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February 23, 2012

SENT VIA EMAIL

Sandy Thiele-Cirka
Administrator
House Health Care Committee

Dear Ms. Thiele-Cirka:

Thank you for facilitating my testimony before the Committee yesterday. I especially appreciate your help distributing the documents I emailed to the Committee members.

Along with this letter I am now submitting yesterday's testimony in written form. Would you please forward it to the Committee members?

I also want to make a short statement regarding Dr. Coté's testimony. He said that when the OBCE receives a complaint the accused chiropractor is asked to submit a written reply. This is true. However, what he did not say is that after the chiropractor replies to the complaint, the Board may modify the original complaint or even replace the original charges with entirely different ones. The accused doctor may have no further opportunity to respond to the new charges until a sanction is publicly proposed. This is what happened to Dr. Freedland, and I know it has happened in other cases, too.

I would appreciate it if you could provide this information to the Committee members along with my written testimony.

Sincerely,

J. Michael Burke, D.C.

TESTIMONY GIVEN BEFORE THE OREGON HOUSE HEALTH CARE COMMITTEE
by J. Michael Burke, D.C.
February 22, 2012

My testimony today concerns malfeasance on the part of the Oregon Board of Chiropractic Examiners (OBCE) in cases involving chiropractors who perform independent medical evaluations and medical record reviews. I am going to briefly explain what an independent medical evaluation (IME) is, discuss the attitudes of the chiropractic profession with respect to IMEs and independent medical record reviews, and how chiropractors carry these attitudes with them when they are appointed to the OBCE. Concerning the complaints brought against Dr. Tom Freedland, I am going to show how the Board ignored evidence of clinical incompetency on the part of a doctor who instigated the complaints. Dr. Freedland will then speak about his Kafkaesque experience defending himself against the ludicrous complaints and charges brought against him by the Board. Following Dr. Freedland, Dr. David Corll will give his perspective as a former chairperson of the Board's Peer Review Committee (PRC). He is a chiropractor who is in general practice and does not perform IMEs or file reviews.

I have been licensed in Oregon as a chiropractic physician since 1981. I am also a board certified chiropractic orthopedist. I have practiced in the Portland metro area during this entire time. In the early 1990s I helped start a chiropractic managed care organization which, during my tenure as president and CEO, provided managed chiropractic services to many of the HMOs and insurers in the Pacific Northwest. I served on the Peer Review Committee of the Oregon Board of Chiropractic Examiners for three years. As an associate faculty member of Western States Chiropractic College I supervised interns providing sports medicine care at numerous athletic events including Hood to Coast and the Pacific Crest Triathlons. In 2006 I joined the clinic faculty at Western States Chiropractic College where I instructed and supervised interns in physical rehabilitation, administered and evaluated OSCE (clinical competency) examinations, and co-taught a class in evidence-based practice with Prof. Richard Gillette. I was also a member of the Postgraduate Division Faculty and lectured to chiropractors throughout the country on forensic chiropractic. The course was cosponsored by the American Board of Forensic Practitioners. For most of the last two years I was an associate professor at the University of Western States Chiropractic College. In that capacity I trained and supervised chiropractic interns in their last year of instruction at an outpatient clinic in Gresham.

In addition to the above professional activities, I have performed independent medical evaluations (IMEs) and medical record reviews for the past 26 years. I have been a consultant to the Washington Department of Labor and Industries and to the Medical Director of the Oregon Workers' Compensation Division.

An IME is a type of consultation that is performed at the request of a third party, usually an insurance company, attorney, or self-insured employer. Typically these are performed in the arenas of personal injury, bodily injury, and workers' compensation. IMEs are usually requested to resolve problems with claims adjudication. These problems commonly concern causation and compensability, nature and location of the injury, medical necessity of treatment, disability, permanent impairment, and apportionment. In an IME, a detailed medical history is taken and a physical examination of the injured areas and related systems is performed. Medical records and diagnostic imaging studies are also reviewed. A medical record review is not an IME. There is no physical examination. It entails only a review of the records and, if available, diagnostic imaging studies. In either case a report is submitted to the requesting party. The independent examiner does not treat the patient or offer advice, but recommendations for further diagnostic studies and treatment may be included in the report.

IMEs are performed by providers in many healthcare disciplines. In most disciplines there is little controversy regarding IMEs. In the chiropractic profession, however, independent medical evaluations are a highly contentious matter. Chiropractors who perform IMEs are vilified by their colleagues. The term "insurance whore" is often heard in candid discussions. Generally, chiropractors tend to believe that their work should not be questioned, especially by other chiropractors, and they tend to think of chiropractors who do IMEs and record reviews as traitors to the profession. If these doctors are being paid by insurance companies, the thinking goes, then certainly their opinions must have been determined by the source payment.

I have brought with me a few examples of this kind of attitude. I would first refer you to one of the PDF files I e-mailed to the Committee titled IME Abuse/a Plan for an End. This article appeared last year in a trade magazine, the American Chiropractor, which is mailed to over 50,000 chiropractors. I have highlighted some of the more salient text. The first two highlighted sentences read, *"In a perfect world, the IME doctor renders a second opinion that allows for necessary care of covered issues of injured patients. However, in the real world, an IME doctor rarely gives an opinion that is in the best interest of the patient."* Care that may seem necessary to the treating chiropractor might not be deemed medically necessary by the independent examiner. This was obviously written from the perspective of the treating doctor, implying that the independent examiner should support the treating doctor's opinion and, furthermore, only that opinion is in the patient's best interest. Further on in the same paragraph it states, *"The IME opinion usually sides with who writes the paycheck...."*

Let me interject that when I do an IME or record review, foremost in my mind is the benefit of the patient. I went into the chiropractic profession to provide a healing service to people, and my role as an independent consultant fulfills that purpose just as much as caring for my own patients.

Returning to the magazine article, the author recommends that if the treating doctor is unhappy with the IME opinion, *"Inform your patient of his/her right to render a complaint against the doctor's license and direct him/her to the website of your state professional conduct board.... Upon receipt of the complaint, the state is obligated to investigate and create a file on the offending doctor."*

Now I want to direct your attention to another document I submitted titled Oregon DC Listserv. This listserv is a Yahoo group that is open to all licensed chiropractors in Oregon. It is a forum on which chiropractors post discussions on various health-related topics. I have excerpted a few posts that are typical of the prejudiced and uninformed attitudes of chiropractors concerning IMEs. According to the listserv rules, these posts can be shared if the doctors' identities are redacted, which I have done. Please look at the first post dated August 22, 2011. This doctor is directing readers to the American Chiropractor magazine article I just mentioned. He is encouraging chiropractors to file complaints against other chiropractors whose opinions they disagree with.

This post does not predate the complaints against Dr. Freedland. However, the idea of complaining to the OBCE is not a recent one. On November 19, 2009 a doctor posted this request: *"Please contact me privately off list or by phone if you have a case that was reviewed by Dr. Freedlund [sic]. You may have your patient's [sic] contact me directly if they so choose. Many thanks to the doctors that have already contacted me about this. It is a bigger problem than I imagined. Also please forward this to other Dc's [sic] not on this list."* Three of the five spurious complaints filed against Dr. Freedland were from this chiropractor's patients. Furthermore, this doctor's records of the patients who filed the complaints are rife with evidence of his clinical incompetency and suggest he is a threat to public health. In pursuit of their investigation of Dr. Freedland, the Board ignored this evidence. I will discuss this in more detail in a few minutes.

Please look at the document titled OBCE Pressing Concern. This is an excerpt from a PDF posted on the website of the Federation of Chiropractic Licensing Boards (FCLB). It was also published on the OBCE's website but has since been removed. What you are seeing is part of a longer report written by Dr. Ann Goldeen who is currently the president of the Board. At the time this was written she was the liaison to the FCLB. When asked what the Oregon Board's most pressing concern is, she reported there is "a growing concern that the current system of IME reviews is biased against the patients in that the insurance companies and the review entities they contract with seem [to] gravitate to those reviewers who consistently cut off payment for care." She goes on to mention a case in which the examining doctor's findings allegedly did not support his conclusions. This was apparently a reference to Dr. Freedland's case.

Contrast this with a statement posted within the last week on the Oregon DC listserv from a Board member whose identity I am constrained from revealing. "Complaints concerning IMEs and paper reviews account for just 3% of total complaints (28 total) since 2001." If there are so few complaints occupying the Board's attention, then why does the Board consider this to be its most pressing concern? Note that the recent post appeared in a discussion concerning the upcoming House Committee meeting on this topic.

I would now like to move on to a document titled Dr. X Complaint. This is the summary portion of the complaint I filed with the OBCE concerning the records of the chiropractor who instigated the complaints against Dr. Freedland. I understand the complaint about "Dr. X" is currently being investigated by the Board's Peer Review Committee. I have redacted the names of the doctor and the patients as well as other identifying information. I will not cite all of the violations here, but some of the most deplorable ones are highlighted in the document.

I did not file this complaint because I am Dr. Freedland's friend and former office partner. I filed the complaint because the records indicate to me that this doctor is not competent to practice chiropractic and may well be a danger to the public. I also filed the complaint because I feel strongly that the members of the Board should themselves have investigated this doctor. I should not have had to file a complaint. OAR 811-010-0040 (1) states, "It shall be the duty of every licensee to notify the Board's administrative office or any member of this Board of any violation of the Act or of these rules in order that the Board may take appropriate investigative and corrective or disciplinary action." ORS 162.415, concerning official misconduct in the first degree, states "(1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another: (a) The public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or (b) The public servant knowingly performs an act constituting an unauthorized exercise in official duties."

I believe the Board members violated OAR 811-010-0040 and ORS 162.415, and I believe they did so because they acted out of their prejudice against doctors who perform independent medical evaluations and record reviews.

If Dr. Freedland's case was the only instance of the Board's malfeasance it would be sufficiently egregious. However, other cases have been dealt with by the Board in a similar manner. I will cite only one other case in which a hearing is now pending.

Dr. Ross Hart reviewed medical records and provided an opinion based upon the records. He did not examine the patient. The treating doctor complained to the Board. The Board again publicized a proposed disciplinary action before the accused chiropractor could defend himself against the charges in an appropriate administrative or judicial forum. Only after the

proposed action appeared did the Board decide to refer the matter to the Peer Review Committee. The PRC called him in for an interview. Dr. Hart has a hearing disability and asked for an accommodation, which was not allowed. As a result he could not hear a good deal of the discussion when he was interviewed. The outcome was a more severe disciplinary proposal than the original one, which I have copied and pasted into this document. An administrative hearing is now pending.

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The Board proposed to issue a Letter of Reprimand with 14 hours of IME continuing education and 12 hours CE in clinical justification, both to be completed within 6 months. The Board assessed a \$2500 civil penalty due within 60 days; and \$2500 restitution to the patient due within 60 days also (and payable to the patient but to be sent to the OBCE as proof of compliance). Daniel Côté moved to accept the determination; Cookie Parker-Kent seconded the motion. All in favor Bilby, aye; Dick, aye; Parker-Kent, aye; Robinson, aye; Cote, aye and Goldeen, aye.

I have included in my testimony only a very few examples of prejudice against chiropractors who perform IMEs and malevolent actions by the OBCE. There is evidence of public statements of prejudice against IME chiropractors by two current OBCE members which should, at the very least, disqualify them from sitting in judgment of any complaint concerning an IME or independent record review matter. I am available to discuss additional instances in which the Board acted prejudicially in similar cases. I believe that a majority of chiropractors do not possess sufficient knowledge of the IME process to judge complaints against chiropractors who provide these services. Bias is in large part a result of ignorance. It is therefore imperative that the OBCE be composed of at least one member whose practice is largely comprised of independent medical evaluations and medical record reviews and who has successfully defended those opinions in judicial and administrative proceedings. This requirement should also apply to the Peer Review Committee. In the absence of such representation, members of the OBCE and PRC cannot be considered peers of IME chiropractors. This profession has lobbied, often successfully, to keep IME chiropractors off the OBCE. I ask this Committee to recommend that the Governor appoint a chiropractor to the OBCE who represents those who perform independent consultations and, furthermore, that the OBCE be required to have an IME member on the Board at all times. I further request this Committee to recommend to the Governor that the two current members of the Board, who have publicly expressed unjustified prejudice against doctors who perform IMEs and who have been involved in the disciplinary cases discussed today, promptly be removed from their appointed positions.

Thank you for hearing this matter and especially for considering my proposals for remediation.