



TO: The Honorable the Members of the Board of Regents

FROM: Johanna Duncan-Poitier

COMMITTEE: Professional Practice

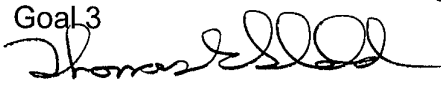
TITLE OF ITEM: Practice Alerts for Chiropractic in New York State

DATE OF SUBMISSION: January 27, 2003

PROPOSED HANDLING: Information

RATIONALE FOR ITEM: This document supports public protection by clarifying good chiropractic practice in key areas for the 6,000 licensees in the chiropractic profession and the general public.

STRATEGIC GOAL: Goal 3

AUTHORIZATION(S): 

SUMMARY:

The Practice Alerts for Chiropractic in New York State address some of the primary areas of professional practice with an emphasis on those practices that have attracted frequent inquiries from the field and complaints of professional misconduct. This publication will encourage licensees to carefully consider practice decisions and will promote safe, ethical and competent chiropractic practice.

PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE



March 2003

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[Practice Memorandum: 2003.3]

To: New York State Chiropractors
Chiropractic Colleges
Chiropractic Organizations
Chiropractic Students and Licensure Applicants
Other Interested Parties

Date: March 2003

From: Johanna Duncan-Poitier, Deputy Commissioner, Office of the Professions and Deputy
Commissioner, Office of Higher Education

Executive Secretary, State Board for Chiropractic

Subject: Practice Alerts for Chiropractic in New York State

The State Education Department and the State Board for Chiropractic have produced the attached practice alerts to provide useful information on good and recommended practices in the profession of chiropractic. While this information is **not** a substitute for an understanding of the law, rules and regulations governing the practice of chiropractic in New York State, it is a useful supplement that reflects common professional practice issues and concerns. These practice alerts can help chiropractors to better understand what might lead to professional practice complaints and to take steps to eliminate or minimize those situations.

These practice alerts reflect the collective experience of the members of the State Board for Chiropractic along with input from a variety of sources, including chiropractic organizations and practitioners, chiropractic educators, Office of the Professions' staff, and other State Boards for the Professions.

Practice alerts provide licensees with general guidance to promote good practice and prevent instances of professional misconduct.¹ They can also benefit licensees and consumers by broadening their understanding of the law, rules and regulations that define professional practice, including professional misconduct and unprofessional conduct.

¹Practice alerts are not intended to establish a standard for the evaluation of issues in civil liability lawsuits involving claims of negligence or malpractice. The intent is to provide a frame of reference to be used with other appropriate considerations for assessment of issues relating to professional misconduct and unprofessional conduct as defined by law, rules or regulations.

Practice alerts do not have the force of law. While the alerts may be a resource in understanding good professional conduct in relation to the professional discipline process, they may not be used as the basis for a charge of or a defense against a charge of professional misconduct. A licensee can only be charged with professional misconduct if there is a violation of the Education Law or Regents Rules. Determinations of which complaints lead to professional misconduct charges are made on a case-by-case basis in accordance with Section 6510 of the Education Law.

For a full understanding of the application of practice alerts, please review the memorandum regarding the purpose and use of practice guidelines included at the end of this packet, which also pertains to practice alerts.

Relevant sections of Education Law are available through the Office of the Professions website at www.op.nysed.gov/title8.htm. Part 29 of the Rules of the Board of Regents on Unprofessional Conduct is accessible at www.op.nysed.gov/part29.htm.

We hope you find these Practice Alerts useful. If in doubt about the appropriateness of specific practices, you should consult the actual laws, rules or regulations. You may also access these Alerts on our web site at www.op.nysed.gov. You may direct any questions and comments to the State Board for Chiropractic, at (518) 474-3817 ext. 190, by fax to (518) 474-3863 or by e-mail at chirobd@mail.nysed.gov.

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PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE

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March 2003

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PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE

Practice Alert 1: Advertising or Soliciting for Patients

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

In a competitive practice environment, violations in advertising or soliciting for patients are an increasing concern. While it is common practice for chiropractors to inform the public about the benefits of chiropractic care through media advertising and various promotional activities, you should be well informed about the appropriate use of promotional activities and materials in a professional practice. Generally, licensees must consider the manner in which information is presented to ensure it is not false, fraudulent, deceptive or misleading.

Keep in mind the following when advertising or soliciting patients:

- a) Repeated attempts to solicit a person who expresses hesitancy or reluctance to schedule an appointment may be perceived as harassment or intimidation, rather than well-meaning persistence.
- b) Refrain from using scare tactics or threats when attempting to solicit new patients or schedule continued care with current patients. Instead, offer your recommendations on evidence-based knowledge or clinical findings.
- c) You have the responsibility for substantiating any claims you make relating to professional services or products; the burden of this proof is with you, not your patient.
- d) Avoid claiming professional superiority in any area of practice. You may inform the public of any practice specialization credential(s) you have earned that are generally accepted by the profession.
- e) Written authorization and consent from a patient should be obtained prior to using his/her portrayal in a testimonial or demonstration of professional practice. You should include clear disclaimers pertaining to any statement or outcome of care.

- f) Maintain all advertising copy, transcripts, audio or videotapes for a period of at least one year after their last appearance, and make them available to the State Education Department, if requested.

You are responsible for the content of all advertisements placed in any medium. Remember that sales representatives from marketing, publishing or advertising agencies do not have the legal authority to regulate advertising by licensees; that authority is vested in the Board of Regents. Also, neither the State Board for Chiropractic nor the State Education Department can pre-approve advertisements; you should seek legal counsel from an attorney for such guidance.

Being overly aggressive in recruiting new patients or family members of patients, or in recommending the continuation of care for current patients, may constitute professional misconduct and be a basis for a professional disciplinary action against your license. Also, schemes such as contests, raffles, or discounts for new referrals may be in violation of Regents Rules on Unprofessional Conduct (as cited at the end of this Alert).

Penalties for advertising not in the public interest may range from being issued an Administrative Warning (AW) to revocation of your license. Failure to comply or repeated advertising violations may result in progressively severe disciplinary actions against your license.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(9) – *“unprofessional conduct”*
Regents Rules, part 29.1(b)(2) – *“exercising undue influence”*
Regents Rules, part 29.1(b)(3) – *“referral fees”*
Regents Rules, part 29.1(b)(11) – *“patient/client authorization of services”*
Regents Rules, part 29.1(b)(12) – *“advertising not in the public interest”*
Regents Rules, part 29.2(a)(2) – *“harassing, abusing, intimidating patients”*

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PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE

Practice Alert 2: Sexual Misconduct

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

Sexual misconduct can be the basis of a charge of professional misconduct. Increasingly across many health professions, including chiropractic, patients are filing complaints alleging that licensees have engaged in some form of sexual misconduct. Since the primary techniques of chiropractic care are “hands-on” requiring the practitioner to be in close proximity to the patient’s body, you should be aware of and anticipate situations that could be perceived as sexual misconduct, and take measures to prevent them.

Patient complaints of sexual misconduct may range from allegations of predatory behavior by licensees, inappropriate romantic relationships, or unexpected physical contact during provision of clinical procedures. Be aware that even if you have taken steps to prevent erroneous allegations, if a complaint is filed, these measures do not provide you with immunity from prosecution.

Good communication can prevent misunderstandings between people, especially health care professionals and their patients. Also, clear, concise documentation of all procedures provided and the reasons for them can form a record that may make the difference between credible and defensible actions and questionable, indefensible practice.

As you prepare to provide care to a patient, consider using every reasonable means available to you to provide the patient with the following information:

- what will be done
- how it will be done
- why it will be done, and
- request him or her to signal when ready.

Prepared text, posters, photographs, videos, computer programs and other tools may be effective in providing pertinent consumer information in addition to direct interaction with your patients. Proper communication not only prepares a patient for the procedure; it provides opportunity for the patient to share expectations, anxieties and personal histories that may have a direct bearing on necessary care, thus enabling you to provide that care with more sensitivity, responsiveness, and efficacy. Therefore, it is considered good practice to be sensitive to words and actions that may be offensive to some patients, and to modify those words and actions to ensure that patients receive the care they need.

To avoid any exploitation or coercion of a patient and to minimize the likelihood of a complaint alleging a boundary violation, you should avoid engaging any patient in a romantic relationship. If you do seek such a relationship with a particular patient, you should refer that patient to another licensee and document the reason for the referral.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(9) – *“unprofessional conduct”*
Regents Rules, part 29.1(b)(2) – *“exercising undue influence”*
Regents Rules, part 29.1(b)(5) – *“moral unfitness to practice”*
Regents Rules, part 29.2(a)(2) – *“patient/client harassment, abuse, intimidation”*

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Practice Alert 3: Record Keeping and Documentation

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

Health care professionals must maintain proper documentation that accurately reflects the evaluation and treatment of the patient, consistent with the appropriate levels of care. Clinical notes serve several important purposes including:

- ensuring comprehensive and consistent patient care
- improving communication with other professionals
- facilitating reimbursement from insurance carriers
- helping to protect licensees against litigation
- standardizing clinical documentation in support of research.

As a competent and prudent practitioner, the initial entry in a patient record should ordinarily include a comprehensive case history documenting an examination of symptoms, past history, family history, past surgeries, traumas, and previous and current medication. You should maintain thorough and accurate records and notes that reflect your care, treatment and interaction with each patient.

Your patient records should include a consistent method for documenting results of care as well as patient outcomes. Forms such as the Oswestry, Neck Pain Index, Visual Analog Scales, or Pain Diagrams may assist in standardizing and objectifying your patients' subjective reports of conditions. These assessments also can be used to monitor the progress of your patients.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(9) – *“unprofessional conduct”*
Public Health Law, section 18 -- *“access to records”*
Regents Rules, part 29.2(a)(3) – *“failing to keep records”*

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PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE

Practice Alert 4: Chiropractic Care and Animals

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

New York State Education Law, section 6551(1) defines the practice of chiropractic as:

detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations **in the human body** for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column. [emphasis added]

Therefore, as a New York State licensed chiropractor, you are practicing beyond the lawful scope of chiropractic if you provide professional services, treat, or correct structural imbalance, distortion, or subluxations for the purpose of removing nerve interference in any living creature, other than a human being.

While there are postgraduate courses available to chiropractors for the study of animal anatomy and associated adjustive techniques, and there is a national organization dedicated to veterinary chiropractic, you should be aware that providing chiropractic care to animals is against the law. Also, even if a service is provided *pro bono*, i.e., without fee, you are accountable under the law. If someone requests you to help an animal, refer that person to a qualified veterinarian, some of whom are trained in adjustive techniques.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(9) – “*unprofessional conduct*”

Education Law, section 6551(1) – “*confines chiropractic care to the human body*”

Regents Rules, part 29.1(b)(9) – “*practicing beyond the lawful scope*”

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Practice Alert 5: Multidisciplinary Practices

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

The health care professions constantly evolve. A variety of forces, sometimes in competition with one another, continue to shape and reshape the methods, procedures and the manner in which health care is provided to the public.

The practitioners who provide the care within that environment also must evolve in terms of knowledge, competencies and techniques. Change poses both opportunity and challenge in ensuring provision of care by competent, knowledgeable, and ethical professionals.

One change emerging in the contemporary practice environment is the increased collaboration of licensees from various professions practicing outside of organized facility settings (i.e., settings regulated by the State Department of Health). Most notably, licensees in the professions of medicine and chiropractic have begun to converge for the expressed purpose of delivering comprehensive services to patients whose conditions warrant a joint approach.

Collaborative arrangements between professionals have the potential for providing effective care in a convenient delivery system for patients. It is important, however, that all licensees participating in the collaboration uphold their respective professional responsibilities.

You should be aware of the following considerations when practicing or contemplating a practice with licensees from other professions:

Scope of Practice

- Practice only within the scope of your license.
- Refuse any delegation of responsibilities by your employer that is outside the scope of your chiropractic license.
- Only delegate duties and responsibilities that require a license in chiropractic or any other profession to a person who is duly licensed.

Professional Practice Entities and Employing Licensees

- Avoid employing licensees in medicine or being the controlling entity in a practice with licensees in medicine or any other profession authorized to perform procedures beyond the scope of your chiropractic license, which includes physical therapy or nursing. With the exception of medicine, dentistry and veterinary medicine, the law allows for licensees in health professions to form a Professional Limited Liability Company (PLLC) or Partnership (PLLP) together as a multidisciplinary practice. It is advisable to seek legal counsel on the formation and operation of such entities to ensure compliance with the law.
- You may hire licensed massage therapists, certified nutritionists or certified dietitians to work in your practice as employees, since your license authorizes you to perform the services provided by these practitioners.
- Remember, you are responsible for the acts of all your employees and staff, licensed and unlicensed.
- If you own a professional practice, you are responsible for overseeing the patient care provided by all associates, other licensees, technicians, and everyone else employed in your practice. If you are an employee of another licensee, chiropractor or physician, it is the employer who bears ultimate responsibility for overseeing the patient care provided in that practice. Therefore, while you remain responsible for the direct care you provide to patients, "absentee owners" may be subject to professional misconduct violations, as well.

Referrals

- Avoid making direct referrals to physical therapists since they are authorized to practice only on referrals from physicians, dentists, podiatrists or nurse practitioners. If you feel your patient may benefit from services provided by a physical therapist, inform your patient of the referral requirement. You may assist him or her to locate a licensed professional who can make a direct referral.

Collaborating with Physicians

- If you are offered a position in a medical practice, remember that the owner/physician must have some level of professional competence in the services you will be providing. As the practice owner, the physician is responsible for appropriately identifying patients you may be able to help, how you can help them, what contraindications there may be to your services, and what outcomes to expect so your work may be monitored. Be sure the owner/physician of the practice is trained as an osteopath, physiatrist, or orthopedic specialist, or has had additional training in manual therapy before accepting an offer of employment in such practice.
- You may not work for or with a physician as an independent professional sub-contractor or consultant (see “fee-splitting” cited at the end of this Alert). If you are employed by a physician, you cannot be authorized to “direct patient care” or be given “complete control” over patients in that medical practice beyond your scope as a Doctor of Chiropractic. However, you remain responsible for the chiropractic care you provide patients. If your physician employer directs you to do something contrary to your clinical judgment, you should exercise that judgment in resolving the directive with your employer.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(2) – *“Practicing fraudulently, incompetently or negligently”*

Education Law, section 6509(9) – *“unprofessional conduct”*

Education Law, section 6509-a – *“fee splitting”*

Regents Rules, part 29.1(b)(3) – *“referral fees”*

Regents Rules, part 29.1(b)(4) – *“fee splitting”*

Regents Rules, part 29.1(b)(9) – *“practicing beyond the lawful scope or beyond one’s competency”*

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PRACTICE ALERTS FOR CHIROPRACTIC IN NEW YORK STATE

Practice Alert 6: Performing Independent Chiropractic Examinations (ICEs)

Law, rules and regulations, not Alerts, specify the requirements for practice and violating them constitutes professional misconduct. Not adhering to this Alert may be interpreted as professional misconduct only if the conduct also violates pertinent law, rules and regulations, some citations of which are listed at the end of this Alert.

There are a number of considerations of which you should be aware when performing independent chiropractic examinations (ICE):

- You should be competent to provide such services. You may wish to complete an acceptable course of specialized training in the practice area known as “Insurance Consulting” or specifically, “Independent Chiropractic Examinations” before accepting such responsibilities.
- When documenting an ICE, your narrative report should note the absence of any prior professional relationship with the patient you examine.
- Your report should reflect only those procedures you performed during the examination and the results obtained.
- The procedural content of an ICE should be sufficient to enable you to arrive at an appropriate physical assessment, and diagnosis/prognosis of the patient.
- From a risk management perspective, the presence of an independent witness during the ICE is recommended to avoid allegations of inappropriate behavior or, to help resolve a situation where there are differing recollections of what took place during the examination.
- When making a statement regarding the patient’s disability/diagnosis/prognosis, it is advisable that your opinion be based upon the patient’s history, objective findings on examination, the diagnostic testing results, and the documentation available for review.

Citations of Pertinent Law, Rules or Regulations:

Education Law, section 6509(2) – *“Practicing fraudulently, incompetently or negligently”*

Education Law, section 6509(9) – *“unprofessional conduct”*

Regents Rules, part 29.1(b)(6) – *“filing a false report”*

Regents Rules, part 29.1(b)(9) – *“practicing beyond one’s competency”*



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ALBANY, NY 12234**

DEPUTY COMMISSIONER FOR THE PROFESSIONS

Office of the Professions

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March 15, 1999

To: Professional State Board Members

From: Johanna Duncan-Poitier

Subject: Professional Practice Guidelines

I write to clarify the purpose and use of practice guidelines developed by Professional State Boards. Practice guidelines provide guidance regarding the implementation of Rules of the New York State Board of Regents to practitioners for the promotion of good practice. Because of questions recently posed about the meaning and use of these guidelines, the following is a more detailed description of the purpose, benefits and limitations of this important tool.

In accordance with Section 6504 of Title VIII of the Education Law:

"Admission to the practice of the professions and regulation of such practice shall be supervised by the board of regents and administered by the education department, assisted by a state board for each profession."

The Board of Regents' supervision and the State Education Department's administration of professional regulation is guided by the Education Law, Regents Rules and Commissioner's Regulations. To meet their responsibility to assist in regulating the practice of the professions, several professional State Boards have developed practice guidelines to assist licensed professionals in understanding how to apply the law and accompanying rules and regulations in their daily practice. They are intended to provide licensees with guidance to promote good practice and prevent incidents of professional misconduct.¹

Practice guidelines can benefit licensees and consumers by broadening their understanding of statutory and regulatory language that defines professional practice, including professional misconduct and unprofessional conduct. They inform practitioners of the Office of the Professions' and State Board's perspective of what constitutes good practice in their profession. In the discipline process, practice guidelines can serve as one of many resources that may be referred to by a board member in consultations, early involvement meetings, and informal settlement conferences, all of which seek resolution of complaints. When combined with the board member's education, experience, and prior activity in the profession and the disciplinary process, they can inform a board member's recommendation when consulted upon a complaint.

¹ It should also be understood that it is not the intent of the guidelines to establish a standard for the evaluation of issues in civil liability lawsuits involving claims of negligence or malpractice. The intent is to provide a frame of reference to be used with other appropriate considerations for assessment of issues relating to professional misconduct and unprofessional conduct as defined by statute, Regents Rule or Commissioner's Regulations.

Practice guidelines, however, are not a substitute for or have the authority of Education Law, Regents Rules, or Commissioner's Regulations. They do not have the force of the law. Therefore, while the guidelines may be a resource in assessing conduct that underlies a violation, they may not be used as the basis for a charge of professional misconduct. Specifically, a professional cannot be charged with professional misconduct based upon a violation of or failure to comply with guidelines. A licensee can only be charged with professional misconduct if there is a violation of the Education Law or Regents Rules. Nor can conformance with guidelines be deemed to immunize a professional from potential charges of misconduct. Those determinations are to be made on a case by case basis by the Professional Conduct Officer in accordance with Section 6510 of the Education Law.

In formal disciplinary hearings, a guideline may not be used in deliberations unless the Administrative Officer determines that it is admissible. Unless guidelines have been legally admitted into evidence upon a motion to be decided by the administrative officer, a panel should not refer to guidelines because a determination should be based solely on the evidence of individual conduct in an individual case. We realize that a panel member may have discussed and contributed to the development of practice guidelines. That is part of the board member's perspective, formed by his or her professional background, education, experience, research, and discussions. When a board member serves on a hearing panel, due process requires that board member to disregard whatever knowledge or insight was developed during the development of the guidelines unless they have been admitted into evidence, as noted above.

A guideline cannot be part of the hearing record or considered as evidence of the respondent's guilt, unless it has been admitted into evidence. In analyzing and interpreting the evidence presented in the hearing record, panel members should not substitute any guideline for evidence or proof of any charge.

As an articulation of good practice, guidelines are a very important tool for the State Education Department in meeting its critical mission of promoting good practice. I appreciate the thoughtfulness and dedication all of the State Professional Board Members bring to matters of professional licensure, practice, and discipline. Your role in the disciplinary process in describing and interpreting what is good practice are essential in assisting the Regents and the Department in matters of practice. If you have any questions in this matter, please contact Doug Lentivech in the Office of Professional Responsibility at (518) 486-1765 or e-mail at dlentivech@mail.nysed.gov.

Again, my appreciation to you for the time, dedication, and professional expertise you devote to regulation.

cc: Frank Muñoz
Fred Burgess
Douglas Lentivech
Executive Secretaries, State Boards and Professional Assistance Committee