

At NCMIC, We Help Doctors Learn From the Experiences and Expertise of Others

Credibility Cuts Both Ways

The patient, 49-year-old Jack Orson, was first seen by Charles Kently, D.C., on February 7, 2014. Mr. Orson had been involved in a motor vehicle accident on November 30, 2013, in which the passenger door was struck broadside at 25 mph. He was treated and released from the ER with a diagnosis of soft tissue injuries following an examination and diagnostic imaging studies. When his neck and low back pain did not resolve after about 60 days, he decided to seek chiropractic care.

Mr. Orson reported to Dr. Kently that he suffered daily from occipital headaches with a pain level of 6 out of 10, as well as stiffness and pain in the low back, also rating at 6 out of 10.

Dr. Kently performed an orthopedic and neurologic exam and found decreased range of motion and tenderness on palpation in Mr. Orson's cervical area. The neurologic function of the upper extremities was intact, but in the lumbar region Dr. Kently found decreased range of motion and tightness and tenderness on palpation. Additionally, Dr. Kently noted minor degenerative changes in the lumbar region based on the MRI study obtained on the day of the accident.

Dr. Kently developed a treatment plan for Mr. Orson to be seen two times per week with treatment to include cryotherapy, stretching, EMS to the cervical area, lumbar traction and cervical manipulation. Dr. Kently discussed all benefits, risks and alternatives to care with the patient, and Mr. Orson consented to the treatment.

Mr. Orson received chiropractic care seven times without incident. Although he reported some improvement in his low back, there was little change in his cervical area and he continued to have daily headaches.

During his eighth visit and approximately 30 days after his initial treatment, Mr. Orson reported 60 percent improvement of his low back problems. However, his neck pain had increased slightly in the few days prior. Dr. Kently performed a thorough reexamination involving neurological, range of motion and orthopedic testing during the visit, noting few changes from the initial exam.

During Mr. Orson's next visit on March 6, 2014, he reported increased neck pain and additional radiating pain into his left arm. Dr. Kently continued with the original treatment plan, and Mr. Orson left the office following high-velocity, low-amplitude adjustments.

Patient Seeks Emergency Care

That evening, after experiencing the most intense neck pain he'd ever had as well as numbness and weakness in his left arm and hand, Mr. Orson went to the local emergency room where he was hospitalized. During the



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early morning of March 7 while he was in the hospital, Mr. Orson reported that he was unable to urinate, and he was catheterized. He had also developed left leg weakness and numbness. The appearance of these symptoms prompted the hospital staff to transfer Mr. Orson to a regional trauma center for further testing and care.

At the trauma center, Mr. Orson was immediately seen by a neurologist. Suspecting a compression of the C5–C7 area, the neurologist ordered an MRI of Mr. Orson's cervical spine, which showed a left-side posterior extradural hematoma at C5 with localized cord compression. Mr. Orson was now unable to move his left leg, and he was prepped for an emergency hematoma evacuation due to the high risk of paralysis.

A decompressive laminectomy at C4, C5 and C6 with an extradural hematoma evacuation was performed just after noon on March 7. Mr. Orson made good progress in regaining the use of his left arm and leg, but he remained weak and had to use a walker to ambulate. Mr. Orson continued to have urinary retention and required catheterization and bladder training upon discharge on March 14, 2014.

Lawsuit Ensues

On November 6, 2014, eight months to the day after the last chiropractic treatment was provided, Dr. Kently was served with a lawsuit filed by Mr. Orson and his wife. The suit alleged that Dr. Kently was negligent in his examination, diagnosis, care and adjustment of Mr. Orson's cervical spine. As a result, Mr. Orson (now the plaintiff) was left with spinal cord damage, bleeding and paralysis.

Several months went by until February 26, 2015, when the plaintiff's attorney presented to the NCMIC-retained defense attorney a settlement demand package of \$5.75 million for all damages, past and future, sustained by Mr. Orson and his wife. Mr. Orson claimed that he was unable to resume his employment as an office manager, which was the majority of his future damages. However, it was revealed that Mr. Orson was receiving a sizable disability benefit through his former employer, which included medical insurance and a monthly disability check. Because Mr. Orson was receiving this compensation, the defense team requested that any settlement/judgment be decreased by that amount.

Not long after receiving the settlement demand, Dr. Kently heard that Mr. Orson was out of town on a hunting trip. Dr. Kently mentioned this information to his attorney who employed an investigator to determine if Mr. Orson's day-to-day activities were restricted. The investigator was able to capture surveillance video of the plaintiff walking with a normal gait, driving around town and carrying items without problem.

Based on discovery laws in the state where the case was venued, the defense was required to disclose during discovery the disability package information and the surveillance video footage. Consequently, the plaintiff's attorney reduced his demand to the doctor's \$1 million policy limits and subsequently never reduced it.

Defense Experts Weigh In

The NCMIC defense team assembled a panel of experts including a Doctor of Chiropractic, a neurosurgeon and a neuroradiologist. After

What Can We Learn?

By Jennifer Boyd Herlihy, Boston, Massachusetts, and Providence, Rhode Island

The Right Protocol

Adhering to the standard of care is often a critical element in a defense verdict. In this case, Dr. Kently's examination, evaluation, assessment and clinical documentation were thorough and appropriate. Additionally, Dr. Kently had obtained the patient's MRI, which demonstrated his careful monitoring of the patient. As a result, the defense experts were able to opine that Dr. Kently didn't deviate from the standard of care.

Honesty Is the Only Policy

Doctors should never keep important information from their defense team no matter how embarrassing or offensive the matter. Defense counsel is appointed by NCMIC to represent your best interests, not those of NCMIC. Without full and honest disclosure, a defense attorney is not able to mitigate any issues exploited by the plaintiff. In this case, Dr. Kently committed a serious sin of omission by not telling his defense team about his past board allegation.

Twists and Turns

Rarely is there one "smoking gun" in a malpractice case, but this case did provide several aha moments. The video surveillance was devastating to the plaintiff's case because it revealed he claimed injuries beyond what he actually experienced. Also harmful to the character

evaluating the patient's exam, diagnosis and treatment protocol, the chiropractic expert opined that Dr. Kently's treatment met the standard of care.

The neurosurgeon stated that the chiropractic manipulation was appropriate and was certainly not contraindicated. Further, he opined that a D.C.'s manipulations would not cause a bleed and most bleeds are spontaneous.

Additionally, the defense neuroradiologist expert testified that it was his professional assessment that the hematoma was likely several days old and was already developing when the patient reported neck pain increase during his seventh chiropractic visit.

Another important element for the defense was that the post-operative MRI showed complete recovery, which was not consistent with Mr. Orson's complaints of residual problems. All of the defense experts—as well as one of the plaintiff's own experts—agreed that an extradural hematoma is an incredibly rare event and not one associated with chiropractic manipulation.


As for the testimony of the doctor himself, Dr. Kently explained his diagnosis and approach to chiropractic care in an articulate and professional manner. Nonetheless, the plaintiff's attorney was able to illicit the following two issues from Dr. Kently that he had not shared with his defense counsel:

1. Dr. Kently had appeared before his state board a few years earlier for an issue about his character that resulted in the board reprimanding him and mandating that he take continuing education courses. Because Dr. Kently had not revealed this information to his defense counsel, the plaintiff's attorney was able to use it against the doctor.
2. Dr. Kently did not note in his records nor did he advise his defense team that prior to litigation he had given Mr. Orson a copy of his records. The records provided to the plaintiff's attorney during discovery were found to be slightly different, which concerned the defense team. Altered treatment records are often a major detriment to the defense of a malpractice case. Fortunately, the slight discrepancy was revealed to have been caused by a software update.

Case Goes to Trial

When the case went to trial in April 2016, the plaintiff's attorney attempted to portray cervical manipulations as inherently dangerous. He presented an animated video to the jury that depicted cervical adjustments as forceful and the alleged cause of the injury. The plaintiff's attorney also used unscrupulous and borderline harassing tactics, which included trying to solicit other patients who were "injured" by Dr. Kently.

Following testimony from all witnesses, the plaintiff's attorney asked the jury to award Mr. Orson an amount in excess of \$10 million with the hope that the jury would award them something as a compromise.

After a trial of 10 days, the jury began deliberations late in the afternoon and returned the following day. After deliberating for one hour and 45 minutes that morning, the jury returned with a defense verdict. Due to a state-specific statute, NCMIC was able to recover \$75,000 of its litigation costs directly from the plaintiff as a result of the defense verdict. 

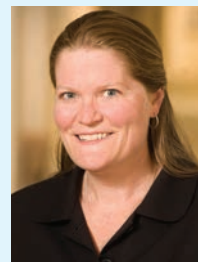
Examiner case studies are derived from the NCMIC claims files. All names used in Examiner case studies are fictitious to protect patient and doctor privacy.

What Can We Learn? continued

and credibility of the plaintiff was the fact that he failed to disclose his disability income, which would diminish the value of his initial demand. In all probability, these credibility gaps were important to the jury finding for the defense.

Courtroom Aspects

Character, preparation, credibility and honesty are all important in the courtroom. A case with excellent clinical care and questionable doctor credibility could have a very different outcome than one in which the clinical care is questionable and the doctor's credibility is outstanding. In this case, the doctor demonstrated quality clinical care and was an excellent witness on his own behalf.



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Perceptions Matter: Risks at Educational Seminars

By Jennifer Boyd Herlihy

If you're like many D.C.s, you strive to inform others about the benefits of chiropractic care, and you may even hold seminars in your community to educate people about chiropractic and other health topics. However, as an attorney who defends Doctors of Chiropractic in malpractice cases and board allegations, I know there are risks for doctors who:

- Fail to disclose that they are chiropractors.
- Cross the line into providing advice outside the licensed scope of their practice.

Many times Doctors of Chiropractic fail to follow state statutes specifying how a D.C. should be designated. For example, some states require the use of the title of "Dr." be accompanied by the kind of doctor. Other states require noting that it's the practice of chiropractic. It's particularly important that D.C.s be forthright about their credentials in advertisements or lectures on topics not normally associated with chiropractic (e.g., thyroid conditions, hormone and endocrine imbalances, fat reduction or hair removal).

Another potential problem is when there is perception of a warranty or promise of a cure. If a doctor says, "Don't worry, we can take care of this condition," it creates an impression of a warranty to the audience.

In many cases, educational events are sponsored by the D.C. with an inducement, such as a "free" dinner to attend. This can create problems because there is a fine line between legitimate education and a solicitation with enticements, which may be prohibited by the state.

Case Example

Seminars where diabetes and thyroid issues are discussed have become especially problematic for D.C.s lately. There have been instances where chiropractors have promised to help individuals reverse diabetes, promised thyroid help or where patients were unaware of the credentials of the presenter. Here is a case from recent years:

A Doctor of Chiropractic placed full-page advertisements promoting free dinner seminars on "nonsurgical, drug-free approach to relief from peripheral neuropathy." The ads included a headline asking "Do You Suffer From One of the Symptoms of This Often-Misdiagnosed Problem?" The advertisements stated that the seminar discussion would include the real cause of peripheral neuropathy, its crippling effects and the dangers associated with medication.



[Go to www.FCLB.org](http://www.FCLB.org)
for links to each state
board's website.



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¹<http://www.mass.gov/ocabr/docs/dpl/boards/ch/233-4.pdf>

²<http://www.mass.gov/ocabr/licensee/dpl-boards/ch/regulations/board-policies/board-policy-guidance-dietary-and-nutritional-advice.html>

Thereafter, the chiropractor was arrested on felony charges of practicing medicine without a license and for claiming to be a thyroid and diabetic specialist. He was ordered not to practice chiropractic after his arrest for eight felony counts of grand theft and one felony count of practicing medicine without a license.

How to Prevent Trouble

The way to prevent these kinds of issues is to conform to your state's statutes. Here is an example from Massachusetts, where I practice law, about regulations specific to advertising:

1. A chiropractor or agent, servant or employee of a licensed chiropractor or of a chiropractic facility may properly advertise the services offered, but shall not engage in advertising which is false, deceptive, misleading or unfair.
2. A chiropractor or chiropractor of record shall preserve a copy of each advertisement for a period of at least two years, and shall make a copy of the same available to the board or its duly authorized representative upon request.
3. Violation of any provision of 233 CMR 4.13 shall be considered "unprofessional conduct" within the meaning of M.G.L. c. 112, § 93, and shall be grounds for disciplinary action by the board.¹


The Massachusetts Board of Registration of Chiropractors went further to educate their chiropractors and also issued a memorandum on January 6, 2012, regarding policy guidelines on dietary and nutritional advice:

On numerous occasions, the board has been asked if a licensed Massachusetts chiropractor may properly give dietary and nutritional advice to an individual without also providing a chiropractic adjustment. The purpose of this guideline is to clarify for licensees and members of the public that chiropractors may provide dietary and nutritional advice as an independent service without any other accompanying primary chiropractic procedure, provided the chiropractor complies with all applicable laws and board regulations.²

Conform to Your State's Standards

As you can see, it is essential that your advertising conforms to expected standards and is not deceptive to the public. Failure to do so could lead to discipline of your license, or worse, criminal charges.

If you're unsure, it is advisable to have your advertising reviewed by an outside auditor or by your state board (some boards have a method for you to ask for clarification). Additionally, many associations and societies offer seminars that discuss the issue and provide guidance.

The final word: sharing information about the benefits of chiropractic and increasing your patient base should not have the opposite impact of causing harm to you, your license or the practice. 

What Should You Do?

Many doctors aren't aware that holding educational seminars can affect their coverage. For example, what happens when you receive a question from someone from a different state since state standards may vary? To better protect you and your practice, give us a call at 1-800-247-8043. We'll analyze your situation, review your policy and explain your coverage options.



Helping D.C.s Avoid Malpractice and Board Allegations

At NCMIC, we've been defending chiropractors since 1946. These 70-plus years of experience and claims data enable us to share the most relevant case studies and articles in *Examiner*.

Our goal with *Examiner* is to help doctors like you learn from the experiences and expertise of others. We are proud to share this exclusive insight into the world of chiropractic claims with you. It's just one more way at NCMIC "We Take Care of Our Own®."

Online CE Announcement:

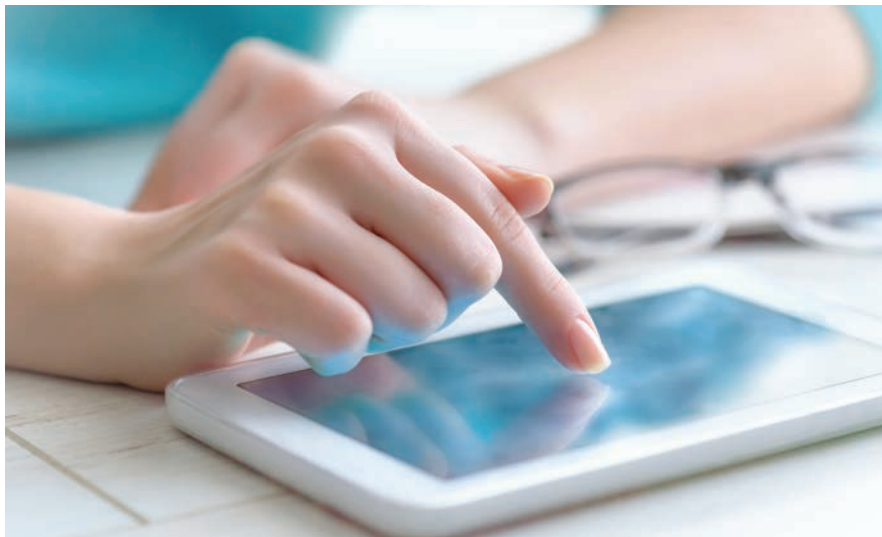
Now You Can Receive NCMIC's Risk Management Discount for Taking Online Courses

NCMIC is making it easier for you to participate in risk management education. You can get your continuing education (CE) credits while you save money on your malpractice insurance premiums.

To earn CEs and get your risk management malpractice insurance discount, simply go to www.ncmic.com/ce and select a program you're interested in from several offered by chiropractic colleges and universities.

All programs listed qualify toward a 5% risk management discount off your NCMIC malpractice insurance premium. Complete 8 hours total (online and/or onsite) to qualify.*

After you have completed the qualifying 8 hours, send your CE documentation to lholt@ncmic.com so we can apply the discount.



At NCMIC, we are proud to offer our doctors outstanding resources while supporting the chiropractic colleges and universities. It's just another example of how "We Take Care of Our Own®."

Questions?

Contact Lori Holt at 515-313-4562.

See www.ncmic.com/ce for a complete program listing.

* Full-time D.C.s receive a 5% discount for three consecutive years on the renewal of their malpractice insurance premiums (2.5% for part-time D.C.s) for completing 8 hours of qualifying programming. Online programming is available through third parties, and course content is not owned or controlled by NCMIC.

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NCMIC's motto “We Take Care of Our Own”[®] is so much more than a slogan or tagline. “We Take Care of Our Own” means NCMIC

has your best interests in mind each day, in every transaction, in everything we do. It means we take care of ... YOU — the chiropractor!

<https://www.ncmic.com/learning-center/articles/insurance/we-take-care-of-our-own/what-we-take-care-of-our-own-really-means/>



Know Your Rights Before You Respond to State Board Investigations

Your license to practice is your most valuable possession. Yet many doctors expose their licenses to unnecessary risks by the way in which they respond to state board investigations and disciplinary complaints.

<https://www.ncmic.com/learning-center/articles/risk-management/board-regulatory/know-your-rights-before-you-respond/>



Avoid the Potential Pitfalls of Social Media

With new technology on the increase, many doctors are using social media as a way to communicate to patients and market their practices. However, there are legal risks of doing so. Jennifer Boyd Herlihy, an attorney who defends D.C.s regularly on behalf of NCMIC, has seen this firsthand.

www.ncmic.com/learning-center/articles/risk-management/social-electronic-media/how-to-avoid-the-potential-pitfalls-of-social-media-copy/



Should I Be Concerned About Risk If I'm Not Personable?

Question: I run a respected chiropractic practice in my community. I take pride in the fact that I keep up to date on the latest techniques, as well as clinical research

and trends. But recently a patient commented that I'm not really a “warm, fuzzy type of doctor.” Should I be concerned?

www.ncmic.com/learning-center/articles/risk-management/patient-interactions/should-i-be-concerned-about-risk-if-im-not-personable/

New Look and Enhancement of NCMIC.com

If you haven't been to www.ncmic.com lately, check it out. We recently updated the website with a fresh look and made it easier to find what you're looking for.

- **New Learning Center** that includes educational and risk management videos, articles, and resources on a variety of topics
- **One-click access to your accounts**—malpractice insurance, MilesAway[®] credit card and credit card processing
- **Easily viewed** on your computer, smartphone or tablet

Should I Make House Calls?

Q

As a doctor who likes to “go the extra mile” for my patients, I’m considering starting a house call program. What are the benefits and risks of this practice model?

A

The return to the house call concept of yesteryear seems to be a trend across the healthcare spectrum. *USA Today* indicates about 4,000 physicians make house calls in the United States and this number is expected to grow.*


From a patient perspective, elderly patients or those with physical constraints often find house calls beneficial. Other patients like the convenience or comfort of being treated in their homes. Many Doctors of Chiropractic appreciate being able to treat these patients according to their wishes, as well as the potential to reduce their overhead expenses, such as staffing.

Nonetheless, it’s important to remember that the customary protocols of taking a history, performing an exam and keeping comprehensive records apply. Additionally, HIPAA requirements are in force, and the doctor must follow state guidelines to be in compliance with his or her state scope of practice.

That’s why, at a minimum, Doctors of Chiropractic who are thinking about starting a house call program should identify how they will handle the following aspects:

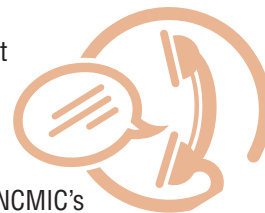
- **Equipment**—What equipment will you need (e.g., treatment table, electronic stimulation, traction, ice and heat)?
- **Privacy**—Is there a private room away from other family members to ensure doctor/patient confidentiality during chiropractic care?
- **Imaging**—How will X-rays and other diagnostic studies be obtained?
- **Documentation**—How will contemporaneous notes be taken during treatment and transferred to the office’s paper or electronic recordkeeping system?

In the event of a malpractice case, it’s imperative to your defense that you can explain what symptoms the patient exhibited, what your care entailed (along with any modalities used) and why you chose this course of care. Proper documentation is always essential to validate what occurred before, during and after the chiropractic care, and it may be even more important when care is provided outside the office.

Although starting a house call program may sound appealing, your protocol should be no different than what you would do in your office, which is to provide the best care possible to your patients. 

The Benefit D.C.s Rely on to Help Avoid Claims

Worried about a touchy situation? Just need advice? Call NCMIC’s confidential Claims Advice Hotline at **1-800-242-4052** to talk with a professional claims representative about any concern or situation you’re not sure how to handle.



See Q & A for an example of how NCMIC’s Claims Advice Hotline has helped D.C.s like you.

Did You Know?

With NCMIC, a claim is not automatically opened when you call us. While other companies may set up a claim file if you call with an incident or situation that causes concern, our approach is different. Your information is logged, but not put into your claims record. This approach helps you keep your claims-free status, but still allows you to receive guidance when you need it.

* http://usatoday30.usatoday.com/yourlife/health/healthcare/doctorsnurses/2010-11-13-house-calls_n.htm