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Addressing Abusive Lawyer Conduct in Relation to Litigation Proceedings

There are situations involving patients in litigation where requests are made of the chiropractor by either the patient's attorney or an opposing attorney. Most attorneys will work cooperatively with the chiropractor in requesting patient treatment records, narrative reports, and potential testimony at depositions or court appearances. Unfortunately, there are also situations where the attorney is not respectful the doctor's time and may make requests that are not conducive to the doctor's schedule or otherwise involves a commitment of time which detracts from the normal operations of the doctor's practice. These situations often develop when there are court imposed deadlines on scheduling depositions or overly broad requests (often in relation to a subpoena) that the doctor produce documents well beyond the scope of normal treatment records. These documents can includes items such as personal and professional income related records, research articles, and information relating to insurance contracts. These types of requests from attorneys often become abusive and should invoke appropriate responses from the chiropractic profession. Summarized below are suggestions for dealing with these types of abusive practices.

First the attorney may be unwilling to provide appropriate compensation to chiropractors for their appearances at depositions or Court hearings. In some situations, the attorneys will offer low amounts of compensation or intentionally avoid paying anything by claiming that the attorney's client or some other attorney is actually responsible for the chiropractor's charges.

The chiropractor should first understand **which attorney is actually responsible for the charges**. Responsibility for the charges depends upon the reason or purpose for the doctor's testimony. If the testimony is provided for "discovery purposes" at the request of an attorney desiring to evaluate the chiropractor's opinions or treatment of an individual, it is the usual practice in this state that the attorney seeking such information will ultimately be responsible for the charges. That attorney is commonly the defense (liability insurance) attorney in a personal injury case who holds a position "adverse" to that of your patient.

In other circumstances, the propose for the deposition is to provide testimony which can actually be videotaped for later replay at trial in support of the presentation of your patient's claim. That type of testimony is commonly called **"Trial" or "evidentiary" testimony** which is customarily paid by the patient's (plaintiffs) attorney in a personal injury case. In both situations, the attorney initiating the questioning is commonly the party responsible for payment of your charges. In either event, the questioning attorney or law firm (not the patient) is ultimately responsible for your charges. Consequently, the chiropractor must initially determine the purpose for this testimony so as to request payment from the appropriate attorney.

After a doctor determines who is actually responsible for the charges, an agreement should be reached, in advance, as to the reasonable charges for the testimony. Presently in Wisconsin, the statutes and an "Inter-professional Code" established by the bar recognize the right of a physician who is testifying as an "expert" **to receive reasonable and appropriate compensation for the time associated with their testimony**. Most chiropractors will be testifying as "expert" witnesses when they are asked to render any opinions to a reasonable degree of their professional capacity. There are instances where a doctor may be called as a non-expert witness. In those situations, the chiropractor would not be "lay" witness and is entitled to a nominal statutory payment for the time in providing testimony.

Questions often develop as to what amount is appropriate for the chiropractor's time. It is appropriate for the chiropractor to charge a fee which is based upon the true value of his hourly rate of income, before the effect of taxes. It can be logically argued that a **chiropractor should be compensated** an hourly fee which has some relationship to the gross compensation which the doctor would have earned while treating patients. It is not unusual for physicians to also charge for their **"preparation and travel time"**; as well as, some type of reasonable, additional amount for the unique and stressful nature associated with the legal testimony. The overall charges should bear some relationship to those fees commonly charged by other professionals within the area of the state who have similar levels of professional experience, training, and knowledge.

Another situation of abuse involves the issuance of subpoenas requiring a doctor to produce often voluminous written documentation largely unrelated to the treatment of a specific patient. These types of requests are commonly made by the attorney opposing the interest of the doctor's patient. In this situation, the doctor may wish to promptly notify the patient's attorney to determine whether anything should be done to limit the scope of requested information. Before contacting the attorney, the doctor should estimate the amount of time which may be required to comply with the documents requested in the subpoena. Upon contacting the patient's attorney, the doctor should consider asking the patient's attorney to have the requesting attorney pay the doctor, in advance, for the time associated in obtaining the requested documents. The doctor should also be reluctant to release proprietary information to a requesting attorney and may wish to similarly discuss those concerns with the patient's attorney. If the patient's attorney is unable to negotiate reasonable arrangements with the requesting attorney, the chiropractor may ultimately need to seek some form of "protective order" as described later in this article.

Unfortunately, some lawyers will not be reasonable in negotiating payment for the chiropractor's time or unilaterally neglect to pay any compensation to the chiropractor. In those situations, the following **suggested courses of action** may be helpful:

1. Always confirm the terms of payment BEFORE the testimony is provided. Letters should be sent to the Attorney responsible for payment (with copy to all other interested attorneys) setting forth your fees which are expected to be paid before the deposition. As the deposition approaches, your staff should confirm that payment has actually been made by the attorney, or that other suitable arrangements have been reached with the attorney.

2. Consider refusing to provide testimony if payment is not made before the time of your testimony. The correspondence should also clearly list a policy of refusing to testify if payment is not made in advance. If there is some uncertainty as to the anticipated length of your testimony, your initial letter should also specify a minimum charge for your appearance at the deposition (usually one hour) and request that the

attorney bring an additional check to the deposition or hearing if the event takes longer than originally anticipated.

3. Caveat: You are required to appear and give testimony at any hearing/deposition if you have been issued a subpoena. Obviously, the point above cannot be followed if a subpoena has been issued for your appearance. Even in the event of a subpoena, the Wisconsin Statutes entitle you to receive appropriate compensation if you are testifying as an expert witness. Upon receipt of a subpoena with inadequate payment, you should consider contacting your patient's attorney to seek assistance in negotiating for appropriate compensation or the filing for a "**protective order**". The Wisconsin Statutes allows an attorney to file a Motion for "Protective Order" seeking to restrict or protect an individual from complying with a subpoena unless certain conditions are met; including a condition for appropriate compensation. Most patient's attorneys should be willing to file such a motion on your behalf. Alternatively, you may need to retain your own attorney to file such a motion for protective order. In any event, the motion must be filed before the actual event stated in the subpoena or you are required to appear at the subpoenaed event.

4. Consider filing an ethics complaint or suing an attorney who refuses to provide compensation within a reasonable time after you provide testimony. Keep in mind that Small Claims Court can be utilized to bring such lawsuits against attorneys at relatively small cost and inconvenience to the doctor. If the attorney is abusive in refusing to provide payment, you may also wish to consider filing an ethics complaint against the attorney. Ethics complaints can be directed to the Office of Lawyer Regulation, in Madison, Wisconsin. The present address is 110 East Main Street, Suite 312, Madison, WI 53703 with a toll free number of (877) 315-6941.

Another situation often faced by chiropractors involve situations **where a doctor's claim or lien to compensation is disregarded by the attorney when settlement / verdict proceeds are paid**. In these circumstances, the chiropractor should keep in mind that he/she may not be entitled to direct payment from an attorney unless the doctor has properly asserted lien rights to a portion of the proceeds. In those situations where a **written lien does not exist or has not properly been signed**, the attorney

may still have an ethical obligation to pay a portion of the settlement / verdict proceeds to the treating chiropractor. Other resources on this website address the proper manner for obtaining written consent to a lien from both the patient and the patient's attorney.

In situations **where a valid written lien exist**, the chiropractor should consider the following steps to insure payment upon settlement of the case:

1. Remind the patient's attorney early in the proceedings of the signed lien and expectation to be paid upon settlement or verdict. Such a letter should be periodically sent to the patient's attorney requesting that the attorney keep the doctor advised of the progress of the case. The letter should also ask the attorney to notify the treating doctor immediately upon settlement or verdict.

2. Advise the Attorney of the balance owed and expectation that such disputed funds not be released to a patient without doctor's consent. Upon the event of settlement or verdict, the proceeds are often made payable directly to the patient's attorney or client trust account. Expectation exists that the attorney will distribute those funds appropriately and maintain in "trust" any funds which may be legally owed by the client to third parties. These funds to third parties may arguably include the balance owed to a treating chiropractor by the patient. It is important to regularly provide written notice to the attorney advising the attorney of the balance owed and the doctor's expectation of payment from any funds received by the attorney.

3. Consider filing an ethics complaint or commencing litigation when not paid amounts owed from any settlement or verdict proceeds. As referenced above, an attorney holding settlement or verdict proceeds in a trust account may arguably be subject to an ethics complaint. Specific attention should be given to Supreme Court Rule 20:1.15 which requires an attorney to safely maintain any portion of proceeds in a trust account which may be owed to a third person, such as the treating chiropractor. If an attorney arbitrarily releases fund necessary to satisfy the doctor's lien - either with or without the approval of the client/patient – the chiropractor may wish to file an ethics complaint with the Office of Lawyer Regulation.

As an alternative, the chiropractor should always consider filing small claims litigation against both the patient and his attorney for the outstanding amount owed to the doctor. The chiropractor may be able to recover the amount owed directly from the attorney if the attorney signed a written lien form. The attorney is probably not an appropriate party to any litigation if the attorney did not acknowledge or sign any written lien form.

As referenced above, the options available to the chiropractor are affected by the existence of a signed, written doctor's lien. In those situations where a doctor's lien does not exist, it is likely that the chiropractors only form of relief would be directly against the patient. In situations where the patient's attorney did not receive regular notice of the outstanding balance owed by the patient, and was legitimately unaware of the balance, it is unlikely that the attorney committed any unethical conduct by releasing the funds directly to the patient.

In situations where a valid written lien does not exist, the **chiropractor may also wish to consider, "intervening" or actively participating in the underlying litigation brought by the patient**. Although there are costs associated with participation in the litigation, the doctor is entitled as a formal party in the litigation of being notified of all litigation proceedings.

A final situation often reported involves attorneys who refuse to provide the patient's doctor with any information on the status of the case since the attorney believes that that information may be confidential. In such situations, the chiropractor is encouraged to, at least, determine the case number and county where the case is pending. That court file is subject to public inspection and a doctor would have a right to view the file by contacting the Clerk of Court's office.

The chiropractor may also wish to **directly contact the patient's attorney to seek any information which is a matter of public record**. Although the terms of settlement are often not made a matter of public record, the event of settlement or date and amount of jury verdict is information which the attorney should be able to provide. The doctor may need to remind the attorney of his obligations under Supreme Court Rule 20:4.1 which requires the attorney to avoid making a false statement of material fact or

law to a third person, such as the chiropractor. The doctor may wish to note any repeated avoidance of telephone calls by the attorney and also consider filing an ethics complaint against the attorney if no response is provided. Under the provisions of the Inter-professional Code, referenced earlier, the attorney is expected to be forthright and candid in dealing with the doctor about matters of public record.

Understanding that options do exist in dealing with these two types of abuse situations should enable chiropractors to experience fair treatment during the litigation process and ultimately receive reasonable compensated for their valuable contribution to the patient's care.