licensee who disregards a patient’s request that the licensee not touch the patient’s breasts or genitalia, is guilty of sexual misconduct. (Rule 64B2-17.0021(3), F.A.C.)

A licensee who makes suggestive, lewd, or lascivious remarks to a patient or who performs suggestive, lewd, or lascivious acts in the presence of a patient is guilty of sexual misconduct. (Rule 64B2-17.0021(4), F.A.C.)

A licensee who intentionally touches a patient’s breasts or sexual organs for non-diagnostic or non-therapeutic purposes is guilty of sexual misconduct, regardless of whether the patient is clothed. (Rule 64B2-17.0021(4), F.A.C.)

A licensee who makes intentional contact with or who penetrates a patient’s oral, anal, or vaginal orifice with the licensee’s own sexual organ is guilty of sexual misconduct. (Rule 64B2-17.0021(5), F.A.C.)

A licensee who makes intentional contact with or who penetrates a patient’s oral, anal, or vaginal orifice with any object for any purpose other than a profes-

sionally recognized diagnostic or therapeutic purpose is guilty of sexual misconduct. (Rule 64B2-17.0021(6), F.A.C.)

[E] Recommendation to Have a Standby Present

To protect himself against baseless accusations from patients, the Board of Chiropractic Medicine recommends that a chiropractor have a standby present during examinations: “To protect both the chiropractor and the patient, the Board recommends the presence of a third person during a chiropractic physician’s examination and treatment of a patient.” (Rule 64B2-17.0021, F.A.C.)

[F] Consent Is Not a Defense

Rule 64B2-17.0021(9), Florida Administrative Code, states:

Consent as a defense. Because of the control that a chiropractic physician exercises in the physician/patient relationship, a patient’s consent may not be used by the chiropractic physician in the defense of an allegation of sexual misconduct on the part of the chiropractic physician.

[5] Additional Regulatory Requirements and Restrictions

Furthermore, the statute authorizes the Board of Chiropractic Medicine to adopt administrative rules to further clarify and implement the state laws. In accordance with this charter, the Board of Chiropractic Medicine has implemented the rules contained in the Florida Administrative Code that we have discussed throughout this chapter. The Florida Administrative Code contains a number of additional detailed rules, which have been adopted by the Board of Chiropractic Medicine to protect the public. In addition to those we have already addressed, the following are significant.

[A] Advertising and Deception

Rule 64B2-15.001, Florida Administrative Code contains detailed guidance on advertising of chiropractic services.

(1) Policy

It is the policy of the Board of Chiropractic that advertising by licensed practitioners of the profession of chiropractic in the State should be regulated so as to protect the health, safety and welfare of its residents. The Board permits the dissemination to the public of legitimate information regarding the art and science of Chiropractic and where and from whom chiropractic services

may be obtained, so long as such information is in no way fraudulent, false, deceptive, or misleading. However, no chiropractor may disseminate any advertisement or advertising that is in any way fraudulent, false, deceptive or misleading.

(2) Prohibitions

Advertising is considered to be fraudulent, false, deceptive, or misleading if it:

- a. Contains a misrepresentation of facts; or
- b. Is misleading or deceptive because in its content or in the context in which it is presented it makes only partial disclosure of relevant facts. The Board finds that it is misleading and deceptive for a chiropractor to advertise free services (i.e, x-rays, examination, etc.) or services for a specific charge when in fact the chiropractor is transmitting a higher charge for the advertised service to a third party payor for payment. The Board finds it misleading and deceptive to fail to include the fact that x-rays and/or video fluoroscopy will only be given if medically necessary in an advertisement for free x-rays and/or video fluoroscopy.

Additionally, a disclaimer is required. For the purpose of this rule, a verbal announcement or a minimum of 15 second exposure of the disclaimer clause required by Chapter 456.062, F.S., is required for free services advertised on radio or television.

The Board also has determined that it is misleading and deceptive for a chiropractor or a group of chiropractors to advertise a chiropractic referral service or bureau unless the advertisement specifically names each of the individual chiropractors who are participating in the referral service or bureau. Referral services that operate on a national or statewide basis, and that have at least 50 participating members, do not have to specifically name each individual chiropractor participating in the service on their advertisements.

Additionally, it is considered to be false or deceptive if any advertising:

- a. Creates false, or unjustified expectations of beneficial treatment or successful cures.
- b. Contains representations relating to the quality of the Chiropractic services offered.
- c. Conveys the impression that the chiropractor or chiropractors, disseminating the advertising or referred to therein, possess qualifications, skills, or other attributes, which are superior to other chiro-

practitioners, other than a simple listing of, earned professional post-doctoral or other professional achievements. However, a chiropractor is not prohibited from advertising that he has attained diplomate status in a chiropractic specialty area recognized by the Board of Chiropractic.

1. Chiropractic Specialties recognized by the Board are those recognized by the various Councils of the American Chiropractic Association or the International Chiropractic Association. Each specialty requires a minimum of 300 hours of post-graduate credit hours and passage of a written and oral examination approved by the American Chiropractic Association or International Chiropractic Association. Titles used for the respective specialty status are governed by the definitions articulated by the respective councils.
 2. A Diplomate of the National Board of Chiropractic Examiners is not recognized by the Board as a chiropractic specialty status for the purpose of this rule.
 3. A chiropractor who advertises that he or she has attained recognition as a specialist in any specific chiropractic or adjunctive procedure by virtue of a certification received from an entity not recognized under this rule may use a reference to such specialty recognition only if the board, agency, or other body which issued the additional certification is identified, and only if the letterhead or advertising also contains in the same print size or volume the statement that "The specialty recognition identified herein has been received from a private organization not affiliated with or recognized by the Florida Board of Chiropractic Medicine."
 4. A chiropractor may use on letterhead or in advertising a reference to an honorary title or degree only if the letterhead or advertising also contains in the same print size or volume the statement "Honorary" or (Hon.) next to the title.
- d. Fails to conspicuously identify the chiropractor or chiropractors referred to in the advertising as a chiropractor or chiropractors.
 - e. Contains any representations or claims, as to which the chiropractor, referred to in the advertising, fails to perform.
 - f. Contains any representation, which identifies the chiropractic practice being advertised by a name, which does not include the terms

“chiropractor”, “chiropractic”, or some easily recognizable derivative thereof.

- g. Contains any representation regarding a preferred area of practice or an area of practice in which the practitioner in fact specializes, which represents or implies that such specialized or preferred area of practice requires, or that the practitioner has received any license or recognition by the State of Florida or its authorized agents, which is superior to the license and recognition granted to any chiropractor who successfully meets the licensing requirements of Chapter 460, Florida Statutes. However, a chiropractor is not prohibited from advertising that he has attained Diplomate status in a specialty area recognized by the Board of Chiropractic.
- h. Appears in any classified directory, listing, or compendium under a heading, which when considered together with the advertisement, has the capacity or tendency to be deceptive or misleading with respect to the profession or professional status of the chiropractor.
- i. Contains any other representation, statement or claim, which is misleading or deceptive.
- j. Contains a reference to an allopathic or osteopathic medical degree or uses the initials “M.D.” or “D.O.” unless the chiropractic physician has actually received such a degree. If the chiropractic physician is not licensed to practice allopathic or osteopathic medicine in Florida, the chiropractic physician must disclose this fact, and the letterhead, business card, or other advertisement shall also include next to the reference or initials a statement such as “Not licensed as a medical doctor in the State of Florida” or “Licensed to practice chiropractic medicine only” in the same print size or volume.

(3) Definition of “Advertising”

The terms “advertisement” and “advertising” mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling professional services, or offering to perform professional services, or inducing members of the public to enter into any obligation relating to such professional services. The terms advertisement or advertising shall include the name under which professional services are performed.

[B] Solicitation

The Board of Chiropractic Medicine has also adopted strict rules governing the solicitation of patients. These are contained in Rule 64B2-15.002, Florida Administrative Code, which sets forth the following requirements.

A chiropractor is prohibited from soliciting, in person or otherwise, a prospective patient with whom a chiropractor has no family or prior professional relationship, when a significant motive for such solicitation is the chiropractor's pecuniary gain. A chiropractor shall not permit employees or agents of the chiropractor to solicit in the chiropractor's behalf. A chiropractor shall not enter into an agreement for, charge, or collect a fee for professional services obtained in violation of this rule. The term "solicit" includes contact in person or by telephone.

The Rule goes on to define exactly what "solicitation" consists of stating:

- a. A written communication to a prospective patient constitutes soliciting if:
 1. It has been made known to the chiropractor that the person does not want to receive such communication from the chiropractor;
 2. The communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;
 3. The communication contains a false, fraudulent, misleading, deceptive, or unfair statement or claim or is improper under Rule 64B2-15.001, F.A.C.
- b. Written communications to prospective patients for the purpose of obtaining chiropractic services are subject to the following requirements:
 1. Each page of such written communication shall be plainly marked "advertisement", and the lower, left corner of the face of the envelope containing a written communication likewise shall carry a prominent, "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark shall appear on the address panel of the brochure or pamphlet. Brochures solicited by patients or prospective patients need not contain the "advertisement" mark.
 2. Written communications mailed to prospective patients will be sent only by regular U.S. Mail and not by Registered Mail or other forms of restricted delivery.
 3. No reference shall be made in the communication to the communication having received any kind of approval from the Board of Chiropractic Medicine.

Any form of invited communication to a potential client is permissible provided such communication conforms to the advertising guidelines of Rule 64B2-15.001, F.A.C.

It is very important that the chiropractor insures that all of his advertising and communications to prospective clients completely follow the above guidelines. He should also make sure that anyone with whom he contracts to provide advertising, marketing or public relations services also strictly adheres to these requirements, because he will still be liable even if an independent contractor violates the Rule. A sample contract, which may be used with those providing marketing and advertising services, which includes language, which will help to protect the chiropractor, is contained in the appendix to this book.

[6] Conduct the Florida Board of Chiropractic Medicine Does not Like to See

These are things the Board of Chiropractic Medicine has seen, expressed its dislike of, and disciplined chiropractic physicians for committing recently include the following:

1. False or fraudulent claims (including over-billing).
2. Advising the patient of a lower price for a service or a visit than was actually billed to the insurance company.
3. Not providing a copy of the patient's record to the patient or to the patient's attorney (legal representative) when requested.
4. Computerized medical records in which the same wording is repeated for patient visits.
5. Sloppy, illegible, brief, or incomplete patient treatment records or progress notes. The Board expects to see SOAP notes for each visit or notes that contain similar information.
6. Ordering x-rays or other diagnostic tests with no corresponding note/record entry that shows a change in the patient's condition or a medical necessity for ordering such.
7. Failing to complete the statutory number of continuing education (CE) hours, without petitioning the Board of Chiropractic Medicine for an extension of time.
8. Not using patient sign-in sheets so that there is clear documented proof that the patient was actually in attendance in the office for the treatment.
9. Practicing beyond the scope of chiropractic medicine (including providing acupuncture when not certified to do so, oxygen therapy, etc.).
10. Failing to keep medical records on a patient being treated.

11. Any type of false, deceptive or misleading statement in any advertisement, sign, mail-out, newspaper article or any other material considered to be “advertising.” This includes failing to make it clear you are a chiropractic physician, stating you are a specialist in an area not recognized as a chiropractic medicine specialty, misstating your total fees, etc.
12. Failing to comply with a prior Board order (e.g., failing to pay a fine when due, failing to make up continuing education hours by the date specified, failing to submit reports as ordered, etc.).
13. Failing to make restitution in over-billing and fraud cases.
14. Failing to appear before the Board when ordered.
15. Making a false statement (especially in an application, on a claim, to an investigator, on a physician profile, or in a statement to the Board).
16. What the board really, really hates is when a doctor appears before the board for disciplinary action and he/she has not remedied the problem for which he/she is being disciplined (e.g., still has not provided the patient the requested records, still has not refunded the money over-billed, still has not obtained the CE hours needed, etc.).

[7] **Helping to Protect Yourself from Disciplinary Action through Better Contracts.**

Often the chiropractic physician will find himself being investigated or charged with violations of the law, not because of conduct that he has committed, but because of conduct committed by his employees, contractors or consultants. The chiropractor must be constantly alert for signs that others are committing conduct, which may affect him. A good compliance program will go a long way to help detect such misconduct or fraud. Additionally, the chiropractic physician should ensure that any contract he makes emphasizes the fact that he expects the employee he contracts with or the outside consultant he contracts with, to abide by all laws and regulations that he himself is obligated to follow.

A sample of a contract for a chiropractic physician to be hired as an employee (associate) of an existing chiropractic clinic is provided in the appendix of this book to demonstrate this. Not only should the contract make sure that it spells out an obligation on the part of the associate to comply with all laws, but the relevant laws and regulations should be attached to it, as well. This will ensure that the associate has a copy of them and reads them.

The same principle applies when dealing with outside consultants such as marketing and public relations firms. Often these firms may not be aware of the strict limitations on advertising or solicitation by chiropractic physicians. Such agreements

must clearly obligate the consultant to comply with the same laws and regulations the chiropractor must follow. Additionally, to ensure that the consultant has the relevant laws and rules at hand, these should be attached to the contract. A sample of a contract for a marketing and public relations consultant is also provided in the appendix of this book to illustrate this point.

§38.06 Risk Management Issues for Chiropractic Physicians

[1] Types of Risk

[A] Civil Liability

Harm caused to patients during the course of treatment by a chiropractor may subject the chiropractor to civil liability, which would result in damages being paid to the victim. In general, there are two types of wrongdoings (or torts) of which the chiropractor should be aware. The most common type of tort is negligence. The difference between negligence and an intentional tort is that in negligence the acts leading to injury are neither expected nor intended.

There are four elements that must be present for negligence to occur. They are:

1. a duty to protect students from unreasonable risks,
2. the individual must have failed in that duty by not exercising a reasonable standard of care,
3. there must be a causal connection between the breach of the duty to care and the resulting injury, and
4. there must be an actual physical or mental injury resulting from the negligence.

In a court, all four elements must be proven before damages will be awarded for negligence.

Intentional torts are usually offenses committed by a person who attempts or intends to do harm. For intent to exist, the individual must be aware that injury will be the result of the act.

A common type of intentional tort is assault. Assault refers to an overt attempt to physically injure a person or create a feeling of fear and apprehension of injury. No actual physical contact need take place for an assault to occur. Battery, on the other hand, is an intentional tort that results from physical contact. For example, if a person picks up a chair and threatens to hit another person, assault has occurred; if the person then actually hits the second person, battery has occurred. Both assault and battery can occur if a person threatens another, causing appre-

hension and fear, and then actually strikes the other, resulting in actual injury. Fraud and theft are also intentional torts.

[B] Criminal Liability

There are risks of criminal prosecution for various violations of statutes and regulations that may arise from such acts as fraudulent billing, making false statements, altering or defiling medical records involved in investigations, unauthorized practice of medicine, inappropriate sexual contact with patients, patient brokering, and giving or receiving anything of value for referrals of patients (kickbacks).

[C] Professional Disciplinary Actions (Licensure Action)

All complaints against chiropractors are initially funneled to the Agency for Health Care Administration (AHCA) for review. If the complaint is legally sufficient, it is referred to an AHCA attorney under contract to the Department of Health to perform prosecutorial functions before the Board of Chiropractic Medicine. The attorney investigates the case and brings his/her findings before a probable cause panel. The panel consists of two members of the Board of Chiropractic Medicine and the Board's counsel, who is an Assistant Attorney General. If there is probable cause, the case moves forward. Ultimately the chiropractor can (1) enter into an agreement with the prosecutor, (2) request an informal hearing before the Board, or (3) request a formal hearing before the Hearing Officer. In all cases where the behavior has been proven or admitted, the chiropractor comes before the Board, which ultimately imposes the discipline.

[2] Primary Problem: Poor or Inadequate Records

Record reviewers, case managers, personal injury attorneys and insurance claims handlers all must have proper documentation for the medical treatment and services the patients receives before they can authorize payment for those services. Most often, they will have nothing but copies of your records upon which to base their opinion of the patient's health status and of the quality of your care. You may be the best physician around, doing a superb job for your patients, but if your records do not meet current record-keeping standards, you will be held to answer for them.

The predominant complaint regarding chiropractors by insurance companies, attorneys, arbitrators and hearing officers involves poor or insufficient records. Insurance claims handlers often have many cases to monitor and process. When chiropractors give them what the Board of Chiropractic Medicine has ruled to be the required standard, the physician increases the likelihood of being paid promptly and

decreases the likelihood of being criticized, investigated or disciplined for having poor records.

[A] The Causes of Poor Records

The problems we have experienced that have led to criticisms of chiropractors' records include:

1. Illegible handwriting.
2. Insufficient or incomplete notes and documentation.
3. Using generic or computerized, repetitive notes.
4. Using forms where the doctor makes check marks, abbreviations or symbols that are nonstandard and not defined in the chart.
5. There aren't any (they can't be located).
6. Inappropriate wording in medical record entries.
7. Alterations to, additions to or deletions from, after there is some notice of a claim, complaint or suit.
8. No medical record entry made for a significant event or change in patient's condition.
9. References to outside confidential documents (e.g., incident reports).
10. Incorrect charting: incorrect entry made, incorrect record, generic charting.
11. Inclusion of "superconfidential information" in medical records released.
12. Informed consent forms or authorization forms with the blanks not filled in.
13. Medical records released to improper parties (e.g., spouse, Better Business Bureau, T.V. station (Action Reporter)).
14. Inconsistent entries made in different parts of the record.

The causes of poor or insufficient records in chiropractic offices is by and large related to the following:

Chiropractors who have been in practice more than ten years may not have been taught to keep the traditional SOAP format while in college and thus were not habituated to that regime as are medical doctors, nurses and other health care personnel. Many chiropractors have aligned themselves with certain treatment techniques or groups of physicians that advocate a system of charting or notes, which may not be traditional in nature. Some physicians are just unorganized,

inefficient, lazy or stubborn and believe that they do not have to comply with record keeping requirements.

[3] The Three Best Risk Reducers: Good Communications, Good Records, and Good Examinations

[A] Good Communications: The Most Effective Risk Management Tool

There is nothing more effective in reducing your risks of all three types of liability than having good, effective communication with your patients. Much of the following is common sense, yet these points bear re-emphasizing again and again.

Effective communication and rapport with patients are developed skills that require the same professional approach, degree of learning, and practice as the technical aspects of medicine. Below are suggested behavioral skills that can lead to improved rapport and communication with patients.

It is important to begin the relationship correctly from the initial contact with the patient. When first meeting a patient, introduce yourself by name, make eye contact, and shake hands. Also ask the patient how they would like to be addressed. Don't assume the patient wants you to use his/her first name. It is extremely important to explain what you will be doing instead of charging in and performing the task on the patient. Allow the patient to ask questions if he does not understand or are unclear about the procedure. One of the most necessary communications skills involves listening. When the patient speaks, listen to and make eye contact with the patient. Never turn your back to the patient or do other tasks while the patient is speaking or while you are talking to the patient.

Questioning is also important to establish open lines of communication with patients. Remember to use open-ended questions whenever possible unless the patient is unable to speak. Ask questions one at a time and allow the patient to respond in their own terms.

The facilitation of effective communication is vital to the physician/patient relationship. The physician should encourage the patient with verbal facilitation, such as "Go on." Nonverbal facilitation such as nodding your head should also be practiced. If necessary, paraphrase or restate what the patient has said for clarification. Allow the patient to speak uninterrupted and identify with and reflect the feelings of the patient in your statement. Avoid paternalistic or authoritarian statements. Be sure to explain or translate any technical medical terms into lay language. But you also should be sensitive to being too simplistic if your patients are sophisticated or well educated.

Additional rapport and patient techniques for effective communication are:

- Encourage the patient to ask questions and willing to explain procedures and answer questions.
- Be just as courteous to relatives and be willing to answer general questions about the patient's condition without compromising confidentiality.
- Return phone calls promptly.
- Give the patient in front of you your full attention. Patients resent interruptions.
- Project a caring attitude.
- Relate to the patient as a person, not just a clinical condition.
- Adjust your level of explanation to match each patient's understanding of medical terminology.
- Respect patient confidentiality even in social situations. Instruct staff on the importance of confidentiality in all settings.
- Accept without judgment a patient's refusal to follow recommendations, but warn them of the possible consequences (document this, but do not be overly critical).
- Resolve complaints and misunderstanding about care, the bill, or other matters yourself before resentment builds.

Summarize what has occurred during the visit when speaking with patients. It is vital to communicate to the patient when the attending physician will have test results to prevent anxiousness. Remember to ask the patient if he/she understand the impact of the diagnosis and the treatment, and be certain that the patient does not have any additional questions. When communicating with patients develop a plan with the patient for future care, if appropriate.

Effective communications between physicians and patients is not difficult. Effective communication with patients is an easy way to prevent claims, complaints and criminal allegations. If patients fully understand all procedures, diagnosis, and treatment options, they are less likely to result in claims. The patient should be made to feel that the physician truly cares about him or her.

[B] Good Records: The Second Best Risk Management Tool

The next most effective tool for reducing risk is to keep good records. Your records must be made contemporaneously with the patient encounter. They should conform to the SOAP format. They should be individualized and different for each patient and each visit. They must document the medical necessity for all treatment

and diagnostic tests (especially x-rays) you order and must show that you actually used (read, interpreted, and/or acted on them) any diagnostic test you ordered.

In justifying the necessity of and for chiropractic care, the following must be in the patient's daily chart note records on every visit:

S (“Subjective” or “Symptoms”) — You must clearly and legibly state the patient's subjective complaints. This does not involve writing long daily paragraphs. Just repeat what the patient tells you regarding their present symptoms. For example: “My neck, mid and lower back still hurt, but my headaches aren't nearly so bad, I feel better.” Ask the patient relevant questions that keep you up to date on the patient's perceptions. For example: “Do you feel better, the same, worse? Do you think you're sleeping better? Do you feel it is easier to move around?”

O (“Objective”) — This indicates those objective signs the physician observes. These signs may include fever, inflammation, responses the patient gives to painful stimuli, Recheck spinal ranges of motion, mention the comparative status of the ranges of motion, mention what your palpation revealed, etc. Mention any measurements you make, what you observe in range of motion, and anything else you see with your own eyes or feel with your palpations of the patient's body.

A (“Assessment”) — This indicates discussion of the methods and procedures utilized by the physician to evaluate, from objective signs, the patient's health status and to assess the patient's condition.

P (“Plan” or “Process”) — If you aren't changing the treatment plan that you gave in your initial report or most recent reevaluation, then include language stating: “Treatment plan remains the same, next visit: as previously scheduled.”

It is also very important that you detail what you actually perform in the way of treatment. Write down what treatment you utilized, for example: “Manipulation of subluxations in the cervical, thoracic and lumbar spine, cervical traction, acupuncture, electrical muscle stimulation.” If you're manipulating subluxations of other articulations such as the shoulder, knee, foot, etc., document it. You're already doing these things, so write them down.

If the chiropractic physician persists in using abbreviations or symbols to denote information in the SOAP, a key must be included in each record which explains what the abbreviations or symbols mean. Avoid using generic SOAP notes or SOAP notes that say the same thing on every visit. Nothing ever remains the same. Your patient and your patient's condition also changes. It should be reflected in your reexamination and daily SOAP notes.

You may want to consider using a computer to document and maintain your records. If so, be sure to use the SOAP format. It is also extremely important not to just copy or repeat the same record entry for each patient visit. Type each one in separately. One thing that fraud investigators look for in insurance and billing fraud is repeated computer entries, use of the same language to describe each visit.

Be sure to record all telephone calls and consults in the patient's record, as well as correspondence, information on missed appointments. Do this every day before you leave the office.

When claims personnel or investigators review your records and bills, they will be looking for this documentation. If you have charges for services that are not documented in your SOAP notes, they will deny payment.

Additionally, you should have the patient sign in when the patient comes to the office, or better yet, sign the record entry at the time of the treatment to document that the patient was actually there and actually received the treatment billed. patient initial each visit on the travel card so there is a record that they were there on that date and that they acknowledge that the services indicated were rendered. Having the patient sign or initial on each visit prevents a lot of potential problems if the patient, attorney or insurance company later becomes hostile and attempts to claim that the patient never received the services.

[C] A Good Comprehensive, Consistent Examination Technique

Chiropractic examinations, whether full body or regional, should consist of the following relative tests:

(1) Basic Measurements, Signs and Techniques

Your basic examination and assessment should include:

- height;
- weight;
- head tilt;
- shoulder level;
- anterior/posterior and lumbar curves;

lateral cervical/thoracic and lumbar curves;
level of hips;
leg lengths;
feet-normal/pronated or supinated;
heel/sole wear;
level of arches;
Deerfield;
teres spasm sign;
mandible drop;
palpation of subluxations;
fixations;
rigidity;
edema;
tenderness;
spasm;
inductions;
masses or nodules;
and superior/inferior and middle ganglions;
cranial 1-12; and
color of eyes.

Ranges of motion of the cervical, thoracic and lumbar spine should be measured and recorded using the two inclinometer method, as well as:

muscle group integrity;
palpation of the cervical lymph nodes;
hyoid and thyroid;
finger to nose;
finger to finger;
heel to shin;
pupillary accommodation to bright light;
vertebral basilar artery;
carotid bruits;

cervical compression/distraction;
foramina compression;
Soto hall;
O'Donahue's;
Dejerine's;
Lhermitte's;
Naffziger's;
upper extremity reflexes;
grip strength;
dermatome distribution;
cervical stethoscope crepitus;
Valsalva's;
Adson's;
Allen's;
Wright's;
Codman's;
supraspinatus;
Apley's scratch;
Bryant's;
Cozen's;
Hoffman's;
Phalen's;
Wartenberg's;
Froment's;
carpal tunnel tests; and
bilateral circumference measurements.

Ranges of motion and palpation of the shoulders, elbows and wrists, major trigger points, blood pressure (bilaterally sitting and standing), and radial and fingertip pulses are essential, usual and customary. In addition to offering the doctor the option of performing the tests, the standardized forms and computer documents we use also give an explanation of each test, the rationale for performing it and its diagnostic significance. Doing so has proven to be of interest to the patient and assists in justification for insurance

reimbursement. It also saves a great deal of time by eliminating typical questions that insurance companies ask when said information is not automatically made available to them.

(2) Lower Extremities

The same techniques and procedures as detailed above also should be used for the thoracolumbar spine and lower extremity problems. Consider including:

thoracic and lumbar ranges of motion;

Kemp's;

O'Donahue's;

the deep reflexes;

Trendelenburg's;

sciatic nerve palpation;

toe/heel walk;

Lasegue's;

Braggard's;

Fajertajn's;

Homan's;

Fabre-Patrick;

Laquerre's;

Gaenslen's;

double leg raise;

muscle testing;

dermatome distribution;

circumference measurements;

Naffziger's;

Babinski's;

Oppenheim's;

Chaddock's;

Sicard's;

Linder's;

Lewin's;

Thomas's;

Bechterew's;
Ober's;
Ely's;
Yeoman's;
Dejerine's;
somatoform differentiation; and
ranges of motion of the knees, ankles and feet.

If there is complaint of knee problems, include McMurray's; Drawer's; collateral ligament; Osgood-Schlatter's; Apley's; the popliteal, tibial pulse and toe pulses; and the major trigger points. All spinal ranges of motion should be evaluated by sight as well as by the two-inclinometer method.

(3) Photographs

It is often useful to obtain photographs of the patient's posture and other physical aspects of their bodies. You should always be sure you have a signed consent form which authorizes this. Often it is most efficient to use the type of camera and film that produces a photograph instantly while you wait (self-developing photographs). This way you can immediately make sure your photograph is accurate and you can correctly label it. Photographs, if taken, should consist of standing front and back and of the feet while sitting. This may also be useful in demonstrating to the patient how you view their posture.

(4) Further Diagnostic Testing

Based on patient history, present complaints, the patient's responses to examinations performed (as well as your own education and experience), you should now have a solid foundation upon which to base further diagnostic recommendations. Consider developing a checklist of further diagnostic options for musculoskeletal as well as metabolic and nutritionally related conditions to use when conducting an examination or consultation. Such a tool might include, for example, for metabolic conditions:

urinalysis;
chem screen;
complete blood count;
ESR (erythrocyte rate);
CRP (C-reactive protein);

Candida antigen titer;
health appraisal questionnaire;
food allergy testing;
urine bone density analysis;
urine hormone analysis;
amino acid analysis;
lactose breath analysis;
salivary IgA;
hair mineral biopsy;
adrenal stress index; and
stool analysis.

(5) Somatoform Differentiation Tests

Certain literature has suggested that chiropractic physicians should include tests that assist in determining possible levels of hypersensitivity to pain and possible psychogenic entities when examining their patients. There are several tests that may be used by having the patient answer questions on paper, including the Oswestry Pain Disability Questionnaire and the Hender back screening. The physician can use the following tests during the office examination:

Libman's, marked pain suggestibility and related joint motion tests indicate the possibility of low-pain threshold.

When appropriate, the utilization of Burn's bench;

axial trunk loading;
Flip's; flexed knee;
Magnuson's;
Mannkopf's;
plantar flexion;
tripod;
trunk rotation;
Hoover's;
COP; and
bilateral limb drop test.

Each of the foregoing tests serves a valid purpose in helping to differentiate between organic and possible psychogenic causes. Performing one or more of these tests not only assists in determining the relative nature of the patient's symptoms, but offers data to determine the correct diagnosis and treatment plan indicators for further diagnostic tests.

Chiropractors are often accused of treating back problems that lack any physical causation element and are of strictly an emotional entity. This type of accusation is easily defended when somatoform differentiation tests are included.

(6) Be Organized and Efficient in Your Medical Approach

If you are organized and use standardized forms or computer documents that make examinations easy, you should be able to completely examine the whole patient. Some of the information can be collected by and some of the tests can be conducted by assistants, i.e., height, weight, blood pressure, radial or tibial pulses, etc., all of which lead to suggestions for further diagnostic tests, a diagnosis and treatment plan.

(7) Treatment Planning

The Board of Chiropractic Medicine, the Department of Health, insurance companies and other third party payers expect the physician doctor to conduct an initial consultation, examination and reexaminations, but, more importantly, to justify them, as well as other diagnostic tests. They also expect you to provide a treatment plan.

The doctor should always prepare a treatment plan and should include the following options where relevant:

Second opinion referrals;

The number of treatments per week for a specific number of weeks;

The types of therapy that may be utilized;

The type of rehabilitative exercise program to be prescribed;

Instructions on accommodating lifestyle, occupationally and non-vocational;

Prescription of cervical collar, back support, TENS, cervical support pillow,

corrective shoe orthotics, or others;

Spinal massage;

Time required to miss from work;

Date of next reevaluation;

Any other factors you feel are called for in the patient's future care.

Having a comprehensive, organized approach to evaluating and treating patients, but most importantly, documenting this, will maximize efficiency and collection of fees, while minimizing risk of exposure for the physician.

[4] Other Important Risk Reduction Tips

The following tips regarding reduction of your own personal risk of civil, criminal or disciplinary risk should be followed at all times:

1. Never talk to an investigator of any kind (Board of Medicine, Medicaid Fraud Control Unit, Attorney General's Office, Sheriff's Department, Police Department, FBI, Office of the Inspector General, etc.) about your practice, your patients or your billings. Call your attorney immediately. Refer them to your attorney. You can't and won't "just explain it away." (Note: your response should always be "You'll have to talk to my attorney.")
2. Never send in your own written response to a DOH complaint/investigator's letter or a managed care/insurance company complaint or letter. You can't and won't "just explain it away." Always have the complaint or letters reviewed by an experienced health care attorney and at least have him review the response before it is sent in.
3. Never allow the time deadline to pass without submitting a response or submitting a written request response or request for an extension of time (after consulting with counsel, of course).
4. Never attempt to represent yourself in an investigation. You can't and won't "just explain it away."
5. If you are served with a formal administrative complaint (note: it looks kind of like a complaint in a law suit) never allow the time period to go by without submitting a written request for a formal hearing, after you have consulted with your lawyer.
6. If you are served with a formal administrative complaint never submit your own response to it or talk to the attorney representing the Department of Health without consulting with an experienced health care attorney. Have him/her do all of the communicating.
7. Regardless, never allow the twenty-one (21) days to go by without something being filed.

8. Never attempt to represent yourself before the Board of Chiropractic Medicine on a disciplinary case. You can't and won't "just explain it away."
9. Always refer any investigator to your attorney, even if you don't have one. Refuse to speak until you get one.
10. Always immediately consult with an experienced health care attorney, especially before responding to an investigator or written document (even if you only have him/her review the documents and review your proposed response).
11. Always reply in writing, even if it is only to elect a formal hearing or to request an extension of time (after consulting with your attorney, of course) within the time frame given.
12. Always send your correspondence regarding any of the above by certified mail, with a return receipt requested, and keep a photocopy of what you sent.
13. Always appear before the Board at the time and date specified (but bring your attorney).
14. If you are an employee, neither your employer nor anyone else is going to protect your individual interests. You must do this yourself.

§38.07 Other Problem Areas of Concern to Chiropractors

[1] Issues Relating to Automobile Accidents and Personal Injury Protection (PIP)

Insurance

The following issues may give rise to significant legal problems for chiropractic physicians.

[A] Patient Solicitation

There are both statutes and administrative regulations which prohibit patient solicitation.

(1) Use of Accident Reports

Probably the single biggest factor contributing to the high level of illegal solicitations is the ready access to public accident reports in bulk by runners. These reports provide runners, and the lawyers and medical professionals who use them, the ability to contact large numbers of potential clients at little cost and with almost no effort. As a result, virtually anyone involved in a car accident in Florida is fair game to the intrusive and harassing tactics of solicitors.

Rules adopted by the Board of Chiropractic Medicine strictly regulate the use of accident reports in soliciting patients. Please consult them. They are included in the appendix to this book.

(2) Use of Runners

In addition to the ban on solicitation imposed by Section 817.234(8), Florida Statutes, doctors, lawyers, and chiropractors are prohibited by their respective ethical rules from contacting potential clients or patients in person or by telephone. As a result unethical practitioners will turn to runners to do the dirty work.

Runners generally will work for a specific lawyer, auto body shop, or chiropractor though sometimes they will freelance and work for more than one individual. Most of these runners work for chiropractors who allegedly typically pay \$250.00 to \$500.00 per referral. Lawyers and auto body shops are generally reported to pay less. Regardless, this is illegal and any payment or exchange of anything of value in exchange for the referral of patients should be avoided.

Runners use a variety of practices to convince individuals to go to a specific doctor or chiropractic clinic for treatment. Sometimes victims are led to believe that the solicitor works for their insurance company and that they must appear as directed or risk loss of insurance benefits.

[B] Diagnostic Testing

Once individuals come in for treatment at a doctor's or chiropractic office they are generally given a variety of tests, which vary little, regardless of the symptoms or injuries. Some tests are of marginal utility or validity, but all are extremely profitable. One popular test employed by medical professionals engaged in patient solicitation and brokering are nerve conduction studies. One chiropractor who testified before us explained how he paid a technician approximately \$100 per patient to conduct these nerve conduction studies in his office. The chiropractor would then bill the insurance company \$900 for these same studies. This enormous markup for diagnostic tests is not customary among legitimate medical professionals.

Another test commonly employed by doctors and chiropractors who solicit patients is video fluoroscopy, a test many experts decry as virtually useless as employed in the treatment or diagnosis of auto accident victims. Video fluoroscopy, we have learned, is essentially a motion picture x-ray, which can last several minutes. Manufacturers of these fluoroscopy machines claim that the exposure from these devices is lower than that of an x-ray; but because the individuals

are being bathed in the gamma radiation for as long as 15 minutes in one session, the total amount of radiation exposure can be many times greater than that of a typical x-ray. A video fluoroscopy machine can be leased for as little as \$1,500 per month and the tests billed at over \$650 per five-minute examination. The profit potential makes this test extremely attractive to unscrupulous medical practitioners.

Other diagnostic tests come and go in popularity, but what they all have in common is that they are extremely expensive, highly profitable, and generally employed to drain the \$10,000 coverage as quickly as possible. In fact one nationally syndicated diagnostic company boasts in its literature that it can teach professionals to reach "policy limits in 90 minutes." The question triggered by such a statement is why medical professionals, ostensibly dedicated to providing the best medical treatment possible to their patients, would ever be concerned about reaching policy limits quickly or otherwise. The enormous profit potential in ordering these tests can only have a corrosive influence on a doctor's independent medical judgment.

[C] MRI Brokering

The brokering of certain diagnostic tests creates another opportunity for unscrupulous medical professionals to profit from these tests. Magnetic Resonance Imaging (MRI) tests have long been used by the medical establishment and have a long history of benefits to patients. Because of a glut of MRI facilities in many populated areas of this state, the price of MRIs has come down over the years. Taking advantage of the excess capacities of MRI facilities, some unscrupulous individuals have formed what they call MRI brokerage businesses. What these businesses do is negotiate a deal with an MRI facility or multiple MRI facilities to perform MRI tests, for a price of roughly \$350-\$450. The MRI broker will then bill out these same tests to an insurance company for as much as \$1,700. They do so by indicating in the billing documents that the broker is actually the facility administering the test, sometimes going so far as cutting and pasting documents, removing the letterhead from the real MRI facility and substituting their own.

Because there is no fee schedule set by the government in PIP claims, and because of the strict rules regarding PIP claims, insurance companies must pay almost any amount billed. For example, a lumbar MRI scan would typically be billed on average at \$1,700 to a PIP insurer. Medicare, however, would only pay \$592 for that same test, a workers compensation carrier would only pay \$546, and a typical preferred patient plan would on average pay \$653.

MRI brokers provide no real service other than scheduling an appointment, which any doctor's office can do, or for that matter for which any patient can do on their own. Even MRI brokers who have testified before grand juries investigat-

ing this matter readily admitted that a patient could take their prescription for an MRI to any facility, just as that same patient could take a drug prescription to any pharmacy. Given that they are providing absolutely no benefit to the process, MRI brokers must somehow induce a doctor or chiropractor to refer their patients to them. All too often that inducement is in the form of what may be perceived as a kickback.

[D] Patient Brokering

The Florida Patient Brokering Act (Sect. 817.505, Fla. Stat.) prohibits offering, paying, soliciting or receiving any commission, bonus, rebate, kickback or bribe in order to induce referrals from a health care provider or facility. It also prohibits engaging in any split-fee arrangement in order to induce referrals or aiding, abetting, advising, or otherwise participating in the prohibited conduct.

A recently published case that found an illegal fee splitting arrangement.² In *Medical Management Group of Orlando v. State Farm Mutual Automobile Insurance Company*, the Court of Appeal found that Medical Management Group of Orlando, Inc. (MMGO) was not entitled to personal injury benefits under the Section 627.736, Florida Statutes (the PIP law), because MMGO did not provide medical services under the PIP provisions.

The court found that a company such as MMGO is not entitled to be compensated for PIP benefits. Section 627.736(1)(a), Florida Statutes, provides that the insurer must pay 80% of the “medically necessary medical . . . services.” The court stated that MMGO was not providing a medical service but rather a referral service and was therefore not entitled to be compensated for PIP benefits. In addition, the court found this arrangement to be nothing more than a fee-splitting scheme designed to compensate MMGO for MRI referrals. As stated above, receiving remuneration in exchange for referrals is prohibited by Section 817.505, Florida Statutes.

[E] Registration of Clinics

A “health care services clinic” means a business operating in a single structure or facility, or in a group of adjacent structures or facilities operating under the same business name or management, at which health care services are provided to individuals and which tender charges for reimbursement for such services. Section 456.0375, Florida Statutes, requires every such clinic to register with the Department of Health. Each clinic location must register separately even though operated under the same business name or management. We discuss these registration requirements in greater detail in a separate chapter of this book. However, since chiropractic physicians may serve as Medical Directors of such clinics, we

have provided a sample of a medical director's contract for such a clinic in the appendix to this book.

A chiropractic physician is allowed to serve as the medical director of a clinic that is required to be registered under Section 456.0375, Florida Statutes. Before undertaking such a position, the physician should be sure that he is well aware of the background of the owners and has the ability to carry out his statutory obligations. We provided in the appendix to this book a sample contract for a medical director of such a clinic, to illustrate some of the requirements that must be met.

[F] Workers Compensation Utilization Review or Peer Review Proceedings

The Workers Compensation Act contains a little-used section that provides for certain utilization review and peer review activities that may be pursued by insurance companies against a physician who is suspected of over-utilizing diagnostic tests and services or providing medically unnecessary treatment. This procedure is set forth in Section 440.13, Florida Statutes. A copy is set forth in the appendix to this book.

The author has found that this procedure is most often used by insurance companies that have previously authorized care and treatment of a disabled workers compensation patient, but who are now attempting to avoid having to pay for that care. The author has also found that the statute is misused and misinterpreted, often by the insurance company's attorney, so as to intimidate the authorized treating physician and too interrupt or interfere in the doctor-patient relationship.

This is a very complex procedure, which contains a number of pitfalls for someone who is not familiar with its operation. We do not have the space here to go into how a physician may defend himself when his care is attacked under this section of Florida Statutes. It is imperative that you immediately contact an attorney who specializes in health care law to represent you in such a case. A personal injury attorney will have little or no knowledge of this procedure or how to represent the physician who may be subjected to it. Sometimes the workers compensation attorney will have some knowledge of this procedure, but most often not. Our experience has been that only attorneys who routinely practice health care law have sufficient knowledge and experience with such matters as to be able to properly defend the physician whose care is challenged under this statute. Some professional liability insurance companies do provide defense coverage in such cases; most do not. Again, time is critical and the physician should take action immediately.

§38.08 References

- ¹ Please see the separate chapter in this book on Clinic Registration Requirements in Florida.
- ² *Medical Management Group of Orlando v. State Farm Mutual Automobile Insurance Company*, 2002 Fla. App. LEXIS 1275, 27 FLA. L. WEEKLY D371 (February 8, 2002)

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