

Multilevel Marketing of Nutritional Supplements

Chiropractors have sold nutritional supplements to patients based upon manufacturer's marketing programs which provide the seller (chiropractor) various forms of profit incentives when that manufacturer's product is eventually sold by that patient to other third party-users. This type of sales incentive is often referred to as "down-line marketing". This type of marketing has been used over many years in the sale of a variety of products, other than just nutritional supplements. Both before and since the passage of administrative code provisions, permitting chiropractors in Wisconsin to obtain certification in "nutritional counseling", some Wisconsin chiropractors have chosen to sell nutritional supplements manufactured by companies which distribute their products through this type of marketing. This form of nutritional product sales became a controversial issue in late 2007 when the examining board began addressing this issue of multilevel marketing (hereinafter referred to as "MLM") of nutritional supplements by chiropractors. This article addresses this issue from various perspectives including: (a) the current state of administrative law, (b) history and legal issues of concern and (c) suggested steps which can be taken by a chiropractor to address those legal concerns.

A. Current status of Administrative Law

During its December 6, 2007 meeting, the Chiropractic Examining Board ("the Board") issued a statement which was adopted in public session. This statement summarizes the current status of administrative law on the issue of MLM. The statement reads:

There is no Board policy prohibiting a Wisconsin Chiropractor from participating in a direct sales or multi-level marketing organization. If the Board decides to pursue the adoption of such a policy, it will do so pursuant to the rule making procedures contained in Chapter 227 of the Wisconsin statutes.

This statement was issued following Board discussions in closed sessions with legal counsel. It is not determined at this time what manner of action the Board may decide to pursue on this issue in the future.

B. History and Legal Issues raised with MLM

The nutritional counseling certification process permitted by Wisconsin Administrative Code CHIR Chapter 12 became effective on December 1, 2006. Shortly thereafter, the Wisconsin Chiropractic Association (“WCA”) issued a statement in the newsletter to its membership which indicated that multi-level marketing plans involve “down-line delegation and a chiropractor who participates in a multi-level marketing plan would be violating the law.” In reliance upon its interpretation of CHIR 12.06, the WCA reiterated its position on this matter in formal correspondence to the Chiropractic Examining Board dated May 14, 2007. At that time the Board indicated an interest in adopting a formal position which would be placed on the Department’s website addressing the new law as it relates to multi-level marketing.

In response to this pending development, several chiropractors who believed their practice could be adversely affected contacted the Riegleman Law Offices, S.C. That law firm, in conjunction with the actions of independent chiropractors chose to engage the services of national direct sales organizations and their legal counsel in an effort to assert relevant legal issues. Legal counsel for various national organizations, including the Direct Selling Association (“DSA”), the USANA Health Sciences, Inc., Market America, Inc. and their respective legal counsels subsequently joined efforts in refuting the position taken by the WCA.

The positions of the various parties were considered during meetings of the Board in June and August of 2007. Prior to the August meeting, legal counsel for the Board issued a Legal Memorandum which concluded that “an appropriately certified chiropractor may engage in nutritionally counseling of patients and may be involved in the sale of vitamins, herbs and nutritional

supplements. While engaging in this practice, the chiropractor may not associate with unlicensed persons in a multi-level marketing program". The memorandum listed three (3) reasons why the involving of a chiropractor in a MLM company may be in violation of the doctor's standards of practice.

First, the Board, through its legal counsel, expressed concern that an MLM organization could establish a sales structure in which "the supplier becomes the business of the purchaser." In such a structure, the "down-line" sales associate would effectively "join in" the practice of nutritional counseling by the chiropractor. The Board believes that such form of delegation would constitute a prohibited practice under Wisconsin Administrative Code CHIR 12.06. This rule provides that "a chiropractor shall not delegate to any chiropractic assistant or any other person any recommendation, analysis, advice, consultation or dispensing with respect to vitamins, herbs, or nutritional supplements." Those opposed to MLM argued that the down-line sales person could be interpreted by the public as providing nutritional counseling to subsequent buyers based solely upon the original recommendation of the chiropractor that the "downline" associate utilize a particular supplement.

Second, the Board, asserted that MLM could constitute a violation of the statutory prohibition against fee splitting. The Board was concerned that MLM involves a "continuing business association" which allows the "up line seller" to remain the "business associate of the down-line purchaser with an expectation of a share of the profits of the down-line purchaser." Legal counsel also noted that in an MLM organization, there is a profit motivation for the chiropractor to be continually recommending a nutritional product without adequate consideration of the quality of the product, the level of the service, or the price "because the chiropractor is now apart of the company".

Third, the Board, through its legal counsel was concerned with both the public perception of this type of marketing scheme and the need to provide adequate "protection" for the public. Legal counsel noted that a chiropractor's

first duty is to promote the health of the patient and avoid business relationships that are “clouded with profit motive”. Legal counsel and individual board members express concern that the MLM organizations were only concerned with profit and that the public would soon develop a detrimental perception that chiropractors who recommended nutritional supplements were only acting out of a profit motivation.

The Board ultimately approved a policy statement promoted by its legal counsel. In response, a Madison law firm was retained by one of the national direct sale companies. That law firm sent a letter to the Board requesting that it cease and desist from all efforts to revise current Board policy and comply with stringent procedural law governing Board activities before adopting any “rule” on this issue. When the Board ignored that letter, a lawsuit was filed by the law firm of Michael, Best and Frederick on behalf of Market America, Inc. in September 28, 2007. The lawsuit sought declaratory judgment invalidating the actions taken by the Board based upon at least five (5) legal grounds.

The impact of this impending lawsuit prompted the Board to ultimately withdraw the adoption of any policy prohibiting MLM. Consequently, the pending lawsuit was dismissed.

C. Suggestions for addressing legal concerns with MLM in the future.

It is noteworthy that most of the discussion by the board in favor of restricting MLM did not reference actions taken by other state’s regulatory boards or provide any legal precedence for Board action. In response, there is significant legal precedence supporting a chiropractor’s involvement with MLM. This section of the article will address that precedence in response to the Board’s legal concerns and provide practical suggestions to address those concerns involving MLM of nutritional supplements in the future.

In response to the Board’s first concern relating to inappropriate delegation of nutritional counseling, the Board did not give complete consideration to the delegation language of Wisconsin Statute Sec. 446.02(7)

and two (2) other sections of the administrative code dealing with the ability of staff to provide adjunctive services. First, CHIR 6.02(31) now specifies that “unprofessional conduct” includes “making a representation likely to create an unjustified expectation about the results of a nutritional counseling service or procedure”. Second, CHIR 12.06(1) indicates that a chiropractor “shall not delegate to any chiropractic assistant or other person any recommendations, analysis, consultation or dispensing with respect to vitamins, herbs, or nutritional supplements.” This section further provides that a chiropractor’s employee may assist in the processing of sales of such item.

In relation to this delegation concern, the chiropractor should be particularly concerned with the nature of the “association” between his services as a professional in providing nutritional counseling and the ultimate “dispensing” of nutritional supplements by “down-line” sales representatives either directly or remotely related to the patient with whom the doctor provided nutritional counseling. As currently practiced, the MLM of nutritional supplements maintains a clear distinction from the prohibitions referenced in the Administrative Code provisions:

1. Chiropractors involvement in MLM do not typically involve any express delegation to anyone. In MLM transactions, the consumer voluntarily locates or selects the sale representative who ultimately sells the nutritional product. As such, the chiropractor does not usually delegate to the sales representative the right to dispense or sell a nutritional supplement since the sales representative has an economic incentive to directly sell the product and the consumer has the right to choose the representative from whom the nutritional product is purchased.

Practical suggestion(s) – The doctor should consider having all patients who receive nutritional counseling sign a form acknowledging that the patient will refrain from utilizing the doctor’s name or authority in promoting a nutritional product to third parties. The doctor may also wish to contact the MLM manufacturer to insure that all correspondence or other forms of promotion

utilized by that particular patient does not reference or otherwise contain any form of “endorsement” by the doctor or his/her office.

2. Chiropractors are not delegating adjunctive services in the ultimate sale of a nutritional product. Adjunctive services are typically regarded as those forms of services which are complementary to chiropractic treatment and usually performed within the office setting by an appropriately trained individual acting under the chiropractor’s direction or supervision. In the MLM scenario, the ultimate sale is made by a third party/sales representative who is acting outside of the chiropractic office normally without any intent to advance or assist the consumer with ongoing chiropractic care. The ultimate consumer is often purchasing a nutritional supplement from a third-party without any patient-client relationship.

Practical suggestion(s) – Doctor should also obtain a written acknowledgement from the patient that the patient has not been granted or otherwise delegated the right to provide any form of nutritional counseling to perspective down-line purchasers without the patient obtaining adequate credentials or training. The doctor may wish to remind the patient that nutritional counseling is available to any third party from that doctor’s office or other appropriately certified chiropractor, nutritionist, or dietitian. The doctor is also encouraged to engage in nutritional counseling and eventually disburse recommended supplements within the confines of the office.

3. The right to sell or dispense nutritional supplements is granted by the manufacturer of the nutritional supplement rather than delegated by the chiropractor. In many MLM transactions, the third-party seller must obtain approval or certification from the manufacturer before they have any right to sell the nutritional supplement products. The manufacturer of the product is ultimately controlling the dispensation of the product, rather than the chiropractor. As such, the ability to sell or dispense the nutritional supplement is not contingent upon approval or delegation by the chiropractor; but rather upon such parties acceptability to the manufacturer.

Practical suggestion(s) – Doctors should consider the nature of their initial involvement with the MLM manufacturer to insure that down-line sales to third parties are recognized as independent sales between a distributor and consumer; rather than the product a result of an initial “recommendation” by the doctor to a patient within the context of nutritional counseling. In effect, the nutritional supplement should effectively be distributed on the merits of its own benefits, rather than merely upon the recommendation of the doctor.

The second concern of the Board relating to fee splitting failed to full consider the nature of the relationship required in a typical fee splitting situation. The Wisconsin Statutory provisions relating to fee splitting are stated in §448.08(1m). The statute provides:

“No person licensed or certified under this subchapter may give or receive, directly or indirectly to or from any person, firm or corporation any fee, commission, rebate or other form of compensation or anything of value for sending, referring or otherwise inducing a person to communicate with a licensee in a professional capacity, or for any professional services not actually rendered personally or at his or her direction.”

There are at least four (4) distinctions between this State’s prohibition on fee splitting and the practice of MLM of nutritional supplements:

1. The transaction does not involve cross-referral between “licensed or certified” persons. Unlike the statutory prohibition involving licensees on both ends of the “transaction”, MLM most often involves the chiropractor and a non-professional making an eventual sale to a consumer. In traditional “down-line” marketing, the lower-level seller most often makes their own sale to the consumer of a nutritional supplement without necessarily referring that consumer to the chiropractor. Even if a referral was made, this transaction is not likely to involve multiple licensees.

Practical suggestion(s) – the doctors should be particularly alert to situations where nutritional counseling may be provided to another licensed professional who may attempt to sell the product to third parties.

2. No fee is exchanged for the chiropractor’s “professional services”. Under the Nutritional Counseling Certification program, a chiropractor should have the ability to charge a fee for the professional services of “nutritional counseling”. The Chiropractor should be permitted to bill individually for that form of professional service rendered to a patient.

Practical suggestion(s) – the chiropractor should bill and code appropriately for only the nutritional counseling services provided. The WCA has noted that a chiropractor should choose the appropriate code in the event that a patient visiting a chiropractor for the express purpose of obtaining nutritional counseling is without symptoms. Those codes are 99401, “preventative medicine counseling” – 15 minutes; 99402 for counseling lasting approximately 30 minutes; 99403 for counseling lasting approximately 45 minutes and 99404 for counseling lasting approximately 60 minutes.

3. Any commission or other form of “value” potentially received by the chiropractor is not paid by another licensee. In most MLM situations, any “commission” paid to the chiropractor for the sale of a nutritional supplement is paid by the manufacturer of the nutritional supplement, rather than a third party involved in the “down-line” marketing and sale of the product.

Practical suggestion(s) – doctor should be aware of the source of all payments to insure that those payments are not being paid by another licensee or a third party.

4. Any “professional services” actually rendered by a chiropractor would be billed separately. This separate billing practice, which was approved by the Attorney General, is unrelated to the monetary commissions which a chiropractor may receive for the actual sale of a particular manufacturer’s product. As such, any commission received by a chiropractor is based on the actual sale

of a manufactured product and not upon the rendition of nutritional counseling services, which is the focus of the fee splitting statute.

Practical suggestion(s) – doctor should not be receiving any payment from a fellow licensee for services which are not specifically rendered by the doctor directly to the patient.

As a final analysis of the fee splitting situation, a Wisconsin Chiropractor should avoid directly referring an active patient to any individual or other entity with advance knowledge or reasonable expectation that such individual or entity will provide some form of nutritional counseling to that patient under circumstance where the chiropractor receives some form of compensation or commission for the referral.

The final concern of the Board relating to the profit motive and public's perception of the profit motive is a much more amorphous concern since it addresses the subjective vagaries of "perception". The Board was frequently reminded by legal counsel that these "profits" available to chiropractors are often taken by other doctors in their sales of products and constitute the foundation for a wide range of retail sales by unlicensed individuals who engage in the sale of nutritional supplements. From a legal perspective, the lawsuit asserted that the prohibition of multilevel marketing by chiropractors would constitute a violation of their constitutional privileges to engage in this form of commerce. It is also noteworthy that chiropractors have been engaged in MLM for years before the Board considered this issue without any notable public "backlash" against the involvement of doctors with nutritional supplements.

In order to maintain this positive perception, chiropractors should consider several suggestions. Foremost, the doctor should continue to maintain appropriate patient records which confirm a sound basis for the doctor's recommendation of a particular nutritional supplement; regardless of whether that product is subject to MLM. The doctor should be able to explain to any investigating party that a particular product was recommended to a patient with

the sole intent of meeting that patient's specific health related concerns. Second, the doctor may wish to order from a variety of nutritional supplement companies so as to avoid the perception that the doctor only sells the product which results in some form of commission. Doctor should, at least, regularly investigate other products and maintain separate files on various forms of nutritional supplements and their manufacturers.

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