

MAKING DISCIPLINARY DECISIONS AIRTIGHT

THURSDAY, SEPTEMBER 23, 2010, 4:00 P.M.

SESSION COORDINATOR AND MODERATOR:

Jon Pellett, Esq., Barr, Murman and Tonelli, P.A.

PANELISTS:

**James R. Anliot, Esq.
Director of Healthcare Compliance Services
Affiliated Monitors, Inc.**

**Alison Cleaves, Esq.
Deputy General Counsel
Tennessee Department of Health**

**Michael J. Ferjak
Criminal Investigator
Criminal Enforcement Unit
Area Prosecutions Division
Iowa Office of the Attorney General**

**Amigo Wade, Esq.
Senior Attorney
Virginia Division of Legislative Services**

**James A. Wilson, Esq.
Private Counsel
Law Offices of James A. Wilson**

THE CAST OF CHARACTERS

Dr. F – the treating chiropractor who treated Elena and is the defendant in our case

Vigilant Auto Insurance Company – the complainant in our case

The pick-up truck driver – was driving the truck which rear-ended Elena’s parents’ car and is insured by Vigilant Auto Insurance Company

Elena – the seven-year-old girl whose patient care is at issue in our case

Elena’s parents – they took Elena to Dr. F for care; neither one speaks English as their primary language

Elena’s attorney – is representing her and her parents in their civil lawsuit against Vigilant Auto Insurance Company and the pick-up truck driver. Was recommended to Elena’s parents by Dr. F’s office manager, who used to work for him.

Dr. F’s office manager – recommended Elena’s attorney to her parents, used to work for him

Board investigator – one of our more experienced investigators, but is not formally trained in chiropractic specifically or in health care generally

Dr. M – the Board’s chiropractic “consultant” who was chosen by our Board chairman to help our investigator with the investigation and preparation of this case

Board chairman – has been a member of our Board for eight years and chairman for the last three.

Dr. Steele – a licensed chiropractor in our state who performed the “independent medical review” of Elena’s treatment for Vigilant Auto Insurance Company

FULL STATEMENT OF HYPOTHETICAL CASE FACTS

This case arises out of a complaint brought by the Vigilant Automobile Insurance Company against Dr. F, a 50-year old chiropractor who has been practicing chiropractic for over 25 years, but moved to our jurisdiction about a year ago. Prior to moving to our jurisdiction, he was licensed in state B for approximately ten years, and in state C for the previous fifteen. Dr. F is now facing formal disciplinary action by our Board, based on this complaint and the results of our investigation into it. At today's Board meeting, we must rule on several pre-trial motions which have been filed by Dr. F's attorney.

Vigilant Auto Insurance alleges that Dr. F "knowingly and fraudulently overtreated" a seven-year old girl named Elena, who was a passenger in the back seat of a car which was rear-ended by a pickup truck six months ago. The pick-up truck was driven by an insured of Vigilant Auto Insurance. Elena's parents have sued the driver and Vigilant, claiming that the driver of the pick-up truck was driving too fast and following too close, and seeking payment for the damage to their car and the costs of Elena's medical care, including hospital emergency room bills and Dr. F's subsequent treatment. The total amount of the damages is believed to exceed \$25,000. Elena's parents are represented by an attorney who was recommended to them by Dr. F's office manager, who once worked for the attorney.

The pick-up truck driver, who was not cited by the police who investigated the accident, claims that Elena's father stopped short in front of him for no reason. Vigilant has refused to pay anything for Elena's medical care and claims that Dr. F's treatment of Elena, which cost more than \$6,000, was "clearly excessive" and "not clinically justified". Under the laws of our jurisdiction, a person who is injured in an automobile accident may sue an auto insurance company for such medical costs and other damages if the damages exceed \$5,000 and the insurance company does not pay on the claim within 90 days after the accident. The suit must be filed, however, within six months after the insurance company notifies the injured party that they will not pay the claim. Vigilant Insurance has already sent this notice to Elena's parents.

Our Board investigator is not trained in medicine generally or chiropractic specifically. To assist him in reviewing Elena's treatment records, particularly the record of her treatment by Dr. F, the Board has retained a chiropractic "consultant", Dr. M, who was recommended by our Board chairman. Dr. M and the Board chairman have been friends for a number of years, and both have previously performed "independent medical examinations" (IMEs) for a company which performs such reviews for a number of insurance companies, including Vigilant. As the review of the treatment records has progressed, our Board chairman has been telephoning Dr. M privately to get "updates" on the status of the review, which Dr. M has provided and which the chairman has shared with the members of the Board.

The review of Elena's medical records shows that she was taken by ambulance to a local hospital immediately after the accident. She complained of a headache, which she described as "not too bad" and some pain in her neck. A CT scan was taken of her skull at the hospital, along with cervical x-rays. Both proved negative, and Elena was discharged a few hours later with pain medication. When Elena woke up the next day, she complained that her headache and neck pain were much worse. Her parents, for whom English is not the primary language, took her to Dr. F. because they had heard a radio advertisement claiming that Dr. F "could provide genuine relief" and "was an expert" in treating victims of whiplash injuries suffered in car accidents.

Dr. F treated Elena three times a week for twelve weeks, using a combination of chiropractic manipulation of Elena's neck and a variety of additional supportive therapies. Dr. F did so without having obtained the results of the x-rays or CT scan taken at the hospital immediately after the accident, and he did not either reduce the frequency of treatment or modify the nature of his treatment at any time during the 12 weeks of care, even though his own progress notes indicated that Elena had improved considerably by the end of the sixth week of treatment. He pronounced Elena "symptom-free" and discharged her from care three days after her records were reviewed by a Dr. Steele, a licensed chiropractor in our state who also performs IMEs. A few years ago, Dr. Steele, Dr. M, and our Board chairman all performed IMEs for the same company; although they have parted ways since, both Dr. M and our chairman know Dr. Steele personally and remain friends with him.

The IME report of Dr. Steele, which is the core of Vigilant's complaint against Dr. F, is highly critical of Dr. F's treatment of Elena. Dr. Steele asserts that there are numerous deficiencies in Dr. F's clinical records concerning Elena's treatment, including:

- Failure to note Elena's complaints of "frequent headaches" over the past year in her medical history;
- Inadequate documentation of his initial examination of Elena;
- A treatment plan which did not identify any goals or explain how Dr. F's proposed treatment of Elena would help her;
- Use of chiropractic manipulation of Elena's neck without knowing what the results of the x-rays or CT scan taken at the hospital after the accident showed, which Dr. Steele has characterized as "tantamount to malpractice"; and
- Failure to reduce the frequency of treatment or modify the treatment regimen despite progress notes indicating that Elena was improving.

Dr. Steele's report concludes that "none of the patient's care beyond week six was clinically necessary", and he recommended non-payment of Dr. F's bills. His report includes the following statement: "It is well-known in chiropractic circles that Dr. F has had a pattern of overtreating patients in motor vehicle accidents in the past". It is not clear where Dr. Steele obtained the information on which he based this last statement. Dr. Steele has been the subject of three complaints to our Board over the past five years, all of which came from treating chiropractors who were unhappy with his opinions of their care. All three alleged that Dr. Steele's negative opinions constituted "unprofessional conduct", but none of these resulted in disciplinary action by our Board.

Dr. M, our Board-selected expert, has agreed with Dr. Steele on everything except the characterization of Dr. F's use of chiropractic manipulation without knowledge of the x-ray or CT results as "tantamount to malpractice". Dr. M's opinion is that Dr. F's decision to do so was "careless, perhaps even reckless", but not necessarily malpractice. In any event, each of the above-noted deficiencies, if proven, would constitute violations of our Board's regulations concerning clinical record-keeping requirements or excessive treatment of patients.

During the course of the investigation, our investigator contacted the licensing boards in states B and C, where Dr. F has previously been licensed, to see if Dr. F was ever disciplined in either state. This is a routine part of our investigation procedure. Our investigator has discovered that state B issued an order two months ago suspending Dr. F's license in that state "indefinitely" for "failure to respond to or cooperate with a Board investigation of a complaint against him". Our investigator learned that State B's licensing board received a complaint against Dr. F six months ago, alleging that Dr. F had engaged in "clinically unnecessary and excessive" treatment of a car accident patient in that state three years earlier. When Dr. F did not respond to the complaint or submit the records requested by state B's board

within the 30-day time limit imposed by state B's laws, the board issued a formal disciplinary complaint. When Dr. F did not respond to this either, state B's board prosecutor filed a motion with the board for "summary decision" in his favor. Dr. F again did not respond, and the board in state B then issued their decision suspending Dr. F's license indefinitely. Under the laws of state B, Dr. F had 30 days to appeal such a decision; no appeal was ever filed.

When questioned about this by our investigator, Dr. F claimed that he had never received any notice of the complaint or any notice of the subsequent disciplinary proceedings in state B. Dr. F told the investigator that he had hired an attorney in state B to inform the licensing board there of Dr. F's new address here, but the attorney apparently failed to do so. This attorney has apparently left state B and his whereabouts are not known.

The formal statement of charges against Dr. F, which initiates the formal disciplinary process, alleges that:

- Dr. F engaged in excessive and clinically unnecessary treatment of Elena in violation of our Board regulations;
- Dr. F "failed to maintain a sufficiently complete patient treatment record" regarding Elena, based on the deficiencies found by Dr. Steele and confirmed by Dr. M, which, if proven, would also constitute sufficient grounds for discipline;
- Dr. F has been disciplined by state B, which is a sufficient basis for discipline by itself under our law, and
- Dr. F failed to inform our Board of that disciplinary action when he renewed his license last month. Our license renewal form does ask whether the licensee has been the subject of any disciplinary action since their last renewal; Dr. F answered "no" to this question.

The formal statement of charges was prepared by our Board prosecutor with the assistance of Dr. M, our clinical expert, and presented at a Board meeting attended by all seven members. The charges was approved by a vote of 6-1. The Board chairman voted in favor; the only member who voted no was the public consumer member, an attorney, who wanted the Board to drop the portion of the charges related to the disciplinary action taken by state B.

QUESTIONS FOR AUDIENCE MEMBERS TO DECIDE

At today's Board meeting, we have been asked to consider several motions which have been filed by Dr. F's defense attorney. These motions include the following:

- A motion to dismiss all charges against Dr. F, on the grounds that the Board chairman's contacts with Dr. M during the investigation of the case, and his subsequent communication of what Dr. M told him to the other Board members, have prejudiced the Board against Dr. F. This motion does not specify exactly what the chairman is supposed to have learned from Dr. M or what the chairman supposedly told the other Board members about Dr. M's findings;
- A separate motion to dismiss all charges against Dr. F on the grounds that the Board, having issued the charges against Dr. F, cannot now decide the merits of the charges themselves because doing so "deprives Dr. F of a fair trial and therefore deprives him of due process of law";
- A motion to transfer the trial of the case from the Board to an independent administrative law judge in our state's Division of Administrative Hearings "in order to ensure that Dr. F receives a fair trial". Because of the current caseload at the Division of Administrative Hearings, granting this motion will delay the hearing on the charges for at least six months;
- A motion to recuse the Board chairman from participating in the hearing or the decision of the case, on the grounds that his contacts with Dr. M during the investigation have prejudiced him against Dr. F;
- A separate motion to recuse the Board chairman from participating in the hearing or the decision of the case on the grounds that his "previous and continued involvement" with the IME company included performance of IMEs for Vigilant in which the chairman recommended non-payment of bills submitted by other chiropractors, and may have included reviews of other cases in which Dr. F was the treating chiropractor. The Board chairman has admitted that he continues to perform IMEs for this company from time to time, but claims that he is not told who the treating chiropractor is when he does them;
- A motion to disqualify Dr. M from testifying at the hearing on the grounds that his personal friendships with the chairman and with Dr. Steele have improperly biased him against Dr. F;
- A motion to exclude Dr. Steele's IME report on the grounds that he did not personally examine Elena, and confined his review entirely to a review of Dr. F's records, and therefore could not properly judge whether Dr. F's treatment of Elena was appropriate;
- A motion to disqualify Dr. Steele from testifying on the grounds that he has previously been the subject of complaints filed with the Board; and
- A motion to dismiss the portion of the charges which relate to the disciplinary proceedings against Dr. F in state B on the grounds that Dr. F was never given proper notice of those proceedings and was never given a fair opportunity to defend against them.

CONTACT INFORMATION FOR PANELISTS

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