

Legal Considerations in Marketing Practices

Chiropractors, like all healthcare service providers, will seek to maximize the benefits of their form of healthcare to the public through various forms of innovative marketing techniques. A doctor must insure that he does not engage in “unprofessional conduct” as prohibited by Wisconsin Administrative Code CHIR 6.02(15) by any advertising which is “false, deceptive or misleading.” Beyond these broad prohibitions, there are various legal concerns which have developed with various promotional techniques used by the profession. This article addresses those legal concerns associated with various marketing techniques.

A. Free or Reduced Services of the Chiropractor

The approved services of a Wisconsin licensed chiropractor are defined in Wisconsin Statute §446.01(2) and Wisconsin Administrative Code CHIR 4.02 and 4.03. There are generally no state regulatory prohibitions preventing a chiropractor from offering services at a free or reduced rate provided that the doctor does not discriminate in the rendition of those services. (See CHIR 6.02(11) which states that a doctor’s refusal to render services to a person because of race, color, sex, or religion constitutes unprofessional conduct.) Consequently, a doctor could offer a free examination, x-rays, report of findings, or similar types of services typically offered by the doctor within the scope of his/her license.

There are at least four (4) concerns associated with the offer of free or reduced chiropractic services:

1. **Truthful Advertising** – Advertising involving the transfer of professional services must not be untrue, deceptive or misleading. As such, the advertising should specifically describe the nature, quantity, and market value of any services which are not charged. It is also recommended that the advertisement clearly reflect the period of time during which the promotion is offered.

2. Providing Professional Evaluation – Regardless of the charge for chiropractic services, a doctor has an ongoing duty to “conduct a competent assessment/evaluation or diagnosis” of a patient. (CHIR 6.02(9)) In addition to conducting a professional evaluation, the doctor has an ongoing obligation to maintain complete and comprehensive patient records as required by Administrative Code CHIR Chapter 11. As a result, the doctor must insure that the patient evaluation is professionally performed and that a thorough evaluation is completed regardless of whether the patient is receiving certain aspect of the overall care at a free or reduced charge.

3. Medicare or Medicaid Patients – The healthcare financing administration has taken the position that certain discounts, rebates or other reductions in the providers pricing may violate the anti-kickback statutes (42 USC §13 20a-7b) since such arrangements may “induce” the purchase of items or services payable by Medicare or Medicaid. Such arrangements are permissible if they fall within the “safe harbor” for certain forms of discounting practices. A “discount” is regarded as a reduction in the amount a seller charges buyer for a good or service. In order to be protected under the “discount safe harbor”, the discount must apply to the original service which is purchased or furnished and cannot be applied to the purchase of a different good or service than the one in which the discount was earned. The use of the phrase “discount” should be compared to that of a “rebate”. A rebate is regarded as a reduction in price which it is not given at the time of sale. Because the reduction in the price of the service is not earned at the time of sale, a rebate is not protected under the discount safe harbor.

In order to comply with this interpretation, some doctors will either exclude Medicare/Medicaid recipients from a promotion or otherwise clearly indicate that the promotion is not intended to induce the purchase of subsequent chiropractic services and that there is no

obligation or requirement of continued care or service. In addition, in order for the discount program to be protected, various factors must be met; including: (1) the benefit of the discount or other reduction in price is reported and passed on to the Medicare/Medicaid programs; (2) the discount must be made at the time of the sale of the good or service; (3) the discount must be offered for the same item or service that is being purchased or furnished; and (4) the discount must be clearly and accurately reported on the claim form. It is generally interpreted that any “credit” or “coupon” type discount directly redeemable from the seller at the time of service may be protected if they comply with all of the standards of the discounts safe harbor.

4. Managed Care and Private Insurance Plans – If the doctor is providing free services, the patient’s private insurer or managed care plan cannot be billed for the applicable services and the patient should be advised, in writing or otherwise, that he/she cannot submit a claim for those services. If the services are being provided at a reduced rate, the doctor must insure that there is compliance with the terms of the private insurance policy and that there is no violation of CHIR 6.02(29). This Administrative Code provision prohibits the doctor from “negating the co-payment or deductible provisions of a contract of insurance.”

In addition to proportional reduction on billing to the private/managed care provider, the doctor should also be aware of the type of care provided in relation to the billing of the appropriate insurance company. In the event that an established patient or patient with an acute injury is seeking such free or reduced chiropractic services, the doctor may be under an obligation to submit claims to a liability insurer or worker’s compensation insurance company which is not the patient’s private or managed care provider. These types of third-party, indemnification insurers may attempt to subsequently discount all future services of the same or similar nature provided to the claimant (patient). As a result,

the doctor's promotion should clarify indicate that the treatment relates to "new patients only" or patients who are not requiring "acute care which is billable through a third party insurance provider".

B. Free/Reduced Services of Other Healthcare Provider

Another proposed means of marketing involves an offer of reduced or free services from another healthcare provider, such as a massage therapist. Within this context, the promotional services are not those of the licensed doctor, but involve the services of another healthcare provider. There again is no specific prohibition against this type of promotional arrangement provided there is compliance with those conditions relating to a chiropractor's own services and no violation of Wisconsin "fee-splitting" provisions.

The broadest interpretation of fee splitting is applied in the area of medical practices and is stated in Wisconsin Statute §448.08(1m). As extended specifically to chiropractors, Wisconsin Statute §446.04 labels a chiropractor's conduct as unprofessional if the doctor is "splitting or dividing any fees for chiropractic service with any person except an associate licensed chiropractor". In legal opinions on Chapter 448 relating to medical providers, the State's Attorney General has generally determined that the fee splitting provisions are intended to prohibit the doctor from receiving of any fee for sending, referring, or otherwise inducing a person to communicate with another "licensee". The opinion was not directed specifically to massage therapist since they were not licensed at the time of the Attorney General opinions. The opinions also note that the statute is intended to prohibit any licensee under the chapter from receiving any fee for professional services not actually rendered personally or at the direction of a particular physician.

In effect, the Statute prohibits any direct or indirect remuneration between licensed professionals for a patient's services which are not rendered by a particular professional. Remuneration has been broadly interpreted by members of a Wisconsin Chiropractic Association and various counsel with the Chiropractic Examining Board to include all forms of financial arrangements; including rental space arrangements, by and between the chiropractor and another healthcare professional. As a result, the doctor

should insure that there is no inappropriate form of compensation between the massage therapist and chiropractor in return for the promoted, free services of the massage therapist. The application of this fee splitting prohibition would also extend to other third party healthcare providers, such as physical therapists, athletic trainers, and occupational therapists.

C. **No Out of Pocket Charges**

Doctors will occasionally market chiropractic services with a promise of no out of pocket (“NOOP”) charges. This NOOP offering is occasionally extended in return for suitable donations or gifts by a prospective patient. Regardless of the consideration necessary for the NOOP, the acceptability of this type of promotion depends largely on whether the patient has a private insurance plan which allows for the waiver of co-pays, co-insurance, or deductibles.

Generally, the doctor providing services must comply with the provisions of any applicable insurance policy as it relates to the patient’s obligation for payment to the provider. As such, the doctor should carefully review the policy to insure compliance with a prospective patient’s insurance plan. If no plan exists, a doctor is generally able to offer a NOOPE promotion under circumstances where there is compliance with general advertising regulations, as described above.

D. **Gift of Merchandise**

There is no direct Administrative Code provision involving chiropractic regulations which would prohibit a “gift” of merchandise to a patient in connection with chiropractic services. However, there are state and federal provisions relating to consumer protection against untrue, deceptive or misleading advertising. From a state perspective, those provisions are contained in Chapter 100 of the Wisconsin Stat. §100.18 which deals with advertising involving the transfer of goods in connection with providing services.

Given the provisions of this State Statute, it is suggested that a chiropractor promoting or advertising the availability of merchandise as gifts should consider the following items in any such advertising:

1. The advertisement should indicate the approximate retail value of the merchandise.
2. The advertisement should indicate that no purchase of merchandise is required.
3. The advertisement should indicate whether the merchandise will be provided to a prospective patient regardless of whether services are actually offered to that prospective patient. (The proverbial “no obligation required” type language.)
4. The advertisement should indicate that there is no obligation to continue chiropractic services in order to receive the merchandise.

E. **Same Day Discount Promotion**

Clinics may offer a discount to patients who either do or do not have insurance coverage if the patient agrees to pay on the same date of service. The normal fees of the doctor are typically discounted by a percentage if the payment is promptly made. The percentage discount may be extended out over a period of time depending upon how promptly the patient pays for services.

Wisconsin Administrative Code CHIR 6.02(29) prohibits a doctor from negating the co-payment or deductible provisions of a contract of insurance by agreeing to forgive any or all of the patient’s obligations for payment under the contract unless the chiropractor reduces the chiropractor’s claim to the insurance carrier for that patient care by an equal proportion. In addition, the adjusted fee must be accurately reported to any third party payer.

In an opinion informally issued by the Office of the Commissioner of Insurance on February 25, 2003, an insurance examiner noted that the reduced discount charges must be extended to the third party payer/insurer even after the patient reaches his deductible. As a result, it is commonly asserted that any discounts applied for prompt or

early payment by the patient must be properly reported to an insurer and extended through the course of a patient's care even after the deductible limits are met. In all situations, any reductions in the patient's portions of the copayment or coinsurance payment must be similarly extended to the insurance company after accurately reporting the reduced charge for the treatment.

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