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M E M O R A N D U M

TO: Colorado Board of Chiropractic Examiners

FROM: David A. Martinez
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RE: Free or Discounted Services Offered by Chiropractors

The Board's staff has been fielding questions about chiropractors offering services for free or at a reduced price to patients. In turn, they have requested some guidance that can be made available to licensees and the public in general. As such, here is a summary of the existing law and interpretation of the scope of practice as it relates to free and discounted services that can be provided by chiropractors to their patients in Colorado.

Statutory Provisions

There are three applicable statutory provisions (listed below). Please note that the one applicable section in Chiropractic Practice Act specifically references the other two statutes that address insurance abuse and fraud in other sections in the Colorado Revised Statutes.

1. § 12-33-117(1)(k), C.R.S., in the Chiropractic Practice Act (cited below) references the two other statutory provisions.

12-33-117. Discipline of licensees - letters of admonition, suspension, revocation, denial, and probation - grounds.

(1) Upon any of the following grounds, the board may issue a letter of admonition to a licensee or may revoke, suspend, deny, refuse to renew, or impose conditions on such licensee's license:

(k) Violation of abuse of health insurance pursuant to section 18-13-119, C.R.S., or commission of a fraudulent insurance act, as defined in section 10-1-128, C.R.S.;

2. § 18-13-119, C.R.S. Health care providers - abuse of health insurance.

This section states that any business practice that eliminates the need for actual payment by the recipient of health care of required copayments and deductibles in health benefit plans is illegal and grounds for disciplinary actions. This statute identifies two specific ways a chiropractor commits abuse of health insurance: if s/he knowingly:

- (a) Accepts from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers; or
- (b) Submits a fee to a third-party payor which is higher than the fee he has agreed to accept from the insured patient with the understanding of waiving the required deductible or copayment.

3. § 10-1-128, C.R.S. Fraudulent insurance acts - immunity for furnishing information relating to suspected insurance fraud - legislative declaration.

This section states that any person who knowingly and with intent to defraud presents a claim for payment or benefit that he or she knows to contain false information commits fraud.

Board Rules

Two related and applicable Board Rules deal with free and discounted services: **Rules 14 and 15.**

(The versions below went into effect on January 1, 2005. The bold type identifies the recent revisions to the Rule adopted late last year.)

Rule 14 Advertisement of Free or Discounted Services

A. Advertisement by licensee of free or discounted services shall be deemed false or misleading pursuant to C.R.S. 12-33-117 (3) unless:

1. Such advertising claims are truthful and detailed as to specific services provided for free or at a discounted price.
2. Prior to the performance of the free or discounted evaluation and the consultation regarding that evaluation, the licensee shall provide the patient with written description of what services are being provided free or at a discounted price. This description shall also indicate the price of other services that may be offered for a fee, in conjunction with the free service, but that are not included in the offer for free or discounted services. The licensee shall provide the patient with a copy of this notice for the patient's retention and maintain a signed copy in the patient's file.

B. No separate charge shall be made for the professional evaluation of **the free or discounted** diagnostic tests whether such professional evaluation is made at the time of the initial office visit or at a later date.

C. The free service or reduced fee differential shall not be billed to a third-party payor for reimbursement.

Rule 15 Advertisement of Free or Discounted X-rays

Advertisement by licensees of free or discounted x-ray services shall be deemed **unethical advertising and grounds for discipline** pursuant to C.R.S. 12-33-117 (3).

Rule 14 Analysis

While the title of Rule 14 speaks to “advertisement” of these free or discounted services, it can be interpreted that under the provisions in this rule, such free or discounted services can be provided to patients so long as they are in compliance with the three statutes identified above.

1. Under Subsection (1) of Section A. in Rule 14:

Advertising of free or discounted services is permitted so long as such advertising is (1) truthful and (2) specifically details the services that are to be provided for free or at a discounted price.

2. Under Subsection (2) of Section A. in Rule 14:

(1) The chiropractor must provide the patient with a written description of what services s/he is going to provide to the patient for free or at a discounted price before any “free or discounted evaluation” (exam) and the consultation is performed by the chiropractor.

(2) The written description given to the patient by the chiropractor must also “indicate” (state) the price of other services that may be offered to the patient “for a fee” (at the patient’s expense), in conjunction with the free service, but not included in the free or discounted services.

(3) The chiropractor must (a) give the patient a copy of this written description that states her/his fees identified in (2), and (b) have the patient sign a copy of this written description, and (c) put a copy of this signed document in the patient’s file.

3. Under Section B. in Rule 14:

The chiropractor cannot charge a separate fee for the professional evaluation of the free or discounted diagnostic tests taken of the patient during the exam and consultation, whether (a) the evaluation is done at the initial visit or (b) at a later time.

4. Under Section C. in Rule 14:

The chiropractor must not bill the insurance company or “third party payor” for payment of the free or the discounted price of such service.

Rule 15 Analysis

Rule 15 forbids the advertising of free or discounted X-ray services by chiropractors.

Hardship Exception

There is a “hardship exception” in §18-13-119(6)(a), C.R.S. that allows for the waiving of the required copayments and deductibles for treatment and related X-rays that can be applicable for up to 25% of a chiropractor's patients during a calendar year. However, for such waiver to apply, such services must be classified as “for charitable purposes.”

The specific section that establishes this “hardship exception” states:
§ 18-13-119(6)(a), C.R.S. Health care providers - abuse of health insurance.

(6) (a) The waiver of any required deductible or copayment for charitable purposes is exempt from the provisions of subsection (3) of this section if:

(I) The person who provides the health care determines that the services are necessary for the immediate health and welfare of the patient; and

(II) The waiver is made on a case-by-case basis and the person who provides the health care determines that payment of the deductible or copayment would create a substantial financial hardship for the patient; and

(III) The waiver is not a regular business practice of the person who provides the health care.

(b) Any person who provides health care and who waives the deductible or copayment for more than one-fourth of his patients during any calendar year, excluding patients covered by subsection (5) of this section, or who advertises through newspapers, magazines, circulars, direct mail, directories, radio, television, or otherwise that he will accept from any third-party payor, as payment in full for services rendered, the amount the third-party payor covers shall be presumed to be engaged in waiving the deductible or copayment as a regular business practice.

“Hardship Exception” Analysis

This is not a carte blanche ‘loop hole’ that creates a competitive edge by allowing the practitioner to waive out-of-pocket payments while legally circumventing the insurance abuse and fraud regulations. Rather, the provisions in this “hardship exception” are very explicit as to the limits placed on the chiropractor.

1. Under Subsection (a) of Section (6), as written, it can be assumed that the waiver of the deductible or copayment must be “for charitable purposes” if it is not to constitute abuse of health insurance by the chiropractor.

2. Then the statute lists three criteria that must be met for the waiver of the deductible or copayment by the chiropractor. Because the conjunction between each of these criteria is “and,” the legal interpretation requires that the chiropractor must satisfy and comply with all three of the elements below in order for waiver of any fees for these services to qualify under the “hardship exception.”

(1) Under (I) of subsection (a) of section (6), the chiropractor must make a determination that the services are necessary for the immediate health and welfare of the patient. The element of time is important to such determination. While the determination is at the professional discretion of the provider, at a minimum the decision has to reflect the need to act or treat without loss or interval of time.

(2) Under (II) of subsection (a) of section (6), each patient has to be assessed independently of others (“on a case-by-case basis”), and the chiropractor has to make a determination that the patient’s out-of-pocket responsibility for payment of the deductible or copayment creates a substantial hardship for the patient. Again the decision is left to the discretion of the chiropractor after a consultation with the patient. But the language of the statute sets the standard fairly high with the use of the adjective “substantial” (meaning “considerable in quantity” or “significantly great”) to quantify the nature of the “hardship.” So applying the reasonable person standard, if payment for services is going to deny the patient funds for food or rent, then that’s probably a “substantial hardship.” But it would be a difficult decision to defend if the patient’s hardship meant payment to the chiropractor foreclosed payment for a pedicure that week.

(3) Under (III) of subsection (a) of section (6), the waiver cannot be a regular business practice of the chiropractor. In essence it must be an exception to the chiropractor’s business practice to grant a patient a “hardship exception” that allows the patient’s out-of-pocket deductible or copayment to be waived

3. Then subsection (b) of section (6) quantifies and essentially defines the maximum limit on the use of this “hardship exception” to no more than one-fourth or 25% of the chiropractor’s patients during any calendar year (January through December). This section states that any chiropractor who waives the deductible or copayment for more than one out of four patients during a calendar year is presumed to be committing abuse of insurance by operating an illegal regular business practice.

Summary

Under current law in the three statutes and two Board Rules identified above, a chiropractor is allowed to offer free and discounted services, as independently determined, so long as such practitioner does not inappropriately abuse or defraud insurance carriers or waive copayments and deductibles, notwithstanding the “hardship exception” with its qualifying criteria. In order to offer such free or discounted services, the chiropractor must provide full disclosure to each patient of fees for other treatment and associated activities that the patient might incur that day, before the exam or consultation occurs. Such disclosure must be given to each patient in writing. Also the chiropractor must obtain a signed notice of such disclosure from each patient and maintain such notice in the patient’s file, prior to the performance of any exam or consultation. Further the chiropractor cannot charge for her/his professional evaluation of the diagnostic tests if such evaluation is part of the free or discounted service.

The “hardship exception” allows for the waiver of the copayment or deductible, for a limited number of patients, so long as the chiropractor makes a professional determination that the need for the services is immediate and that the patient basically cannot otherwise afford these services unless these fees are waived.

Finally, current Colorado law allows for the “time of service discount” for prompt payment that appears to be gaining popularity in the profession, so long as such discount complies with the statutory insurance billing and copayment requirements, and Rule 14’s timing and disclosure mandates. Obviously this would not fit into the “hardship exception.” But, there is nothing in the current law that limits free or reduced price services to only the “time of service discount.” Thus the current law also allows for chiropractors to offer other services for free or at discounted prices as well, so long as there is compliance with all applicable insurance statutes and related Board Rules.