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CHIRO - LEGAL NEWSLETTER

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*This publication is intended to provide general information regarding legal issues and concerns faced by practitioners in the chiropractic arts field who treat patients who have a legal claim for bodily injury. An experienced attorney should always be consulted if you or a patient are faced with a specific legal problem or concern.

What do attorneys expect from a chiropractor who is treating their client for injuries related to a legal claim?

What do attorneys expect from a chiropractor who is treating their client for injuries related to a legal claim?

While it would be fair to state that different attorneys would have different expectations from their client's treating physician, most responsible legal practitioners appreciate the following:

[1] One Medical-Legal Report
[2] Timely Billings
[3] Let the Attorney Know of Significant Developments
[4] The Final Itemized Billing
[5] Chart/"SOAP" Notes
[6] Being Realistic About the Problem Case

1.One Medical-Legal Report:

This document is appreciated when the patient has reached a permanent and stationary status. Most attorneys expect to pay the doctor a fee of $150-250 for this exercise, based upon it length or complexity. Burying the report charge in the billing as a "final evaluation" fools nobody, especially an insurance adjuster, and especially if the final examination fee is excessively high. Paying a doctor for the cost of a narrative report is simply another litigation expense, and the doctor is entitled to be paid for this extra effort.

From a standpoint of goodwill with either the patient and/or the patient's attorney, offering to do the report gratuitously will never find offense with the patient or their attorney, but it is a task that is above and beyond the call of treatment and it is not being unfair for the doctor to request payment for same.

Periodic reports (unless it is a workers' compensation case) are not necessary, increase the overall litigation expenses, and lend themselves to an argument that the treating doctor is more concerned with a litigation posture than actually treating the patient.

Medical-Legal reports should contain a history, findings on examination and radiographically, a diagnosis, a description of the course of treatment, and a prognosis.

If the patient has a pre-existing condition, a prior accident, or a subsequent accident, then there should always be a specific discussion of this in the report.

A failure to address the issues of pre-existing conditions or prior and subsequent similar accidents are the most glaring omission of many reports, in the experience of this law firm. This is even more the case when the treating doctor has treated the patient on prior occasions for a similar condition or injury, and then avoids any mention of it whatsoever in the report. If the case goes into litigation, the doctor's entire records on the patient will most likely be subpoenaed by the defense, and the lack of reference to the prior or subsequent treatment or condition can undermine the credibility of the doctor, the objectiveness of the report, and (if it goes that far) the credibility of his or her testimony on the witness stand as a treating doctor.

The diagnosis should be set forth in straightforward terminology, like "cervical sprain/strain" or "hyper flexion/extension" injury to a specific section of the spine, as opposed to using multiple diagnostic terms for the same condition at the same spinal level.

References to "subluxations of the spine" should be avoided, as insurance carriers tend to view that as an over-dramatization of the patient's condition. Many personal injury cases are evaluated by insurance companies in today's claim environment by computer software programs, and these programs do not recognize subluxations as having any clinical significance whatsoever unless the diagnosis is made by a medical doctor.

Long dissertations in the report on the biokinetics of a hyper-flexion/extension injury to the spine are unnecessary, and tend to make the health care practitioner appear as if they are putting on airs as a biomechanical expert. Stick to the medicine, and not the kinesiology.

Any objective sign supporting the patient's injury should be emphasized in the report, ie.: reversal of the cervical lordosis on radiograph, positive MRI findings, visible bruising or lacerations on examination, positive orthopedic testing, or atrophy of extremities due to chronic radicular problems.

If there was something unusual about the mechanics of the patient's accident that would predispose or evidence the patient's exposure to greater trauma, then that should be commented upon as well, ie.: the patient in a motor vehicle collision is looking sideways as opposed to straightforward in a rearend-type collision, the patient's glasses fall off their face due to the impact forces, articles in the front seat fly into the backseat because of the impact forces, a slip and fall patient was carrying packages at the time they suffered the fall, etc. Getting a complete history, preferably in writing from the patient, is the best way to secure this information and then use it effectively in the body of the report.

Most important of all is the need to send the narrative to the attorney as soon as the patient has gone through the final evaluation exam. Most clients will want to attempt to settle their case as soon as possible after this event, and the attorney needs the report to accomplish this task.

2. <u>Timely Billing:</u>

The doctor should send the attorney a periodic billing every one or two months. The attorney needs to keep abreast of the size of the bill, and keep the insurance company advised of same. Insurance companies set reserves on claims, and the receipt by them of the billing is the basic tool by which they accomplish this. It also allows the insurance company to evaluate the claim as the patient is treating, as opposed to having to review a lot of documents at once in the body of a settlement demand letter from the attorney. Keeping the carrier periodically advised of the nature and extent of medical treatment can

expedite the timeliness of the settlement process, and lets the carrier know that the attorney is on top of the matter.

Never send a bill directly to the adverse party's insurance carrier (unless it is in response to a signed medical authorization or a subpoena) unless it is first cleared with the patient's attorney.

Even in clear-cut liability cases, the amount of the billing and the length of treatment remain the most hotly contested issues in any liability claim. Insurance carriers balk at per diem charges that exceed $100.00 or so, regardless of the number of modalities per day. Excessive diagnostic charges are also frowned upon, especially nerve conduction studies. M.R.I. and CT scan studies that are undertaken without a clear clinical requirement for same (like chronic radiculopathy as opposed to chronic localized back or neck pain) will generally be regarded as unnecessary or an attempt to "pad the bill".

While the insurance company may disregard such diagnostic charges, the patient is left with the expense regardless of the outcome of the case, which may lead to the patient's attorney having to negotiate with the physician about discounting their bill.

3. Let the Attorney Know Significant Developments:

Clients do not always keep their legal counsel aware of significant developments in their treatment progress. Any significant changes in the patient's treatment regimen should be reported by the doctor or his staff to the patient's attorney, ie.; the patient is not keeping scheduled appointments, the patient won't come in for a final evaluation, the patient requires a special diagnostic test like an MRI or a CT scan, or the patient is being referred to a specialist like an orthopedist or neurologist.

4.The Final Itemized Billing:

A fully itemized billing should be submitted with the final medical-legal report. It should refer to each specific modality and evaluation by date, amount, and RVS or CPT code. A billing "summary" that mentions the dates of treatment, without regard to charges per diem, and then ends with a grand total without regard to dates of incurrence, is not as effective or professional-looking. Credits for interim payments from the patient's own insurance should be deleted, if possible. Showing such credits gives the opposing party's carrier the idea that they don't have to offer full value on the bills (under the law, the defendant is only obligated to pay for medical and chiropractic bills if they are "reasonable and necessary", and never in an amount greater than that which was actually paid to reduce the bill by a third party source such as medical insurance).

5.Chart/"SOAP"Notes:

Most insurance carriers will want the doctor's chart or SOAP notes, in addition to the billing and the narrative report. In the experience of this law firm, most chart notes by chiropractors are either not sufficiently documented, and/or are illegible. Keeping detailed and legible chart notes for each and every patient visit can better support the reasonableness and necessity of the treatment, provide additional information for the doctor to include in his narrative report, and defuse defense doctor arguments that some treatment didn't occur or is unsubstantiated due to the lack of chart notes confirming that something indeed happened.

Doctors should seriously consider dictating or having their chart notes typed, as opposed to being recorded solely in longhand. More and more medical physicians are having their chart notes typed, but in the experience of this law firm typed chart notes for chiropractic physicians are a rarity.

6. Being Realistic About the Problem Case:

The biggest issue in motor vehicle injury cases nowadays is the "low impact rearender". The absence of or presence of minimal property damage to the patient's motor vehicle will always be seized upon by the adverse insurance carrier to argue that the impact could not have been that severe and therefore the patient could not have been hurt or hurt that bad. While there are significant scientific and medical studies for the proposition that minimal property damage does not equate with a situation of non-injury, the "low impact" defense is an argument that usually finds ready acceptance by juries, and it is for this reason that most of the major insurance carriers will insist on a jury trial if the case cannot settle. Mercury Insurance Company is probably the biggest exponent of such scorched earth tactics, and the argument that it will cost them more money to try the case is no longer a selling point of any settlement demand.

If you are treating a patient in a "low impact rearender", and the patient has no insurance of their own to apply to the charges, bear in mind that the attorney will nearly always ask the doctor to compromise their bill in order to settle the claim (while probably most attorneys ask for a reduction, regardless of the impact involved, this is the area where it is most likely to arise). While the doctor does not have to agree to a reduction, the refusal to do so may lead to a jury trial (with the doctor being asked to testify and thereby take a half day or more off from their practice), the patient's dropping of their claim, or the attorney declining to take the case further.

This means that the astute doctor, if they are going to offer treatment on such a case, will have to go into it knowing that they probably won't get paid dollar per dollar, or they will have to put the patient on a budget type of treatment. If you utilize a massage therapist as an independent contractor, the patient may have to forego this treatment or pay for it out of pocket as they receive it.

Don't forget that if the attorney asks for a reduction in the bill, that the quid pro quo is to request the attorney to do likewise, and even to provide written evidence that they did so. Damage control should not apply just to the doctor. Many attorneys will be unreasonably resistant to such a proposition, but the doctor should stand their ground, which is easier to do with a signed lien containing an attorney's fees clause, as discussed hereafter.

Another problem case is where the patient delays their initial treatment for a significant period of time following the accident. While there is usually (from the patient's standpoint) a viable reason for this ("I didn't have medical insurance", "I didn't know I could treat on a lien", "I couldn't afford the time off of work", "I was booked for a vacation the day after the accident", etc.), significant lapses of time between the date of the accident and the first treatment gives the carrier the argument that the patient was not hurt, wasn't hurt that bad, or is treating just to build up a claim.

The absolute worst problem is when the motor vehicle accident patient did not have auto insurance on the date of injury. Under Proposition 213, if that is the case then the patient can only be awarded economic damages, ie., reasonable medical bills and loss of wages. They can be awarded nothing for non-economic losses, or what is usually called pain and suffering type damages. If all the patient can get is their medical bills, then even assuming full payment of the bill, after a reduction for attorney fees and legal costs there is not enough to pay the bill in full, by definition. This is not to mention the fact that some patients will not authorize a settlement, regardless of their self-inflicted insurance situation,

unless they also clear part of the recovery in their own pocket.

The bottom line is that the prudent doctor must balance his patient's health care needs against the probability of reasonable payment of the bill in the above scenarios, and then live with the decision.

How Do I Protect My Charges From Non-Payment By the Patient and the Patient's Attorney?

It is an unfortunate reflection on some members of the legal fraternity that they negligently or willfully omit to satisfy the doctor's charges when the case is finally resolved. It is an equally unfortunate reflection on certain patients that their gratitude for professional chiropractic care evaporates once they are looking at actually receiving a recovery. The prudent practitioner should therefore keep the following in mind:

1. Get A Lien!: A signed lien by the patient and their attorney should accompany each injury case, even if the patient has their own medical insurance which will cover at least some of the charges. The lien should contain an attorney fees clause so that if the lien is not honored, the chiropractor can be awarded his attorney fees in any ensuing litigation to enforce it. Without such clear contract language, the prevailing party in the legal action must bear their own attorney fees.

If the attorney represents himself in litigation over the lien (the doctor can sue the attorney, the patient, or both if the lien is not honored after the case is resolved), then even if the attorney is somehow found to be the prevailing party in the litigation, they will not be entitled to an award of attorney's fees in their own name. Attorney fee clauses in contracts do not inure to the benefit of attorneys who represent themselves as litigants in lawsuits.

Follow up with the attorney if he does not timely return the lien. If the patient changes attorneys, have the new attorney sign a lien as well. Beware of attorneys who will not commit themselves to the signing of a lien, or who strike out the attorney's fees clause in the body of same.

Without a signed lien, the attorney is not legally obligated to satisfy the health care provider's charges, even if knowing that the doctor is going to be unpaid.

2. MedicalPayment Coverage: If the patient has medical payment coverage under their own automobile insurance, it can and should be used to help pay the doctor's bill. If the patient represents themselves in their legal claim, then you should insist that your offices send the billing directly to the patient's insurance carrier and receive payment directly.

If the patient has an attorney, then the situation becomes more problematic. Unfortunately, it has been the experience of this law firm that there are some attorneys who charge attorney fees on the client's medical payment coverage, and to accomplish this the attorney will handle the billing exchange between the doctor and the patient's carrier. In the opinion of this law firm, this constitutes the charging of an unconscionable and excessive fee, and is in violation of the Professional Rules of Conduct which govern the practice of law.

If the client/patient is proceeding against the other driver's insurance carrier, then most responsible attorneys have no problem with the doctor directly billing the patient's own carrier, so long as the attorney is kept apprised of the billing on a periodic basis. On the other hand, if the patient is making an Uninsured Motorist claim, such that their own carrier is in an adversarial position to them, then most prudent attorneys will not want the bills to be passed directly from the doctor to the carrier.

This is because the attorney must review all of the billing and records before they pass to the adverse carrier, in order to correct any problems or misunderstandings in same before they reach the attention of the carrier. Assuming the attorney then submits the billing to the patient's own carrier, so long as there is medical payment coverage the doctor should still receive payment therefrom, from the attorney as he receives it, without reduction for "attorney fees". Beware of legal counsel who depart from this procedure, if not for your own sake, then for the sake of your patient.

3. <u>Payment of Expert Witness Fees:</u> If the doctor has to testify at a deposition, arbitration or trial, then he/she is entitled to be paid an expert witness fee. If it is a deposition, the adverse party is liable under the code of civil procedure for a "reasonable" expert witness fee, excluding travel and preparation time, the latter of which is the financial responsibility of the patient and their attorney. $300-500 per hour would probably be considered a reasonable expert witness fee, with a two hour minimum. The doctor should insist at the start of the deposition that a check will be received from opposing counsel at the conclusion of the deposition. Most doctors prefer to give the deposition in their office, and if the opposing attorney is reluctant to do this then the doctor should talk to the patient's attorney to see if the attorney can persuade defense counsel to do it in the doctor's office.

Expert witness fees for an arbitration or trial are the responsibility of the patient and their attorney. The prudent doctor will request payment in advance, for two reasons: (1) to avoid the possibility of an unsatisfactory outcome where there is not enough money to cover the expert witness fee and the treatment charges, and (2) to avoid giving the defense attorney the argument that the doctor's trial testimony is biased because a favorable outcome for the plaintiff is the only way the doctor will recover their expert witness fee.

The testifying doctor should bring their file with them to court, and have it on the witness stand to refer to as necessary. However, prolonged "paper-shuffling" in the presence of a jury before responding to a question does not come across well as to the doctor's familiarity with the case.

Any plaintiff's attorney who won't sit down with the treating doctor before the trial and pay him/her for an hour's worth of time to go over the scope of the trial testimony is not doing their homework and is not rendering the client any cost saving benefits.

The testifying doctor should also review and be familiar with the medical records of any other providers who have seen or treated the patient, including any physician hired by the defense to perform the so-called "independent medical examination".

Some attorneys will not provide related medical records and independent medical examination reports on the patient to the chiropractor, either because they are not paying attention to detail or they are trying to maintain "cost containment" on litigation expenses. The former omission

is inexcusable and the latter omission is penny-wise but pound foolish. Don't be afraid to ask the patient's attorney if such records exist or are relevant, before you prepare the narrative report, and definitely before you face a deposition or trial testimony.

4. <u>Beware The Patient Who Handles Their Own Legal Claim:</u> Unless the injury is relatively minor, most personal injury claimants will do better with an attorney than without, even after the payment of attorney fees.

Notwithstanding this, some patients will eschew the use of an attorney. Their only defensible reason for doing so will be to try and save a buck. Such ill-ventured frugality does not speak well for the doctor's chances of getting paid when the legal claim is finally resolved by the patient, who will probably view the doctor's charges with the same trepidation as they do with attorney fees.

If the doctor cannot persuade the patient to seek competent legal counsel, then as a guarantee of payment they should have the patient sign a specially worded medical lien putting the adverse insurance company on notice that the doctor's name is to be added as an additional payee on any check or draft issued in settlement on the claim. In this procedure, the doctor can then visit the bank with the patient, endorse the check, and receive payment. Alternatively the doctor can trade their endorsement on the check to the client in exchange for payment of the bill by cash or a certified cashier's check. Without an appropriately worded medical lien, the doctor is totally at the mercy of the patient for payment from the settlement funds.

While some insurance carriers may balk at adding the doctor's name as a co-payee to the settlement check, should they refuse to do so after being put on notice of the doctor's lien rights, and the patient then refuses to honor the bill thereafter, then the doctor may have a legal claim against the insurance company for payment of the bill under the legal theories of interference with contractual relations or interference with prospective economic advantage.

If you desire a complimentary copy of such a specially worded medical lien, with a model form letter to an insurance company, simply forward a written request to these offices and enclose a stamped return envelope.

In Conclusion ...

Knowing what insurance companies look for in the evaluation of a bodily injury claim and how to help the patient's attorney satisfy those expectations is the best way to ensure the payment of your bill and the satisfactory resolution of the patient's claim.

Especially with first time patients, who are likely to translate the outcome of their legal claim with the outcome of their chiropractic treatment – if the treatment has been helpful <u>and</u> the claim has been satisfactorily resolved, then the doctor has a satisfied patient, the attorney has a satisfied client, and both professionals will be the recipient of future referrals from the person that they were of assistance to. Helping the patient to present their claim in cooperation with their attorney is the best way for the doctor to help his or herself.

The Law Offices of Lawrence A. Strid have over 32 1/2 years of legal experience in assisting personal injury victims involved in vehicular accidents, assaults, dog attacks, products liability, premises cases, and professional malpractice.