STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

Board of Chiropractic Examiners
2525 Natomas Park Drive, Suite 260
Sacramento, California 95833-2931
Telephone (916) 263-5355 FAX (916) 263-5369
CA Relay Service TT/TDD (800) 735-2929
Consumer Complaint Hotline (866) 543-1311
www.chiro.ca.gov

NOTICE OF PUBLIC MEETING
ENFORCEMENT COMMITTEE

July 8, 2010
Upon Adjournment of the Public Relations Committee Meeting
2525 Natomas Park Drive, Suite 100
Sacramento, CA 95833
(916) 263-5355

AGENDA

1. **CALL TO ORDER**
2. **Approval of Minutes**
   May 6, 2010
3. **Enforcement Oversight**
4. **Enforcement Process Improvements**
5. **Expert Reviewer and Witness Training**
6. **Proposed Regulations Based on Provisions of SB 1111 (Negrete-McLeod)**
7. **PUBLIC COMMENT**
8. **FUTURE AGENDA ITEMS**
9. **ADJOURNMENT**

ENFORCEMENT COMMITTEE

Hugh Lubkin, D.C., Chair
Francesco Columbu, D.C.
Frederick Lerner, D.C.

The Board of Chiropractic Examiners' paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care.

A quorum of the Board may be present at the Committee meeting. However, Board members who are not on the committee may observe, but may not participate or vote. Public comments will be taken on agenda items at the time the specific item is raised. The Committee may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at www.chiro.ca.gov.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@chiro.ca.gov or send a written request to the Board of Chiropractic Examiners, 2525 Natomas Park Drive, Suite 260, Sacramento, CA 95833. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

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BOARD OF CHIROPRACTIC EXAMINERS
MEETING MINUTES
Enforcement Committee
May 6, 2010
Embassy Suites LAX
1440 E. Imperial Avenue
El Segundo, CA 90245

DRAFT

Committee Members Present
Francesco Columbu, D.C.
Frederick Lerner, D.C.

Committee Member Absent
Hugh Lubkin, D.C., Chair

Staff Present
Robert Puleo, Interim Executive Officer
Dixie Van Allen, Associate Governmental Program Analyst
Valerie James, Office Technician

Call to Order

Dr. Lerner called the meeting to order at 1:38 p.m.

Roll Call

Dr. Columbu called the roll. All committee members were present with the exception of Dr. Lubkin who was absent.

Approval of March 11, 2010 Minutes

MOTION: DR. LERNER MOVED TO APPROVE THE MINUTES.
SECOND: DR. COLUMBU SECONDED THE MOTION.
VOTE: 2-0
MOTION CARRIED.

Consideration of Provisions of SB 1111

Dr. Lerner reported that SB 1111 did not make it out of its committee. The Board worked diligently on this bill and Mr. Puleo created a chart of parts of the bill the Board was interested in.

The committee reviewed the chart for recommendations to bring forward to the full Board.

Mr. Calton came forward and provided the committee a list of items that were feasible without changes to the statute which he worked on from a previous committee meeting.

Enforcement Oversight – Establishment of a Board of Chiropractic Examiners Oversight Commission

The committee discussed the pros and cons of establishing a commission to oversee the Board's enforcement operations. The committee will discuss this with our Legal Counsel to determine the best course of action.

Debra Snow came forward to express her views as a member of the public regarding the enforcement oversight.

Peace Officer Status for Board of Chiropractic Examiners' Investigators

The committee discussed the pros and cons of providing peace officer status for the Board's investigators.

Public Comment

Debra Snow came forward and spoke in favor of the enforcement oversight by establishing a committee.

Future Agenda Items

Dr. Lerner requested Mr. Puleo to review Mr. Calton's list of items for agenda items at the next Enforcement Committee meeting.

Dr. Lerner requested a Compliance Analyst and an Investigator to come to the next Enforcement Committee meeting to speak on their processes and views of the program.

Adjournment

MOTION: DR. LERNER MOVED ADJOURN THE MEETING.
SECOND: DR. COLUMBU SECONDED THE MOTION.
VOTE: 2-0
MOTION CARRIED.

Dr. Lerner adjourned the meeting at 3:03 p.m.

DRAFT

DRAFT

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June 29, 2010

Dear Licensees:

The Board of Chiropractic Examiners (Board) is seeking qualified chiropractors to serve as expert witnesses to review consumer complaints, develop expert opinions, prepare written reports, and testify at administrative hearings. An expert witness is any person possessing technical or professional knowledge from advanced education and extensive work experience enabling the formation of definite opinions in an area of expertise.

The Board will consider only those licensees who hold a current active license in good standing with no prior disciplinary actions or convictions. Following a review of each application, the Board will invite selected licensees to attend a required training session conducted by the Board. The training is free; however, licensees are responsible for their own travel, meal and other expenses.

If you would like to be considered by the Board to serve as an expert witness, please submit your application to the Board at the above address. If you have any questions, please contact Julianne Vernon at jvernon@chiro.ca.gov.

Best regards,

Robert Puleo
Interim Executive Officer

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Application – Expert Witness/Consultant

If you need additional space to complete the application, please attach a separate sheet or complete the information on the reverse side. Please complete each section and **attach your curriculum vita/resume.**

APPLICANT INFORMATION

Name:		License Number:	
Business Address:			
City:		State:	ZIP Code:
Phone:	Fax:	E-mail:	

Are you a citizen of the United States? YES ☐ NO ☐

If no, are you authorized to work in the U.S.? YES ☐ NO ☐

Have you ever been employed by or provided services to the Board? YES ☐ NO ☐

If so, when and what services?

EMPLOYMENT INFORMATION

Current Employer:			How long?
Address:			
City:		State:	ZIP Code:
Phone:	Fax:	E-mail:	
Position:			

COLLEGE EDUCATION

College/University:		
Address:		Phone:
City:	State:	ZIP Code:
Degree:		Year:

PROFESSIONAL EDUCATION

College:		
Address:		Phone:
City:	State:	ZIP Code:
Degree:		Year:

PROFESSIONAL QUALIFICATIONS

Are you board-certified or board-eligible in any of the chiropractic diplomat programs? YES ☐ NO ☐

If yes, attach a copy of each certification or eligibility.

Have you, at any time in the past two years, worked for an insurance carrier, self-insured plan, third party administrator, or chiropractic claims review company? YES ☐ NO ☐

If yes, attach a description of the services you provided and your employment relationship with the above-mentioned entities.

Are you a State of California Qualified Medical Evaluator? YES ☐ NO ☐

If yes, attach a copy of the certificate.

Have you testified in court as an expert witness? YES ☐ NO ☐

If yes, how many times: _____

For each phrase listed below, please mark the statement that most accurately represents the depth of your knowledge and skill in the field of Chiropractic.

A) Knowledge and skill in case review of medical records (including x-rays) for the purpose of medical and legal proceedings.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

B) Knowledge and skill in presenting testimony in court or arbitrations as an expert in medical and legal proceedings.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

C) Knowledge and skill in rendering opinions regarding treatment utilization.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

D) Knowledge and skill in performing case management review.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

E) Knowledge and skill in reviewing chiropractic laws and regulations and written opinions relating to the review of these laws and regulations.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

F) Knowledge and skill in testifying and interpreting chiropractic laws and regulations.

☐ I posses this knowledge and skill ☐ I do NOT possess this knowledge and skill.

Academic Appointments:

Have you ever held any academic appointments at any college or university? YES ☐ NO ☐

If yes, attach a description of each appointment and your job duties.

Have you developed or assisted in the development of chiropractic statutes, regulations, and/or guidelines?
YES ☐ NO ☐

If yes, please attach a description of each experience.

Publications:

Please list all published articles and texts which you have written:

_____

_____

_____

_____

_____

_____

_____

REFERENCES

Please list two professional references.		
Full Name:	Relationship:	
Company:	Phone:	
Address:		
City:	State:	ZIP Code:
Full Name:	Relationship:	
Company:	Phone:	
Address:		
City:	State:	ZIP Code:

ADDITIONAL INFORMATION

Have you ever been involved in a malpractice lawsuit or arbitration proceeding related to your treatment of a patient? YES ☐ NO ☐

If yes, attach an explanation of each lawsuit or arbitration complaint.

Are there currently any pending medical malpractice lawsuits or arbitration claims? YES ☐ NO ☐

If yes, attach an explanation of each lawsuit or arbitration complaint.

Has your professional liability insurance coverage ever been denied, limited, or cancelled by the action of any insurance company? YES ☐ NO ☐

If yes, attach explanation for each occurrence.

Have any of the following been, or are any currently in the process of being, investigated, denied, revoked, suspended, refused, limited, placed on probation or placed under other disciplinary action? You must answer all questions and provide an explanation for each affirmative answer.

(a) Chiropractic license in this state or another state or territory YES ☐ NO ☐

(b) Any professional license, registration, or certification YES ☐ NO ☐

(c) Academic appointment YES ☐ NO ☐

(d) Membership or employment on any hospital medical staff YES ☐ NO ☐

(e) Clinical privileges or other rights on any medical staff YES ☐ NO ☐

(f) Other institutional affiliation or status YES ☐ NO ☐

(g) Professional society membership or fellowship YES ☐ NO ☐

(h) Participation in any private, state, or federal health insurance program YES ☐ NO ☐

(i) Any other type of professional sanction, discipline, or other adverse action YES ☐ NO ☐

(j) Have you ever been the subject of any investigation by any private, state, or federal health insurance program? YES ☐ NO ☐

(k) Have you ever been convicted of a misdemeanor or felony or are you currently under indictment for any alleged criminal activities? YES ☐ NO ☐

(l) Have you ever been the object of an administrative, civil, or criminal complaint or investigation regarding sexual misconduct? YES ☐ NO ☐

(m) Have you ever voluntarily surrendered a professional license, staff privileges or consented to a limitation of the same pending a review or investigation? YES ☐ NO ☐

(n) Are there any other issues that should be disclosed that may have an adverse impact on your ability to deliver effective and objective professional services? YES ☐ NO ☐

Please Read and Initial each Paragraph and Sign

I hereby certify that I have not knowingly withheld any information that might adversely affect my Appointment as an expert reviewer and that the answers given by me are true and correct to the best of my knowledge. I further certify that I, the undersigned applicant, have personally completed this application.

_____

I hereby authorize the Board to thoroughly investigate all of the information I have provided on this application, including attachments, as well as my references, work record, education and other matters related to my suitability for employment and, further, authorize the references I have listed to disclose to the company any and all letters, reports and other information related to my work records, without giving me prior notice of such disclosure. In addition, I hereby release the Board, my current and former employers and all other persons, corporations, partnerships and associations from any and all claims, demands or liabilities arising out of or in any way related to such investigation or disclosure. _____

I hereby certify under penalty of perjury under the laws of the State of California that all statements, answers and representations in this application, including all attachments, are true and accurate.

Signature of applicant: _____ Date: _____

State of California

Board of Chiropractic Examiners
Office of the Attorney General
Expert Reviewer / Witness Training

City, California
Date

Training Outline

- Purpose and Mission
- Organizational Structure
- Enforcement Program Overview
- The Role of the Expert
- Attorney General's Office
- Administrative Hearing
- Questions, Comments, and Feedback

Our Purpose and Mission:

The Board of Chiropractic Examiners' paramount responsibility is to protect California consumers from the fraudulent, negligent, or incompetent practice of chiropractic care.

The BCE at a Glance

- Established 1922
- 7 Board Members (Gov. Appointed)
- 18.5 Authorized Positions
- 3.7 Operating Budget
- 13,300 Total Licensees
- 12 Chiropractic Schools and Colleges

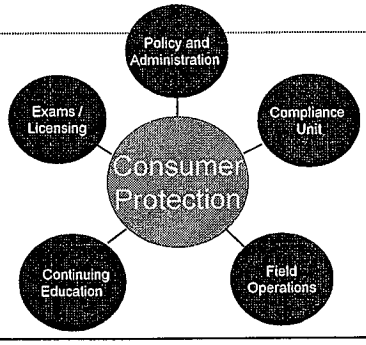
How We Protect Consumers:

Ensuring those entering the profession are trained and meet minimum competency standards.

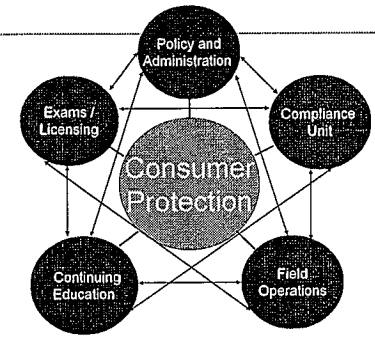
Enforcing the Chiropractic Initiative Act, Regulations, and other applicable laws.

Educating consumers on how to protect themselves and make good choices.

Mission Centered Focus



Mission Centered Focus



We Regulate Chiropractic:

- Doctors of Chiropractic
- Chiropractic Schools and Colleges
- Chiropractic Corporations
- Chiropractic Referral Services

Our Enforcement Strategy

- Proactive Enforcement
  - Educate
  - Inform
  - Promote
- Reactive Enforcement
  - Compel
  - Discipline
  - Prosecute

Our Enforcement Process
Complaint Sources

- Patients
- Government Agencies
- Insurance Companies
- Profession
- Internal
- Anonymous

Our Enforcement Process
Complaint Review and Assessment

- Jurisdictional
- Sufficient Information to Proceed
- Priority
- Preliminary Plan
- Expert Review (Complaint Assessment)

Our Enforcement Process
Complaint Investigations

- Information Gathering
- Field Investigation
- Expert Review (Case Review)

Our Enforcement Process
Disposition of Investigated Complaints

- No Violation
- Insufficient Evidence
- Close With Merit
- Citation
- Proceed with Formal Discipline

Enforcement Tools

- Letter of Admonishment
- Citation and Fine
- Probation
- Suspension
- Revocation
- Criminal Filings

Our Enforcement Process
Hearings

Stipulated Agreements
(informal hearing)

Administrative Law Judge Proposed Decision
(formal hearing)

It's the Board Burden:

- Preponderance of the Evidence
- Clear and convincing proof to a reasonable certainty
- Beyond a reasonable doubt

Our Enforcement Process
Final Order

The BCE Governing Board determines the final order.

Our Enforcement Process
Compliance Monitoring

Probation Monitoring
Self-Reporting
Random Inspections
Office Conferences
Complaint Patterns

As the Expert Reviewer

You assist the Board in evaluating enforcement cases relevant to your area of expertise.

You truthfully and objectively express your opinion without influence from other parties.

Expert Reviewer / Witness Immunity / Representation

As an expert reviewer / witness you have immunity from liability.

The Board will provide you with legal representation.

The Expert Does Not

The expert never advocates on behalf of the Board, the subject chiropractor, or the patient.

The expert never contacts a board member about an enforcement case.

Selection of the Expert

Geographic Location
Specific Expertise
Free of Conflicts
Timely Completion

We will contact you

- Discuss any potential conflicts
- Provide complaint / case information
- Proposed due date for completion
- Provide complete complaint / case information
- Board will follow up to ensure timely completion

Expert Reviewer's Role In Complaint Review

During the initial stages of the enforcement process, you may review written complaints and medical records to help determine if an investigation is warranted.

Expert Reviewer's Role in Case Review

You will review the case file, which includes the written complaint, medical records, investigation report, and other relevant information collected by the Board and prepares a written report.

In Your Expert Opinion:

Based on the facts as presented, did the subject chiropractor deviate from the chiropractic standard of care in California?

The Expert Reviewer's Written Report

List the records that were reviewed

- Summarize the patient's case
- State the standard of care provided
- Describe departures and explain
- State your overall opinion

Expert Witness

If the Board files an accusation, you may be called upon to provide expert testimony in an administrative hearing.

Expert Reviewer / Witness Evaluation

The Board will conduct internal evaluations of its experts to measure quality and adherence to the published guidelines.

Expert Reviewer / Witness Fees

Record Review:
$100 per hour

Testimony at hearing:
$600 half day
$1200 full day

Administrative Discipline Overview

Types of Cases

Statement Of Issues (SOI)
- a. Lack of Qualifications
- b. Criminal History
- c. Petition for Reinstatement

Citations: Minor or Technical Violations

Accusations: Serious Violations

Draft Pleading

- Deputy Attorney General Review
- Discuss with Expert
- Draft
- Expert Review
- Send to Executive Officer
- Serve

Notice of Defense

- 15 Days (Govt. Code Sec. 11505)
- Default
- Reconsideration

Discovery

Administrative Procedure Act Controls
(Govt. Code sec. 11507.6)

Expert Reports

Hearing Preparation

- Meet with the Expert
- Decide on Exhibits
- Review Respondent's Documents

Hearing

- Administrative Law Judge (ALJ)
- Burdens of Proof
- Expert's Role
- Testifying
- Evaluating Respondent's Case

Post Hearing

- Proposed Decision
- Reconsideration
- Stay of Decision
- Writ of Mandate (CCP sec. 1094.5)
- Appeal

Any Questions
Comments
Or Feedback?

State of California
Board of Chiropractic Examiners

Guidelines for Expert Reviewers/Witnesses

May 2008

Arnold Schwarzenegger, Governor
State of California

TABLE OF CONTENTS

SECTION I INTRODUCTION TO THE CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS

SECTION II DEFINITIONS

SECTION III GUIDELINES FOR EXPERT REVIEWERS

- Frequently Asked Questions
- Instructions
- Immunity From Liability
- Representation of Legal Counsel
- Confidentiality
- Investigations And Disciplinary Process
- Stages Of Expert Review
  - A. Investigative Review
  - B. Hearing Testimony
- Section 317 re Unprofessional Conduct
- Types Of Evaluations
  1. Quality Of Care
  2. Sexual Misconduct
  3. Excessive Treatment Violations
  4. General Unprofessional Conduct

SECTION IV THE OPINION ITSELF

- A. Contents
- B. Violations vs. Mitigation
- C. Injury Is Not Essential
- D. Evaluation And Credibility
- E. Assess Standard As Of Time Of Violation
- F. Objectivity

SECTION V COMPENSATION

- A. Initial Evaluation
- B. Consultation With Deputy Attorney General
- C. Testimony At Hearing
- D. Miscellaneous Expenses

SECTION VI SAMPLE EXPERT OPINION

SECTION VII SERVING AS AN EXPERT WITNESS

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 reviewer 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 witness 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 reviewer, which is the first stage of this process for yourself and perhaps the only stage, 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 reviewer 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

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.[1]

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.[2]

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.[3]

"Gross Negligence" an extreme departure from the ordinary standard of care.[4]

"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.

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1 California Civil Jury Instructions CACI 501, 2003.
2 California Civil Jury Instructions CACI 502, 2003.
3 Barris v. County of Los Angeles, 20 Cal.4th 101, 83 Cal.Rptr.2d 145 (1999).
4 Kearl. v. Board of Medical Quality Assurance, 189 Cal.App3d 1040 (1986); City of Santa Barbara v. Superior Court, 41 Cal.4th 747, 62 Cal.Rptr3d 527 (2007).

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

"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.

"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 III

GUIDELINES FOR EXPERT REVIEWERS

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.

---

5 Kearl.

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 reviewers. 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 V.

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. And, 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 contact the Board and arrange to deliver the report along with your statement for services, payee data record form, and current curriculum vitae. It is necessary for you to retain the records you reviewed until the case is final in the event you need to review them 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 reviewers 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

As an expert reviewer to the Board, you must safeguard the confidentiality of the records delivered to you for review and to safeguard the identity of the patients, complainants and chiropractors involved. 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.

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 though 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 is necessary. If so, Board staff sends the case to an expert reviewer who is qualified to render an opinion as to whether a departure from the standard of care occurred.

After the expert reviewer 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 reviewer 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 reviewer 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 reviewer 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 contendre 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 thererunder;

(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 IV

THE OPINION ITSELF

There are Sample Expert Reports appended to this booklet at Section V. Please refer to those when writing your report, but remember that they are guidelines only, and that 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 to be reviewed. 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 reviewer. 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 reviewer 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 V

COMPENSATION

The Board staff will provide you with a form entitled "Expert Chiropractic Reviewer's 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 reviewer. 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 VI

SAMPLE EXPERT OPINION

The attached sample expert reviewer reports are examples of the product the Board expects from your expert review.

It is provided for purposes of reference as to form 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 reviewer'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, expert reviewers 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 reviewer 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 VII

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 case 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 Reviewers in Section II.

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.

Proposed New Regulatory Language
Based on the Provisions of SB 1111 (Negrete McLeod)

27. Each licensee shall file a current and accurate e-mail address with the board at its office in Sacramento and shall immediately notify the board at its said office of any and all changes of the e-mail address, giving both the old and new e-mail address within 30 days of change.

720.4. (a) Notwithstanding Section 11415.60 of the Government Code, the board may enter into a settlement with a licensee or applicant in lieu of the issuance of an accusation or statement of issues against that licensee or applicant, as applicable.

(b) The settlement shall include language identifying the factual basis for the action being taken and a list of the statutes or regulations violated.

(c) A person who enters a settlement pursuant to this section is not precluded from filing a petition, in the timeframe permitted by law, to modify the terms of the settlement or petition for early termination of probation, if probation is part of the settlement.

(d) Any settlement against a licensee executed pursuant to this section shall be considered discipline and a public record and shall be posted on the board's Internet Web site. Any settlement against an applicant executed pursuant to this section shall be considered a public record and shall be posted on the board's Internet Web site.

720.10. Except as otherwise provided, any proposed decision or decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, that contains any finding of fact that the licensee or registrant engaged in any act of sexual contact, as defined in subdivision (c) of Section 729 of the Business and Professions Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order of revocation. The revocation shall not be stayed by the administrative law judge.

720.12. (a) Except as otherwise provided, with regard to an individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, under military law, or under federal law, the board shall be subject to the following requirements:

(1) The board shall deny an application by the individual for licensure in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

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(2) If the individual is licensed under Chiropractic Initiative Act, the board shall promptly revoke the license of the individual in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The board shall not stay the revocation nor place the license on probation.

(3) The board shall not reinstate or reissue the individual's license. The board shall not issue a stay of license denial nor place the license on probation.

(b) This section shall not apply to any of the following:

(1) An individual who has been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender, or whose duty to register has otherwise been formally terminated under California law or the law of the jurisdiction that requires his or her registration as a sex offender.

(2) An individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code. However, nothing in this paragraph shall prohibit the healing arts board from exercising its discretion to discipline a licensee under any other provision of state law based upon the licensee's conviction under Section 314 of the Penal Code.

(3) Any administrative adjudication proceeding under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that is fully adjudicated prior to January 1, 2008. A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition against reinstating a license to an individual who is required to register as a sex offender shall be applicable.

720.14. (a) A licensee shall not include or permit to be included any of the following provisions in an agreement to settle a civil dispute arising from his or her practice, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting or cooperating with the healing arts board.

(2) A provision that prohibits another party to the dispute from filing a complaint with the healing arts board.

(3) A provision that requires another party to the dispute to withdraw a complaint he or she has filed with the healing arts board.

(b) A violation of this section constitutes unprofessional conduct and may subject the licensee to disciplinary action.

DRAFT

720.16. (a) Notwithstanding any other provision of law making a communication between a licensee of a healing arts board and his or her patients a privileged communication, those provisions shall not apply to investigations or proceedings conducted by the board. Board members, deputies, employees, agents, the office of the Attorney General, and representatives of the board shall keep in confidence during the course of investigations the names of any patients whose records are reviewed and may not disclose or reveal those names, except as is necessary during the course of an investigation, unless and until proceedings are instituted. The authority under this subdivision to examine records of patients in the office of a licensee is limited to records of patients who have complained to the healing arts board about that licensee.

(b) Notwithstanding any other provision of law, the Attorney General and his or her investigative agents, and a healing arts board and its investigators and representatives may inquire into any alleged violation of the laws under the jurisdiction of the healing arts board or any other federal or state law, regulation, or rule relevant to the practice regulated by the healing arts board, whichever is applicable, and may inspect documents relevant to those investigations in accordance with the following procedures:

(1) Any document relevant to an investigation may be inspected, and copies may be obtained, where patient consent is given.

(2) Any document relevant to the business operations of a licensee, and not involving medical records attributable to identifiable patients, may be inspected and copied where relevant to an investigation of a licensee.

(c) In all cases where documents are inspected or copies of those documents are received, their acquisition or review shall be arranged so as not to unnecessarily disrupt the medical and business operations of the licensee or of the facility where the records are kept or used.

(d) Where certified documents are lawfully requested from licensees in accordance with this section by the Attorney General or his or her agents or deputies, or investigators of the board, the documents shall be provided within 10 business days of receipt of the request, unless the licensee is unable to provide the certified documents within this time period for good cause, including, but not limited to, physical inability to access the records in the time allowed due to illness or travel. Failure to produce requested certified documents or copies thereof, after being informed of the required deadline, shall constitute unprofessional conduct. The board may use its authority to cite and fine a licensee for any violation of this section. This remedy is in addition to any other authority of the board to sanction a licensee for a delay in producing requested records.

(e) Searches conducted of the office or medical facility of any licensee shall not interfere with the recordkeeping format or preservation needs of any licensee necessary for the lawful care of patients.

DRAFT

(f) The licensee shall cooperate with the board in furnishing information or assistance as may be required, including, but not limited to, participation in an interview with investigators or representatives of the healing arts board.

(g) Failure of a licensee to cooperate with the board as specified in (f), shall constitute unprofessional conduct and is grounds for suspension or revocation of his or her license. The board may use its authority to cite and fine a licensee for any violation of this section. This remedy is in addition to any other authority of the board to sanction a licensee for a delay in producing requested records.

(h) This section shall not apply to a licensee who does not have access to, and control over, certified medical records.

720.18. (1) Notwithstanding any other provision of law, a licensee shall comply with a request for the certified medical records of a patient, that is accompanied by that patient's written authorization for release of records to the board, within 15 days of receiving the request and authorization from the board unless the licensee is unable to provide the documents within this time period for good cause.. Failure of a licensee to produce requested certified documents or copies thereof, after being informed of the required deadline, shall constitute unprofessional conduct and is grounds for suspension or revocation of his or her license. The board may use its authority to cite and fine a licensee for any violation of this section. This remedy is in addition to any other authority of the board to sanction a licensee for a delay in producing requested records.

(b) A licensee shall comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board. Failure of a licensee to produce requested certified documents or copies thereof, after being informed of the required deadline, shall constitute unprofessional conduct and is grounds for suspension or revocation of his or her license unless it is determined that the order is unlawful or invalid. The board may use its authority to cite and fine a licensee for any violation of this section. This remedy is in addition to any other authority of the board to sanction a licensee for a delay in producing requested records.

(c) For purposes of this section, "certified medical records" means a copy of the patient's medical records authenticated by the licensee or health care facility, as appropriate, on a form prescribed by the licensee's board.

(d) This section shall not apply to a licensee who does not have access to, or control over, certified medical records.

720.24. (a) Notwithstanding any other provision of law, any licensee who is an employer of a licensed chiropractor shall report to the board the suspension or termination for cause, or any resignation in lieu of suspension or termination for cause, of any licensed

DRAFT

chiropractor in its employ within 15 business days. The report shall not be made until after the conclusion of the review process specified in Section 52.3 of Title 2 of the California Code of Regulations and Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, for public employees. This required reporting shall not constitute a waiver of confidentiality of medical records. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800 and shall not be subject to discovery in civil cases.

(b) For purposes of the section, "suspension or termination for cause" or "resignation in lieu of suspension or termination for cause" is defined as resignation, suspension, or termination from employment for any of the following reasons:

(1) Use of controlled substances or alcohol to the extent that it impairs the licensee's ability to safely practice.

(2) Unlawful sale of a controlled substance or other prescription items.

(3) Patient or client abuse, neglect, physical harm, or sexual contact with a patient or client.

(4) Gross negligence or incompetence.

(5) Theft from a patient or client, any other employee, or the employer.

(c) As used in this section, the following definitions apply:

(1) "Gross negligence" means a substantial departure from the standard of care, which, under similar circumstances, would have ordinarily been exercised by a competent licensee, and which has or could have resulted in harm to the consumer. An exercise of so slight a degree of care as to justify the belief that there was a conscious disregard or indifference for the health, safety, or welfare of the consumer shall be considered a substantial departure from the standard of care.

(2) "Incompetence" means the lack of possession of and the failure to exercise that degree of learning, skill, care, and experience ordinarily possessed by a responsible licensee.

(3) "Willful" means a knowing and intentional violation of a known legal duty.

(d) Failure of a licensee to make a report required by this section constitutes unprofessional conduct and is grounds for suspension or revocation of his or her license. The board may use its authority to cite and fine a licensee for any violation of this section. This remedy is in addition to any other authority of the board to sanction a licensee for a delay in producing requested records.

(f) No report is required under this section where a report of the action taken is already required under Section 805.

DRAFT

720.32. (a) Whenever it appears that an applicant for a license may be unable to practice his or her profession safely because the applicant's ability to practice *may* be impaired due to mental illness, or physical illness affecting competency, the healing arts board may order the applicant to be examined by one or more physicians and surgeons, chiropractors, or psychologists designated by the board. The report of the examiners shall be made available to the applicant and may be received as direct evidence in proceedings conducted pursuant to Chapter 2 (commencing with Section 480) of Division 1.5.

(b) An applicant's failure to comply with an order issued under subdivision (a) shall authorize the board to deny an applicant a license.

(c) The board shall not grant a license until it has received competent evidence of the absence or control of the condition that caused its action and until it is satisfied that with due regard for the public health and safety the person may safely practice the profession for which he or she seeks licensure.

720.35. (a) The board shall report to the National Practitioner Data Bank and the Healthcare Integrity and Protection Data Bank the following information on each of its licensees:

(1) Any adverse action taken by the board as a result of any disciplinary proceeding, including any revocation or suspension of a license and the length of that suspension, or any reprimand, censure, or probation.

(2) Any dismissal or closure of a disciplinary proceeding by reason of a licensee surrendering his or her license or leaving the state.

(3) Any other loss of the license of a licensee, whether by operation of law, voluntary surrender, or otherwise.

(4) Any negative action or finding by the board regarding a licensee.

(b) The board shall conduct a search on the National Practitioner Data Bank and the Healthcare Integrity and Protection Data Bank prior to granting or renewing a license to an applicant

720.36. (a) Unless otherwise provided, if a licensee possesses a license or is otherwise authorized to practice in any state other than California or by any agency of the federal government and that license or authority is suspended or revoked outright and is reported to the National Practitioner Data Bank, the California license of the licensee shall be suspended automatically for the duration of the suspension or revocation, unless terminated or rescinded as provided in subdivision (c). The board shall notify the licensee of the license suspension and of his or her right to have the issue of penalty heard as provided in this section.

DRAFT

(b) Upon its own motion or for good cause shown, the board may decline to impose or may set aside the suspension when it appears to be in the interest of justice to do so, with due regard to maintaining the integrity of, and confidence in, the practice of chiropractic.

(c) The issue of penalty shall be heard by an administrative law judge sitting alone or with a panel of the board, in the discretion of the board. A licensee may request a hearing on the penalty and that hearing shall be held within 90 days from the date of the request. If the order suspending or revoking the license or authority to practice is overturned on appeal, any discipline ordered pursuant to this section shall automatically cease. Upon a showing to the administrative law judge or panel by the licensee that the out-of-state action is not a basis for discipline in California, the suspension shall be rescinded. If an accusation for permanent discipline is not filed within 90 days of the suspension imposed pursuant to this section, the suspension shall automatically terminate.

(d) The record of the proceedings that resulted in the suspension or revocation of the licensee's out-of-state license or authority to practice, including a transcript of the testimony therein, may be received in evidence.

(e) This section shall not apply to a licensee who maintains his or her primary practice in California, as evidenced by having maintained a practice in this state for not less than one year immediately preceding the date of suspension or revocation. Nothing in this section shall preclude a licensee's license from being suspended pursuant to any other provision of law.

(f) This section shall not apply to a licensee whose license has been surrendered, whose only discipline is a medical staff disciplinary action at a federal hospital and not for medical disciplinary cause or reason as that term is defined in Section 805, or whose revocation or suspension has been stayed, even if the licensee remains subject to terms of probation or other discipline.

(g) This section shall not apply to a suspension or revocation imposed by a state that is based solely on the prior discipline of the licensee by another state.

(h) The other provisions of this article setting forth a procedure for the suspension or revocation of a licensee's license or certificate shall not apply to summary suspensions issued pursuant to this section. If a summary suspension has been issued pursuant to this section, the licensee may request that the hearing on the penalty conducted pursuant to subdivision (c) be held at the same time as a hearing on the accusation.

802.1. (a) (1) A licensee shall report any of the following to the board:

(A) The bringing of an indictment or information charging a felony against the licensee.

(B) The arrest of the licensee.

(C) The conviction of the licensee, including any verdict of guilty, or plea of guilty or no contest, of any felony or misdemeanor.

(D) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government .

(2) The report required by this subdivision shall be made in writing within 30 days of the date of the bringing of the indictment or the charging of a felony, the arrest, the conviction, or the disciplinary action.

(b) Failure to make a report required by this section shall be a public offense punishable by a fine not to exceed five thousand dollars ($5,000) and shall constitute unprofessional conduct.

DRAFT