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Chiropractors use of MRI Centers and other outside Labs or Facilities

Chiropractors are frequently approached by MRI Centers and other Comprehensive Outpatient Treatment Facilities (CORF's) regarding utilization of those outside services by patients. The nature and extent of the value provided by the CORF'S in the treatment of patients varies with the background and nature of treatment provided by each chiropractor. Information is often issued to chiropractors containing warnings about the utilization of CORF's as possible violations of federal or state law. Some articles will insinuate that MRI Centers and similar facilities may actually constitute "scams".

This legal commentary **reviews whether relationships with MRI centers actually violate regulations and laws** in light of existing case law. For purposes of this article, it is assumed that the chiropractor's relationship with an MRI center is within the context of a "lessee-lessor" relationship and that the doctor has no direct or indirect financial or ownership interest in the actual MRI business or equipment. This commentary also addresses factors to consider in any written lease with a MRI center and miscellaneous considerations for the chiropractor in providing such referral services.

I. Allegations of State Law Violations

There are aspects of current state statutory and regulatory law which may be influenced by a chiropractor's referral to MRI centers. Each of those prospective areas are addressed below:

A. Fee splitting. Wisconsin statutes Sec. 446.04(4) provides that a chiropractor engages in **unprofessional conduct when "splitting or dividing any fee for chiropractic service with any person except an associate licensed chiropractor."** Those critical of the chiropractor's referrals to MRI centers assert that "fee splitting" occurs when the "chiropractor pays the MRI center for their services and the chiropractor bills the insurance company at an inflated price." This type of assertion against the use of MRI referrals fails to accurately understand the nature of the

relationship between the chiropractor and the MRI center; as well as, mischaracterizes the current nature of case law on fee splitting.

From a practice standpoint, an enforceable lease arrangement with an MRI center will contain carefully drafted language delineating those actual services provided by the MRI center; from those distinct services provided by the chiropractor. Those carefully distinguished forms of services are then commonly billed in a proportionate manner to the value of services provided by both the MRI center and chiropractor. Those rates utilized by each party must be reasonable and comparable to those charges for similar services within the general geographic area.

With such properly drafted matters in a service agreement, the chiropractors billing for MRI-related services is unlikely to constitute a violation of the fee splitting statute in this state under existing case law. There are both opinions from this state's Attorney General and federal case law which support the contention that such referrals do not constitute fee splitting.

1. Attorney General Opinion. In an opinion rendered on April 14, 1982, in response to an inquiry by the Medical Examining Board, the Wisconsin Attorney General addressed the statute on fee splitting within the context of the employment of physical therapists by a physician, through a service corporation owned by that physician. In addressing the law of fee splitting, the Attorney General noted that the **fee splitting statute is intended to prohibit two things**:

> "**First**, it prohibits the receiving of any fee for sending, referring or otherwise inducing a person to communicate with another licensee. **Secondly**, it prohibits any licensee under this chapter from receiving any fee for any professional services not actually rendered personally or at his or her direction."

The Attorney General noted that under the applicable circumstances, the physical therapist and physician can receive compensation for their own respective services through separate and distinguishable charges for their respective services. The Attorney General concluded that the employment of physical therapists under those circumstances does not violate the fee splitting statute.

2. Federal Case Law. In several relevant cases, **federal judges have also addressed aspects of fee splitting statutes**. Of significance are the cases of E&B Marketing Enterprises v. Ryan, 568 N.E. 2d 339 (IL App., 1991), Practice Management Associates v. Orman, et al, 614 So. 2d 1135 (FL App., 1993) and Practice Management Associates v. Wakefield, 615 So. 2d 846 (FL App., 1993). In these cases, the court evaluated arrangements of outside entities with doctors where the outside entity received a form of remuneration directly from the doctor based upon the volume of services rendered by the doctor. In the E&B Marketing Enterprises case, the federal court found a violation of the fee splitting arrangement where an outside marketing firm received a consultant's fee based on a percentage of the billings collected by a medical doctor in connection with referrals obtained through various marketing techniques used by the marketing firm. In contrast, the court did not find a fee splitting violation in the Practice Management Associates ("PMA") cases where this outside consulting firm did not directly assist with patient referrals or patient solicitation and, in fact, did not engage in those types of marketing activities. The court noted that the **traditional definition of fee splitting involved a "dividing of a professional fee for specialist medical service with the recommending physician" who did not provide any form of services to the patient**. In contrast to that traditional definition, the contracts with PMA fully involved distinct and distinguishable services which were provided by separate parties. It is interesting to note that in the 1993 decision, the federal court specifically found that Wisconsin's fee splitting law is substantially similar to those laws in Illinois involving circumstances where fee splitting were not found to exist.

B. Engaging in Unprofessional Conduct or Prohibited Practices. The regulatory aspects to the Wisconsin Administrative Code relating to chiropractic describes certain **"unprofessional conduct" and "prohibitive practices."** Some common arguments by those opposing CORF involvement are that the chiropractor often does not provide any professional service in conjunction with the MRI and would be submitting an "inflated" bill to an insurance company for MRI services. These types of broad characterizations again fail to recognize the enforceable nature of certain MRI service contracts and the professional role of the chiropractor in utilizing an MRI.

With respect to the service agreements, an enforceable agreement would require the MRI service center to provide safe and effective equipment. Moreover, such enforceable contracts would also clearly delegate that subcutaneous substances be administered only by qualified individuals and provide that the MRI "films" are interpreted by properly trained and qualified individuals. As a result, properly drafted language in an MRI service contract provides for the appropriate delegation of MRI services so as to avoid any situation where the chiropractor engages in "prohibited practices" under Wisconsin Administrative Code CHIR 4.05.

From a practice standpoint, **a chiropractor utilizing proper referral practices with a MRI center would not be engaging in "unprofessional conduct"** specified in Wisconsin Administrative Code CHIR 6.02. Of the approximately thirty (30) items listed in that section of the Administrative Code, the chiropractor must particularly ensure that he is not performing professional services "inconsistent with training, education or experience." Moreover, the chiropractor must not engage in "excessive evaluation or treatment of a patient" or otherwise implement billing procedures which negate the "co-payment or deductible provisions of a contract of insurance" held by a patient.

It should also be noted that the current **CMT codes recognize cognitive work** done by a chiropractor in connection with overall patient treatment while relying upon diagnostic referral services. The CMT values arguably include billing for work involving the review of MRI, CT's, x-rays and other diagnostic services. The evaluation and management codes further recognize that a chiropractor should be compensated for both the professional and technical components associated with their referral to an MRI. Consequently, current billing codes recognize the right of the chiropractor to compensation for the cognitive/professional component of the E&M codes in relation to the use of an MRI.

In contrast to those assertions against referrals, chiropractors should be able to demonstrate that the **use of MRI referrals actually benefits overall patient care and promotes greater utilization of chiropractic**. As it relates to the practice and treatment of patients, Wisconsin Administrative Code **CHIR 4.03 specifically allows chiropractors to use "x-ray and other instruments"** in the application of chiropractic

science. The philosophy and training which constitute chiropractic science clearly enables chiropractors in this state to interpret the diagnostic value of **MRI's since they document and assist a doctor in treating spinal stenosis and related subluxations**. In that regard, the MRI is one of the more modern and effective diagnostic tools for properly analyzing and treating a patient's condition. In that regard, **chiropractors are well equipped, trained, and experienced in understanding and utilizing the results from MRI's** in effectively treating their patients. It is irresponsible to assert that "a chiropractor does not provide any professional service in conjunction with the MRI . . ." In contrast, it could be argued that a chiropractor utilizing MRI services is employing some of the most recent and vital technology for "the adjustment of the spinal column, skeletal articulations and the adjacent tissue."

In addition to promoting better care of the patient, **the use of MRI's may also indirectly advance greater utilization of chiropractic services**. Initially, the direct referral for MRI's by chiropractors minimizes health insurance costs since it eliminates the referral of a patient to a specialist who then charges for making the eventual referral to an MRI center. Moreover, this type of direct referral induces competition within the marketplace by requiring those MRI centers to compete with each other in the cost of providing such services. It should also be noted that the charges of most chiropractors are comparable, if not less, than similar charges by other professionals utilizing MRI's, such as radiologists, hospitals, podiatrists, and osteopaths (not to mention, medical doctors).

Most chiropractors in this state are very familiar with the scenario in which a patient is referred to another health care provider with the express intent of having an MRI ordered; only to find that the **specialist "assumes" care of that patient** and the chiropractor is left with the loss of an opportunity to fully treat a patient. In that regard, the overall growth in the utilization of chiropractic is gravely affected by the denial of such doctor's access to MRI's. Finally, it is **very ironic** in this time of increased discussion about duty to refer and "cross-referrals" by chiropractors that a diagnostic technique such as an MRI <u>commonly</u> used by various professionals should become unavailable to the chiropractor. Instead of expanding greater utilization of chiropractic,

the denial of access to this important diagnostic tool can only result in lower utilization of chiropractic services.

II. Federal Regulations

There are multiple aspects of federal regulations which are influenced by a health care provider's referrals to outside services. Several of the major provisions are addressed below:

A. Unfair Trade Practice. Certain practices constitute "unfair trade practices" pursuant to the Sherman Antitrust Act set forth in Chapter 15 of the United States Code Service. In general, this section of the federal regulations **prohibit arrangements which establish restraints on pro-competitive effects**. As referenced above, the use of MRI services usually do not result in any type of "price fixing" which deters competition. In contrast, referral to MRI services actually promotes competition and has the effect of reducing overall health costs.

B. Fraud and Abuse. Other forms of trade practices are **prohibited which involve arrangements in which a health care provider is given a "kick back" or other form of renumeration for the referral to the outside service**. In general, such forms of "secret payments," allowances, rebates, refunds, commissions, discounts or other type of debt forgiveness by and between the referring doctor and the outside service may be prohibited under these types of federal regulations and statutes. A chiropractor utilizing valid MRI referrals should ensure that charges for the technical component of the MRI are clearly stated, fairly calculated, and not based upon any type of unfair renumeration to the chiropractor for the volume of referrals, or other types of incentives. Similarly, the chiropractor should ensure that all payments to the MRI center are fair and reasonable and similarly customized to reflect fair trade practices.

C. Medicare/Medicaid Reimbursement. Some insurance payers, including Medicare, require a **"physician's order" to obtain reimbursement for MRI services**. Moreover, the Medicare program has regulations relating to prohibitive relationships between the healthcare provider and the supplier of outside services. In most instances, a chiropractor should be advised to avoid referrals of Medicare or Medicaid patients to these outside suppliers of services where there is some type of remuneration

to the outside supplier for those services. In addition, the doctor should avoid any ownership, management or other form of financial interest in the operations of the outside services.

It is interesting to note that in connection with the preparation of this paper, information was solicited from the legal counsel with the Department of Regulation & Licensing. Reprinted below is a letter from Attorney John Schweitzer, dated February 8, 2003:

> *"Every month or so, I am contacted by a chiropractor, an attorney, or a company asking me to have the Chiropractic Examining Board review a proposed contract for services from mobile testing services, or some variation on that theme.*
>
> *The Board has no problem with a chiropractor using an outside diagnostic testing service as long as the chiropractor doesn't receive payment for services he or she doesn't provide and as long as the arrangement with the testing service doesn't create a financial incentive for the chiropractor to have patients tested.*
>
> *If you wish to provide additional information on this issue with the board, you may send it to me. I will tell you that I responded to a call from an attorney just yesterday who wants to do the same thing, so I'm not sure I suffer from insufficient information. My comment to her was that a contract with a testing service will be acceptable as long as it doesn't create either of the situations above. Further, since it's my understanding that the routine practice followed by medical doctors is to have the testing service bill for both the professional component and the technical component, the burden is probably on the person promoting a different arrangement to show why it would be beneficial."*

The board addressed this issue in a short article in its Regulatory Digest last June, and it will include the same message in a longer article on misleading advertising in the Digest scheduled for this month. Those follow:

June 2002 Article:

Fee-splitting or Fraudulent Billing Through Use of Diagnostic Testing Services.

The Board has *recently been approached by providers of certain diagnostic testing services seeking approval of agreements under which a chiropractor refers a patient to the service, which performs and interprets a diagnostic test. A problem arises if the testing service bills for the technical component and the referring chiropractor bills for the professional component. Practitioners should be aware that an arrangement that permits a chiropractor to bill for services not performed may be either fraudulent or fee-splitting.*

Article for February 2003:

Get Rich Quick? – Be Wary of Ads.

Be particularly careful with respect to any relationship which might be considered fee splitting. An article was printed in the last Regulatory Digest regarding chiropractic referrals to diagnostic testing services. Several companies marketing mobile diagnostic services will tell you that their proposed financial arrangement is legal, and the contracts apparently satisfy *certain federal requirements. The Board is aware that providers of these services continue to approach chiropractors in Wisconsin. The Board has reviewed some of the proposed contracts, and the Board's interpretation of its statutes and rules remain unchanged. Chiropractors may only bill for work they actually perform, services performed by another entity must be billed by that entity, and arrangements that lease an unlicensed technician to a chiropractor as an "employee" appear to serve only to permit the chiropractor to bill insurance for services s/he did not perform. The scope of chiropractic permits a chiropractor to perform diagnostic tests if s/he is qualified to do so by education, training and experience. A chiropractor is also permitted to delegate diagnostic testing to an unlicensed person under the chiropractor's supervision if the requirements of chapter CHIR 10 are met. A chiropractor may also refer a patient to a diagnostic service, including a mobile service, if indicated. A problem arises, however, if the arrangement with the testing service allows the referring chiropractor to bill for services he or she did not perform. This is usually proposed under the theory that the equipment "belongs" to the chiropractor*

during the time it's used, or the technician is an "employee" of the chiropractor for that time period. Wisconsin chiropractors should be aware that any arrangement that permits a chiropractor to bill for services not performed is likely to be found to be either insurance fraud or fee-splitting.

After the first article was written, I realized that it misleadingly, seemed to limit the problem to the situation where the testing service bills for the technical component, and the referring chiropractor bills for the professional component. That limitation was removed in the later article. [End of Letter]

III. Conclusions

In light of these considerations, **most service agreements with MRI centers do not violate state and federal** regulations **when the agreement is properly drafted and the chiropractor implements proper billing and other practice procedures**. Those procedures should include informed consent from the patient, adequate documentation, distinguishable billing practices, and reasonable charges for the technical and cognitive components of the MRI services. If properly implemented, **these referrals to MRI centers not only enhance the overall treatment of the patient, but also promote competition, lower healthcare costs, and promote greater utilization of chiropractic services**.