

Accountable and Responsible  
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Ladies and Gentlemen, thank you for the invitation to again have an opportunity to provide some closing remarks to the 2009 FCLB conference. The theme this year *Accountable and Responsible* will clearly resonate in our currently “out of control” world of financial collapse as well as the public’s collapse causing a **crisis of confidence** in the entire world regarding our government and private corporations ability to solve even minor problems in a responsible and ethical way. Just a few years ago we were rocked with Enron, Adelphia, Global Crossing, Tyco, WorldCom, Arthur Anderson, and in 2008 & 2009 the news of Lehman Brothers, J.P. Morgan, Washington Mutual, AIG, Fannie Mae and Freddie Mac, Wachovia, and on and on. This unfortunately is the new world we live in. I promise I won’t spend any time on the list of Cabinet Nominees who have had to back out of the running because of TAX avoidance and other ethical issues, from HHS to Commerce secretary, from Labor to Treasury is it any wonder we are entering a crisis of confidence in every aspect of governance. This lack of confidence and trust permeates every aspect of society.

The Boards of Examiners thankfully are not as high profiled as financial institutions or cabinet level posts but none-the-less they were created for a reason.

What is the main goal of any state board of examiners?

Is it---Protecting the Public or Protecting the Provider?

Or perhaps a novel approach to board who regulate might be considered which would ***help prevent problems*** for the provider (before they begin) and thus de-facto protect the consumer. I want to focus my talk today on some real practical and pragmatic issues which I know happen each and every week. Perhaps some of you, as members of your respective boards of examiners, can consider if you decide to take an innovative and very different approach to complaints in the future. The examples I will use are taken from actual data accumulated on various cases which arise either because of direct “action” or because of “inaction” by the various boards.

Now all of us, I hope, are united in the firm resolve to rid our profession of the 5% of practitioners who seem to cause 90% of the problems and give all the rest of the practitioners a perpetual black-eye. Ferreting out fraud and punishing it will undoubtedly help improve our image. But I can't help but wonder whether the STATE BOARDS are making the best use of their time, resources and expertise by focusing so much on the **punishment phase** rather than on **prevention and rehabilitation**.

Rather than focusing on the negative punishment phase, perhaps FCLB and the various state boards and provincial boards might **shift their focus, thoughts and actions** from:

**FRAUD & CRIMINAL ACTIVITY** to using **seminars, newsletters, On-line CE** and secure **web training** to alert doctors of ongoing investigations, disciplinary actions, and reporting on criminal activities.

**“Help the doctors stay out of trouble”**...now that's a very real doable function for boards...in addition to their mission of protecting the public. The focus would **not be on punishing the doctors after the fact**...but instead focus the vast majority of efforts and resources on protecting the public by **proactively preventing** the doctors from getting in trouble in the first place.

Let's start at the top of the list with a very recent controversy involving INFORMED CONSENT. This topic clearly comes into focus with the recent activity in Connecticut. A group, whose mission is clearly to see chiropractic de-licensed, set out with an ambitious agenda to pass legislation which would mandate that chiropractors be required---by law--- to provide **informed consent** to their patients and specifically listing the fact that chiropractic adjustments can cause “STROKE” (and that word stroke was mandatory in the proposed legislation). Aside from the obvious anti-chiropractic agenda of this group, the fact remains there is merit to boards being pro-active in this **era of consumer protection** and defuse these out-of-control measures which have just enough merit to enlist the support of legislators, and consume huge resources and time by all parties.

While this specific legislative measure in Connecticut failed--- another was born demanding a **“discharge summary”** be provided to each patient upon leaving the office of a chiropractor. The discharge summary would list complications which could result

from an adjustment. Imagine the chaos this would create and the group supporting this measure point to the similarity of the document listing the side effects of drugs given with each prescription, while similar this analogy is in no way appropriate.

The solution to this matter is an obvious one, but not necessarily an easy one. The ACC has developed an informed consent document model. This could easily be developed into an FCLB model bill for introduction nationwide legislatively or adopted by rules and regulations where permitted by the board. The profession would be proactive and point to these activities as clear evidence of chiropractic consumer sensitivity and support. Appoint a committee this year and develop a model bill and see how many states can enact this before FCLB meets again in 2010. This is an issue that will not go away...and needs to be addressed in a thoughtful manner. I urge you to begin working on this now.

Here is an item of discussion that may not go over well--- what about the boards themselves? What do I mean by this seemingly innocent statement? Well there are boards in this country where complaints against “board” members are treated **differently** than complaints against other **licensees**? Yes, I know this is hard to believe that this activity could occur but it does and some of you are on board where this has taken place. If you were call to be on trial and asked to truthfully respond to the question: “What measures are in place on your individual board to provide for transparency of actions against the very individuals appointed to protect the consumer and regulate the doctor”, what would your answer be? If there is anything even remotely resembling a double standard on your board, step in early and correct it before it blows up and becomes headline news. This kind of activity simply cannot be allowed to exist.

I wonder about The National Practitioners Data Bank and what happens to these reports? As you know the NPDB does not require a patients name to be listed, yet certain boards around this country will send a subpoena to malpractice carriers asking for a complete “claim file”. As most of you know carriers will defend their “work product” and refuse to provide data that is not warranted by boards who have simply taken it upon themselves to go on a modern 21<sup>st</sup> century Witch Hunt, using NPDB information.

While I am at it, let me suggest that you as board members may want to check into your INVESTIGATORS who are doing your investigations.

They sometimes use **less than ethical methods** for obtaining information, they use intimidating tactics, coercive technics and downright bullying strategy on doctors. Last time I checked, doctors still have certain legally protected rights under our constitution, such as the “right of counsel”, the “right of appropriate notice” and while not a constitutional right the “right of common courtesy”. Now you know I am telling you this because it has happened in the past, is happening now and will happen in the future unless you as board members fully know what the investigators are doing when they attempt to build a case against a doctor. These investigators are sometimes abusive on the phone, appear at the office unannounced, flash a badge and attempt to obtain information. The doctors in your state have a right to counsel, and if there is activity which is illegal or will result in board sanctions, this can all be discovered using due process. Boards have a responsibility to protect the doctors in their state as (consumers) and provide them with the same kind of legal procedures afforded everyone in our society.

I know that board member attitudes can and do become cynical by the long and the creativity list of various schemes to defraud which often are indeed innovative. How I wish that talent would be applied to doing things right rather than clever ways to “beat the system.” By the way, the estimated cost to the USA for insurance fraud alone is \$100 billion dollars a year (United States GAO).

Let’s talk about those doctors who attempt to rationalize the fact that they “FORGIVE” a co-payment or provide a no-out-of-pocket-expense scheme to attract patients and do it all in the name of providing “care” to those less fortunate who are having trouble. Of course it is legal and morally right to waive a fee for those with legitimate hardships, but it is illegal to interfere with a contractual arrangement between an insurer and the insured.

I’m also reminded of the supposedly good “advice” given to many DCs attending seminars taught by renowned gurus of the profession, “....that the way to stay under the federal radar is to not bill Medicare, Medicaid or Champus...” I suspect that there are any number of licensees who are continuing to follow that "advice" without realizing that

the NEW **HIPAA** legislation defines a health care benefit program to include any private plan or contract. You can be guilty under this act for billing Blue Shield, Aetna, Allstate or State Farm, just as easily as any government program. When the doctor is caught the Guru is nowhere to be found

In these instances could **BOARDS** across this country creatively devise an On-Line educational program to alert and inform doctors that this activity is illegal and improper? Could the boards mandate a certain number of hours of education? Hours that are in addition to the license renewal hours or **encompassed within** the hours already mandated in order to truly develop a target focused program which will identify these areas of risk to the doctor and risk to the patient.

One of my favorites, I ask is it **conscious ignorance** for a practitioner to sign a declaration stating they do not “diagnose” in order to receive a reduction in malpractice insurance premiums by some groups selling this nonsense out there? Knowing that many of the claims for malpractice allege that the doctor “Failed to Diagnose” or “Failed to Refer,” it becomes very difficult if not impossible to provide a defense to these doctors when they have in essence provided a clear **ADMISSION** of guilt by declaring they do not diagnose, when it is in your state statute! Yet this nonsense is going on in some states even in 2009 and boards have not taken action to do anything about this proactively.

Additionally, are the boards exercising their full and complete authority by permitting such blatant misrepresentations to exist at all? The proactive process would suggest that investigations by all boards across the country should be undertaken to be certain that the “state statutes” are being upheld by all agencies. Then the task of informing the practitioners, that these kinds of activities can get them into problems would be a service FCLB and all the boards could perform. This would proactively inform those doctors who may not honestly know or intentionally want to do anything wrong.

There are many such examples where proactive board activity can help to prevent problems in advance, by regularly publicizing the kind of issues to their licensees in advance and also to use examples of what happened to others to serve as guidance.

There are plenty of agencies to take care of actual crimes...at least after they're committed. Why not have your boards concentrate on preventing the crimes from happening in the first place? The sentinel effect is a very powerful deterrent to criminal activity. There is the old adage, "we don't put locks on doors to keep out burglars, and we put locks on doors to keep honest people honest."

If the primary focus is concentrated on the 95% of the doctors who aren't "bad apples" but can be led astray by economic hard times, drugs, alcohol or glib attorneys and advisors, who knows what can be done to reduce the incidents of the criminal activity. Do instituting disciplinary proceedings that go on for years really accomplish anything? Refocusing on a better, earlier and more efficient intervention goes directly to the heart of the issue and may really be a better way for FCLB and the boards to focus their energy.

I don't mean to be disparaging to some of the Assistant Attorneys General who serve as counsel to the various boards, but I see the usual outstanding quality of counsel retained by the "unsavory element" and the sometimes less than yeoman effort by many overworked, underpaid and often times unmotivated board counsel. I wonder just how effective the prosecution effort really is and perhaps there may be another way to be more effective. Many times board members are frustrated because the AG's opinion of their boards prevents them from taking action against the advice of the AG.

What can be done by FCLB to help this matter on a national level? Perhaps FCLB might consider undertaking the formation of a National Training Program(s) with sharp focus on educating the AG's across the country on a variety of topics. These programs would NOT be designed to teach the law, but rather to do what NCMIC has done with our top- notch defense counsel. For 15 years now, we have held defense counsel seminars to talk about the NUANCES of defending chiropractors in malpractice actions. Our defense counsel are skilled in the law and in medical malpractice defense, having benefited from educational programs on the nuances of disc herniation research, stroke, and various chiropractic equipment to help them better defend each and every chiropractic malpractice case. FCLB can provide the same kind of training and education which will heighten the awareness of the issues confronting the state boards and the profession. Early information about "trends" occurring throughout the country

could be developed and made into an effective learning program. Legal strategies could be discussed; position papers on difficult topics could be developed so each state does not have to reinvent the wheel. Early alerts to innovative schemes and scams and the way to prepare to combat them in a pro-active fashion would be extremely helpful. This kind of national resource may get the AG's excited and interested in reducing the criminal and fraudulent activity with innovative and creative programs, knowing they have help and support nationwide. With the sophistication of technology today and the ease of such on-line education programs this kind of innovative approach to educating our AG's and board is easy. Perhaps FCLB could provide this to the various boards that provide timely information on licenses etc. at NO COST. For those states that are a bit less cooperative the program would have a fee if they want to avail themselves. Some incentive might be used to get the states interested in proactively rather than punitive time consuming hearings and reprimands. An on-line AG-Education program available only to AGs who represent boards would be easy to implement and easy to update on a quarterly basis. How about an AG-Education learning lab, with various cases from around the country being shared with allegations, resolutions and dispositions all clearly outlined. A kind of FCLB – LEXUS/NEXUS© where cases could be researched, reviewed and used for education.

The time, energy, money, and publicity saved with a paradigm shift in thinking from POST-CRIMINAL PROSECUTION to PRE-VENTION OF CRIMINAL ACTIVITY could be enormous. Additionally, by having an attitude of sharing, the cost is expended only once and the benefit multiplied 50 times.

My comments today were primarily prompted by activities in various states where the consequences of the efforts could have been huge. Bringing awareness to the boards and encouraging perhaps new concepts to think and rethink ways to maximize the limited dollars of each board and to perhaps lead the way in board regulatory innovation by focusing on prevention. After all, isn't that the best consumer protection? Thank you