

## It's Your License, Your Call and Your Exposure

By: Daniel J. Osborne, M.S.

A number of boards opine that therapeutic procedures can be delegated to unlicensed staff. Some 'certify' chiropractic assistants who complete (minimal) training programs, where these boards purport that the certification process is similar to the requirements of boards for other disciplines (i.e., physician assistants and physical therapy assistants). Is such a comparison analogous to comparing 'apples to oranges' with the stark differences between physician assistants, physical therapy assistants and chiropractic assistants, particularly, on requisite clinical education, training and experience?

Todd Whitehead, D.C., opining in 2007 at the request of his State Association writes: *"As a doctor you can delegate therapeutic procedures to whomever you wish to perform those services. You simply must be in the building at the time services are rendered to 'supervise'. You do not have to perform the treatment yourself, nor do you have to stand over them and watch.... However, as far as I know, no insurance company has any policy in place to prohibit you from delegating to staff. As far as statute goes in Texas, if an insurance company did write that into their policy, we would have to go to the [Texas Department of Insurance] with [a] complaint. The P.T.'s (sic) would love to have those rules in place as well."*

- Dr. Whitehead's position is reflective of the position many providers have taken, but that position is violative of applicable laws, rules, and regulations. Doctors may delegate therapeutic procedures only to those individuals who are qualified and properly trained, not to whomever they wish.

- It is true, as Dr. Whitehead proclaims, insurers (e.g., payors) don't have policies to prohibit doctors from delegating to staff; however, they do have policies that limit and/or prohibit payment of provider services administered by non-providers (e.g. unlicensed staff).

- To add to the confusion, contrary to Dr. Whitehead's contention, the board jurisdiction in which his opinion was provided does not require chiropractors to be on premises to supervise services administered by unlicensed staff.

A chiropractic regulatory board, in 2003, provided the following in response to my inquiry on behalf of my clients in that state: *"Rule ... expresses the Board's policy on the issue of delegation - designed to give its licensees a threshold standard which they must adhere to in their practice or be subject to disciplinary action if in delegating a procedure the standard of care is not met. That determination for disciplinary purposes is determined on a case-by-case basis. The Board expects its licensees to be properly trained and knowledgeable in chiropractic services. Each licensee is expected to determine for his or her own practice the specific procedures **that are appropriate for delegation** under their license and Board rules and whether his or her employees are properly trained for such delegation. Likewise, a licensee must make his or her own determinations about adequate supervision under the circumstances. The Board **does not set training standards** for chiropractic assistants or dictate detailed protocols that licensees must follow. Neither does **the Board determine how a chiropractor should bill third party payers for therapeutic procedures...**"*

- The failure to adequately address the issue of delegation poses great harm to licensees to whom the above-referenced Board owes a fiduciary duty. The Board fails to identify what constitutes a qualified and properly trained individual to whom such delegation may be made. Make no mistake, unless an applicable state regulatory entity (e.g., Board) either licenses or otherwise certifies the basic requirements of those individuals to whom the services are delegated, that regulatory entity has no authority to determine whether that individual is qualified and properly trained. That regulatory entity's authority begins and ends with those over whom it may exercise that authority (e.g., licensees).

Samuel Collins, in his article *"Denial for Services Done by Staff"* (Dynamic Chiropractic, 12/2/08), reports it is becoming more common for carriers to ask chiropractors who administered the (therapeutic procedures) with an apparent trend for carriers to not pay for services done by unlicensed or noncertified staff. Further, he indicates it is a tricky legal question of whether an insurer has a right to exclude payment for services done by unlicensed support staff, and that the chiropractic profession will have to battle this legally and force payment per state regulations or implement certification of chiropractic assistants.

- Collins brings out some thought-provoking points in his article. The apparent trend he notes of carriers not paying for services performed by unlicensed staff might be more accurately identified as a strong indicator that carriers are becoming more diligent in their efforts to evaluate health care claims so that only proper claims are paid. Additionally, his claim that tricky legal questions are involved to determine if a payor can refuse to pay for provider services administered by non-providers is just not correct! Payors set the standards for reimbursement and doctors must follow them when seeking the payors money!

### **What are the risks?**

In 2002, following a joint investigation by the Federal Bureau of Investigation, Internal Revenue Service and the Texas Workers' Compensation Commission, John Schmidt, D.C. entered a guilty plea on tax evasion and admitted to fraudulently billing for supervision of work-hardening services.

The government asserted in their investigation and subsequent prosecution that the approved codes for medical procedures require the chiropractor or a licensed therapist to supervise work hardening. Prior to sentencing the defense asked the Court to withdraw the guilty plea, and brought in a doctor from a local chiropractic college who testified as an expert witness. Schmidt's expert witness testified that Schmidt could lawfully delegate supervision of work hardening services to unlicensed individuals under the Texas Board of Chiropractic Examiners ("TBCE") rules, stating that TBCE's rules take precedence over the CPT codes.

The judge asked if the expert's position justified health care fraud by chiropractors as a group. The defense argued that Schmidt was obligated to practice under TBCE's rules. **The judge then asked, even if in doing so he commits fraud?** The defense responded that the comments appeared to accuse all chiropractors of fraud. The judge replied he did not say all chiropractors commit fraud, but understood the expert, in effect, to advocate that chiropractors may **engage in activity that is at variance with the CPT codes**, as long as the Chiropractic profession, as a group, approved of such activity.

The defense asked the judge to recuse himself, arguing that the Court had a bias against chiropractors in general, and Schmidt in particular. The judge denied the defense motion, stating the Court had merely expressed its surprise at the seemingly outrageous legal position advocated by the defendant during the course of the hearing. **Schmidt was sentenced to three years in prison, ordered to pay a \$30,000 fine, and \$72,145 in restitution.** ("Texas Chiropractor Draws Judge's Ire, Three Years in Prison," *Fort Worth Star-Telegram*, 8/16/02)

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