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## INTRODUCTION

The Canadian Chiropractic Protective Association has been protecting chiropractors from allegations of professional negligence since 1986. Our mandate at CCPA is not only to defend chiropractors in legal actions that result from allegations of negligence; it is to help prevent chiropractors from ever becoming named in lawsuits. CCPA first became involved with risk management in a very informal way. Gradually as our experience and knowledge increased our programs evolved.

The following is a compilation of our experience in protecting chiropractors. Some of the information is com-

mon sense, some is derived from our litigation experience, and some is from hands on experience managing practitioners through incidents, before they become actual claims or lawsuits.

## Goals and objectives

This article will explore several areas of significant importance in order to help practitioners manage the risk in their chiropractic practice. In order to understand the concepts I have separated the material into distinct sections as follows:

- a) General Concepts In Risk Management
- b) Risk Management In Sexual Impropriety Issues
- c) Consent And Informed Consent

## General concepts in risk management

What is Risk Management? In order to understand how to minimize the risk in your practice it is important to understand what Risk Management means as it relates to your chiropractic practice. The components of risk management can be loosely broken down into the following:

- a) Being aware there is always a (potential) risk
- b) Reviewing past incidents to prevent their recurrence
- c) Reviewing all patient complaints
- d) Reviewing existing systems including:
  - a. Personnel
  - b. Policies and procedures
  - c. Equipment and premises
- e) Educating your staff about practice, work habits and chiropractic issues

Chiropractors have been very poor at accepting that there is an inherent risk involved in providing care to patients. Most chiropractors see their mode of treatment as being non-invasive and “low-tech” care, therefore carrying little or no risk. Pragmatically speaking, any form of treatment with the potential to help has the potential to

cause harm. Reviewing past incidents, your own and those reviewed for you by others [e.g. CCPA], is of great benefit. Knowing the risks associated with a treatment modality or procedure and rating those risks will prepare the practitioner for that eventuality. Understanding what causes side effects of certain treatment modalities or procedures will assist the doctor in prevention. It is only possible to discuss risk with patients once the doctor knows and understands the risk. It is also impossible to expect a patient to accept the risks of chiropractic procedures if the doctor does not accept the risk. This is never more evident than when a stroke or stroke-like symptoms occur following a cervical adjustment. These events are obviously of grave concern for the patient but the devastating effect on the doctor is also significant. Chiropractors will often tell me they just never expected it would happen to them. If you are performing cervical adjustments the risk of stroke is a reality, albeit remote.

Practitioners must listen when a patient complains. Complaints, even if not legitimate, may signal a breakdown in the doctor patient relationship. All complaints require your immediate attention. Remember even if you feel the complaint is frivolous it is not to the person complaining. A small amount of effort in trying to understand and solve the complaint early on can save significant difficulty for the practitioner in the long run. When I review patient complaints against practitioners to regulatory boards they almost always include a statement to the effect: "The doctor just seemed to busy to listen to me." or "I told him the procedure was hurting me but he continued to do it anyways." The same applies to plaintiffs in lawsuits. They almost always say the doctor did not or would not listen to them when things weren't going right.

Reviewing office procedures, discussing staff responsibilities and obligations, and inspecting all equipment for proper function and cleanliness are all key strategies in avoiding unexpected and unnecessary problems in your practice. In practice we tend to get into a rhythm and habituate our actions and procedures. Step back once in a while and take a look at your office, see it again for the first time. See it from the patients' perspective. Have a colleague review your office, staff and procedures. This may be hard for you to do because professionals tend to have fragile egos and are often unreceptive to even constructive criticism. Forget the ego for a moment, it will make your office better.

Your staff is invaluable to you. Many practitioners do not utilize this valuable resource effectively. Take the time to educate your staff about their responsibilities and how they can better assist you. They also need to know and understand the risks of chiropractic care. They are the first and last interface between you and your patients. Often they will be the first person that the patient will confide in about being nervous about the care they are going to receive. If things go wrong with treatment your staff may have to deal with a complaint over the phone or reassure the patient until you can speak with them. They need to clearly understand what their role is in this process. They must be told that you will talk to all patients in distress. A patient in distress should not be put off because it invites trouble.

Chiropractors have certain obligations in providing care to patients:

1. To investigate a patient's complaint and establish a diagnosis.
2. To establish a treatment protocol for that complaint.
3. To present the treatment protocol and alternatives to the patient in a manner that the patient can understand.
4. To explain the risks and benefits of the treatment plan and alternatives to the patient.
5. To follow through with the treatment plan and modify it as necessary.

There are several well-defined risk management tools available to all health care practitioners:

- a. Record Keeping
- b. Communication
- c. Office Management

### **Record keeping**

Practitioners often tell me it takes too much time to have "good" records. They think financial information and a few notations about where the patient was treated are enough. I am often asked: Why do I need good records?

The most obvious answer to the question and the primary reason is that it is impossible to provide complete and quality care to patients without good records. Without complete records how can you remember how you arrived at your diagnosis? What advice you conferred to the patient? What you treated? What was their response to care? Were there contra-indications to certain procedures?

Your secondary interest in quality records should be to protect yourself. How can you protect yourself from allegations of negligence or substandard care without recorded information? Not having adequate records contravenes a standard of care in many jurisdictions and is addressed in the Glenerin Guidelines. In all cases recorded information holds much more weight than memory, especially in a court of law. Good records invariably protect the doctor in cases of alleged wrongdoing and are often what stands between exoneration and a finding of negligence.

As a health care practitioner you have certain obligations in record keeping.

1. To open a file to record the data from the history, examinations, diagnosis, report of findings and planned treatment protocols.
2. To record that you informed the patient of any material risks involved in the proposed treatment and obtain consent and informed consent before treatment.
3. To record subsequent findings, reports of findings, SOAP notes, referrals, etc.

In order to ensure the above information is collected a systematic approach is required. Structuring your records in the following manner assists the chiropractor in this area.

1. Patient's Personal Data [name, address, age, sex, etc.]
2. Patient's Health Data [history, past history, family history, complaints, investigations, examinations and findings, diagnosis, reports of findings, treatment plans, SOAP notes, etc.]
3. Consent Forms [signed informed consent]
4. Chiropractors Personal Notations and Observations
5. Financial Records [fees charged, payments received]

### **Record keeping trouble shooting**

Consistent collection and recording of information is a vital link in ensuring the reconstruction of the interaction between the doctor and the patient. In my experience, however, there are some key points that need to be canvassed to ensure adequate record keeping. The most common deficiencies in record keeping are:

### **Diagnosis**

- a) Did you make a diagnosis?
- b) Did you record the diagnosis?
- c) What are your differential diagnostic considerations?

When I receive files to review from practitioners I am astonished to find a high percentage do not have a recorded diagnosis or differential diagnosis on them. Recording a diagnostic code for billing purposes is not a diagnosis! How can a doctor offer care to a patient without diagnosing the problem? In fact it interrupts the entire flow of information from the doctor to the patient if there is no diagnostic impression reached. Just as the examination flows from the history, the diagnosis flows from the history and examination. The treatment plan must flow from the diagnosis. A secondary or differential diagnosis should also be put forward. This is particularly evident in cases of lumbar or cervical disc syndrome. Think about the number of simple "strain/sprain" low back pain cases you undertake to treat that are actually early lumbar disc syndromes. The symptoms are local initially but the neurological signs and symptoms follow in days or weeks. If the patient has not been alerted to this possibility and if the chiropractor has not documented it in the notes, the chiropractor may be blamed for causing the problem. The only thing the chiropractor has been guilty of in cases such as this is not halting the progression of the problem. We have several real life cases just like this! The risks and benefits of the proposed care must also be clearly presented to the patient, and understood by them. Remember if results are not observed after a reasonable therapeutic trial, you may have to reconsider your original diagnosis and the treatment plan may have to be revised. At a minimum, a reassessment must be made of a patient's plan of management in an appropriate fashion within a reasonable level of continuing care.

In court it is terribly embarrassing to have to admit in front of a judge that you did not record the diagnosis. It goes to your credibility. Judges will generally side in favour of plaintiffs if they do not find the doctor credible, believable, and professional.

### **Soap notes**

1. "S" = Subjective Findings
2. "O" = Objective Findings
3. "A" = Analysis
4. "P" = Procedure

In relation to SOAP notes the following can help:

1. Train your staff to look at your notes for obvious omissions

2. Be consistent in what you record and how you record it
3. Prepare a “key” for frequently used abbreviations and make sure your staff know what they stand for

In order to justify continuing care it is imperative that you record the patient’s progress and your objective measure of that progress. If there is no progress, why not? What treatment did you provide? Of late, plaintiff’s experts are becoming more creative in attacking chiropractic procedures. We also have some plaintiff experts willing to make gratuitous leaps of faith in connecting procedures to injuries. It is important to be able to reconstruct from your notes the exact procedure performed. If there were any unusual side effects to that treatment, they should be recorded. If the patient said they felt good after the treatment that should be recorded too. The more information you have the better we can protect you and the less likely there will be credibility issues to fight as well.

Your staff is extremely important to you in your record keeping. They should be trained to look at your notes before re-filing the chart. If they do not appear complete the file should be returned to you for completion. Staff can also be invaluable as your “eyes” and “ears” outside of the treatment encounter. Patients often speak to other patients or to your staff directly. What they say in these encounters can be vital in having a complete picture of their health and their impressions of your care. For example a patient may tell you that you are not helping them and, in fact, they are getting worse under your care. This can often be perplexing when you expected a routine recovery. This same patient may confide in another patient within hearing range of your staff that they had helped someone move on the weekend! These tidbits that your staff may overhear can be valuable clues in your treatment of the patient. In practice this scenario, whereby the patient tries to make the doctor the scapegoat for their lack of progress, happens all too often.

Records should always include the following:

1. Patient’s non compliance with care or failure to follow instructions
2. Comments relayed by the patient that have an impact on care
3. Missed or changed appointments
4. Reasons for changing the patient’s treatment plan
5. Reasons for terminating patients from care

All of the above information is important for you in tracking the progress of your patient in their treatment program. It is also valuable information in our ability to protect you should an allegation or claim arise from your care of the patient.

### **Confidentiality**

Every patient deserves to have his or her health information kept confidential. It is not only an ethical issue it is a legal issue. Many regulatory authorities have specific regulations on how healthcare information is handled. Make sure that your reception staff are aware of this and adhere to strict guidelines when handling patient information. Also remind them not to give out information over the phone to anyone other than the patient themselves. This includes spouses as well. Employers also have a habit of phoning doctors offices to confirm appointments of their employees. Unless specifically stipulated by the patient the employer is not entitled to any information from you, including whether or not they had a scheduled appointment. Provide information only when the request is accompanied by a signed release from the patient. Make sure the date on the release is current, within a few weeks. If in doubt call the patient to confirm it is their wish for you to release that information.

1. This means phone requests for information
2. This means releasing information to insurance companies
3. This means talking to the patient’s brother, husband, or friend...
4. Release information only upon a written request signed by the patient
5. Release only copies
6. Release only the patient’s record and associated reports

### **Communication**

In health care today it is vital for a chiropractor to communicate in a professional and understandable fashion. The communications habits you have with your staff will set the tone for your communication with your patients. Your staff needs to know:

- About the profession,
- What you do [the advice you give, the exercises you prescribe, the different procedures you use],
- Current chiropractic issues etc.

This will empower your staff to communicate effectively with your patients as they enter the office. It will also allow them to more effectively communicate with you about patient questions and responses to care.

As the treating doctor you need to ensure two-way communication with your patients. It means you need to understand why they are in your office today as well as their current and past health history. Language can be a barrier in today's global community. Make sure you do understand your patient. Have an interpreter if you need one. It is often helpful, on a second or follow up visit, to ask the patient to reiterate what it is you told them during the resume of findings. You might be surprised at what you hear! I guarantee if you make this a habit it will not only clear up misunderstandings, it will make you a much better communicator. Asking a patient what their expectations are up front can alleviate unnecessary confrontations later. If a patient is expecting immediate and complete relief but you can only deliver partial relief over a period of time it is a recipe for disaster. Be direct and ask them their expectations and be as direct in telling them what you can deliver.

It is important to remember that problems can arise even from appropriate care. An integral part of communicating with patients is dealing with these situations as they arise. Meet these problems head on by talking to the patient personally, do not delegate this task to your staff. Also, don't put the patient off, see them if they need to be seen. You may find that no further treatment is necessary; sometimes all that is required is a reevaluation and a little reassurance. If a second opinion or referral is required don't delay. Make the arrangements and document what you have done. Make sure the patient follows up on your recommendations or note if they don't and why.

1. Communication begins with your front office staff
2. Establish communications habits for you and your staff
3. Establish communications habits between you and your staff
4. Communication starts with the first phone call from a potential patient
5. The patient's first impression of your office may be the lasting one
6. Communicate as you go through the patient entrance process through the history and examination procedures
7. Communicate clearly your exam findings, diagnosis,

differential diagnosis and treatment plan

8. Make sure the patient and you both have the same expectations
9. Some people require different communications media [pamphlets]
10. If language is a barrier have an interpreter

### Office management

Managing your office to reduce risk includes:

1. Maintaining a clean and professional office environment
2. Maintaining all office equipment in proper working order
3. Keeping current professionally
4. Having set protocols for dealing with unruly patients, patient complaints, and emergencies.

Recently there have been some high profile cases where the office procedures and protocols of chiropractors have been examined in minute detail. [Mathiason Inquest] The conduct of the doctor and the office support staff during emergent situations will have a bearing on how the problem is resolved. If immediate emergency action is required and delivered it may have a very positive influence on the recovery of your patient as well as highlighting your professionalism and credibility. This will have a significant impact if the matter ever reaches a court of law. Having set protocols and practicing them will ensure a calm and measured response by you and your staff in any emergency.

It is imperative that issues that may arise between the office and the patient concerning billings and collections be dealt with immediately and without the necessity of threats or litigation. Patients must know what the doctors charges are from the outset. If there is a dispute over the billings, a doctor may well be better served by foregoing the collection of the outstanding account as compared to the patient filing a complaint with the licensing board with respect to the validity of the outstanding charges.

Proper management of your office staff will not only improve office moral it will ensure that patients view your office as being competently and professionally run. It will instill confidence in your patients so that if something unusual takes place they will give the doctor the benefit of the doubt and trust the doctor to continue to manage them through their problem.

### **Staff management**

- Scheduling appointments
- Answering the phone
- Dealing with emergent office situations
- Record keeping
- Office policies on [e.g. on confidentiality, consent, gowning]
- Guidelines on office dress
- Billings and collections

### **Sexual impropriety and risk management**

There are significant emotional, professional and personal costs associated with allegations of sexual impropriety in addition to the financial costs. Many times the doctors accused of allegations of sexual impropriety have crossed boundaries inadvertently because they are poorly informed and out of touch with the realities of today's societal expectations. While this is no excuse it is unfortunate and can be tragic. By educating these doctors on boundary issues we should be able to reduce the number of allegations of impropriety. What we cannot do, by educating chiropractors, is stop those who are pathologically inclined to abuse their patients. We can only hope their patients or colleagues will report them, as they may be legally required to do, to the regulatory authorities before they do irreparable harm to themselves or their patients.

For the purposes of this article definitions are immaterial. In fact, it matters not whether the allegation is sexual harassment, sexual abuse or sexual misconduct, the doctor's reputation will be significantly tarnished in all cases.

When there are allegations of a sexual nature there are several different forums for patients to complain:

- Criminal: charges may be laid through a complaint to the police
- Professional: a complaint can be lodged with the licensing authority
- Human Rights: the Human Rights Commission might consider becoming involved
- Civil: the patient may opt to sue the chiropractor

Sometimes an angry patient will utilize a combination of these options against the doctor.

Knowing the difference between appropriate professional behavior and crossing a boundary with a patient should be clear to a chiropractor. There are times, with certain presenting complaints that require examination and

treatment in sexually sensitive areas, that extra caution by the doctor is required. Communication and consent are vital in these cases. Patients must be informed about exactly what you intend to do to them and agree to the procedure [consent] before you proceed. This should be documented carefully. It is also imperative the chiropractor understands that the patient has the right to change their mind about a procedure. If they decide they don't like it they have the right to withdraw their permission for you to continue. Pay attention to this! Stop immediately and deal with their concerns. Do not force them to have a procedure they are not comfortable with.

As doctor/patient relationships evolve there is sometimes a tendency to be less cognizant or careful of boundary issues. Kibitzing and joking can often get out of hand. Comments about body size, shape, weight, or especially any comments with sexual connotations may land the doctor in trouble. Don't assume familiarity even if the relationship is a long term one.

Ethnic and racial customs are another possible area of conflict. What may be acceptable behavior to some patients may evoke a strong reaction to others. Sensitivity is key in these relationships.

With the foregoing in mind identifying potential areas of sensitivity are essential to prevention:

- Any erotic or sexual advance of any kind
- Verbal or physical conduct with sexual overtones
- Non-therapeutic or diagnostic attempts by the doctor to touch or contact with any sexual area of the patient
- Romantic involvement with a patient
- Erotic encounters with patients [even outside of the office]
- Voyeurism or exhibitionism
- Sexual intercourse with a patient

Female doctors used to be all but immune from allegations of impropriety. This is no longer the case. As the number of female practitioners increases the sheer number of patient interactions makes it more likely to happen. It may also be that because allegations of this sort have been almost the exclusive domain of female patients making complaints against male doctors female practitioners are less sensitized to the possibility of being accused.

Even relatively innocuous actions such as accepting gifts from patients can end up causing problems. There is no such thing as a "no strings attached" gift. [Please don't

misunderstand me, a loaf of bread isn't likely to come back and haunt you] Even if the female doctor is just flirting with a patient, beware of the jealous wife! Even if the doctor hasn't crossed any hard boundaries she will still have to fight to clear her name. Make sure that advances are repelled early rather than thinking you are being kind to the patient. Make sure he understands the boundaries and a personal relationship is not possible. Once you let him start thinking there is a chance of a personal relationship rejection later on will only escalate his anger towards you. This often results in irrational action including untrue or exaggerated allegations.

Dating patients can also end up in a problem. Doctors should never date patients or former patients. Even so, it is inevitable that occasionally an interest beyond a professional one can happen with a patient. In these cases the doctor patient relationship must end before any personal relationship begins. This must be documented and the patient referred to another chiropractor. Remember, nothing adverse might happen as long as you stay together. It is when the doctor ends the relationship that it becomes a problem and a complaint may be advanced against the doctor by the patient. Also if you date a married patient beware! The spouse or in-laws may decide to get even by making a complaint! This happens more often than you might expect.

Some simple risk management tools for preventing the possibility of being accused of impropriety are:

- Respect the patient's privacy
- Obtain permission to perform examinations in intimate areas
- Document that consent was obtained
- Document why the examination was necessary
- Do not date patients or former patients
- Learn to deflect seductive patients
- Have a third party in the room when in doubt

All procedures being performed on a patient must be justifiable. As previously discussed it is essential that the examination procedures being performed flow from what you discover in taking a history from the patient. The treatment provided must flow from the results of the history and examination. If a procedure is not in keeping with this flow, allegations of impropriety may arise and be difficult to defend.

Finally, it is imperative that as a doctor you treat every

doctor/patient relationship professionally. Make sure you clearly understand professional boundaries and make sure you do not cross these boundaries. Do not accept patients into your practice that you are not comfortable developing a doctor patient relationship with and once you are caring for a patient if the doctor/patient relationship breaks down, refer or discharge them immediately.

## CONSENT AND INFORMED CONSENT

Practitioners still have difficulty understanding the difference between consent and informed consent.

Consent is integral to every doctor/patient interaction. The patient is giving consent when they submit to a history from the doctor. This may be implied simply from the fact they are at the clinic and they volunteer information to the staff as well as the doctor and answer questions put to them. Once the history is taken and it is time to examine, consent must be given by the patient and ongoing throughout. Consent must be obtained prior to any treatment being administered. The doctor must be ever mindful that consent can be withdrawn at any time. A patient may initially agree to a procedure but change their minds at a later date. This must be respected and the procedure must not be done again until or unless the patient gives consent. It is helpful to indicate in your notes that consent to examine and treat was obtained. Consent must always be obtained and documented when examinations are performed that involve sexually sensitive areas.

Informed consent is an entirely separate issue. It involves the education of the patient about the risks of any procedures that are being considered, whether they are diagnostic procedures or treatment procedures. This process is summarized as follows:

### 5 steps in obtaining informed consent

- What the treatment is?
- Why the patient should have the treatment?
- Alternatives to having the treatment?
- Effects, risks, side effects of the treatment and alternatives to treatment?
- What might happen if the patient does not have treatment?

Why is it necessary for chiropractors to inform patients of the material risks that may be associated with examination and care? Because it has been established in law!

- Reibl v. Hughes
- Mason v. Forgie
- Leung v. Campbell

In *Reibl v. Hughes* the Supreme Court of Canada confirmed that doctors should inform their patients of the material risks of procedures that were going to be performed. *Mason v. Forgie* and *Leung v. Campbell* established that stroke was a material risk associated with cervical adjustments. Chiropractors resent the fact that they are required to inform patients of these risks. It does not matter whether a chiropractor is aware of another health care practitioner who might not obtain informed consent, such conduct is without question improper. These practitioners should be alive to the fact that they have not been singled out in this regard. Informed consent applies equally to all healing professions. It must also be emphasized that aside from the legal issues there is a moral and ethical imperative to inform patients of the risks associated with treatment. Doctors will be empowered to be able to do their best for their patients with the knowledge that the patient understands the risks of care, has accepted those risks, and has given the doctor permission to provide that care.

In order to be valid the patient must have read the informed consent and had the opportunity to ask questions about it. The doctor should verify that the patient has read the form and understands what it says. This should be documented and signed prior to the beginning of care.

Frequently asked questions about obtaining informed consent:

- Will it cause patients to refuse care?
- Will it scare patients?
- Will it take a lot of time?
- Who should obtain it?
- When should it be done?
- Should all of my "old" patients sign one?

Our experience with informed consent spans 13 years and indications are that in reality people rarely refuse care because of being informed of the risks of care. On occasion they may not wish to have a certain procedure performed. If this is the case, respect the wishes of your patient. Most patients are inured to the risks of daily living

and are not frightened by open disclosure and agree to have the offered care. Once you are in the routine of having patients read and sign the consent forms it takes very little time to complete the process. Remember though, that if a patient requires a little extra time to ask questions it is time well spent. The doctor must ultimately ascertain that the form has been understood by the patient and give them the opportunity to ask questions. It must always be signed prior to treatment beginning. All patients receiving care need to be informed of the risks of care whether they have been patients of your office in the past or not. It is always a good idea to review the informed consent with patients if something significant has changed or if you are doing something new or different. This should always be documented. If a patient has been absent from the office for a long period it is a good idea to have them sign a new form.

## CONCLUSION

Doctors need to intervene early if there are signs the doctor/patient relationship has broken down. In most cases listening to the patient will give you all the information you need to remedy the situation. If you find that the issues between you and the patient are not resolving contact CCPA or your insurer. The well-meaning advice of your colleagues may be helpful but it cannot be relied upon to guide you through a difficult situation with a patient. Call the experts that manage these situations on a regular and ongoing basis.

Risk management is a matter of being aware and being proactive. Chiropractors must be aware of the ongoing changes in laws governing health care, both legislative and those decided by court decisions. Read your journals, communiqués, and attend continuing education programs. We are living in a fast paced, consumer aware and consumer driven society. Doctors who meet the challenges and responsibilities of managing the risk in their practices should have a long and rewarding professional career.

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