

State of California  
Board of Chiropractic Examiners

Guidebook for Expert Consultants



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# TABLE OF CONTENTS

<b>SECTION I</b>	INTRODUCTION TO THE CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS
<b>SECTION II</b>	ELIGIBILITY CRITERIA AND COMPETENCY REQUIREMENTS FOR EXPERT CONSULTANTS
<b>SECTION III</b>	DEFINITIONS
<b>SECTION IV</b>	GUIDELINES FOR EXPERT CONSULTANTS <ul style="list-style-type: none"><li>Frequently Asked Questions</li><li>Instructions</li><li>Immunity From Liability</li><li>Representation of Legal Counsel</li><li>Confidentiality and Conflict of Interest</li><li>Investigations And Disciplinary Process</li><li>Stages Of Expert Review<ul style="list-style-type: none"><li>A. Investigative Review</li><li>B. Hearing Testimony</li></ul></li><li>Section 317 re Unprofessional Conduct</li><li>Types Of Evaluations<ul style="list-style-type: none"><li>1. Quality Of Care</li><li>2. Sexual Misconduct</li><li>3. Excessive Treatment Violations</li><li>4. General Unprofessional Conduct</li></ul></li></ul>
<b>SECTION V</b>	THE OPINION ITSELF <ul style="list-style-type: none"><li>A. Contents</li><li>B. Violations vs. Mitigation</li><li>C. Injury Is Not Essential</li><li>D. Evaluation And Credibility</li><li>E. Assess Standard As Of Time Of Violation</li><li>F. Objectivity</li></ul>
<b>SECTION VI</b>	COMPENSATION <ul style="list-style-type: none"><li>A. Initial Evaluation</li><li>B. Consultation With Deputy Attorney General</li><li>C. Testimony At Hearing</li><li>D. Miscellaneous Expenses</li></ul>
<b>SECTION VII</b>	SAMPLE EXPERT OPINION
<b>SECTION VIII</b>	SERVING AS AN EXPERT CONSULTANT

# Section I

## INTRODUCTION

The State Board of Chiropractic Examiners (Board) is an administrative agency created by the Chiropractic Initiative Act of 1922. The Board's paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care. Among its many duties, the Board investigates and disciplines chiropractors for unprofessional conduct to protect the public from incompetent, negligent, dishonest or impaired chiropractors. Your role as an expert consultant is extremely important in identifying whether a deviation from the chiropractic standard of care or unprofessional conduct has occurred and in serving as an expert consultant at any hearing that may result from your expert assessment.

These guidelines introduce you to the administrative disciplinary process and define the Board's expectations of the expert review you have been asked to provide, your responsibilities, your legal protection, your compensation, and your testimony if necessary.

As an expert consultant, which is the first stage of this process for yourself and perhaps the only stage (besides attendance at mandatory Expert training), you will be provided with the complaint, patient records, and certain other information, including any interviews with patients, subsequent treating chiropractors or other licensed health care providers, other witnesses, and any statements of the chiropractor who is the subject of the investigation. You will NOT be provided a copy of any report prepared by another Board expert consultant to avoid the appearance of tainting your evaluation. You will be asked on the basis of your review of the documentation provided to render your professional assessment of the care rendered by the subject chiropractor to the patient or patients involved and other conduct relating to the practice of chiropractic.

You are neither asked, nor should you try, to determine what discipline should be imposed upon the subject chiropractor. Your opinion must be based solely upon the information provided to you by the Board; however, whenever possible you should refer to chiropractic texts and other authoritative reference materials that help define accepted standards. Your opinion should be based upon your knowledge of the standard of care or compliance with professional conduct standards, based upon your education, training, and experience and not upon the manner in which you personally practice chiropractic care.

If you have prior knowledge of the subject chiropractor or if you feel you cannot be objective in your assessment for any other reason, please immediately contact the Board representative who sent you the materials. Also, if you are in need of any additional documents or the records provided to you appear incomplete, please contact the Board representative who will attempt to resolve the issue.

**In some cases, you will be required to testify in person as to your opinions in administrative hearings held before an administrative law judge and be subject to**

**cross-examination by the respondent regarding your opinions. In these instances, you will be considered an expert witness and will be required to make time to meet with the Deputy Attorney General (DAG) assigned to prosecute the matter in advance of the hearing to prepare for the hearing.**

The Board appreciates your cooperation in lending your expertise and experience to accomplish this important work. The Board recognizes that you play a vital role and your objective performance will reflect well on the Board and the profession.

## **Section II**

### **CRITERIA/COMPETENCY REQUIREMENTS FOR EXPERT CONSULTANTS**

Effective September 2014, Board Expert Consultants must certify or declare under penalty of perjury on the Expert Consultant application for appointment that he or she:

- A. Has not been employed by any insurance company or chiropractic review service within two (2) years prior to their appointment or use as a Board expert.
- B. Has experience providing written review and evaluation of the professional competence, standard of patient care, or conduct of licensees in relationship to the requirements of law and regulations.
- C. Has an active California license in good standing with no statement of issues or prior or pending disciplinary actions, which may deem or impact that license status as revoked, restricted, interim suspended, suspended, or probationary in nature from the state licensing board.
- D. Has possessed an active California license for a minimum of five (5) years.
- E. Has not sustained a misdemeanor or felony conviction related to the practice of chiropractic, including crimes of fraud or moral turpitude.
- F. Has experience providing Expert witness testimony in court.
- G. Will not use their status as an Expert to promote themselves in advertisements.
- H. Will not use the Board as a reference, or in any way indicate that they are endorsed by the Board.
- I. Will not state nor imply that they are an employee or representative of the Board other than when they are testifying as a witness on a case for which they are acting in the capacity of an expert.

## **Section III**

# **DEFINITIONS**

The following terms are used throughout this guide and have specific legal meaning:

**“Negligence”** is the failure to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful chiropractors would possess and use in similar circumstances.<sup>1</sup>

If a chiropractor is a specialist, then “negligence” is the failure to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful chiropractic specialists (in the same specialty) would possess and use in similar circumstances.<sup>2</sup>

Under California law, a “single act of negligence” does not constitute grounds for discipline of a professional license, however, “repeated acts of negligence” does constitute grounds for discipline of a professional license.

**“Standard of Care”** and **“Standard of Practice”** are terms used in evaluating the negligence of a chiropractor. The term “standard of care” and “standard of practice” are used interchangeably, however, for purpose of this document and your report, please use the term “standard of care.” The standard of care requires that the chiropractor exercise that degree of skill, knowledge, and care ordinarily possessed by members of his or her profession under similar circumstances.<sup>3</sup>

**“Gross Negligence”** an extreme departure from the ordinary standard of care.<sup>4</sup>

**“Incompetence”** means an absence of qualification, ability or fitness to perform a prescribed duty or function. Incompetence is distinguishable from negligence in that one may be competent or capable of performing a given duty but was negligent in performing that duty.

Thus, a single act of negligence may be attributable to remissness in discharging known duties, rather than incompetence respecting the proper performance.<sup>5</sup>

**“Scope of Practice”** refers to the range of services that can be provided by a chiropractor under the Chiropractic Initiative Act. The scope of practice is found in Sections 7 and 16 of the Initiative Act, Section 302 and 306 of the regulations, and in several California court decisions.

**“Administrative Procedure Act”** is the California law that governs all Board disciplinary cases against a chiropractor.

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<sup>1</sup> California Civil Jury Instructions CACI 501, 2003.

<sup>2</sup> California Civil Jury Instructions CACI 502, 2003.

<sup>3</sup> Barris v. County of Los Angeles, 20 Cal.4<sup>th</sup> 101, 83 Cal.Rptr.2d 145 (1999).

<sup>4</sup> Kearl v. Board of Medical Quality Assurance, 189 Cal.App3d 1040 (1986); City of Santa Barbara v. Superior Court, 41 Cal.4<sup>th</sup> 747, 62 Cal.Rptr3d 527 (2007).

<sup>5</sup> Kearl.

**“Administrative Law Judge” or “ALJ”** presides at all administrative hearings before the Board.

**“Deputy Attorney General” or “DAG”** is the attorney that represents the Board’s Executive Officer who is the “complainant” in all disciplinary cases. DAGs are employed by the California Attorney Generals Office.

## **Section IV**

# **GUIDELINES FOR EXPERT CONSULTANTS**

### ***FREQUENTLY ASKED QUESTIONS***

#### **1. Will I have to testify?**

Possibly. If the case is submitted for disciplinary action and a stipulated agreement is not reached, you will be called upon to provide expert testimony before an ALJ. However, the majority of cases are settled before a hearing is held.

#### **2. How much will I be paid?**

The expert is paid \$100 per hour for record review and a maximum of \$600 per half day and \$1200 per full day of testimony at an administrative hearing. You will also be compensated for other expenses you may incur, (i.e., parking, postage or travel, if applicable) in accordance with state law (effective July 1, 2008).

#### **3. How soon will I be paid?**

Generally speaking you should receive payment for your services within 4 to 6 weeks following receipt of your billing for services rendered. Incomplete forms will delay payment so be sure to provide your taxpayer identification number and signature. It is also important to complete the Payee Data Record form that is required by the IRS and return it with the statement.

#### **4. Can I be sued for expressing my opinion and if I am sued who will represent me?**

Yes. However, **Civil Code section 43.8** provides immunity from civil liability for expert consultants. If you are sued, either the Attorney Generals Office or outside counsel in the event of the conflict with the Attorney Generals Office will represent you.

## **5. Should I do research?**

Yes, you should consult chiropractic texts and other authoritative reference materials that help define accepted standards and are encouraged to do so. However, it is important that you do not attempt to conduct your own investigation of the facts in the case.

## **6. How soon do I need to complete the review and provide an opinion?**

The Board expects reports to be completed within 30 days of assignment; however, this may vary depending on the volume and complexity of the case. In a complicated case involving multiple patients, your review could extend beyond our 30-day time frame in which you are expected to notify the Board representative. Keep in mind that the chiropractor you are reviewing will continue to see patients until a determination is made by the Board. If this chiropractor poses a danger to patients, it is vital that you provide your opinion expeditiously so that the Board can move rapidly to protect the public.

## **7. Who will see my report?**

The Subject chiropractor will be provided with a copy of your report as a part of legal discovery if an accusation is filed. In addition, if the case goes to a hearing, your report may be introduced into evidence.

## **8. Can you give me a copy of a sample report?**

Yes, please see Section VII.

## **9. What is the difference between negligence and gross negligence?**

See Definitions Section for full explanation.

## **INSTRUCTIONS**

- A.** Ensure that records, reports and materials provided for your review are kept confidential and secure.
- B.** Review the case and determine if there is any reason you cannot provide an opinion because of a professional or personal relationship with any subject, witness, or patient.
- C.** If for any reason you determine that you cannot complete the review or provide an opinion, please let us know immediately and the case will be reassigned.
- D.** Keep track of dates and hours spent reviewing.
- E.** Do not mark on the copy of the records provided to you.
- F.** Do not contact the Subject or patients.

- G. Do not discuss the case with outside third parties. You may use an office assistant or transcriptionist to assist you in the preparation of your report.
- H. Do not perform any investigation on your own, i.e., attempting to obtain additional records or interviewing participants in the case. If you feel the file is incomplete, please contact the enforcement staff at the Board.
- I. Do not offer any recommendation about the appropriate disciplinary action for the Subject.
- J. Do not make a copy of the records.
- K. Do not destroy any of the materials provided to you.
- L. Remember to date and sign your opinion.
- M. Enclose a current curriculum vitae with your report. Fourteen (14) days before the hearing, if a hearing is scheduled, you need to send an updated curriculum vitae to the DAG assigned to the case.
- N. When your review is completed, please return your report along with the documents unmarked and in date-stamped order, confidentiality and conflict of interest agreement, statement for services, and current curriculum vitae. It is necessary for you to retain the report until the case is final in the event you need to review it for either a meeting with the DAG or in preparation for a hearing.
- O. If you have questions or concerns, contact the Board's enforcement manager or Executive Officer.

## **IMMUNITY FROM LIABILITY and LEGAL REPRESENTATION**

**Civil Code Section 43.8** states, in pertinent part:

“ . . . there shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person on account of the communication of information in the possession of such person to any hospital, hospital medical staff, . . . professional licensing board or division, committee or panel of such licensing board, the Senior Assistant Attorney General of the Health Quality Enforcement Section appointed under section 12529 of the Government Code, peer review committee, . . . when such communication is intended to aid in the evaluations of the qualifications, fitness, character . . . of a practitioner of the healing arts . . . . ”

This statutory provision provides for immunity from civil liability for expert consultants and expert witnesses acting within the scope of their duties in evaluating and testifying in cases before the Board. Should any problems arise in this area or if you are served a lawsuit related to your participation in this process, you should immediately contact Board staff. Failure to do so may result in a default decision being taken against you.

Section 306.2 of the regulations provides that the Board through the Attorney Generals



Office shall provide legal representation under specified conditions. This section reads:

“If a person, not a regular employee of the board, is hired or is under contract to provide expertise or to perform investigations for the Board of Chiropractic Examiners in the evaluation of the conduct of a licensee or administration of a board examination, and such person is named as a defendant in a civil action directly resulting from opinions rendered, statements made, investigations conducted or testimony given, the board shall provide for representation required to defend the defendant in that civil action. The board shall not be liable for any judgment rendered against that person. The Attorney General shall be utilized in those civil actions.”

## **CONFIDENTIALITY AND CONFLICT OF INTEREST**

As an expert consultant to the Board, you must safeguard the confidentiality of the records delivered to you for review and protect the identity of the patients, complainants and chiropractors involved. If you have prior knowledge of the subject chiropractor or if you feel you cannot be objective in your assessment for any other reason, please immediately contact the Board representative who sent you the materials. You will be given materials to review, including relevant patient records and investigative materials. You are obligated not to divulge any information contained in these materials to other parties. The obligation to preserve confidentiality also extends to any assistant you may utilize in the preparation of your report. You will be required to sign a confidentiality and conflict of interest agreement form on each case you review.

## **INVESTIGATIONS AND THE DISCIPLINARY PROCESS**

The Board is responsible for investigating and bringing disciplinary action against the professional licenses of chiropractors suspected of violations of the Chiropractic Initiative Act of California, the California Code of Regulations, and other applicable laws and regulations.

The Board's hearings are conducted in accordance with the Administrative Procedure Act (**Government Code § 11150 et seq.**). Its investigations are conducted pursuant to **Government Code sections 11180 through 11191**.

The Board, through the Executive Officer and investigative staff, identifies and takes appropriate action against chiropractors who commit unprofessional conduct, including acts or omissions evidencing repeated negligence, gross negligence, or incompetence, practicing under the influence of drugs or alcohol, practicing while mentally or physically impaired affecting competence, fraudulently billing patients or health insurance companies, clearly excessive treatment or use of diagnostic procedures, altering or creating false records, sexual misconduct, criminal acts and other conduct that endangers the health, welfare, or safety of the public.

The Board Members are not involved in the investigatory, expert review, or decision as to whether an accusation should be filed.

Consequently, you should NEVER contact any Board Member regarding any aspect of any case even after you have completed your opinion.

The purpose of the disciplinary process is not to punish as in the criminal justice system but to protect California consumers by ensuring that quality chiropractic care is provided by licensed chiropractors.

Standard investigations in quality of care cases include obtaining all relevant patient records, conducting interviews with witnesses, including the affected patient or patients, and obtaining any additional information. In insurance fraud cases, billing records and insurance claims are obtained. At times, information is found that goes far beyond the original complaint. After the documentary and interview evidence is obtained, the case is reviewed by the Board to determine if an evaluation by an expert consultant is necessary. If so, Board staff sends the case to an expert consultant who is qualified to render an opinion as to whether a departure from the standard of care occurred.

After the expert consultant submits his or her report, the Board makes a determination if the matter should be submitted to the Attorney General's Office to determine whether sufficient evidence exists to file an accusation against the subject chiropractor for unprofessional conduct.

If it is determined that sufficient evidence exists, an accusation is prepared and served upon the subject chiropractor, and he or she is given the opportunity to contest the charges.

In a majority of cases, the case is settled between the parties. However, if the case is not settled, a hearing is held before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings. The hearing may last from one day to several weeks, depending upon the complexity of the case and the defense. Both sides may call expert witnesses to support their views. This makes it incumbent upon the expert consultant to ensure the utmost care is taken when reviewing cases. The ALJ hears evidence against and for the subject chiropractor and renders a proposed written decision that is submitted to the Board Members for adoption as its decision in the matter. If the Board members adopt the proposed decision, it becomes final; if the Board members do not adopt the proposed decision, the administrative record is ordered including the transcript from the hearing, the exhibits, and other documents. The Board members then decide the case themselves based upon the administrative record and the disciplinary guidelines. The Subject chiropractor may petition for reconsideration if dissatisfied with the decision or proceed to take a writ of mandate to the appropriate Superior Court contesting the decision.

## **STAGES OF EXPERT REVIEW**

### **A. Investigative Review**

After the investigator assigned to a case has completed his or her investigation, the case is reviewed by a Board reviewer who then makes a recommendation as to whether or not a full expert evaluation is warranted. If the Executive Officer agrees that an expert evaluation is necessary, that is where you come into the process.

You, the expert consultant at this point, will be contacted by the Board and will be

asked to review the case. Information will be provided to you that should be sufficient for you to determine whether you will be able to devote the necessary time to the matter and prepare an expert report in a timely manner. If you agree to review the case, you will be provided with the case file that includes all necessary documents, statements, and other evidence to render your opinion. Your review should include an assessment of all relevant aspects of chiropractic care with strict attention to information provided in the file. If you should require any other information or something is not clear, you should contact the Board's representative, and every effort will be made to provide you with the information necessary.

You must remember that at this stage, the review is primarily concerned with whether the facts as presented constitute unprofessional conduct. You are not asked to be an advocate for the Board, the chiropractor, or the patient. Your evaluation should be objective, well reasoned and impartial because it is the primary factor in deciding whether the case is submitted for disciplinary action.

The Board is not interested in using your services to advocate a position, make an example of a licensee or punish a licensee. The Board only wants you to provide an objective evaluation so that it can determine if public protection warrants the filing of disciplinary charges. Your evaluation may also result in the issuance of a lesser enforcement action such as a citation.

## **B. Hearing Testimony**

Once the case is submitted for disciplinary action, and an accusation is filed, you may be called upon to provide expert testimony, should the case go to a hearing. The majority of cases are settled before a hearing is held.

If a case is set for hearing, the Deputy Attorney General (DAG) assigned to prosecute the case will meet with you, perhaps several times, to review your expert opinion. You will be asked to educate the DAG in the details of your opinion and to assist in the presentation of that opinion in the clearest and most concise manner possible. You may also be asked to assist in reviewing the opinions of the opposing experts and in preparing cross-examination questions for them.

During the hearing, you will be called as the Board's expert witness to testify concerning your opinion and the reasons for your opinion. You will be asked questions by the DAG and by the subject chiropractor or his or her attorney if the chiropractor is represented by counsel. The total time taken for your testimony at the hearing varies with the complexity of the case. The subject chiropractor will have been provided with copies of any written opinions you have submitted during the investigative stage of the case. You should always provide truthful testimony even if it is contrary to the interests of the Board. You may also be asked to evaluate the opinions expressed by respondent's expert at hearing because oftentimes respondents' experts fail to prepare a written opinion.

## REGULATION SECTION 317 “UNPROFESSIONAL CONDUCT”

The following are the primary laws that are used when an expert consultant is evaluating a case. However, you should be familiar as an expert in the field with all applicable laws relating to the practice of chiropractic.

Section 317 referred to above under “Quality of Care” includes other acts that constitute unprofessional conduct. This section reads:

The Board shall take action against any holder of a license who is guilty of unprofessional conduct which has been brought to its attention, or whose license has been procured by fraud or misrepresentation or issued by mistake.

Unprofessional conduct includes, but is not limited to, the following:

- (a) Gross negligence;
- (b) Repeated negligent acts;
- (c) Incompetence;
- (d) The administration of treatment or the use of diagnostic procedures which are clearly excessive as determined by the customary practice and standards of the local community of licensees;
- (e) Any conduct which has endangered or is likely to endanger the health, welfare, or safety of the public;
- (f) The administration to oneself, of any controlled substance, or the use of any dangerous drug or alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license;
- (g) Conviction of a crime which is substantially related to the qualifications, functions or duties of a chiropractor;
- (h) Conviction of any offense, whether felony or misdemeanor, involving moral turpitude, dishonesty, physical violence or corruption. The board may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if such conviction was of an offense involving moral turpitude, dishonesty, physical violence or corruption. A plea or verdict of guilty, or a plea of nolo contendere is deemed to be a conviction within the meaning of the board’s disciplinary provisions, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code. The board may order a license to be suspended or revoked, or may decline to issue a license upon the entering of a conviction or judgement in a criminal matter.
- (i) The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any dangerous drug or alcoholic beverage, or any combination of those substances
- (j) The violation of any of the provisions of law regulating the dispensing or administration of narcotics, dangerous drugs, or controlled substance;
- (k) The commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of the individual’s activities as a license holder, or otherwise;
- (l) Knowingly making or signing any certificate or other document relating to the

- practice of chiropractic which falsely represents the existence or nonexistence of a state of facts;
- (m) Violating or attempting to violate, directly or indirectly, or assisting in or abetting in the violation of, or conspiring to violate any provision or term of the Act or the regulations adopted by the board thereunder;
  - (n) Making or giving any false statement or information in connection with the application for issuance of a license;
  - (o) Impersonating an applicant or acting as a proxy for an applicant in any examination required by the board for the issuance of a license or certificate;
  - (p) The use of advertising relating to chiropractic which violates section 17500 of the Business and Professions Code;
  - (q) The participation in any act of fraud or misrepresentation;
  - (r) Except as may be required by law, the unauthorized disclosure of any information about a patient revealed or discovered during the course of examination or treatment;
  - (s) The employment or use of persons known as cappers or steerers to obtain business;
  - (t) The offering, delivering, receiving or accepting of any rebate, refund, commission, preference, patronage, dividend, discount or other consideration as compensation or inducement for referring patients to any person;
  - (u) Participation in information or referral bureaus which do not comply with section 317.1 of the regulations.
  - (v) Entering into an agreement to waive, abrogate, or rebate the deductible and/or co-payment amounts of any insurance policy by forgiving any or all of any patient's obligation for payment thereunder, when used as an advertising and/or marketing procedure, unless the insurer is notified in writing of the fact of such waiver, abrogation, rebate, or forgiveness in each such instance. **(Subdivision contains actual waiver language)**
  - (w) Not referring a patient to a physician and surgeon or other licensed health care provider who can provide the appropriate management of a patient's physical or mental condition, disease or injury within his or her scope of practice, if in the course of a diagnostic evaluation a chiropractor detects an abnormality that indicates that the patient has a physical or mental condition, disease, or injury that is not subject to appropriate management by chiropractic methods and techniques. This subsection shall not apply where the patient states that he or she is already under the care of such other physician and surgeon or other licensed health care provider who is providing the appropriate management for that physical or mental condition, disease, or injury within his or her scope of practice.
  - (x) The offer, advertisement, or substitution of a spinal manipulation for vaccination.

## TYPES OF EVALUATION

Because there are many possible violations of the laws governing the practice of chiropractic, evaluations of cases vary with the subject matter of the possible unprofessional conduct. Listed are the major kinds of evaluations you may be asked to prepare.

## 1. Quality of Care

These cases involve the quality of care rendered to a patient or patients. The general question asked in this context is whether the subject chiropractor's treatment of the patient constituted gross negligence, repeated acts of negligence, or incompetence. Often, it is difficult to distinguish which of these definitions fits the treatment rendered and sometimes, the conduct described exhibits both incompetence and negligence or gross negligence for a given patient's treatment.

One departure from the standard of care is not considered unprofessional conduct unless it is an extreme departure. Your evaluation should state whether in your opinion it is negligence, repeated acts of negligence, gross negligence or incompetence. You may have situations where the subject's conduct constituted both negligence and incompetence. You should explain this in your report.

The determinations are often difficult to make, but that is why you are called upon to render your expert opinion. With your knowledge of the standards of care within the chiropractic community, especially in your area of expertise, we are asking you to render a professional opinion based upon your education, knowledge, experience, and training.

## 2. Sexual Misconduct

Section 316 of the regulations prohibits certain sexual acts both on the premises of a chiropractic business and with patients and other individuals. This section reads:

“(a) Every licensee is responsible for the conduct of employees or other persons subject to his supervision in his place of practice, and shall insure that all such conduct in his place of practice conforms to the law and to the regulations herein.

(b) Where a chiropractic license is used in connection with any premises, structure or facility, no sexual acts or erotic behavior involving patients, patrons or customers, including, but not necessarily limited to, sexual stimulation, masturbation or prostitution, shall be permitted on said premises, structure or facility.

(c) The commission of any act of sexual abuse, sexual misconduct, or sexual relations by a licensee with a patient, client, customer or employee is unprofessional conduct and cause for disciplinary action. This conduct is substantially related to the qualifications, functions, or duties of a chiropractic license.

This section shall not apply to sexual contact between a licensed chiropractor and his or her spouse or person in an equivalent domestic relationship when that chiropractor provides professional treatment.”

In this area you are asked to assess, based upon the standard of care, whether a chiropractor's relationship or conduct with a patient constitutes unprofessional conduct based on California law and the facts presented in each case.

In evaluating these cases, you are not asked to evaluate the CREDIBILITY of the complaining witness or whether the alleged statements or actions actually occurred.

This will be determined at the hearing, if one is held. For purposes of your review, you are to assume that the complainant's account of the doctor's conduct is true.

While some actions clearly constitute sexual misconduct, there are cases in which you will need to consider whether the conduct was appropriate because the doctor used an acceptable diagnostic or treatment technique.

In these cases, your evaluation should address whether the diagnostic or treatment technique is appropriate and whether the doctor used the diagnostic or treatment technique in an appropriate manner with the patient.

### **3. Excessive Treatment Violations**

**California Code of Regulations Section 317** states that the "administration of treatment or the use of diagnostic procedures which are clearly excessive as determined by the customary practice and standards of the local community of licensees..." In this type of case, you are asked to state the standard of the local community of licensees concerning the number of chiropractic visits necessary to treat a certain condition and the kind and extent of diagnostic procedures necessary to diagnose the condition. Excessive treatment may also constitute gross negligence or repeated acts of negligence. The insurance industry does NOT set the standard of care, therefore whether or not an insurance company considered treatment to be excessive is irrelevant.

### **4. General Unprofessional Conduct**

**Section 317** states that a chiropractor may be disciplined for unprofessional conduct, which includes, BUT IS NOT LIMITED TO certain enumerated conduct. Any unprofessional conduct which is not set forth as such in the Chiropractic Initiative Act, governing regulations, or other statutes covering the practice is referred to as "general unprofessional conduct." General unprofessional conduct reflects conduct which demonstrates an unfitness to practice chiropractic that does not fit into other categories.

In a case entailing ethical violations, you are asked to set forth the standard of conduct for a chiropractor in the circumstances described, and perhaps the underlying ethical code, and then you are asked to describe in what manner the subject chiropractor violated that standard.

## Section V

### THE OPINION ITSELF

There are Sample Expert Reports appended to this booklet at Section VI. Please refer to those when writing your report, but remember they are guidelines only, and your case and the contents of your report will necessarily differ.

#### A. Contents

Your expert report should contain:

- 1) An accurate listing of the records and other documents sent to you –for review. Additionally, all of the documents provided for your review will be stamped with a sequential number (“Bates Stamped.”) For example, if you receive a five-page investigation report and 50 pages of patient records, each one will contain a page number stamped at the bottom of the page starting from 1 to 55. You should refer to these numbers whenever you reference a document in your evaluation. This will assist the DAG who will later review your report. It will also ensure that your testimony before an administrative law judge will be organized and time-efficient.
- 2) The substance of the opinion, which should consist of the following for each patient, if there is more than one patient:
  - a. Do a summary of the patient’s case, including relevant patient history and presenting complaint. Describe the subject chiropractor’s treatment, and any subsequent treatment. Summarize the facts of the treatment and the findings.
  - b. State the standard of care for the treatment of such a patient. Remember to state the standard of care for the community of chiropractors, not just the way in which you personally would treat such a patient. The standard reflects what a reasonable chiropractor would do under the circumstances.
  - c. Specifically describe any departures from the standard of care and explain why. Each finding of a departure from the standard of care should be specifically described.
  - d. State your opinion as to whether the overall care of this patient constitutes no departure, a departure, an extreme departure, a lack of knowledge or ability, excessive treatment, excessive use of diagnostic procedures, sexual misconduct, and so on, or any combination. You must also state the basis for each opinion.



## **B. Violation vs. Mitigation**

In writing your report, you are asked to summarize the treatment rendered and the findings of the subject chiropractor. In preparing your summary, you may have identified certain factors that could have hampered accurate treatment. Please remember that it is your obligation to state the standard of care and the departure therefrom.

Mitigation is defined as an abatement or diminution of penalty or punishment imposed by law. Although there are instances where mitigating circumstances are relevant to the imposition of any penalty, those factors will be considered by the trier of fact. Therefore, you are asked to refrain from commenting whether the subject chiropractor should or should not be punished because of certain mitigating or aggravating factors.

The actual discipline to be imposed on the chiropractor is the province of the trier of fact, and you are not expected to prescribe or recommend any discipline in the case.

## **C. Injury Is Not Essential**

The primary focus in an expert review is whether there has been a departure from the standard of care of chiropractic, not whether the patient has been injured. Although the potential for injury because of the violation of the standard of care may be relevant to a determination of the degree of departure, actual injury is not required to establish unprofessional conduct. Also, just because there was no injury does not mean there was no departure from the standard of care. Conversely, injury to a patient in and of itself may not constitute violation of the standard of care.

## **D. Evaluation and Credibility**

In many cases, the significant facts will not be in dispute. However in some cases, (such as sexual misconduct or allegation of assault) significant facts may be disputed. For example, the patient may state that something happened, while the subject may deny that it occurred. In those cases, your opinion should not include an assessment as to the subject and witnesses credibility, but if you render an opinion as to whether certain conduct constituted unprofessional conduct you should state in your report whose statement you relied to reach that conclusion.

## **E. Assess the Standard of Care as of the Time of the Violation.**

The standard of care of chiropractic is constantly evolving, and so it is particularly important to be cognizant of the time that the violation occurred and assess the case in terms of the standard of care **AT THAT TIME**.

This does **not** mean, however, that if you were not in practice at the time of the violation, you are disqualified as an expert consultant. If you are aware of the standards at the time the violation occurred through your education, training and

experience, you may render an opinion on the case.

## **F. Objectivity**

In performing your review, you should maintain objectivity, and view the assigned case without regard to any other legal activity that may surround it. In specific, you should ignore the existence, non-existence or magnitude of any civil judgments or settlements involving the case. Since you may not be reviewing the same documents that were used to support or refute a civil case, no attention should be paid to any past adjudicatory history. The expert consultant should focus on the patient records and other case records, not on the reports, depositions or other testimony of other expert witnesses. However, you may review deposition testimony of patients or non-expert witnesses.

## **Section VI**

### **COMPENSATION**

The Board staff will provide you with a form entitled “Expert Chiropractic Consultant Statement of Services” and a form entitled “Payee Data Record” for use in billing for services which you render to the Board as an expert consultant. You will be asked to fill out the Statement of Services form **COMPLETELY** for each case that you review and you may be required to fill out more than one Statement of Services form during the course of a case. Failure to fill out the form completely will delay your compensation. The Payee Data Record is only required to be completed annually.

#### **A. Initial Evaluation**

You will be compensated at the rate of \$100 per hour for your evaluation and expert report. Please record the hours worked on the case for each DAY for your eventual billing.

The Board keeps its accounts by Fiscal Year, which begins July 1 through June 30. Please do not submit bills for two Fiscal Years on one form. Instead, use a separate form for each Fiscal Year.

#### **B. Consultation with Deputy Attorney General**

This includes any consultation, in person or by telephone, before the case is filed, during the pendency of the action, or in preparation for hearing. You will be compensated at the rate of \$100 per hour.

#### **C. Testimony at Hearing**

You will be compensated at the rate of \$600 for a half day of testimony and \$1200 for a full day of testimony.

## D. Miscellaneous Expenses

Expenses incurred in fulfilling the various requests may be itemized on a separate sheet of paper. Mileage and parking can be charged in connection with testimony at hearings. All expenses incurred in this category must be accompanied by a receipt, excluding mileage. In the event your testimony requires an overnight stay, the Board will make the appropriate arrangements for you.

## Section VII

### **SAMPLE EXPERT OPINION(S)**

The attached expert consultant report samples are what the Board expects from your expert review.

These are provided for purposes of reference as to format and expression only, and in no way reflects the decisions or opinions of the Board with reference to any of the fact situations cited. You may, in fact, agree or disagree with, or have no opinions about the opinion in substance.

#### **TERMS TO BE AVOIDED IN REPORTS**

**Guilt or Innocence:** The expert consultant's role is to determine whether, and in what manner, a chiropractor's actions depart from the standard of care, or demonstrate a lack of knowledge or ability.

**Judgmental or subjective comments:** Your report should objectively establish what behavior was expected and how the chiropractor failed to meet the expectation. Avoid terms such as "*this guy is clearly incompetent*" or "*no-one in his right mind would do...*"

**Malpractice:** Malpractice is a term which applies to civil law (i.e., suits between individuals). The Board functions under administrative law, and its cases deal with unprofessional conduct. Also, the expert consultant should not let any information regarding malpractice filings, settlements or judgments affect their review of a case. The standards of evidence and proof for civil cases are different than for administrative cases.

**Penalties:** It is not the role of the expert consultant to propose a penalty. This will be determined at hearing, based on detailed guidelines adopted by the Board and utilized by Administrative Law Judges.

**Personalized comments:** Avoid characterizing the actions of the chiropractor in personal terms: "*She was rude and unprofessional to the patient.*" Instead, describe what the expected standard was, and how the chiropractor deviated from the standard.

## Section VIII

### SERVING AS AN EXPERT WITNESS

#### A. EXPERT WITNESS

You have been asked to testify at an *administrative hearing* against a chiropractor. You will be an *expert witness*. What this means is that because of your background, training and experience you can express opinions and make evaluations that a layperson could not make.

Prior to the hearing date, you will be contacted by the *Deputy Attorney General* (DAG) assigned to represent the Board and to present our case at the hearing. The DAG may arrange to meet with you to review the case, your written expert opinion, your qualifications to serve as an expert, and what you can expect at the hearing. The DAG also may ask you to review expert opinions provided by the respondent chiropractor or his or her attorney in the discovery phase of the case.

Discovery is when each side provides the other with all documents and other exhibits it will use, as well as the names of any witnesses it intends to call.

If the case is unusually complex or involves voluminous records, you may have to meet with the DAG more than once prior to the hearing.

#### B. THE HEARING

The hearing afforded a chiropractor who is charged by the Board, is known as an “administrative hearing,” and is conducted under the Administrative Procedure Act (APA). While an APA hearing has some things in common with a criminal trial, it also has numerous differences. In general, APA hearings are less formal than trials. The hearing will be conducted by an Administrative Law Judge (ALJ) who works for an independent state agency, not for the Board. No jury is used in APA hearings. The attorneys (or the subject chiropractor, if he or she represents him or herself) can ask questions of witnesses for both sides (direct and cross-examination). The ALJ also may choose to ask a witness questions to clarify specific points.

As with a trial, the burden of proving the case rests with the Board, which brings the accusation against the subject chiropractor on behalf of the Board’s Executive Officer who is the Complainant in these cases. In an APA hearing, the standard of proof that the Board must meet when an accusation is filed against a chiropractor is “*clear and convincing evidence to a reasonable certainty*”. The standard that is used when a statement of issues (filed against an applicant) or citation is appealed is “preponderance of the evidence.”

As with criminal trials, the Board presents its charges against the subject chiropractor first. The chiropractor or attorney can cross-examine each witness.

Then the chiropractor presents his or her defense, and the Board (DAG) has the opportunity to cross-examine. Each side has the opportunity to give an opening statement describing what they intend to prove and a closing statement summarizing what they have attempted to prove.

### **C. YOUR TESTIMONY**

Before you can give evidence, you must establish your expertise at the hearing. This is done by the DAG asking you questions about your qualifications. This process is known as *voir dire*. You may be asked about the following, or about other matters relating to your qualifications:

1. Your license status and history.
2. Your education, chiropractic education and training.
3. Your experience.
4. Any private board certification or board eligibility you have achieved.
5. The extent of your experience as it relates to the types of chiropractic care or treatment at issue in this case.
6. Your professional affiliations, memberships, staff appointments and other associations.
7. Your publications.
8. Any other information that could shed light on your qualifications to be considered an expert.
9. You probably will be asked whether you know or have any kind of business or professional relationship with the subject chiropractor.

During direct and cross-examination, you probably will be asked questions about the documents and other “exhibits” you reviewed as you prepared your expert opinion report. You should be prepared to identify any publications or resources you referred to as part of your review. You also may be asked to describe the kinds and extent of experience you have in performing the chiropractic procedures or treatments involved in the case.

It is extremely important that you be able to describe what is the *standard of care in the chiropractic community* for the type of procedure involved in the case. The term “standard of practice” or “standard of care” is set by the community of licensed chiropractors based upon their training, education and experience. This standard may change over time with new advancements in chiropractic. It will be necessary for you, as an expert witness, to articulate what the current acceptable standard is in chiropractic for various diagnosis and treatment procedures. Focus on what the standard is. Also, use lay terms whenever possible, and explain unavoidable technical terms and acronyms.

Focus on how the treatment in a particular case departed from the standard of care.

You also may need to address a charge of incompetence based on use of outmoded procedures. In some instances, you may be faced with a lack or inadequacy of patient records upon which to assess the quality of the care the patient received. Your testimony may consist of pointing out that based on the patient chart, it is not possible to determine what tests, if any were ordered, what

instructions were given the patient, what in-office procedures were done, etc. You could be asked to explain the standard of care as it relates to documenting such information in the patient record.

Be prepared to discuss the degree to which the treatment departed from the standard of care. Was the treatment a departure or an extreme departure? For more information on this, see the Guidelines For Expert Consultants in Section IV.

Very often, the other side will attempt to discredit you, belittle your qualifications, or use other techniques to raise doubts about your testimony.

You should make every effort to remain objective and detached. Try not to become defensive or to lose your professional demeanor. Your role is as a teacher, not as an advocate for the Board.

#### **D. AFTER THE HEARING CONCLUDES**

When the hearing is completed, the ALJ will take the case under submission. He or she has 30 days to prepare a proposed decision (PD). The PD is sent to the Board, which then has 100 days to decide whether to accept the PD, reject it and substitute its own decision in the case, or modify and adopt the decision.