CHIROPRACTIC LAW

Volume XIII, Issue I February, 2010

W e l c o m e . . . .

This issue of the Newsletter will focus on a recent ethics opinion addressing a lawyer's responsibility when a doctor's patient gives a third-party (doctor) a "**lien**" on settlement proceeds. This issue will also address a recent topic in the news involving "**flat fee**" **arrangements** with patients.

As with all issues of this newsletter, this issue also **references articles from recent scientific journals** that may be of interest to chiropractors. We will also summarize recent actions taken by the **Chiropractic Examining Board** in our attempt to keep you informed of proposed regulatory changes that may have a significant impact upon practice development.

We welcome any questions you might have relating to legal matters presented in this newsletter. We would be **pleased to add other chiropractors to our e-mail list**. Feel free to call our office to add a doctor's name to that list.

This office is a general and trial practice firm with particular experience in personal injury matters, workers compensation cases, insurance and small business/ contract issues. We **appreciate any referrals** and are always willing to **provide free initial consultation** to prospective clients at any convenient location. Our office is ready to provide legal services on those unique legal concerns affecting chiropractors, their practices, and their patients.

This newsletter is published periodically throughout the year. **Our objective** with this newsletter is to provide better communication between the legal and chiropractic professions so as to improve the chiropractor's understanding of major legal issues and **advance the greater utilization of chiropractic as a primary and effective source of health care**.

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States Lawyers receive ethics opinion on the enforceability of chiropractic "liens"

A significant ethics opinion was recently issued by the Wisconsin State Bars Professional Ethics Committee describing a lawyer's responsibility when a client gives a third-party, such as a chiropractor, a "lien" on settlement proceeds. This opinion was printed in the March issue of the State Bar's magazine and is known as "**Formal Opinion E-09-01**". Wisconsin Chiropractors should become familiar with this important ethics opinion since it regulates the conduct of lawyers who receive settlement proceeds from clients who may be patients of chiropractors under circumstances where the patient signed a **chiropractic "lien"**. Copies of the formal opinion are available from this office, upon request.

This important pronouncement from the ethics committee summarizes a lawyer's ethical obligations following a series of court decisions and a disciplinary

decision which all emanated from the court of appeals landmark decision in a case handled by this law firm. That case, **Riegleman v. Krieg** involved a situation where a personal injury lawyer and his client refused to pay any of the settlement proceeds to the chiropractor after the patient/client had signed a written "doctor's lien". What was unique with this case was the tactical decision made by the treating chiropractor and his attorney to actually sue both the patient and the patient's attorney for noncompliance with the signed fee agreement. The Court of Appeals found that the signed doctor's agreement was a valid contract that created **an assignment of benefits to the treating chiropractor**. Since both the patient and the attorney signed the lien, the Court of Appeals found both the patient and his attorney **jointly and severally liable** for the full amount of the treatment expenses. The prominent personal injury law firm in Milwaukee sued in this case ultimately became responsible for paying the full amount of the treating doctor's bill.

This landmark decision from 2004 ultimately lead to another significant court decision and a disciplinary proceeding involving an attorney. In the court case, **Yorgan v. Durkin**, the Wisconsin Supreme Court rendered a decision in 2006 addressing the situation where the lien form was signed by the patient, but not by the attorney. The patient's attorney was aware of the lien, but **did not sign the form** acknowledging an obligation to eventually pay the chiropractor upon settlement. The lawyer disbursed the entire settlement amount to the client so the chiropractor sued both the patient and the lawyer in reliance on the **Riegleman** decision. The Supreme Court held that the lawyer was not **civilly liable** to the chiropractor as found in the Riegleman decision, based on various policy considerations weighing against holding a lawyer civilly liable to creditors and assignees of a client. As such, the lawyer who did not sign the lien did not have any civil liability to pay the chiropractor.

These two cases ultimately lead to a disciplinary case in which the Supreme Court had to determine whether a lawyer can be **ethically responsible** for his actions; if not civilly liable, when the lawyer does not sign the lien. The Wisconsin Supreme Court eventually addressed this situation in 2007 in the case involving a **disciplinary proceeding against Attorney Barrock**. In that case, a personal injury lawyer acted as a successor counsel for a client in a personal injury action. The client's first lawyer asserted an attorney's lien for a portion of the settlement proceeds based upon a fee agreement with the client. The successor lawyer was aware of the lien but did not make any payment to the prior lawyer when the case settled. In its decision, the Supreme Court determined that a lawyer who is aware of another lawyer's statutory lien on settlement proceeds is obligated under the ethics rules to protect the other lawyer's lien. In analyzing this case within the context of the two (2) court decisions involving chiropractor's liens, the Supreme Court noted that this ethics decision dealt with two different kinds of causes of action. The Court cases addressed a lawyer's civil liability with respect to a third-party (doctor) when the patient gives an assignment of benefits (doctor's lien); while the Barrock Ethics Decision addressed a lawyer's ethical responsibility when the lien is asserted against settlement proceeds.

Based upon these decisions, the States Ethics Committee has now issued a formal opinion which is governed by **Supreme Court Rule 20:1.15**. Under this opinion, a lawyer who receives funds or other property in which a client has an interest (such as a settlement of jury verdict) or which the lawyer has received notice that a third party (chiropractor) has an interest identified by lien, court order, judgment, or contract (typically the chiropractor's lien); the lawyer must promptly notify the client/patient or third party (doctor) in writing, of that settlement if a dispute exists over paying the lien. In addition, the lawyer has a responsibility to hold or otherwise protect the property when both the client and the third party (doctor) claim ownership interest in that property or settlement/judgment proceeds.

The amount in dispute must be held in the lawyer's trust account until there is a **mutual agreement relating to the distribution of those funds** or until the dispute is resolved through legal means. As a result, the opinion states that: **"when a lawyer is notified that a third party has an ownership interest in trust property, such as a personal injury settlement, that falls within one of the four specified categories (lien, court order, judgment, or contract) the lawyer has a duty of prompt notice, delivery, and accounting. If the client disputes that ownership interest, the lawyer must hold the disputed funds in trust pending resolution of that dispute."**

The ethics opinion focuses some attention on whether all written "doctor's liens" are valid contracts. The opinion notes that the validity and enforceability of doctor's liens may vary depending upon the language in the form. The form analyzed in the Riegleman Decision was determined to be a valid contract which created an assignment of benefits entitling the doctor (assignee) the right of contractual enforcement against both the patient (assignor) and the patient's lawyer. This office has assisted chiropractors in drafting **enforceable chiropractic liens** and will be updating the proposed formatting of such a lien based upon this ethics opinion. Copies of the new lien format will be available at this newsletters new website which should go online in Spring/Summer of 2009.

This Newsletter has frequently presented articles on steps which can be taken by chiropractors to enforce their chiropractic liens so as to protect payment of an outstanding bill out of personal injury or workers compensation settlements or judgment. Summarized below is a general **review of the actions** which should be taken in light of this recent ethics opinion:

1. Create a valid and enforceable written "doctor's lien";

2. Have the patient promptly sign the lien in the presence of a witness;

3. Regularly advise the patient of the current extent of all treatment charges/lien balances.

4. Regularly have the patient sign updated amendments to the lien form acknowledging all current balances as reasonable and necessary treatment for their condition.

5. Insure that a copy of the doctor's lien is promptly sent to any legal representative and liability insurance company. Copies should be sent via registered or certified mail with appropriate cover letter.

6. Maintain regular contact with the patient and the legal representative/insurer to determine the status of any negotiations or pending judgments. Such period contacts should remind the legal representative/insurer of the outstanding written lien.

7. Upon notification of settlement or verdict, send further communication to attorney and insurance company. With respect to the insurance company, request that any payment list the doctor as an additional payee. With respect to the attorney, insure that the attorney protects and preserves the doctor's lien as required by this ethics opinion and case law.

8. If the lawyer disburses funds only to the patient and signed the lien, consider filing civil litigation against both the patient and attorney.

9. If the attorney did not sign written lien, seek an attorney to enforce your rights against the funds held in trust by the patient's attorney. Various legal options exist at that time. Throughout these proceedings, keep in mind that there may be

time limits under the statute of limitations for enforcing the written lien.

This valuable ethics opinion provides additional reasons for the chiropractor to properly protect doctor's liens and describes the ethical means available to enforce those liens against patients' attorneys.

Recent news on "flat fee" medical doctor

Articles have recently appeared in the newspaper and on talk radio involving actions taken by a New York medical doctor, **John Muney**. Dr. Muney created an innovative method of servicing patients who could not afford health insurance. Under his plan, **patients would pay a flat fee per month, plus an additional charge per visit**. Under the plan, all of Dr. Muney's services would be broadly covered under this payment plan.

This situation was featured in the news since Dr. Muney was prohibited from engaging in this practice by the New York State Insurance Regulators. The Regulators determined that this **plan constitutes an insurance policy** and could not be offered by the doctor because he was not licensed to sell insurance. Various individuals have argued that this **"flat fee" approach is very similar to the "retainer fee" situation** created by attorneys and other forms of "wellness" type plans developed by various practitioners. There are various approaches available to address this situation which are legally enforceable. New approaches are needed by doctors attempting to address the health care needs of low income and uninsured patients.

It's Regulation Time

- Executive director of the Wisconsin Chiropractic Association (WCA) appeared before the Board during its August Meeting to discuss the legislation it proposed in the newly adopted State Budget Bill. In reviewing that legislation, Mr. Leonard indicated that the WCA sought the reinstatement of the State Chiropractic Exam as a way to insure better quality and ethical care by State Chiropractors. He also indicated that requiring certification of Chiropractic Assistants would "raise the bar for these professionals" so that they would be similar to other assisting other professionals, such as physical therapists. Apparently, the Department of Regulation was not consulted regarding the new certification requirements before the WCA sought the new legislation. Leonard further indicated that the WCA had already planned continuing education requirements for the chiropractic radiology certification which was more expansive than the examination which CRT's are required to take in order to obtain certification.

- During the August meeting, the Board noted that the precertification educational requirements which chiropractic assistants would need to obtain must be approved by either the US Department of Education or the Wisconsin Educational Approval Board.

- During the October meeting of the Board, discussion was held as to whether CT and CRT licensees would be "grandfathered" with regard to the requirements for continuing education. The Board approved a motion to waive the continuing education requirement for the current biennium through December 14, 2010.

- During the October meeting, the Board noted that either the Chiropractic Examining Board or the Department of Regulation had any part in the certification legislation. As such, the Board determined that it did not need to address the certification requirements for Chiropractic Assistants and referred the matter back to the Wisconsin Chiropractic Association and the legislature for

guidelines on the certification process.

- Minutes from the October meeting indicate that the WCA had asked the Board to regulate/"limit" the number of hours per day that a practitioner may participate in continuing education programs. In response to that recommendation, the Board informed the WCA that it would not initiate the rule making process on that issue at this time.

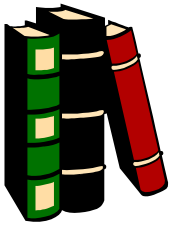
- During the October meeting, the Board responded to correspondence from the National College of Chiropractic regarding a program which would offer a degree in "Chiropractic Medicine". The Board directed a response to the College that a Chiropractor in Wisconsin is not permitted to practice "Chiropractic Medicine".

- Minutes from the November meeting of the Board indicate that the Secretary of the Department of Regulation, Shelia Jackson, made comments to the Board regarding several concerns she has with recent activities of that Board. According to the Minutes, Secretary Jackson commented on her concerns relating to the Board's demand for live patient exams during the testing process, course approval for continuing education, the tone and tenor of communication between existing Board members, and the Board's role in relation to the activities of the Division of Enforcement which imposes discipline upon Chiropractors. During the discussions, legal counsel informed the Board that it was the Department's goal to close all regulatory cases within eighteen (18) months of the case being opened. In addition, the Minutes included substantial documentation to assist Board members in resolving conflict issues and dispute resolution.

- Despite those concerns voiced by the Department's Secretary, the Board went ahead to consider the use of live individuals/"subject" during the State's practical examination. The Board then approved a motion, over the objection of Board Member-Dr. Steven Silverman, to require the use of live subjects during the practical examination for State licensure. In connection with the debate, it was noted that Wisconsin is the only jurisdiction in the Country with a proposed requirement of this nature. The Secretary had expressed concerns regarding liability and the cost of utilizing live individuals as part of the examination process. An individual associated with the WCA spoke during the debate and indicated that he had a "positive experience" relative to the use of live subjects during examinations. It was also noted that Wisconsin ahs the third largest chiropractor per capita population in the US and that the exam was not designed to exclude individuals from becoming licensed chiropractors in Wisconsin.

- Contained within the Minutes of the November meeting was a Stipulation involving discipline of a Chiropractor who had become engaged in a sexual relationship with a patient. The Stipulation is informative since it comments on the nature of the doctor/patient relationship as it was affected by the personal relationship. The doctor initially informed the patient that he could no longer see her professionally and bill for services because of the developing personal relationship. The Stipulation notes that the doctor "mistakenly believed that there would be no further professional relationship" with the patient "if he did not bill for his services and did not keep records of the patient's treatment". It goes on to state that the doctor "mistakenly believed" that if he provided chiropractic services by not billing and maintaining records, the individual would not be regarded as his "patient" and a sexual relationship would not be prohibited. The doctor went on to provide occasional chiropractic care of the patient outside of his office and no longer charged or kept records of treatment. The Stipulation provided for an indefinite suspension after determining that the doctor engaged in a sexual relationship with the patient while still treating that patient and that such conduct constituted a violation of Wisconsin Administrative Code CHIR 6.02(7).

- During the meeting in late January, the Board is expected to address the issue of whether a chiropractor can prescribe low pressure hyperbaric therapy for patients.



Useful Reading

Listed below are several recent research articles which may be of interest to the Wisconsin chiropractor:

✓ A study analyzing the different methods of quantifying flection-relaxation in the clinical features associated with chronic low back pain is presented in the Clinical Journal of Pain, November/December, 2009.

✓ A three dimensional study of the load distribution on neck muscles in lateral, frontal and rear end impacts is presented in Spine, November 15, 2009.

✓ A study analyzing the use of head restraints in the prevention of whiplash injury is presented in Clinical Biomechanics from November, 2009.

✓ Spine Magazine contained an article on dynamic bulging of the intervertebral discs in a degenerative lumbar spine. See issue of November 1, 2009.

✓ A study analyzing the attitudes of North American Orthopedic Surgeons towards chiropractic is presented in Spine, December 1, 2009.

✓ A study analyzing the effects of physical activity and diet upon the risk of Alzheimer Disease is presented in JAMA, August 12, 2009.

✓ A study analyzing the supply and demand of chiropractors in the United States from 1996 to 2005 is presented in Alternative Therapies and Help in Medicine, May/June, 2009.

✓ A double blind study analyzing the effects of low-frequency pulsed electromagnetic field therapy in Fibromyalgia is presented in Clinical Journal of Pain, October 2009.

✓ A study analyzing comparative MRI studies of upper and lower lumbar motion segments in patients with low back pain is presented in the Journal of Spinal Disorders and Techniques, October, 2009.

✓ A study analyzing the use of complementary and alternative medicine in patients suffering from primary headache disorder is presented in Cephalalgia, October, 2009.

✓ A morphology of acute disc herniation is presented in Spine, October 1, 2009.

✓ Recent issues of the Chiropractic Report provided overviews of two (2) subjects relevant to the current healthcare debate. In the September, 2009 issue of the Newsletter, an extensive study analyzes the dramatic changes in the conflicting medical and chiropractic principles and practices of treatment of patients with back pain during the past fifteen years. This issue of the Newsletter reviews a number of major studies demonstrating the changes and attitudes regarding treatment of patients with back pain.

✓ The November, 2009 issue of the Chiropractic Report provides an overview of studies relating to the cost effectiveness of chiropractic care. The Newsletter notes that the mercer report is the "latest in a now compelling line of evidence supporting the conclusion that offering patients of equal access to chiropractic and medical care for spinal problems in a health benefits plan – whether sponsored by an employer or government is cost effective. Studies consistently show higher patient satisfaction with chiropractic treatment.

Nutritional Articles

✓ The cardiovascular benefits of soy supplements is presented in Integrated Medicine: A Clinicians Journal, August/September 2009.

✓ The effects of vitamin D supplements is presented in The American Journal of Medicine, September, 2009.

✓ A study analyzing the effects of vitamin D on skin cancer is presented in The Journal of American Academy of Dermatology, October, 2009.

✓ The British Medical Journal of October, 2009, analyzes the prevention of falls from the use of vitamin D supplements.

✓ The nutritional approaches to the prevention and treatment of gull stones is presented in Alternative Medicine Review, September, 2009.

✓ The effects of vegetarian and vegan diets on bone health is presented in Nutritional Perspectives, October, 2009.

✓ The use of aged garlic supplemented with vitamin B, folic acid and L-arginine retards the progression of atherosclerosis in Preventative Medicine, August/September, 2009.

✓ A study analyzing the effects of complementary and alternative medicine for psoriasis is presented in The Journal of the American Academy of Dermatology, November, 2009.

We welcome your "feedback" and comments about this newsletter – Please call our offices at any time to discuss this newsletter further.